CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

COMMISSION ON HUMAN RIGHTS
ex. rel. CYNTHIA JORDAN,

Petitioner,

-against-

BAQIR RAZA and JAFAR RAZA,

Respondents.

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Complaint No. M-P-RL-14-1029378

OATH Index No. 716/15

DECISION AND ORDER

Complainant Cynthia Jordan initiated this discrimination action with the Law Enforcement Bureau of the New York City Commission on Human Rights (the "Bureau") against Respondents Baqir Raza and Jafar Raza. On December 4, 2013, the Bureau filed a complaint alleging violations of the New York City Human Rights Law, New York City Administrative Code Section 8-107(4)(a) ("NYCHRL") against Respondent Baqir Raza, asserting that Respondent Baqir Raza, a taxi driver, discriminated against Ms. Jordan by refusing her a public accommodation based on her race and color. (Administrative Law Judge ("ALJ") Exhibit ("Ex.") 1 (Complaint).) On March 28, 2014, the Bureau issued a Probable Cause Determination pursuant to NYCHRL Section 8-116 against Respondent Baqir Raza, and referred the matter to the Office of Administrative Trials and Hearings ("OATH") for trial and a recommendation ("Report and Recommendation" or "R&R"). (Bureau Ex. 1.) On April 21, 2014, the Bureau amended the Complaint to add Respondent Jafar Raza, whom the Bureau

identified as an owner of a taxicab. (ALJ Ex. 2 (Amended Complaint).) On June 25, 2014, Respondent Baqir Raza, acting *pro se*, filed an Answer pursuant to 47 RCNY § 1-14, denying all of the allegations in the Amended Complaint. (ALJ Ex. 3 (Answer).) Respondent Jafar Raza did not submit an Answer. Because the Bureau added Respondent Jafar Raza after issuing a Probable Cause Determination with respect to Respondent Baqir Raza, the Bureau sent a Notice of Referral to Trial to both Respondents on September 22, 2014. (Bureau Ex. 7.) On November 10, 2014, a pretrial conference was held before OATH; neither Respondent Baqir Raza nor Respondent Jafar Raza appeared. (Bureau Ex. 2; Trial Transcript ("Tr.") at 13.)

On January 20, 2015, the Bureau moved to hold Respondents in default for failure to properly answer the Amended Complaint. On February 11, 2015, Administrative Law Judge Astrid Gloade denied the Bureau's motion. (R&R at 1.)

The trial was scheduled for February 25, 2015 before Administrative Law Judge Raymond E. Kramer. Neither Respondent appeared at the trial. After waiting several hours, the Bureau moved to hold Respondents in default. (Tr. at 4-5.) Judge Kramer considered the Bureau's efforts to contact Respondents and inform them of the proceedings, including proof of service of the Complaint and Amended Complaint, Notice of Probable Cause, Notice of Referral to OATH, Notice of Conference, Notice of Trial, Notice of Trial Adjournment, and an email notification of the adjourned trial date. (*Id.* at 7-13; Bureau Exs. 1-5, 7-9.) After holding Respondents in default, Judge Kramer proceeded with the hearing as an inquest. (Tr. at 13.)

On July 27, 2015, Judge Kramer issued a Report and Recommendation. In his R&R, Judge Kramer recommended that the claims against Respondent Jafar Raza be dismissed with prejudice because: 1) the Bureau failed to prove that he is an employer of Respondent Baqir Raza; 2) Respondent Baqir Raza is "likely" an independent contractor; and 3) the Bureau did not

prove that Respondent Jafar Raza had actual knowledge of Respondent Baqir Raza's conduct and acquiesced to such conduct. (R&R at 6-7.) Judge Kramer further recommended finding Respondent Baqir Raza violated Section 8-107(4) of the NYCHRL by refusing to provide services to Ms. Jordan on account of her race and color. (*Id.* at 2.) As such, he recommended: 1) an award of $10,000 to Ms. Jordan in emotional distress damages; 2) the imposition of civil penalties to be paid to the general fund of the City of New York; and 3) that Respondent Baqir Raza participate in anti-discrimination training pursuant to the NYCHRL. (*Id.* at 11-13.)

The parties had the right to submit written comments and objections to the R&R within twenty days after the Commission commenced consideration of the R&R unless good cause for additional time was shown. *See* 47 RCNY § 1-76. The Commission commenced consideration of the R&R on July 31, 2015. The Bureau sought a one-week extension to submit comments to the R&R, to which Respondent Baqir Raza consented. The Bureau submitted written comments on August 26, 2015, asking the Commission to adopt Judge Kramer's R&R with respect to Respondent Baqir Raza. (Bureau Comments to the R&R at 1.) With respect to Respondent Jafar Raza, the Bureau requested that the Commission find that the allegations in the Amended Complaint be deemed true and hold him liable as an "employer" of Respondent Baqir Raza. (*Id.* at 2-3.) Respondent Baqir Raza submitted written comments on August 14, 2015, urging the Commission to reject the R&R in its entirety, but did not challenge Judge Kramer's finding of default. (Resp't Comments to the R&R at 1-2.)

The Commission has reviewed the Bureau's post-trial brief, Judge Kramer's R&R, the trial transcript, the trial exhibits, and the parties' comments to the R&R. For the reasons set forth in this Decision and Order, the Commission adopts the R&R, 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. *Stamm v. E&E Bagels, Inc.*, OATH 803/14, Dec. & Ord., 2016 WL 1644879, at *2 (Apr. 20, 2016); *Howe v. Best Apartments, Inc.*, OATH 2602/14, Dec. & Ord., 2016 WL 1050864, at *2 (Mar. 14, 2016); *Cardenas v. Automatic Meter Reading Corp.*, OATH 1240/13, Dec. & Ord., 2015 WL 7260567, at *2 (Oct. 28, 2015).

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 has correctly applied the [New York City Human Rights Law] to the facts." *Comm'n on Human Rights v. Ancient Order of Hibernians*, Comp. No. MPA-0362, Dec. & Ord., 1992 WL 814982, at *1 (Oct. 27, 1992); *see Orlic v. Gatling*, 844 N.Y.S.2d 366, 368 (App. Div. 2007) ("[I]t is the Commission, not the Administrative Law Judge, that bears responsibility for rendering the ultimate factual determinations, and the Commission would not be bound by the report and recommendation of an Administrative Law Judge."); *see also Cutri v. Comm'n on Human Rights*, 977 N.Y.S.2d 909, 910 (App. Div. 2014) (Commission not required to adopt the Administrative Law Judge's recommendation).

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. *Stamm*, 2016 WL 1644879, at *2; *Howe*, 2016 WL 1050864, at *3; *Cardenas*, 2015 WL 7260567, at *2. Accordingly, the Commission reviews the Report and Recommendation and the parties' comments and objections *de novo* as to findings of fact and conclusions of law. *Howe*, 2016 WL 1050864, at *3.

II. TRIAL TESTIMONY AND POST-TRIAL SUBMISSIONS

Knowledge of the facts as described in Judge Kramer's Report and Recommendation is assumed for purposes of this Decision and Order. Because Respondents chose not to appear at trial, Judge Kramer could only consider the testimony and documentary evidence of the Bureau's witnesses, and the Commission's review is limited to the trial record. Accordingly, the facts described below are based on the Bureau's presentation of its case.

The Bureau took testimony from Ms. Jordan and two witnesses, Ms. Jordan's daughters, Chiley Holder and B.J.[1] (Tr. at 19, 27, 35.) Ms. Jordan testified that on October 19, 2013, she and her two daughters sought to hail a cab at 35th Street and Seventh Avenue in Manhattan. (*Id.* at 20, 22.) Ms. Jordan saw someone exit a cab and Ms. Holder walked over and held the door open for Ms. Jordan and B.J. to enter the now-empty cab. (*Id.* at 20.) The driver, Respondent Baqir Raza, told Ms. Holder that he was going off duty. (*Id.*) Ms. Jordan told her daughter that she should have just entered the cab because drivers are not supposed to have their light on, which reflects that they are on duty and available for pick-ups, and refuse to pick someone up. (*Id.*) Ms. Jordan told Respondent Baqir Raza that they would report him, and Ms. Holder noted the number on the top of the cab. (*Id.*) Ms. Jordan and her daughters walked away and started

[1] B.J. is referred to by her initials in this decision due to her status as a minor. *See* 48 RCNY § 1-49(d).

looking for another cab. (*Id.* at 21.) Ms. Holder then noticed that the same cab was picking up someone else and said to Ms. Jordan, "Mom, look, he's picking up someone else down the block." (*Id.*) Ms. Jordan looked down the block and saw the same taxi driver picking up two Caucasian people at 34th Street and Seventh Avenue. (*Id.* at 21, 22.) Ms. Jordan ran up to the car and said, "Are you kidding me? You picked up these two…white bitches…instead of me and my family. I'm going to report you." (*Id.* at 21.) According to Ms. Jordan, Respondent Baqir Raza responded, "Go ahead report me." (*Id.*) Ms. Jordan testified that she said "alright," closed the door, and Respondent Baqir Raza then drove away. (*Id.*)

Ms. Holder also testified about the October 19, 2013 incident and corroborated Ms. Jordan's testimony. (*Id.* at 27-35.) Ms. Holder testified that she filed a complaint with the Taxi and Limousine Commission ("TLC") at approximately 6:19 pm by phone, a few minutes after the incident occurred. (*Id.* at 29; Bureau Ex. 10.) The "Incident Narrative" on the TLC Complaint states, "Driver let out passengers, refused my black family's entry & picked up 2 white woman [sic] shortly thereafter about to smoke a cigarette." (Tr. at 30; Bureau Ex. 10.) Ms. Holder testified that in December 2013, the TLC informed her that a hearing was not necessary because Respondent Baqir Raza accepted a stipulation, in which he "plead guilty" to the violation. (Tr. at 31; Bureau Ex. 11.)

B.J., Ms. Jordan's younger daughter, also testified about the October 19, 2013 incident. B.J. explained that she heard Respondent Baqir Raza state that he was going off duty to use the bathroom, and then switched his light from on duty to off duty. (Tr. at 36.) She then observed him drive down the street, switch his light back on when two Caucasian females approached his cab, and let them enter the cab. (*Id.*)

Ms. Jordan testified that the incident made her "angry" and "very sad." (*Id.* at 23.) She further testified that having her two daughters with her, particularly her younger daughter, who was sixteen at the time of the incident, "hurt [her] that [her daughter] had to be exposed to that." (*Id.* at 25.) Nearly two years later, the incident still made her "really angry and very upset." (*Id.* at 26.)

The Bureau admitted into evidence documents it requested from the TLC, including Respondent Baqir Raza's driver trip log, which shows that he dropped off passengers at 35th Street and Seventh Avenue and then picked up passengers one block south at 34th Street and Seventh Avenue. (*Id.* at 38; Bureau Ex. 12.) The Bureau also admitted into evidence a document titled "Consumer Complaint Settlement" which shows that the TLC considered charging Respondent Baqir Raza with two violations based on Ms. Holder's complaint: 1) refusal to take a passenger; and 2) use of the taxicab for personal use. (Bureau Ex. 11.) If found guilty at a hearing, Respondent would have faced a fine ranging between $450 and $1,150. The TLC offered Respondent a settlement of $200, which he agreed to and paid. (*Id.*)

Because Respondent Baqir Raza chose not to appear at trial, the trial record is devoid of testimony regarding his description of the October 19, 2013 incident. Respondent Baqir Raza did submit an Answer, in which he denied the allegations in the Complaint, and Comments to the Report and Recommendation, in which he objected to Judge Kramer's findings. In his Answer, Respondent Baqir Raza claims that as soon as he stopped his taxicab, the last passenger stepped out of his taxicab and another passenger stepped in. (ALJ Ex. 3 (Answer).) Both sets of passengers were Caucasian. (*Id.*) Respondent Baqir Raza states that as he was ready to drive off, an African-American woman, presumably Ms. Jordan, walked up to his window and said she was waiting for the taxicab before the Caucasian passenger who had just entered the taxicab.

(*Id.*) He claims that he had no control over who entered his taxi after the last passenger exited. (*Id.*) Respondent further claims that Ms. Jordan started screaming at him, called him a racist, said she would file a complaint against him, and called him "inappropriate names," so he drove off. (*Id.*)

Respondent Baqir Raza's Comments to the Report and Recommendation repeats his version of events and states that the "inappropriate names" Ms. Jordan allegedly called him were: "dirty Arab," "low life cab driver," and "filthy Muslim." (Resp't Comments to the R&R at 1.) He also challenges the probative value of the "driver trip log," which the Bureau used to corroborate Ms. Jordan's version of events – that Respondent Baqir Raza dropped passengers off at 35th Street and picked passengers up one block away at 34th Street – claiming that the one-block gap is likely due to the fact that taxi drivers sometimes turn their meters on after trips have begun. (*Id.* at 2.) Respondent Baqir Raza further asserted that he accepted the TLC settlement not because he was admitting wrongdoing but because "all taxi drivers do the same," and the more time taxi drivers "spend fighting the complaint, the more money we lose." (*Id.*) Finally, he claimed he stopped driving a taxi because of the poor treatment he has endured from passengers, and the onerous fines he has paid to the City. (*Id.*)

III. DISCUSSION

A. Legal Standard

The NYCHRL "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 this title, 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." N.Y.C. Local Law No. 85 ¶ 1 (2005).

This statutory language makes plain that while the Commission may cite federal and state anti-discrimination jurisprudence, it has neither precedential nor persuasive authority over the Commission's interpretation of the NYCHRL. *Id.* Further, while the Commission's interpretation and application of state and federal case law addressing the NYCHRL informs the Commission's jurisprudence, "'an agency's interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness.'" *Exxon Mobil Corp. v. State of New York Tax Appeals Trib.*, 5 N.Y.S.3d 555, 556 (N.Y. App. Div. 2015) (quoting *Lorillard Tobacco Co. v. Roth*, 99 N.Y.2d 316, 322 (2003)) (internal quotation marks and citation omitted).

The NYCHRL makes it unlawful for "any person, being the owner, lessee…or employee of any place or provider of public accommodation, because of the actual or perceived race…[or] color…of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof…." N.Y.C. Admin. Code § 8-107(4)(a). Places or providers of public accommodation are defined as "providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold or otherwise made available." *Id.* § 8-102(9).

The Bureau bears the burden of establishing a *prima facie* case of discrimination. *See Romo v. ISS Action Sec.*, OATH 674/11, Rep. & Rec., 2011 WL 12521359, at *5 (Apr. 12, 2011), *adopted*, Dec. & Ord. (June 26, 2011). To do so under Section 8-107(4), the Bureau must show that: 1) complainant is a member of a protected class as defined by the NYCHRL; 2) respondent directly or indirectly refused, withheld from, or denied an accommodation, advantage, facility, or privilege thereof based, in whole or in part, on complainant's membership in a protected group; and 3) respondent acted in such a manner and circumstances as to give rise to the inference that its actions constituted discrimination in violation of Section 8-107(4). *See* N.Y.C. Admin. Code § 8-107(4); *see also Romo*, 2011 WL 12521359, at *5. In establishing the second element above, the Bureau can also show that respondent made a declaration to the effect that complainant's patronage is unwelcome, objectionable or not acceptable, desired, or solicited. N.Y.C. Admin. Code § 8-107(4). Once the Bureau establishes a *prima facie* case of discrimination, respondent may advance a legitimate, non-discriminatory reason for its actions. *See Stamm*, 2016 WL 1644879, at *4. If the respondent articulates a clear and specific non-discriminatory reason for its actions, the burden shifts to the Bureau to demonstrate that discriminatory animus was at least a factor in the adverse action. *See id.* (citing *Melman v. Montefiore Med. Ctr.*, 946 N.Y.S.2d 27, 31 (App. Div. 2012)). The Bureau may also establish its *prima facie* case with direct evidence of discrimination. *See id.* (citing *Lukasiewicz v. Cutri*, OATH 2131/10, Dec. & Ord., 2011 WL 12472971, at *7 (citations omitted)). Claims of discrimination under the NYCHRL must be proven by a preponderance of the evidence. *See*

Cardenas, 2015 WL 7260567, at *7 (citing *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 110 (2d Cir. 2013)).

B. Charges Against Respondent Jafar Raza

As described above, the Bureau filed an Amended Complaint adding Jafar Raza as a Respondent on April 21, 2014, almost one month after finding Probable Cause against Respondent Baqir Raza. It is undisputed, however, that the Bureau never issued a Determination of Probable Cause against Respondent Jafar Raza. Instead, the Bureau sent both Respondents a Notice of Referral to OATH for trial on September 22, 2014. (Tr. at 9; Bureau Ex. 7.) In order for the Bureau to refer a case to OATH for trial, the Bureau must first issue a written notice to the complainant and respondent stating that the Bureau has determined that "probable cause exists to believe that the respondent has engaged or is engaging in an unlawful discriminatory practice...." N.Y.C. Admin. Code § 8-116(a). Issuing a determination of probable cause to the parties provides them with notice of the proceedings, and is particularly important for respondents to be informed of the fact that probable cause has been issued against them. Specifically, the Notice of Probable Cause issued to Respondent Baqir Raza in this case informed him that "it is the intention of the Law Enforcement Bureau to notice this case for public hearing if this matter is not promptly resolved by a conciliation agreement." (Bureau Ex. 1.) Respondent Jafar Raza was never provided with such notice and therefore had no opportunity to explore the possibility of resolving the matter through conciliation. Further, when the Bureau issues a Notice of Probable Cause, its posture in the matter changes significantly; it shifts from being a neutral investigator to prosecutor. Respondent Jafar Raza was never informed of this important shift in the administrative process, which may have prompted his participation in the process. The Commission therefore finds that it lacks

jurisdiction to address the charges against Respondent Jafar Raza because the Bureau did not issue a Notice of Probable against him, in violation of the New York City Human Rights Law and the Commission's Rules of Practice, and dismisses the charges against him with prejudice. *See* N.Y.C. Admin. Code §§ 8-116(a), (c); 47 RCNY § 1-52.[2]

C. Liability

The Bureau has established its *prima facie* case. Ms. Jordan is black, and as such is a member of a protected class as defined by the NYCHRL. (Tr. at 20.) Respondent Baqir Raza is a "provider of public accommodation" because he provided the service of hailed taxi rides. *See Gardner v. I.J.K. Serv., Inc.*, OATH 1921/08, Rep. & Rec., 2008 WL 8115730, at *6-7 (Oct. 10, 2008), *aff'd in part, rev'd in part*, Dec. & Order (Feb. 19, 2009) (for-hire vehicle driver of livery service was provider of a "public accommodation"). While the testimonies of Ms. Jordan, Ms.

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[2] Even if the Bureau provided Respondent Jafar Raza with a Determination of Probable Cause, however, the Commission finds that the allegations in the Amended Complaint are insufficient to support jurisdiction over Respondent Jafar Raza. The Amended Complaint alleges only that Respondent Baqir Raza leases a taxicab and Respondent Jafar Raza owns a taxicab. (ALJ Ex. 2 (Amended Complaint) at 1.) It alleges further that "Respondents discriminated against [Complainant] based upon her race and color by refusing to pick her up in Respondents' taxicab...." (*Id.* at 2.) The Amended Complaint is devoid of information regarding Respondents' relationship, whether an employer/employee relationship or any other agency relationship. *See* N.Y.C. Admin. Code § 8-107(13)(a) ("An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions one and two of this section"); *id.* § 8-107(13)(c) ("An employer shall be liable for an unlawful discriminatory practice committed by a person employed as an independent contractor...to carry out work in furtherance of the employer's business enterprise only where such discriminatory conduct was committed in the course of such employment and the employer had actual knowledge of and acquiesced in such conduct."). Therefore, even if the Commission deems all allegations in the Amended Complaint admitted due to Respondents' default – as the Bureau so requests in its Comments – the Amended Complaint does not contain sufficient information to support personal jurisdiction over Respondent Jafar Raza. *See Gurvey v. Cowan, Liebowitz & Latman, PC*, No. 06 Civ. 1202, 2009 WL 691056, at *4 (S.D.N.Y. Mar. 17, 2009) (finding that a mere conclusory allegation of an agency relationship in a pleading is insufficient to support personal jurisdiction over defendant).

Holder, and B.J. contained slight variations, they were overwhelmingly consistent in their description of the October 19 incident. Based on the uncontroverted testimony and the supporting documentary evidence at trial,[3] Respondent Baqir Raza acted in such a way that gives rise to the inference that his actions constituted discrimination under Section 8-107(4) of the NYCHRL: he refused to provide a service to an African-American customer under the pretext that he was going off-duty and then proceeded to accept a hail from two Caucasian customers approximately one block away.

Because he failed to appear at trial, Respondent Baqir Raza lost his opportunity to put forth contrary evidence to dispute the Bureau's case and also lost his opportunity to put forth a non-discriminatory justification for his behavior. Though Respondent Baqir Raza was not completely absent from the process – he submitted an Answer and Comments to the R&R – his absence from the hearing means he could not be cross-examined on the allegations contained in his Answer. Those allegations therefore cannot be afforded considerable weight. Further, Respondent Baqir Raza's Comments, which sought to admit new facts into the record, fall outside what is permissible at the post-hearing stage. *See* 47 RCNY § 1-76 ("The comments should raise any objections to the recommended decision and order. Comments shall be limited

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[3] The Commission does not credit the evidence put forward by the Bureau regarding Respondent Baqir Raza's "guilty plea" before the TLC in making its conclusion. (Tr. at 17-18; Bureau Ex. 12; Bureau Post-Hr'g Br. at 6-7.) It is within the discretion of the adjudicator to determine the admissibility of decisions by other administrative agencies in collateral proceedings. *See, e.g., Abramowitz v. Inta-Boro Acres, Inc.*, No. 98 Civ. 4139, 1999 WL 1288942, at *8 (E.D.N.Y. Nov. 16, 1999) (finding the prejudicial value of an Unemployment Appeal Board decision outweighed its probative value and declining to consider it). Respondent Baqir Raza faced a minimum fine of $450 and a maximum fine of $1,150 if he did not accept the $200 settlement proffered by the TLC, in addition to subsequent days spent before the TLC tribunal, and presumably, time off from work to attend. Respondent Baqir Raza therefore had legitimate reasons for agreeing to pay the $200 and accept a "guilty plea" that may have had little or nothing to do with an admission of wrongdoing.

to the record below."). Based on the case the Bureau presented at trial, the Commission finds Respondent Baqir Raza liable for violating Section 8-107(4)(A) of the NYCHRL.

IV. DAMAGES, AFFIRMATIVE ACTION, AND 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 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 the complainant damages. *See id.* § 8-120(a)(8). In addition, the Commission may impose civil penalties of not more than $125,000 on respondents who engage in discriminatory practices, 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 may be imposed. *Id.* § 8-126(a); *see Cardenas*, 2015 WL 7260567, at *15 (finding $250,000 civil penalty appropriate where respondent engaged in willful and wanton sexual harassment over a three-year period). The penalties are paid to the general fund of the City of New York. N.Y.C. Admin. Code § 8-127(a).

A. Emotional Distress Damages

Judge Kramer recommended an award of $10,000 in emotional distress damages. (R&R at 11.) The Bureau, in its post-trial brief, argued that an award of $12,500 in emotional distress damages was appropriate.[4] (Bureau Post-Hr'g Br. at 12-15.) In its Comments to the R&R, the

[4] Later in the Bureau's post-trial brief, it requests $15,000 in emotional distress damages. The Commission assumes this is a typographical error. (Bureau Post-Hr'g Br. at 15.)

Bureau requested that the Commission generally adopt Judge Kramer's recommendation. (Bureau Comments to the R&R at 1.)

The NYCHRL empowers the Commission to award "compensatory damages," a category of damages that includes compensation for emotional distress. *See* N.Y.C. Admin. Code § 8-120(8). Compensatory damages, including emotional distress damages, are intended to redress a specific loss that the complainant suffered by reason of the respondent's wrongful conduct. *See Vasquez v. N.Y.C. Dep't of Educ.*, No. 11 Civ. 3674, 2015 WL 3619432, at *13 (S.D.N.Y. June 10, 2015) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003)); *see also Patrolmen's Benevolent Ass'n of City of N.Y. v. City of New York*, 310 F.3d 43, 55 (2d Cir. 2002) (citing cases). The complainant must present evidence establishing actual injury in order to be awarded compensatory damages for emotional distress. *See Patrolmen's Benevolent Ass'n*, 310 F.3d at 55; *Najnin v. Dollar Mountain, Inc.*, No. 14 Civ. 5758, 2015 WL 6125436, at *3 (S.D.N.Y. Sept. 25, 2015). Such evidence may consist solely of complainant's credible testimony. *See N.Y.C. Transit Auth. v. N.Y. State Div. Human Rights*, 577 N.E.2d 40, 44, 45 (N.Y. 1991).

Where evidence regarding complainant's emotional harm, which encompasses humiliation, shame, shock, moodiness, and being upset, is limited to complainant's own testimony without other evidence of the emotional harm, such as medical treatment or physical manifestation, tribunals generally award between $30,000 and $125,000 in emotional distress damages. *See Dotson v. City of Syracuse*, No. 5:04 Civ. 1388, 2011 WL 817499, at *15 (N.D.N.Y. Mar. 2, 2011), *aff'd*, 549 Fed. App'x 6 (2d Cir. 2013). Courts have also awarded emotional distress damages at a lower range when "evidence of mental suffering is generally limited to the testimony of the [complainant] who describes his or her injury in vague or

conclusory terms...." *Holness v. Nat'l Mobile Television, Inc.*, No. 09 Civ. 2601, 2012 WL 1744847, at *5 (E.D.N.Y. Feb. 14, 2012), *rep. & rec. adopted as modified*, 2012 WL 1744744 (E.D.N.Y. May 15, 2012) (citing *Rainone v. Potter*, 388 F. Supp. 2d 120, 122 (E.D.N.Y. 2005)); *see Najnin*, 2015 WL 6125436, at *3; *see also Manson v. Friedberg*, No. 08 Civ. 3890, 2013 WL 2896971, at *7 (S.D.N.Y. June 13, 2013); *Fowler v. N.Y. Transit Auth.*, No. 96 Civ. 6796, 2001 WL 83228, at *13 (S.D.N.Y. Jan. 31, 2001).

In such cases, where aggrieved parties have presented courts with bare evidence of emotional distress, courts have commonly approved awards in the range of $2,500 to $30,000. *See Perez v. Jasper Trading, Inc.*, No. 05 Civ. 1725, 2007 WL 4441062, at *9 (E.D.N.Y. Dec.17, 2007); *see also, e.g.*, *Holness*, 2012 WL 1744847, at *5; *Fowler*, 2001 WL 83228, at *13; *Bick v. City of New York*, No. 95 Civ. 8781, 1998 WL 190283, at *25 (S.D.N.Y. Apr. 21, 1998) (surveying cases in which emotional distress awards ranged between $5,000 and $30,000).

Ms. Jordan credibly testified to feeling "angry" and "very sad," particularly because she could not shield her daughters from this experience. (Tr. at 23, 25.) Ms. Jordan also testified that she still thinks about the discriminatory act several years after it occurred. (*Id.* at 25.) The Commission recognizes that there may be circumstances in which the kind of treatment Ms. Jordan experienced here – being denied access to a basic service because of one's race – would justifiably and reasonably cause significant shame, humiliation, or stress, warranting emotional distress awards of $10,000 or more based on the complainant's testimony alone, and indeed that could have been the case here as well, but the trial record does not support it.

Judge Kramer, in recommending an emotional distress award of $10,000, cites two cases that are highly distinguishable from the relevant facts here regarding emotional distress. In *Secor v. N.Y.C. Comm'n on Human Rights*, in which the complainant was awarded $10,000 in

emotional distress damages, the complainant and a witness described the impact of the discriminatory act on the complainant: she "was very withdrawn, she cried a lot, she didn't eat, she lost weight...she didn't sleep," and the court noted that there was "substantial evidence on the record" of emotional distress. 13 Misc. 3d 1220(A), 831 N.Y.S.2d 350 (Sup. Ct. 2006). Similarly, in *DaCosta v. Framboise Pastry, Inc.*, the complainant credibly testified that she was "hurt to the core" by respondents' acts, and that she "had never experienced such racism in her personal or professional life, and she was still hurt by the incident." OATH Nos. 727/13, 728/13, Dec. & Ord., 2013 WL 5912574, at *6 (Sept. 25, 2013).

Considering Ms. Jordan's testimony – that she felt "angry" and "very sad," and that she still thinks about the incident years later – the egregiousness of denying someone a service because of race, and the indignity of the situation, the Commission finds an emotional distress award of $7,000 appropriate. Ms. Jordan's testimony does not articulate the type of harm that courts consistently require to support a higher emotional distress award. *Compare Howe*, 2016 WL 1050864, at *7, 10 (awarding $2,500 in emotional distress damages where complainant testified that respondent's actions caused him to feel "pretty upset," but where there was no further explanation of the severity or impact of the discriminatory act on complainant's emotional or physical well-being), *with Stamm*, 2016 WL 1644879, at *9 (awarding $7,000 in emotional distress damages where complainant testified to feeling "really upset and depressed and angry," "humiliated, nervous, [and] embarrassed," "angry and disgusted," and then "withdrawn and depressed."). The Commission does not doubt that being denied a basic service because of one's race or color may cause significant emotional distress. However, the

Commission is constrained by the law, which requires that Complainant articulate or otherwise demonstrate emotional harm of a higher magnitude than what the record reflects here to assign emotional distress damages at a correspondingly higher value.

The Commission recognizes the difficulty of assigning a monetary sum to an individual's emotional distress. Money may seem like an insufficient method of addressing the harm inflicted by discriminatory behavior. In recognition of the limitations of this framework, the Commission also looks to restorative justice to present alternative options to compensate Ms. Jordan for the emotional harm of experiencing discrimination.

The New York City Human Rights Law empowers the Commission to take any actions to "eliminate and prevent" discrimination, and even more broadly, to "take other actions against prejudice, intolerance, bigotry, discrimination and bias-related violence or harassment." N.Y.C. Admin. Code § 8-101. The New York City Human Rights Law further empowers the Commission to mandate "such affirmative action, as in the judgment of the commission, will effectuate the purposes of this chapter." *Id.* § 8-120. The Commission, with its broad mandate to combat discrimination, vindicate the public interest, and require such affirmative action, is framed under a holistic human rights model.

The concept of restorative justice emerges from the belief that a conventional civil process may be ineffective in separating an offender from the consequences of a wrongful act, in the timing of a remedial action, and in the inattention to the personal nature of the wrong. *See* Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 164 (2007). As such, "restorative justice creates space for an alternate dialogue of reparation of harm focused on maintaining membership within a specific community...." Thalia

González, *Reorienting Restorative Justice: Initiating A New Dialogue of Rights Consciousness, Community Empowerment and Politicization*, 16 CARDOZO J. CONFLICT RESOL. 457, 458 (2015). In short, restorative justice focuses on "healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends." John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 6 (1999).

The Commission orders the Bureau and Complainant to consider the possibility of an alternative resolution that may involve, for example, a mediated apology or other method of resolution, in lieu of payment of emotional distress damages, and to provide a letter to the Commission within thirty days of the date of this Order informing the Commission as to whether Complainant will consider an alternative resolution. If Complainant does not wish to consider an alternative resolution or fails to submit the letter within thirty days of this Order, the Commission will notify Respondent of his obligation to pay the emotional distress damages within thirty days of the date of the Commission's notification letter.

If the parties agree to consider an alternative resolution, the parties have sixty days from the date of the letter submitted to the Commission to mediate an alternative resolution and submit a proposed conciliation agreement outlining the proposed resolution. If no such resolution is reached within sixty days, the parties must inform the Commission in writing and Respondent must pay the emotional distress damages as outlined above within thirty days. The Commission will not entertain any requests for extensions to the timelines detailed above.

B. Other Affirmative Actions To Effectuate the Purposes of the NYCHRL

The Commission is empowered to order respondents "to take such affirmative action as, in the judgment of the commission, will effectuate the purposes of" the NYCHRL. N.Y.C. Admin. Code § 8-120. The Commission finds that such affirmative action is appropriate here.

Individual respondents are uniquely situated when they are not business owners, corporate entities, or partnerships, as the burden of any action ordered rests squarely on them. Taking account of Respondent Baqir Raza's situation as well as the Commission's mandate to vindicate the public interest and prevent discrimination, the Commission again applies the principles of restorative justice in fashioning affirmative action in this case. The Commission orders Respondent Baqir Raza to work with the Commission's Community Relations Bureau to educate taxi drivers on the NYCHRL. Respondent Baqir Raza will perform this work in an effort to prevent future violations of the NYCHRL and inform taxi drivers of the importance of cooperation in the Bureau's and OATH's processes. The Commission, therefore, orders Respondent Baqir Raza to work with the Commission's Community Relations Bureau for 229 hours over the course of one year. Based on an approximate gross income of $30.50/hour in earnings as a taxi driver,[5] this period of time is valued at $7,000. The Commission finds that community service roughly equivalent to $7,000 is appropriate. Unlike the respondent in *Spitzer v. Dahbi*, OATH 883/15, Dec. & Ord. (July 7, 2016), where the Commission mandated community service roughly equivalent to $5,000, Respondent Baqir Raza chose to flout the Commission's and OATH's procedures by failing to appear at either the scheduled hearing or trial dates. *See Stamm*, 2016 WL 1644879, at *11 (imposing civil penalty of $7,000 involving

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[5] *See* New York City Taxi and Limousine Commission, "2016 Taxicab Fact Book" at 7, *available at* http://www.nyc.gov/html/tlc/downloads/pdf/2016_tlc_factbook.pdf (last accessed July 5, 2016).

one incident of public accommodations discrimination where the respondent defaulted and there was no information regarding respondent's resources); *see also Howe*, 2016 WL 1050864, at *8 (finding failure to cooperate a critical factor to consider "[b]ecause it is in the public interest to have individuals respond and participate in a process designed to cure discriminatory practices." (citation omitted).

In addition, consistent with the Commission's desire to assist respondents' understanding of their obligations under the NYCHRL, the Commission regularly orders respondents to complete training and finds such training appropriate here for Respondent Baqir Raza. The Commission also orders Respondent Baqir Raza to complete training on the NYCHRL, available, free of charge, through the Commission's Community Relations Bureau.

C. Civil Penalties

In arriving at his civil penalty recommendation, Judge Kramer considered the following factors: 1) the egregiousness of the discrimination and its impact on the public; 2) whether the conduct was willful; 3) the nature of the violation; 4) whether there have been prior findings of discrimination against the same respondent; and 5) other aggravating factors such as offensive language or whether the respondent cooperated with the Commission's investigation. (R&R at 12.) The Bureau requests that the Commission affirm Judge Kramer's recommendation. (Bureau Post-Hr'g Br. at 15-19; Bureau Comments to the R&R at 1.)

In determining the civil penalty necessary to vindicate the public interest, the Commission may consider several additional factors, including, but not limited to: 1) respondent's financial resources; 2) sophistication of respondent's enterprise; 3) respondent's size; 4) the willfulness of the violation; 5) the ability of respondent to obtain counsel; 6) whether

respondent cooperated with the Bureau's investigation and the OATH proceedings; and 7) the impact on the public of issuing civil penalties. *See Stamm*, 2016 WL 1644879, at *10; *Howe*, 2016 WL 1050864, at *8; *Cardenas*, 2015 WL 7260567, at *15.

The Commission is tasked with imposing civil penalties to vindicate the public interest and deter future discriminatory conduct. A civil penalty that achieves these goals must be tailored to the specific circumstances of the respondent. For example, the amount of a civil penalty that would deter future discriminatory conduct when the respondent is a business with hundreds of employees, multiple locations, and millions of dollars in revenue in New York City looks very different than a civil penalty ordered against a business with five employees, one location, and is barely breaking even. Because the Commission has ordered Respondent Baqir Raza to work with the Commission's Community Relations Bureau for 229 hours, which equals approximately $7,000 worth of his time, the Commission does not find it necessary to order additional civil penalties in this circumstance. In this case, the affirmative action ordered will serve the same purpose of deterrence and vindicating the public interest that a civil penalty would.

IT IS HEREBY ORDERED, that all claims against Respondent Jafar Raza are dismissed with prejudice;

IT IS FURTHER ORDERED, that Respondent Baqir Raza immediately cease and desist from engaging in discriminatory conduct;

IT IS FURTHER ORDERED, that no later than sixty (60) calendar days after service of this Order, Respondent will attend a Commission-led training on the NYCHRL;

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Complainant and the Bureau will communicate with the Commission regarding whether they will pursue an alternative resolution or whether Complainant will accept emotional distress damages from Respondent Baqir Raza in the amount of $7,000;

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondent Baqir Raza contact the Community Relations Bureau of the Commission on Human Rights to coordinate his community service;

If Respondent Baqir Raza fails to timely contact the Community Relations Bureau of the Commission regarding the community service as set forth above, or fails to perform such community service, an automatic penalty of $7,000 will be levied against Respondent Baqir Raza.

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 Respondent Baqir Raza, Respondent Baqir Raza 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
July 7, 2016

SO ORDERED:

New York City Commission on Human Rights

Carmelyn P. Malalis
Commissioner/Chair