

***Comm'n on Human Rights ex rel. Stamm v.
E & E Bagels, Inc.***

OATH Index No. 803/14 (Mar. 21, 2014)

At a default hearing, petitioner established that respondent's employee discriminated against complainant by denying her and her service dog access to a restaurant. ALJ recommended \$7,000 in compensatory damages, a civil penalty of \$7,000, and anti-discrimination training for respondent's employees.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**COMMISSION ON HUMAN RIGHTS EX REL.
ESTELLE STAMM**

Petitioner

- against -

**E & E BAGELS, INC. d/b/a EMPIRE CITY BAGELS
d/b/a THE CORNER CAFE**

Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

This proceeding was brought by petitioner, the New York City Commission on Human Rights ("Commission") on behalf of complainant Estelle Stamm. *See* 47 RCNY § 1-71. The verified complaint alleges that respondent, E & E Bagels, Inc., d/b/a Empire City Bagels d/b/a The Corner Café, discriminated against the complainant because she uses a service animal and denied her a reasonable accommodation for her disability in violation of sections 8-107(4) and 8-107(15) of the Administrative Code of the City of New York ("Human Rights Law") (ALJ Ex. 1).

Respondent failed to appear for a settlement conference on December 3, 2013, or the hearing on February 20, 2014. After petitioner proved that it properly served the complaint and notice of hearing upon respondent at the address provided in a letter captioned "verified answer" submitted on respondent's behalf (ALJ Ex. 2), I found respondent in default and the hearing

proceeded in the form of an inquest. At the hearing, petitioner relied on the testimony of Ms. Stamm and her friend, Dennis Owens, and on documentary evidence.

For the reasons set forth below, I find that the Commission established that respondent discriminated against Ms. Stamm because she uses a service animal and denied her a reasonable accommodation for her disability. I recommend that Ms. Stamm be awarded \$7,000 for mental anguish, that the Commission be awarded \$7,000 as a civil penalty, and that respondent be required to provide training to its employees regarding their obligations under the City's Human Rights Law.

ANALYSIS

Ms. Stamm testified that she requires the assistance of a service dog because she has chronic depression, hearing deficits, and balance and mobility issues (Tr. 15). Her service dog provides support because of her balance and mobility issues, performs medical alert and response, and alerts Ms. Stamm to sound (Tr. 15).

Ms. Stamm's dog, Wargus, is licensed as a service animal by the New York City Department of Health and Mental Hygiene ("DOH") (Tr. 22; Pet. Ex. 2). On July 26, 2006, DOH issued to Ms. Stamm a service dog tag to be attached to her service dog's collar; the dog is described as an "Anatolian shep." and its license number is listed as "2909963" (Pet. Ex. 2). Petitioner produced a dog license, dated August 29, 2011, bearing the same information, which identifies Ms. Stamm, her address, and the dog's name. Directly above the Commissioner's signature it states, "SERVICE DOG" (Pet. Ex. 2).

According to Ms. Stamm, on June 11, 2011, at about 3:10 p.m., she went to a food service establishment, The Corner Café, located at 729 Sixth Avenue, with Mr. Owens and her service dog (Tr. 14-15). They went to the restaurant because Mr. Owens wanted a meal and Ms. Stamm wanted some coffee (Tr. 14). Ms. Stamm could not recall having been to the restaurant before that date (Tr. 17). According to Ms. Stamm, her service dog was wearing a "mobility collar" when they entered the restaurant. She described the "mobility collar" as a "leather collar that has a handle on it that the person can hold on to for balance or for help with movement" (Tr. 16). Ms. Stamm testified that the collar was about four inches high and six inches across and extended from the dog to a height just below her waist (Tr. 16).

On entering the restaurant, Ms. Stamm and Mr. Owens stood on line with her dog. Ms. Stamm testified that a man who was working behind the counter of the restaurant told her that her dog was not allowed in the restaurant (Tr. 17). Ms. Stamm maintained that the statement caused her to feel nervous and scared that they would be made to leave without being served (Tr. 17-18). According to Ms. Stamm, she advised the counterperson who made the statement that she is a person with a disability and that her dog is a service animal, but the counterperson told her that she had to leave the premises (Tr. 18). Ms. Stamm stated that she felt “humiliated, nervous, embarrassed, and really upset” at being asked to leave a second time (Tr. 18). She reiterated to the counterperson that the animal was her service dog and that his conduct violated the law, at which point he told her to leave the establishment (Tr. 18). According to Ms. Stamm, a minute or two elapsed between the time she walked into the restaurant and when she was directed to leave, and during that time her service dog did not engage in any disruptive behavior such as barking or sniffing people (Tr. 19).

Ms. Stamm testified that when she was made to leave the restaurant, she felt angry, depressed, and embarrassed (Tr. 19-20). Those emotions persisted as she made her way home after the incident and returned when she thought about it later (Tr. 20). Ms. Stamm also felt remorse because her friend, who she said was quite hungry, was not able to eat at the restaurant. She testified that because she feared they would be subject to the same type of treatment at the next food establishment they visited that afternoon, she waited outside while her friend went into a deli to get some food (Tr. 20-21).

Mr. Owens has been Ms. Stamm’s friend for over 12 years (Tr. 32). He accompanied her into the restaurant and his account of the incident is consistent with that of Ms. Stamm (Tr. 29-31). Mr. Owens testified that on the same day as the incident he noted on a Corner Café menu the time of the incident and a summary of the exchange between Ms. Stamm and the person he presumed to be a restaurant employee. Mr. Owens’ note reads:

15:10 hrs
Empl. # 1: You can’t bring pets in here/You can’t bring the dog in here.
Cis: ‘This is a service dog’ x 2
+
Again + You’re breaking the law

(Pet. Ex. 3). According to Mr. Owens, he noted that respondent’s employee twice told Ms. Stamm that she was not allowed to bring her service dog into the restaurant and that Ms. Stamm,

whom he calls “Cissie” told the employee two times that her dog is a service animal and also told him he was violating the law (Tr. 31; Pet. Ex. 3). Ms. Stamm testified that she wrote the date of the incident on the same menu (Tr. 25; Pet. Ex. 3).

After Mr. Owens obtained food from a different establishment, he walked Ms. Stamm to her home because she was upset (Tr. 31-32). Mr. Owens testified that he was concerned about his friend because when Ms. Stamm is upset, “she does not necessarily pay attention to the environment the way that she normally would” and she had to cross a lot of avenues on her walk home (Tr. 32).

Ms. Stamm testified that as Mr. Owens walked her home, which she said took 20 minutes to half an hour, she expressed her anger and disgust at the incident and then became withdrawn and depressed (Tr. 21). She maintained that she did not contact the Commission about her complaint for seven months because she “couldn’t deal with it” and “didn’t feel strong enough to . . . revisit what had happened” (Tr. 21).

The Commission alleged that respondent discriminated against the complainant because she uses a service animal and denied her a reasonable accommodation for her disability in violation of sections 8-107(4) and 8-107(15) of the Administrative Code.

Section 8-107(4)(a) provides that it is an unlawful discriminatory practice for an owner, agent, or employee of any place or provider of public accommodation to refuse, withhold from, or deny a person a public accommodation. The section also prohibits “any declaration . . . to the effect that any of the accommodations, advantages, facilities and privileges of any such place or provider shall be refused, withheld from or denied to any person on account of . . . disability . . . or that the patronage or custom of any person belonging to, purporting to be, or perceived to be, of any particular . . . disability . . . is unwelcome, objectionable or not acceptable, desired or solicited.” Section 8-107(13)(a) provides that 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.”

The Local Civil Rights Restoration Act of 2005 (“Restoration Act”), requires that the Human Rights Law be “construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof.” Admin. Code § 8-130 (Lexis 2013); *Albunio v. City of New York*, 16 N.Y.3d 472, 477-478 (2011) (the City's Human Rights Law must be construed broadly in favor of discrimination plaintiffs whenever reasonably possible).

To prevail in its claim that respondent violated section 8-107(4), petitioner must establish that: (1) the complainant is a member of a protected class as defined by the Human Rights Law, and has been denied privileges or advantages by the respondent; (2) respondent is a public accommodation; 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 Comm'n on Human Rights ex rel. Whittacre v. Northern Dispensary*, OATH Index No. 380/87 at 3-4 (Mar. 30, 1988) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973)), *adopted*, Comm'n Dec. & Order (Aug. 17, 1988). Petitioner has met its burden.

The credible and undisputed evidence establishes that the complainant is a member of a protected class because she has a disability. Section 8-102(16) of the Administrative Code, in pertinent part, defines "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." I find that Ms. Stamm, who has chronic depression, hearing deficits, and balance and mobility issues for which she requires a service animal, is a person with a disability within the meaning of section 8-102(16) and is therefore a member of a protected class. The undisputed testimony also establishes that Ms. Stamm was denied service in respondent's restaurant and was made to feel unwelcomed because she was accompanied by her service animal. Therefore, the Commission has satisfied the first element.

Respondent is a place of public accommodation. The Human Rights Law defines a "place or provider of public accommodation" 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." Admin. Code § 8-102(9) (Lexis 2013). Respondent is a restaurant and thus qualifies as a public accommodation. *See Comm'n on Human Rights v. Silver Dragon Restaurant*, OATH Index No. 677/03 (May 30, 2003), *modified on penalty*, Comm'n Dec. & Order (July 28, 2003), *modified on penalty*, 2004 N.Y. Slip Op 30317(a), 2004 N.Y. Misc. LEXIS 3200 (Sup. Ct. Kings Co. 2004) (as a restaurant, the respondent is a provider of a public accommodation under section 8-102(9)). Therefore, the second element is satisfied.

The undisputed evidence establishes that after Ms. Stamm and her service animal entered the restaurant and stood on line for service, the restaurant's counterperson told her that she had to leave the establishment, and persisted in directing her to leave after she told him that she was a

person with a disability, that her dog was a service animal, and that his conduct violated the law. These facts give rise to an inference that respondent's employee violated section 8-107(4) when he denied Ms. Stamm access to the restaurant and made declarations that made her feel unwelcome based on a disability. Thus, petitioner has satisfied its burden.

As noted above, respondent did not appear at the hearing to rebut petitioner's proof of discrimination. Respondent submitted to the petitioner an unverified answer to the complaint, dated September 30, 2012 (ALJ Ex. 2). The answer is captioned "Verified Answer," and indicates that it was submitted on behalf of The Corner Café by "Evita Alexiades." However, the answer is unsigned, unsworn, and does not provide Ms. Alexiades' title, role, or affiliation with respondent.

The Administrative Code and the Commission's rules provide that a respondent shall file a verified answer with the Commission's Law Enforcement Bureau within 30 days of having been served with a complaint. Moreover, any allegations in the complaint not specifically denied or explained in the verified answer shall be deemed admitted. Admin. Code § 8-111(a); 47 RCNY § 1-14(a)-(b) (Lexis 2013). The Commission's rules require that the answer be "verified as to the truth of the statements therein." 47 RCNY § 1-14(b). At the hearing, petitioner's counsel maintained that respondent's submission is not a verified answer and thus the allegations in the complaint should be deemed admitted (Tr. 37-38). Petitioner's counsel also argued that certain statements in respondent's unverified answer should be afforded some weight as they reflect respondent's admission of culpability (Tr. 36). I find that although the answer is not in compliance with the requirements of the Administrative Code and the Commission's rules, it is appropriate to consider the statements made in the unverified submission. *See Comm'n on Human Rights ex rel. Okoumou v. County Recovery Corp.*, OATH Index No. 445/09 at 6-8 (Feb. 6, 2009), *modified on penalty*, Comm'n Dec. & Order (July 7, 2009) (after considering defenses raised in an unverified answer by a respondent who failed to appear at the hearing, ALJ concluded that the answer was "unsupported hearsay," which was "unpersuasive, in light of petitioner's contrary, sworn, and partially corroborated credible evidence").¹

Here, the unverified answer contains declarations against respondent's interest, which have some assurance of reliability under the premise that people do not ordinarily disclose facts

¹ The Commission concluded, however, that it was erroneous to consider statements in the unverified answer to lessen the amount of the civil penalty absent evidence elsewhere in the record to corroborate the claims in the unverified answer. *County Recovery Corp.*, OATH 445/09 at 6-8.

that are adverse to their interest. *See Dep't of Buildings v. Stallone Testing Laboratories, Inc.*, OATH Index No. 362/10 at 4-7 (Aug. 26, 2009) (interview of deceased witness that was recorded, given under oath and with counsel present, and was against his interest, is inherently reliable); *Fire Dep't v. Loscuito*, OATH Index No. 509/06 at 17 (June 14, 2006), *adopted*, Comm'r Dec. (June 28, 2006), *aff'd*, 50 A.D.3d 905 (2d Dep't 2008), *motion for lv to appeal den.*, 13 N.Y.3d 716 (2010) (statement against interest deemed generally credible) (quoting *People v. Maerling*, 46 N.Y.2d 289, 295 (1978)) ("Simply stated, in the case of declarations against interest, the theory is that such assurance flows from the fact that a person ordinarily does not reveal facts that are contrary to his own interest. Therefore, the reasoning goes, absent other motivations, when he does so, he is responding to a truth-revealing compulsion as great as that to which he would likely be subjected if cross-examined as a witness"). Thus, some weight should be given to the unverified answer submitted on respondent's behalf.

The answer states that the respondent concedes it is a place of public accommodation. It goes on to state that "Respondent also admits that it is possible that its employee (who is no longer employed by Respondent, and has not been for several months) may have told Complainant that she could not enter the establishment with her animal" (ALJ Ex. 2). The answer then asserts that respondent did not violate the Human Rights Law because respondent was unable to obtain a statement from its former employee and based on the complaint "there is no evidence that the employee involved knew or should have known that the animal was a service animal or that Complainant has a disability." Moreover, the answer states that because respondent is subject to inspection by the City's Health Department, it instructs its employees to "use caution whenever a customer approaches the premises with an animal to prevent violations of the Health Code." The answer also indicates that respondent is extremely accommodating to customers with service animals and that the establishment is regularly frequented by "residents of a blind person's home" in the vicinity of the restaurant, who are treated with respect and provided "any additional accommodations that they need." According the letter, respondent's employees "are instructed to ask customers with animals if they would like someone to watch their pet outside while they shop." The letter also asserts that the respondents own dogs and are animal lovers (ALJ Ex. 2).

The answer does not specifically deny the allegations in the verified complaint that Ms. Stamm is a person with a disability who uses a service animal and that on the date in question

respondent's employee told the complainant that she could not enter the establishment with her animal and repeatedly asked her to leave. Under the Administrative Code, by failing to specifically deny these allegations, respondent has admitted them. *See* Admin. Code § 8-111(c); 47 RCNY § 1-14(b) (Lexis 2013).

Moreover, the answer concedes some of the allegations in the complaint; to wit, that respondent is a place or provider of public accommodation and that its employee may have told Ms. Stamm that she could not enter the establishment with her dog. This is consistent with the credible evidence presented at the hearing.

The assertion that respondent's employee did not know that Ms. Stamm's animal is a service dog or that Ms. Stamm is a person with a disability is belied by the undisputed evidence that Ms. Stamm told the employee that her animal was a service dog and that she was a person with a disability.

The claims that respondent's employees are told to exercise caution about animals out of concern regarding possible Department of Health inspection and that the establishment is regularly frequented by blind persons are self-serving, unsupported by evidence, and unpersuasive defenses to the charges here. Moreover, the answer is unsigned and does not describe the nature of the relationship between the author of the letter, Ms. Alexiades, and the respondent, which further undermines its reliability. In the end, respondent failed to appear at the hearing to rebut the petitioner's proof or to assert a defense.

The Commission further alleges that respondent violated section 8-107(15) of the Administrative Code by denying respondent a reasonable accommodation. Section 8-107(15)(a) provides, in pertinent part, "any person prohibited by the provisions of this section from discriminating on the basis of disability shall make reasonable accommodation to enable a person with a disability to . . . enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity." The Human Rights Law defines "reasonable accommodation" as "such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship." Admin. Code. § 8-102(18).

In *Comm'n on Human Rights ex rel. L. D. v. Riverbay Corp.*, OATH Index No. 1300/11 (Aug. 26, 2011), *adopted*, Comm'n Dec. & Order (Jan. 9, 2012), ALJ Richard set forth a standard for determining whether a provider of housing accommodation violated 8-107(15)(a).

The issue in *Riverbay Corp* was whether a provider of housing accommodation failed to provide reasonable accommodation by denying a tenant who suffers from a psychiatric disability a companion animal. After considering the liberal construction of the Human Rights Law that is mandated by the Restoration Act and judicial interpretation of “reasonable accommodation” under the Human Rights Law, Judge Richard determined that the Commission must establish “(i) complainant has a disability, (ii) respondent knew or should have known of the disability; (iii) an accommodation enables the complainant to use and enjoy her apartment; (iv) the accommodation is reasonable; and (v) respondent refused to provide it.” *Riverbay Corp.*, OATH 1300/11 at 14 (finding that the Commission established that respondent discriminated against a tenant by denying her the reasonable accommodation of a companion animal). I find that this standard, modified to reflect that respondent is a restaurant, is applicable to the facts here.

First, as discussed above, the Commission has established that the complainant is disabled. Second, the evidence establishes that respondent’s employee knew or should have known of the disability because the complainant told him of her disability after he told her the dog was not permitted in the restaurant. Moreover, the complainant credibly testified that her service animal was equipped with a mobility collar, which would have further put the employee on notice of her disability. Third, an accommodation, permitting the complainant and her service animal access to the restaurant, would allow her to use and enjoy the restaurant. Fourth, such an accommodation was reasonable. Fifth, respondent refused to provide the sought accommodation when its employee told Ms. Stamm that she could not enter the restaurant with her service animal and told her to leave. Therefore, the Commission has satisfied its *prima facie* case. Respondent failed to appear at the hearing to put forth a defense and its unverified answer does not state a meritorious defense.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent was properly served with the complaint and notice of hearing.
2. Petitioner proved that respondent discriminated against Ms. Stamm in the provision of a public accommodation because she uses a service animal and by denying her a reasonable accommodation for her disability, in violation of Administrative Code sections 8-107(4) and 8-107(15).

RECOMMENDATION

At the conclusion of the hearing, petitioner requested that I recommend \$15,000 in compensatory damages for Ms. Stamm's mental anguish, a civil penalty of \$15,000, and mandatory training for respondent's staff regarding its obligations under the Human Rights Law, with a focus on serving persons with disabilities (Tr. 40).

Section 8-120(a) of the Human Rights Law permits the Commission to award compensatory damages, which include damages for mental anguish, to persons aggrieved by discrimination upon a sufficient showing of the existence and extent of such injury. Admin. Code § 8-120(8)(a) (Lexis 2013). The applicable standard is whether "a reasonable person of average sensibilities could fairly be expected to suffer mental anguish from the incident." *Batavia Lodge No. 196 v. N.Y.S. Div. of Human Rights*, 43 A.D.2d 807, 810 (4th Dept. 1973), *rev'd on other grounds*, 35 N.Y.2d 143 (1974). Further, "there must be some evidence of the magnitude of the injury, to assure that the Commissioner's damage award is neither punitive nor arbitrary." *N.Y.C. Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 217 (1991).

Factors to be considered in determining appropriate damages for mental anguish include the number of instances of discrimination, the severity of the offense, the level of anguish caused by the misconduct, and prior awards for comparable discrimination. *Comm'n on Human Rights ex rel. L. D. v. Riverbay Corp.*, OATH Index No. 1300/11 at 21 (Aug. 26, 2011), *adopted*, Comm'n Dec. & Order (Jan. 9, 2012); *Comm'n on Human Rights ex rel. Romo v. ISS Action Security*, OATH Index No. 674/11 at 13 (Apr. 12, 2011), *adopted*, Comm'n Dec. & Order (June 26, 2011), *aff'd*, 2011 NY Slip Op 33552U, 2011 N.Y. Misc. LEXIS 6489 (Sup. Ct. Queens Co. 2011), *modified*, 114 A.D.3d 943 (2d Dep't 2014) (Court affirms award for mental anguish, but reduces civil penalty); *Comm'n on Human Rights ex rel. Campbell v. Personal Employment Services*, OATH Index No. 1579/07 at 6 (Aug. 20, 2007), *adopted*, Comm'n Dec. & Order (Dec. 14, 2007).

Ms. Stamm credibly and compellingly testified about the embarrassment, humiliation, and anger she felt on being denied access to respondent's restaurant because she was accompanied by her service animal. While this was a single incident, it was aggravated by Ms. Stamm's efforts to persuade respondent's employee that she is a person with a disability and her dog is a service animal – which employee rejected. Ms. Stamm testified to the lingering effects

of this incident not only on the day it occurred, but several months later. Indeed, on the day the incident occurred, Ms. Stamm refrained from entering a different food establishment with her friend after the incident because she was concerned she and her service dog might be subject to the same type of treatment they experienced in respondent's establishment. In addition, her friend felt compelled to walk her home because he was concerned about her mental state after the incident. Ms. Stamm testified that she did not file a complaint about the incident with the Commission for several months because she did not want to relive the incident and lacked the capacity to "deal with" it.

Further, Ms. Stamm credibly testified that she experienced depression as a result of the incident. Although she acknowledged that she experienced depression before the incident, there is no doubt that the incident contributed to her emotional distress. Thus, while it is not possible on this record to disaggregate the depression attributable to the respondent's discriminatory conduct from Ms. Stamm's pre-existing depression, this is not fatal to her claim for damages. *See ISS Action Security*, OATH 674/11 at 14-15; *Comm'n on Human Rights ex rel. De La Rosa v. Manhattan and Bronx Surface Transportation Operating Auth.*, OATH Index No. 1141/04 at 5-7 (Dec. 30, 2004), *adopted*, *Comm'n Dec.* (Mar. 11, 2005).

In sum, Ms. Stamm's testimony and that of Mr. Owens support a finding that she suffered emotional distress as a result of the incident at respondent's restaurant on June 11, 2011. *See N.Y.C. Transit Auth.*, 78 N.Y.2d at 216 ("Mental injury may be proved by the complainant's own testimony, corroborated by references to the circumstances of the alleged misconduct"); *Comm'n on Human Rights ex rel. Russell v. Chae Choe*, OATH Index No. 2617/09 at 7 (Sept. 25, 2009), *adopted*, *Comm'n Dec.* (Dec. 10, 2009).

In prior cases involving discrimination in public accommodations against persons who are disabled, mental anguish damages have ranged between \$5,000 and \$20,000. *See, e.g., ISS Action Security*, OATH 674/11, *aff'd*, 114 A.D.3d 943 (2d Dep't 2014) (\$20,000 in mental anguish damages awarded where respondent's security guards denied complainant and his service dog access to a building, asked him to disclose his HIV status in public, and made a cruel remark about that status; the events caused complainant to stay in his apartment, crying, for an entire weekend, he lost 15 to 20 pounds, and traveled out of state to seek the comfort of his family); *Comm'n on Human Rights ex rel. Latif v. New Master Nail, Inc.*, OATH Index Nos.

1576/10 & 1577/10 (Aug. 10, 2010), *adopted*, Comm'n Dec. & Order (Nov. 16, 2010) (\$7,500 in mental anguish damages awarded after nail salon refused service and made insulting comments to a customer in a wheelchair; the discrimination had an ongoing impact on complainant, who became upset whenever the incident was discussed); *Comm'n on Human Rights ex rel. Alvarez v. Gerardo's Transportation*, OATH Index No. 2045/09 (May 22, 2009), *adopted*, Comm'n Dec. & Order (Aug. 12, 2009) (\$7,000 mental anguish award recommended where respondent refused to transport respondent because she used a portable wheelchair, causing her to feel anxious and fearful about public transportation a year after the incident); *Manhattan and Bronx Surface Transportation Operating Authority*, OATH 1141/04 (mental anguish damages of \$12,000 and \$10,000 awarded to disabled passengers after bus driver refused to assist them to disembark from a public bus at their requested stop and did not permit them to do so until 65 blocks later, causing them ongoing anxiety and feelings of helplessness that contributed to insomnia); *Peters v. Cunningham's Florist*, CHR Complaint No. PA-92-0064, Rec. Dec. & Order (Aug. 31, 1993), *adopted*, Comm'n Dec. & Order (Oct. 27, 1993) (\$5,000 awarded to disabled customer for mental anguish after he was denied access to a florist shop, causing him to become subdued and depressed); *Blair v. Delince Car & Livery Service Corp.*, CHR Complaint No. FH388121588-DN, Dec. & Order (Nov. 14, 1991) (\$7,500 compensatory damages awarded to a blind man who was refused transportation by a cab company on four occasions because he was accompanied by a service dog).

Considering the circumstances of this case and prior relevant mental anguish awards, I find that respondent's conduct demeaned and embarrassed Ms. Stamm to such a degree that she experienced mental anguish after the incident, which caused her to avoid filing a complaint for several months because she did not want to relive the painful, humiliating episode. However, Ms. Stamm did not describe any physical effects such as loss of appetite, weight loss, sleeplessness, nor did she testify that she sought medical treatment or counseling as a result of the incident.

Petitioner suggested that the recommended compensatory damages award should be \$15,000 because the incident here involved violation of two provisions of the Human Rights Law, in contrast to *New Master Nail, Inc.*, OATH 1576/10 & 1577/10 and *Gerardo's Transportation*, OATH 2045/09, where penalties in the range of \$7,000 to \$7,500 were imposed

for violations of a single provision of the Human Rights Law (Tr. 39-40). Petitioner offered no authority for such an approach to determining the appropriate award for mental anguish. Moreover, while there are separate statutory violations charged and proven, there is a single incident of discrimination that is alleged – directing Ms. Stamm to leave the restaurant with her service dog. The mental anguish award is meant to compensate a complainant based upon the effects of that mental anguish. In any event, the cases cited by petitioner involve discriminatory conduct that is more sustained or severe than that at issue here or the petitioner was able to establish greater degree of mental anguish than established here. I find that an award in the amount of \$7,000 is appropriate to compensate Ms. Stamm for her mental anguish.

The Human Rights Law also provides that the Commission may impose a civil penalty of up to \$125,000. Admin Code § 8-126(a) (Lexis 2013). In determining the amount of such penalties, relevant considerations include the pervasiveness of the violations, the impact on the public, and aggravating factors, such as use of offensive language. *Compare Comm’n on Human Rights ex rel. Cherry v. Stars Model Management*, OATH Index No. 1464/05 at 14-15 (Mar. 7, 2006), *adopted*, Comm’n Dec. & Order (April 13, 2006), *aff’d*, 13 Misc.3d 1120A (Sup. Ct. N.Y. Co. 2006) (\$15,000 civil penalty imposed where employment agency handled bookings for hundreds of companies, discriminated on the basis of race, and told complainant, “we don’t take niggers”), *with Silver Dragon Restaurant*, OATH 677/03 (\$5,000 civil penalty imposed where restaurant discriminated on the basis of race by requiring black customer to pay in advance for food, where similar restriction was not imposed on white customers). The willfulness of the conduct and whether there have been prior findings of discrimination against the same party may also be considered. *See Comm’n on Human Rights ex rel. Martin v. Hudson Overlook, LLC*, OATH Index No. 137/06 at 15 (Aug. 30, 2006), *adopted*, Comm’n Dec. & Order (Dec. 5, 2006) (\$25,000 civil penalty recommended in light of landlord’s demonstrated scofflaw attitude toward its legal obligations).

Here, a civil penalty of \$7,000 is appropriate. This case involves a single incident of brief duration and offensive language was not used. There is no evidence in the record about the size of respondent’s business; however, as a restaurant, respondent provides services to the public; thus, its discriminatory conduct has significant impact on the public. *See Comm’n on Human Rights ex rel. Perez v. Lee’s Kapri Cleaners & Glen Lee*, OATH Index No. 101/14 at 6-7

(Dec. 12, 2013) (\$10,000 civil penalty recommended for persistent discriminatory remarks over the course of a year that involved offensive language); *New Nail Salon*, OATH 1576/10 & 1577/10 at 12 -13 (\$12,000 civil penalty for single incident of discrimination that involved use of offensive language); *Gerardo's Transportation*, OATH 2045/09 at 9 (\$15,000 civil penalty where transportation service refused to transport a customer because she was in a wheelchair and made disparaging remarks about people with disabilities).

Finally, the Administrative Code authorizes the imposition of affirmative measures to prevent further discrimination. Admin. Code § 8-120(a)(4) (Lexis 2013). The Commission requested that respondent be required to train its employees so they are made aware of their obligations under the Human Rights Law, with a focus on service of customers with disabilities. Considering that the purpose of the law is “to eliminate and prevent discrimination,” Admin. Code § 8-101, this action is appropriate and I recommend that respondent be required to train its staff.

In sum, I recommend that respondent be ordered to pay \$7,000 in compensatory damages and a civil penalty of \$7,000, and to provide Human Rights Law training to its employees.

Astrid B. Gloade
Administrative Law Judge

March 21, 2014

SUBMITTED TO:

PATRICIA L. GATLING

Commissioner

APPEARANCES:

PAUL LABOSSIERE, ESQ.

CARLOS VELEZ, ESQ.

Attorney for the Petitioner

No appearances by or for Respondent