CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

COMMISSION ON HUMAN RIGHTS,

Petitioner,

-against-

A NANNY ON THE NET LLC and AMY HARDISON,

Respondents.

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Complaint Nos. M-E-D-12-1027051-D, M-E-T-13-1029227

OATH Index Nos. 1364/14, 1365/14

DECISION AND ORDER

The Law Enforcement Bureau of the New York City Commission on Human Rights (the "Bureau") initiated this employment discrimination action on June 29, 2012 against Respondent A Nanny on the Net LLC ("NOTN") by filing a verified complaint ("Complaint"), alleging violations of § 8-107(1)(d) of the New York City Human Rights Law ("NYCHRL"), codified at N.Y.C. Admin. Code tit. 8. (*See* Compl. ¶ 4, ALJ Ex. 1.) Specifically, the Bureau alleges that Respondent NOTN's online job application included a series of questions regarding a prospective applicant's health and history of impairments, in violation of the NYCHRL's prohibition on any inquiry made in connection with prospective employment "which, directly or indirectly, expresses a limitation, specification, or discrimination . . . as to disability . . . or any intent to make any such limitation, specification or discrimination." N.Y.C. Admin. Code § 8-107(1)(d); (*see* Compl. ¶ 4). On September 24, 2013, the Bureau filed an amended verified complaint ("Amended Complaint") adding Respondent Amy Hardison, identified in the Amended Complaint as a "manager and/or owner" of Respondent NOTN. (*See* Am. Compl. ¶ 3, ALJ Ex. 1.) On September 26, 2013, the Bureau filed a separate verified complaint ("Second

Complaint") against Respondent Amy Hardison and Respondent NOTN (collectively, "Respondents"), alleging that Respondents' online application included a series of questions regarding applicants' arrest and conviction records, in violation of § 8-107(11) of the NYCHRL.[1] (*See* 2d Compl. ¶ 5, ALJ Ex. 2.)

On December 5, 2013, the Bureau issued a Notice of Probable Cause and of Intent to Proceed to Public Hearing on the Amended Complaint and the Second Complaint (*see* Bureau Comments to Report & Recommendation, dated Oct. 3, 2014 ("Bureau Comments") at 2), and the cases were then joined and referred to the Office of Administrative Trials and Hearings ("OATH") for a hearing and a recommended determination by an administrative law judge ("ALJ"). Respondents did not file an answer, but generally cooperated in the later stages of the investigation process and during the hearing at OATH. (*See* Tr. of OATH Hearing ("Tr.) at 71:18-74:18; Report & Recommendation ("R&R") at 10.) Following a one-day hearing on June 12, 2014, ALJ John Spooner issued a report and recommendation dated August 8, 2014 ("Report and Recommendation") (1) finding that Respondents were an "employment agency" under the NYCHRL; (2) finding that Respondents violated §§ 8-107(1)(d) and 8-107(11) of the NYCHRL by publishing on their website an employment application inquiring about health conditions that may constitute disabilities and inquiring about arrest histories; and (3) recommending a civil penalty of $3,000.00. *In re Comm'n on Human Rights v. A Nanny on the Net, LLC*, OATH Index No. 1364/14, R&R, 2014 WL 4425629, at *6-9 (Aug. 8, 2014).

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[1] At the time that the Second Complaint was filed, § 8-107(11) of the NYCHRL prohibited "any inquiry about . . . any arrest or criminal accusation of such person not then pending against that person which was followed by a termination of that criminal action or proceeding in favor of such person . . . ." The text of § 8-107(11) was subsequently amended by the Fair Chance Act of 2015, Local Law 63, and now states, in relevant part, that inquiries are prohibited "regarding any arrest or criminal accusation of an applicant or employee when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the New York state executive law."

The parties had the right to submit written comments and objections to the Report and Recommendation within 20 days after the Office of the Chairperson of the Commission on Human Rights (the "Commission") commenced consideration of the Report and Recommendation. *See* 47 RCNY § 1-76. The Bureau submitted written comments on October 3, 2014. Respondents did not submit comments. 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 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 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 ex rel. Stamm v. E&E Bagels*, OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at *2 (Apr. 20, 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); *In re Comm'n on Human Rights v. Shahbain*, OATH Index No. 13-2439, Dec. & Order, 2014 WL 4211293, at *4 (May 22, 2014). 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. Accordingly, the Commission reviews a report and recommendation and the parties' comments and objections *de novo* as to findings of fact and conclusions of law. *Stamm,* 2016 WL 1644879 at *2; *Howe*, 2016 WL 1050864 at *3; *CU29 Copper Rest. & Bar*, 2015 WL 7260570 at *2.

II. HEARING TESTIMONY AND EVIDENCE

For purposes of this Decision and Order, knowledge of the facts described in the Report and Recommendation is generally assumed. During the hearing, the Bureau called four witnesses: Emily Ravich, a nanny from New York City who was invited to apply for a job through NOTN's website;[2] two Bureau attorneys, Laura Flyer and Vaughn Browne, who had been involved in the underlying investigation of the case; and Respondent Hardison. The Bureau

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[2] Ms. Ravich filed a complaint against NOTN, but later withdrew it. (Tr. at 52:12-21.)

also entered eight exhibits into evidence. Respondents' presentation of the case consisted solely of testimony by Respondent Hardison. Respondents did not submit any documentary evidence.

Ms. Ravich testified that during the relevant period she resided in Brooklyn and worked as a nanny. (Tr. at 21:7-24.) She stated that on June 21, 2012, she received a call from a NOTN representative, inviting her to complete an application through NOTN's website so that she might be considered for a job in Manhattan. (*Id.* at 22:5-16; 24:6-9.) Ms. Ravich visited NOTN's website and partially completed the online application form, but ultimately abandoned her efforts because, as she explained, there were "some questions that I felt were invasive . . . they asked about medical issues that you might have and medications that you might be taking, and I knew that that was not quite right, that they shouldn't be doing that." (*Id.* at 23:1-12.) Ms. Ravich testified that it was not possible to submit the online application without completing the questions about health and disability, which she found objectionable, and without attesting that her answers were complete and accurate. (*See id.* at 23:14-18.)

During the hearing, Respondent Hardison testified that she is the owner of NOTN and, as of the hearing date, had been operating NOTN's business from her home office in Rocklin, California for a period of seven years. (Tr. at 84:22-85:13.) At the time of the hearing, Respondent Hardison was the sole employee of NOTN and testified that it had been at least two years since the company had employed an additional part-time employee. (*Id.* at 85:22-24, 86:2-4, 86:23-87:1.) According to Respondent Hardison, NOTN's job application form was based on "a template online application that [Respondents] got from a software company." (*Id.* at 15:22-23.) Nevertheless, she admitted that she has the final say on, and was fully aware of, NOTN's website content, including the questions on the job application form that are at issue in this case. (*Id.* at 86:8-9, 89:24-90:1.)

The Bureau presented evidence of two different versions of the online application form that its investigators had encountered when visiting NOTN's website on June 22, 2012 and September 20, 2013. (*See* Bureau Exs. 2 & 5.) The version of the application form that appeared on the website on June 22, 2012 included several questions regarding applicants' health information. For example, the application asked:

> I. Do you have any problems with: Drug or alcohol abuse? Emotional illness? Eating disorder? If yes, when? How was it resolved? How did this affect you?
> II. Do you take any frequent medication? If yes, please list.
> III. Do you have any physical/mental restrictions or impairments or congenital defects? If yes, explain.
> IV. Do you suffer from depression? If yes, are you currently, or have you ever taken any medication for depression? . . .

(Bureau Ex. 2 at 9.) The June 22, 2012 version of the application form also asked applicants to indicate whether they would consent to a physical examination, drug screening, HIV test, or other form of examination if a family were to hire them as a nanny (*id.*), and asked whether applicants had ever been arrested (*id.* at 8). The revised application form that appeared on NOTN's website on September 20, 2013 (after the original Complaint was filed) did not include any health-related questions, but still asked applicants to report whether they had ever been arrested. (Bureau Ex. 5 at 10.) The Bureau also presented evidence showing that various links on the NOTN website were specifically targeted to individuals looking to work as nannies in New York City and to families who were looking to employ a nanny in New York City. (*See, e.g.*, Bureau Ex. 5 at 1-2; *see also* R&R at 3.)

III. DISCUSSION

A. Legal Standard

The NYCHRL expressly provides that it "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether

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

B. The Commission Has Jurisdiction Over Respondents.

Before addressing the substantive allegations, the Commission considers the following questions, raised by the parties during the hearing and in their post-hearing briefing: (1) whether Respondents' apparent lack of a physical presence in New York City precludes the Commission from having jurisdiction over the claims in this case; (2) whether Respondent NOTN is an "employment agency" under the NYCHRL; and (3) whether Respondent NOTN is an employer under the NYCHRL.

1. Respondents Are Subject to the Commission's Jurisdiction Because the Impact of Their Conduct Was Felt Within New York City.

For purposes of determining whether Respondents are subject to the Commission's jurisdiction, the relevant inquiry is not whether Respondents operated out of New York City, but whether the impact of their alleged discriminatory conduct was felt in New York City. *See, e.g., Int'l Healthcare Exch. Inc. v. Global Healthcare Exch. LLC*, 470 F. Supp. 2d 345, 362 (S.D.N.Y.

2007); *Hoffman v. Parade Publ'ns*, 15 N.Y.3d 285, 290-91 (2010); *Benham v. eCommission Sols., LLC*, 118 A.D.3d 605, 606 (1st Dep't 2014); *Hardwick v. Auriemma,* 116 A.D.3d 465, 467 (1st Dep't 2014).

In identifying the site of impact of a discriminatory act for purposes of applying the NYCHRL, courts have consistently held that jurisdiction may not be based solely on the initial decision to discriminate (*e.g.*, a decision to terminate) having been made in New York City. *Hoffman*, 15 N.Y.3d at 290-91; *see also Chin v. CH2M Hill Co.*, No. 12 Civ. 4010, 2012 WL 4473293, at *3-4 (S.D.N.Y. Sept. 28, 2012); *Robles v. Cox & Co.*, 841 F. Supp. 2d 615, 625 (E.D.N.Y. 2012); *Hardwick*, 116 A.D.3d at 467. Instead, courts have generally found jurisdiction if New York City is the location where the discriminatory act took place (*e.g.*, the place where the termination occurred), or the location where the complainant experienced the relevant injury (*e.g.*, the employee's workplace, which may or may not differ from the place of termination). *See Anderson v. HotelsAB, LLC*, No. 15 Civ. 712, 2015 WL 5008771, at *3-4 (S.D.N.Y. Aug. 24, 2015); *Robles*, 841 F. Supp. 2d at 624; *Rylott-Rooney v. Alitalia-Linee Aeree Italiane-Societa Per Azioni*, 549 F. Supp. 2d 549, 554 (S.D.N.Y. 2008); *see also Wexelberg v. Project Brokers LLC*, No. 13 Civ. 7904, 2014 WL 2624761, at *10-11 (S.D.N.Y. Apr. 28, 2014); *Chin*, 2012 WL 4473293 at *3-4; *Regan v. Benchmark Co.*, No. 11 Civ. 4511, 2012 WL 692056, at *13-14 (S.D.N.Y. Mar. 1, 2012); *Int'l Healthcare Exch. Inc.*, 470 F. Supp. 2d at 362-63; *Hardwick,* 116 A.D.3d at 467. Generally, the place of the "original experience of injury" is determined based on "practical substantive consideration[s]," such as "how and where the injury actually affected the [individual] with respect to [the individual's] employment." *Anderson*, 2015 WL 5008771 at *3. For example, jurisdiction under the NYCHRL has been established where an applicant interviewed for a position that would be located in New York City for approximately half of each

year, despite the fact that the alleged act of discrimination occurred during an interview outside of New York City. *See id.* at *1-4.

In this case, the Bureau established through documentary evidence and testimony that Respondents solicited applications for nannies to work in New York City, and at least one individual who sought to work in New York City was chilled from submitting her application because of what she described as "invasive" questions about her mental and physical health. (Tr. at 23:1-12.)[3] Regardless of where Respondents' business is located, "the impact requirement is satisfied if the plaintiff [or complainant] alleges that the conduct has affected the terms and conditions of the plaintiff's [or complainant's] employment within the city." *Anderson,* 2015 WL 5008771, at *2; *see Chin*, 2012 WL 4473293, at *3-4; *Regan*, 2012 WL 692056, at *13-14 (noting that job transfer to New Jersey "was the culmination of a number of alleged discriminatory acts that took place at [defendant's] New York City office while [plaintiff] worked there"); *Int'l Healthcare Exch. Inc.*, 470 F. Supp. 2d at 362-63. Here, because Respondents directed their job outreach to the New York City market and the direct impact of their alleged discriminatory conduct was felt by Ms. Ravich, a prospective job applicant seeking employment in New York City, the Commission has subject matter jurisdiction over the case.

2. Respondent NOTN Is an Employment Agency Under the NYCHRL.

The NYCHRL defines an employment agency as "any person undertaking to procure employees or opportunities to work." N.Y.C. Admin. Code § 8-102(2). In this case, Respondent Hardison testified that "we help families locate a nanny to work in their home" (Tr. at 86:12-13)

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[3] In addition, the Bureau submitted evidence that a Google search of the term "A Nanny on the Net" returned an address at East 94th Street, in Manhattan. (Bureau Ex. 4.) In his Report and Recommendation, ALJ Spooner properly found that, in the face of Respondent Hardison's credible testimony that Respondents have never been associated with the East 94th Street address, no weight can be given to the Bureau's evidence absent additional information concerning how such Google results are generated. (*See* R&R at 4.)

and that "a family basically pays me [] the finder's fee when they hire one of our nannies" (*id.* at 87:17-18). There is therefore no dispute that Respondent NOTN satisfies the definition of an employment agency. *See, e.g.*, *Comm'n on Human Rights ex rel. Campbell v. Pers. Emp't Servs.*, OATH Index No. 1579/07, R&R, 2007 WL 7275800, at *2 (Aug. 20, 2007), *adopted* Dec. & Order, 2007 WL 7270827 (Dec. 14, 2007); *Comm'n on Human Rights ex rel. Cherry v. Stars Model Mgmt.*, OATH Index No. 1464/05, Dec. & Order, 2006 WL 4680498, at *2 (Mar. 1, 2006). Moreover, there is no minimum number of employees that is required for an employment agency to fall within the jurisdiction of the NYCHRL. *See* N.Y.C. Admin. Code § 8-102(2). As such, Respondent NOTN and Respondent Hardison, as NOTN's owner and sole employee, are both subject to the requirements of the NYCHRL. *See, e.g.*, N.Y.C. Admin. Code § 8-107(1)(b) & (d).

Having found that Respondent NOTN and Respondent Hardison are subject to the NYCHRL, respectively, as an employment agency and an employee thereof, the Commission need not reach the Bureau's alternative argument that Respondents also qualify as "employers" under the NYCHRL.[4]

C. Respondents Violated the NYCHRL by Publishing an Application for Employment Indirectly Expressing a "Limitation, Specification, or Discrimination" Based on Disability, and Asking About Criminal Arrests.

The NYCHRL makes it unlawful for an employment agency or an employee thereof to make any inquiry in connection with prospective employment "which expresses, directly or

[4] Of course, that does not preclude a finding in a different case that a person who is an employment agency is also an employer under the NYCHRL.

indirectly, any limitation, specification or discrimination as to . . . disability . . . or any intent to make any such limitation, specification or discrimination." N.Y.C. Admin. Code § 8-107(1)(d).[5]

In this case, NOTN's job application included approximately 17 questions related to an applicant's disabilities (Bureau Ex. 2 at 9-10), and job applicants were not permitted to submit their applications without providing answers to those questions (Tr. at 23:14-18). Some of the questions were posed in a manner that strongly indicated an intention to use the applicant's responses as a basis for assessing their job eligibility, including asking whether applicants would consent to a physical examination or an HIV test if they were hired, and asking them to "explain" their "physical/mental restrictions or impairments or congenital defects." (*See* Bureau Ex. 2 at 9.) During the hearing, Ms. Ravich testified that the disability-related questions on NOTN's job application made her feel discriminated against and caused her to worry, presumably about the prospect that she would be judged based on her responses. (*See* Tr. 23:21, 32:15-16.) Given the totality of the circumstances in this case, it can be reasonably inferred that NOTN and Respondent Hardison required extensive disability-related disclosures from job applicants because they regarded such information as relevant to nannies' job eligibility, and because they intended to select candidates at least in part based on whether or not they had a disability. In other words, the job application prepared by Respondent Hardison on behalf of NOTN indirectly expressed a "limitation, specification or discrimination" on the basis of disability, in violation of § 8-107(1)(d) of the NYCHRL. *See N.Y. Times Co. v. City of N.Y. Comm'n on Human Rights*, 41 N.Y.2d 345, 350 (1977) ("the test under the advertising subdivision [of the NYCHRL] is not whether the actual discrimination is practiced. The standard is whether the advertising expresses

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[5] A "specification," as defined by Black's Law Dictionary, includes a statement of "the measurements, quality, materials, or other items to be provided under a contract," such as an employment contract. *Specification*, Black's Law Dictionary (10th ed. 2014).

discrimination, directly or indirectly."); *see also Delta Air Lines, Inc. v. N.Y. State Division of Human Rights*, 229 A.D.2d 132, 141 (1st Dep't 1996) (holding that, under state law, New York State Division on Human Rights may reasonably infer from the facts that a job inquiry expresses a "limitation, specification or discrimination").

Under § 8-107(11) of the NYCHRL, it is also impermissible to inquire about a job applicant's record of non-pending arrests or criminal accusations. *See* N.Y.C. Admin. Code § 8-107(11) (1991); *see also Schwarz v. Consol. Edison, Inc.*, 49 Misc. 3d 832, 843 (Sup. Ct. N.Y. Cnty. 2015) ("the legislature sought to address the stigmatizing effect criminal convictions have on ex-convicts").[6] The question on NOTN's job application, "[h]ave you ever been arrested?" (*see* Bureau Ex. 2 at 8 & Ex. 5 at 8), is impermissibly overbroad because, in violation of § 8-107(11) of the NYCHRL, it seeks information from applicants concerning *any* arrest, including non-pending arrests that were followed by a termination of the criminal proceeding in the individual's favor. Based on the foregoing, the Commission finds that Respondents are liable for violating § 8-107(1)(d) and § 8-107(11) of the NYCHRL.

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[6] The Fair Chance Act of 2015, which was passed after the Amended Complaint and Second Complaint were filed in this case, added two new categories of arrests about which it is now impermissible to inquire of a job applicant or employee. Specifically, employment-related inquiries are no longer permitted concerning arrests that are followed by youthful offender adjudications or for which the records were sealed. *See* N.Y.C. Admin. Code § 8-107(11)(b) (2015); N.Y. Exec. L. § 296(16).

The Fair Chance Act also added protections making it unlawful for any employer, employment agency or agent thereof to, among other things, "[m]ake any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment . . . until after such employer or agent thereof has extended a conditional offer of employment to the applicant." N.Y.C. Admin. Code § 8-107(11-a)(a)(2). Had this case been filed after the Fair Chance Act was passed, Respondents presumably would have faced additional liabilities under § 8-107(11-a) of the NYCHRL.

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 complainants. *See id.* at § 8-120(a)(8). In addition, 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.* at § 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).

A. Civil Penalties

In recommending a civil penalty of $3,000.00 in this case, ALJ Spooner considered the egregiousness and duration of the violations, whether there were any previous findings of discrimination against the Respondents, the extent of Respondents' cooperation with the Commission, and the potential impact of the violations on the public. (R&R at 9, 11.) ALJ Spooner also cited to two cases, *Commission on Human Rights ex rel. Campbell v. Personal Employment Services*, OATH Index No. 1579/07, and *Commission on Human Rights v. Rent the Bronx, Inc.*, OATH Index No. 1619/11, R&R (July 27, 2011), *adopted*, Dec. & Order (Oct. 27,

2011),[7] in support of his recommended fine. (R&R at 10-11.) The Bureau urges that each separate violation of the NYCHRL be subject to civil penalties of $7,500.00, for a total of $15,000.00. (Bureau Comments at 2.) In support of its penalty request, it cites *Commission on Human Rights v. Vudu Lounge*, OATH Index No. 233/12, Dec. & Order, 2012 WL 1657554 (Mar. 22, 2012). (Bureau Comments at 10.)

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., Howe*, 2016 WL 1050864, at *8; *Cardenas*, 2015 WL 7260567 at *15; *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").

1. Respondents' Size, Sophistication, Financial Resources, and Ability to Obtain Counsel

Here, it is undisputed that Respondent NOTN is a small, unsophisticated business with limited financial resources. Respondent Hardison testified that at the time of the hearing she was NOTN's sole employee (*id.* at 85:22-24) and Respondents were placing "maybe one nanny a

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[7] Available via OATH's website at http://a820-isys.nyc.gov/ISYS/View.aspx?filename=/isysquery/18ddabb3-67c7-4d0d-9342-2dd86e962597/1/doc/11-1619.pdf&format=%20Adobe%20Acrobat%20(PDF)

month" (Tr. at 86:20-22) for a fee of $1,200.00 for part-time placements and $1,800.00 for full-time placements (*id.* at 87:15-17). In other words, the undisputed evidence suggests that, at most, Respondents were grossing approximately $21,600.00 annually at the time of the hearing. Even in 2012, when NOTN was somewhat larger and employed an additional part-time employee (*id.* at 86:20-87:1), the company was only making "between one and four placements a month" (*id.* at 87:3-4). The record also shows that Respondents were unable to afford legal counsel in this case. (*See* R&R at 1; Tr. at 7:14-23.) Each of these considerations weighs in favor of a lesser fine, based on the principle of proportionality that the Commission applies in assessing civil penalties. *See 119-121 E. 97th St. Corp. v. N.Y.C. Comm'n on Human Rights*, 220 A.D.2d 79, 88 (1st Dep't 1996); *In re Comm'n on Human Rights v. Shahid*, OATH Index No. 1381/13, Dec. & Order, 2013 WL 5912811, at *3 (July 26, 2013).

2. Willfulness of the Violations and Remedial Action Already Taken by Respondents

As for willfulness, the record suggests that Respondents' violations of the NYCHRL were inadvertent. Respondent Hardison testified that Respondents "were not aware" that their conduct violated the NYCHRL (*id.* at 16:1-3), and that they promptly modified the NOTN website after they were notified about the violations. (*See id.* at 15:24-16:1-9, 17:12-15.) The absence of willfulness and Respondents' prompt remedial action to remove problematic questions also weigh in favor of a reduced civil penalty in this case.

In particular, the Commission is careful to avoid unduly harsh penalties for inadvertent violations of the NYCHRL where such penalties may have the undesirable effect of shuttering or discouraging small business operations and where respondents indicate an inclination to comply with the NYCHRL but may not fully understand their legal obligations. *See CU 29 Copper Rest. & Bar*, 2015 WL 7260570, at *4. The Commission also takes special note of the fact that during

the hearing Respondent Hardison offered Ms. Ravich an unsolicited and, based on the trial transcript, seemingly genuine apology on behalf of Respondents, expressing remorse for any harm that their conduct might have caused her. (*See* Tr. 32:17-33:16.) In this regard, Respondents' actions evince their inclination to comply with the NYCHRL in the future, and are consistent with the spirit of restorative justice that informs our jurisprudence and the principle of mutual respect that forms the foundation of the NYCHRL. *See In re Comm'n on Human Rights ex rel. Jordan v. Raza,* OATH Index No. 716/15, 2016 WL 7106070, at *10-11 (July 7, 2016); *Spitzer,* 2016 WL 7106071, at *9-10.

3. Respondents' Cooperation with the Investigation and Hearing Process

As for Respondents' cooperation with the investigation and hearing processes, the record is more mixed. In his Report and Recommendation, ALJ Spooner concluded that Respondents had largely cooperated with the Commission, noting that Respondent Hardison promptly replied to emails from the Bureau and OATH, provided documents as requested, and participated in the hearing process. (R&R at 10.) However, the record also suggests that Respondents may have initially been resistant to cooperating with the Bureau. For example, Ms. Hardison reportedly informed a Bureau investigator that someone from NOTN's "New York office" would be in touch – despite her later testimony that no such office exists – and she then failed to return the Bureau's call. (Tr. at 56:23-57:1.) Respondents also failed to file an answer, despite the Bureau's repeated invitations for them to do so. (*See id.* at 71:18-74:18.) Generally, such a "refusal to take [the administrative hearing] process seriously militates in favor of a higher penalty '[b]ecause 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 (quoting *Crazy Asylum*, 2015 WL 7260568, at *6). Despite Respondents' cooperation in the later stages of the case, their initial

refusal to cooperate with the Bureau weighs in favor of civil penalties. *Accord id.* at *5, *9 (noting that respondents demonstrated a "steadfast refusal to take [the] process seriously" by failing to answer or appear at trial). However, as discussed below, when weighed against other considerations, the Commission concludes that the need for civil penalties in this case is not overriding.

4. Impact of Civil Penalties on the Public

With respect to the public impact of civil penalties, the Bureau argues in its comments to the Report and Recommendation that "a higher civil penalty should be assessed here," than in instances of direct discrimination, such as a refusal to hire, "*precisely* because we cannot know how many people were affected by these discriminatory acts because this type of discrete discrimination is specifically designed to discourage applicants with disabilities and/or arrest records from even applying for a job." (Bureau Comments at 11) (emphasis in original). While job applications that discourage prospective applicants from applying can have an invidious effect, the Bureau's argument does not hold water. It is the Commission'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* . . .'." *See Crazy Asylum*, 2015 WL 7260568, at *6 (quoting *Capitol Records, Inc. v. MP3tunes, LLC*, 48 F. Supp. 3d 703, 728 (S.D.N.Y. 2014)) (emphasis added). Relevant evidence of the scope of harm to the public may include direct proof or circumstantial evidence. For example, in a case such as this, the Bureau might have presented evidence about the duration that the discriminatory questions were on NOTN's website, the average number of page views that NOTN receives on its New York City job application page in a given period, and the number of actual applications it receives from New York City applicants over a comparable period. Absent such evidence, however, the Commission generally will not presume that

heightened penalties are warranted, particularly where the respondents have generally cooperated in the litigation process.

Although there is no question that Respondents' discriminatory conduct had a negative impact on at least one worker in New York City, Ms. Ravich, there is little evidence of a broader impact on the New York City public. At most, the record shows that NOTN had one available nanny position in New York City. Moreover, given NOTN's national orientation, it can be reasonably inferred that only a portion of its approximately twelve job placements per year are within New York City.

Based on all of the foregoing considerations, the Commission concludes that it can accomplish the same public policy objectives without the imposition of civil penalties in this case. It does not appear that civil penalties are necessary to deter Respondents from future violations of the NYCHRL and there is a reasonable risk that financial penalties may have the undesirable result of forcing the closure of a small business and discouraging other small businesses from engaging in New York City. *See CU 29 Copper Rest. & Bar*, 2015 WL 7260570, at *4. Rather than impose a fine, the Commission concludes that the public interest would be best served in this case through remedial action.

B. Remedial Action

The Commission has frequently required individuals who have been found liable for violations of the NYCHRL to attend Commission-led trainings in order to strengthen their understanding of their obligations under the law. *See, e.g., Spitzer,* 2016 WL 7106071, at *10; *Jordan*, 2016 WL 7106070, at *11; *Stamm*, 2016 WL 1644879, at *11. The Commission is cognizant, however, that Respondents in this case have limited financial means, reside in California, and rarely, if ever, visit New York City. (*See* Tr. 92:25-93:8.) Under the

circumstances, the benefits of requiring Respondents to attend an in-person training are likely outweighed by the burden of attending.

Nevertheless, because Respondents maintain a website that targets workers in New York City, the Commission will require as an alternative to training that Respondents educate themselves about the NYCHRL by reviewing specific designated educational materials, and by providing a written attestation that they have done so. In particular, because Respondents likely would have faced additional liabilities if the Fair Chance Act of 2015 had been in effect at the time that the Amended Complaint and Second Complaint were filed, the Commission requires that Respondents educate themselves about the new protections that the Fair Chance Act added to the NYCHRL, as set forth below. In addition, the Commission requires that Respondents post a notice of rights on their website for prospective New York City workers and for domestic workers generally, as also described in further detail below.

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 Respondents review the enclosed "Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63 (2015)," available at http://www1.nyc.gov/assets/cchr/downloads/pdf/FCA-InterpretiveGuide-112015.pdf, and provide the Commission with a signed, notarized affidavit postmarked no later than 30 calendar days after service of this Order, affirming under penalty of perjury that Respondents have reviewed the required materials. The signed, notarized affidavit should be sent to the New York City Commission on Human Rights, 22 Reade Street, New York, New York 10007, Attn: Recoveries.

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 conspicuously post to the NOTN webpage for job applicants (currently http://www.anannyonthenet.com/nannyapplication.html) a hyperlink titled "Special Notice of Rights for Applicants Seeking Employment in New York City," written in a clearly legible typeface no smaller than 16-point in size, linking to the Commission's Notice of Rights, available at http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/CCHR_NoticeOf Rights.pdf.

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 conspicuously post to the NOTN webpage for job applicants (currently http://www.anannyonthenet.com/nannyapplication.html) a hyperlink titled "Know Your Rights as a Domestic Worker," written in a clearly legible typeface no smaller than 16-point in size, linking to the National Domestic Workers Alliance's notice of rights, available at https://portal.domesticworkers.org/en/know-your-rights.

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 civil penalty of $100.00 per day for every day the violation continues. N.Y.C. Admin. Code § 8-124. Furthermore, failure to abide by this Order may result in criminal penalties. *Id.* at § 8-129.

Dated: New York, New York
February 10, 2017

SO ORDERED:

New York City Commission on Human Rights

Carmelyn P. Malalis
Commissioner/Chair