U Ocean Palace Pavilion, Inc.[1] ***and*** **Zi Zheng Yang.**
Case 29–CA–25985

September 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 19, 2004, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, U Ocean Palace Pavilion, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire, or to consider for hire, applicants for employment because they have concertedly filed and maintained a lawsuit under the Fair Labor Standards Act (FLSA) or the New York Labor Law (N.Y. Lab. Law), or because they have engaged in other concerted activities protected by the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer instatement to four of the following employees, whose identity is to be determined in the compliance stage of this proceeding, to the positions to which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them, and make them whole for any loss of earnings and other benefits sustained by reason of the discrimination against

[1] We have amended the caption to reflect the fact that during the course of the hearing the General Counsel withdrew all complaint allegations against Ocean Palace Restaurant-I, Inc. Therefore, it is no longer a respondent in this proceeding.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent challenges as unclear and inappropriate the judge's recommendation that the compliance proceeding include a full exploration of all of the Respondent's hiring since August 2003. We find that the judge's refusal-to-consider remedy is proper under *FES*, 331 NLRB 9, 15 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). Any ambiguity in the judge's decision is clarified in fn. 16 of his opinion. There, he explained that while *FES* generally restricts the refusal-to-consider remedy to openings that occur after the commencement of the hearing, *FES* permits a refusal-to-consider remedy for openings that arise before the beginning of the hearing that the General Counsel neither knew about nor should have known about. In light of the Respondent's failure to submit complete and accurate records and the confusion concerning Chinese names and nicknames, the judge properly found that the General Counsel neither knew nor should have known about all the openings that developed from August 1, 2003, to the commencement of the hearing. Thus, the refusal-to-consider remedy properly includes any jobs filled by the Respondent for waiters or busboys during this period.

We recognize that parties may attempt to settle "wage hour" litigation. However, in our view, an employer may not refuse to hire employees because they filed the lawsuit. Tsoi's statements virtually admitted that unlawful motive. No party filed exceptions to the judge's conclusion that such statements were not privileged as settlement discussions. Accordingly, we have relied on those statements.

In adopting the judge's finding of a violation, Member Schaumber does not rely on Tsoi's statement, made during the course of settlement discussions, that Tsoi would hire employee Soon Bo Huang if Huang would agree to drop his pending wage-and-hour claims. In Member Schaumber's view, Tsoi's statement was consistent with legitimate settlement efforts, and does not evidence unlawful motivation on the Respondent's part in failing to hire the alleged discriminatees. Regardless of whether the Respondent excepted to the judge's ruling on the admissibility of Tsoi's statement on privilege grounds, it specifically excepted to the judge's *reliance on that statement as evidence of animus* and argued in its brief that the statement was consistent with good-faith settlement discussions. The Board's rules and regulations require no more. Parties to litigation routinely request, as a condition of settling employment-related litigation and instating or reinstating a plaintiff, that the plaintiff agree to dismissal of the underlying civil action. Accordingly, his colleagues err in relying on Tsoi's statement to find a violation.

As to Tsoi's statement to employee Zi Zhen Yang ("Since you are still suing us then how are we going to hire you back"), Member Schaumber believes that the statement could be properly construed as a reiteration of Respondent's previously asserted settlement posture, namely that the Respondent would not bifurcate settlement by instating employees first and then resolving the employees' additional claims for damages. However, in the absence of any exception to the judge's finding that this statement was evidence of the Respondent's unlawful motivation for failing to hire the alleged discriminatees, he does not reach that issue.

Member Schaumber also does not rely on the judge's adverse inference against the Respondent for not calling Ching and Ng to corroborate Tsoi's testimony on several factual matters. Where the testimony of other witnesses simply would be cumulative of testimony already offered, the failure to call additional corroborative witnesses does not support an adverse inference. See *McCormick on Evidence* at § 272 (3d ed. 1984) (indicating that where the testimony of the witness would merely be cumulative of other evidence, an adverse inference is not available).

[3] We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001), and to conform to standard remedial language.

them, with interest, in the manner set forth in the remedy section of the judge's decision.

Zi Zhen Yang	Jun Jie Liang
Soon Bo Huang	Xin Ce Chen
Lian Fu Liang	Jue Hui Mei
Tia Ming Tan	

(b) Consider the remaining discriminatees for any job openings that arose since August 1, 2003, and any future openings that may arise, in accord with nondiscriminatory criteria, and notify them, the Charging Party, and the Regional Director for Region 29 of such openings in positions for which they applied or substantially equivalent positions. If it is shown at the compliance stage of this proceeding that, but for the failure to consider them, the Respondent would have selected any of these employees for any job openings arising since August 1, 2003, the Respondent shall hire them for any such opening and make them whole for any loss of earnings and other benefits sustained by reason of the discrimination against them, with interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider for hire or hire Zi Zhen Yang, Soon Bo Huang, Lian Fu Liang, Tia Ming Tan, Jun Jie Liang, Xin Ce Chen, and Jue Hui Mei, and within 3 days thereafter, notify them in writing that this has been done and that these unlawful actions will not be used against them in any way.

(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix,"[4] which shall be printed in Chinese and in English. Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to hire, or to consider for hire, applicants for employment, because they have concertedly filed and maintained a lawsuit under the Fair Labor Standards Act (FLSA) or the New York Labor Law (N.Y. Lab. Law), or because they have engaged in other concerted activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them as set forth above.

WE WILL offer instatement to four of the following employees, whose identity is to be determined in the compliance stage of this proceeding, to the positions to which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them, and we will make them whole for any loss of earn-

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ings and other benefits sustained by reason of the discrimination against them, with interest, in the manner set forth in the remedy section of the judge's decision.

Zi Zhen Yang	Jun Jie Liang
Soon Bo Huang	Xin Ce Chen
Lian Fu Liang	Jue Hui Mei
Tia Ming Tan	

WE WILL consider the remaining discriminatees for any job openings that arose since August 1, 2003, and any future openings that may arise, in accord with nondiscriminatory criteria, and notify them, the Charging Party, and the Regional Director for Region 29 of such openings in positions for which they applied or substantially equivalent positions. If it is shown at the compliance stage of this proceeding that, but for the failure to consider them, the discriminatees would have been selected for any job openings arising since August 1, 2003, we shall hire them for any such opening, and we will make them whole for any loss of earnings and other benefits sustained by reason of the discrimination against them, with interest, in the manner set forth in the remedy section of the judge's decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider for hire or hire Zi Zhen Yang, Soon Bo Huang, Lian Fu Liang, Tia Ming Tan, Jun Jie Liang, Xin Ce Chen, and Jue Hui Mei, and WE WILL within 3 days thereafter, notify them in writing that this has been done and that these unlawful actions will not be used against them in any way.

U OCEAN PALACE PAVILION, INC.

Marcia Adams, Esq., for the General Counsel.
Jonathan A. Wexler, Esq., of Brooklyn, New York *(Vedder, Price, Kaufman & Kamholtz P.C.),* of New York, New York, for the Respondent.
Wing Lam, of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Zi Zheng Yang (the Charging Party or Yang), the Regional Director for Region 29 issued a complaint and notice of hearing on May 6, 2004, alleging that U Ocean Palace Pavilion Inc. (Respondent Avenue U or Respondent)[1] and Ocean Palace Restaurant No. 1, Inc. (Respondent 8th Avenue), are single employers, and have violated Section 8(a)(1) of the Act by refusing to hire Yang and six other individuals because they concertedly filed a lawsuit against Respondent 8th Avenue. During the course of the hearing, held before me on August 10, 11, and 12, 2004, the General Counsel withdrew its complaint allegation that Respondent Avenue U and Respondent 8th Avenue were single employers. Briefs have been filed and have been carefully considered.

Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Avenue U is a domestic corporation, with its principal office and place of business located at 1418 Avenue U, Brooklyn, New York, where it is engaged in the operation of a restaurant.

During the past year, Respondent Avenue U derived gross revenues in excess of $500,000 and purchased and received at its restaurant goods and products valued in excess of $5000 directly from suppliers located outside the State of New York.

It is admitted and I so find that Respondent Avenue U is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. FACTS

Respondent 8th Avenue was a Chinese restaurant located on 8th Avenue in Brooklyn, New York. The shareholders of the corporation are Kar Ng, Hing Ching, and Wing Kuen Tsoi, known as "Danny," and hereinafter referred to as Tsoi. The restaurant employed approximately 45 full-time employees and 10 part-time employees. Tsoi was the restaurant's manager who hired the staff and supervised day-to-day operations.

Respondent Avenue U is also located in Brooklyn. The shareholders of that restaurant are Tsoi, Ng, and Jimmy Ching, and until July 2003, the restaurant was managed and supervised by Ching.

At Respondent 8th Avenue, the restaurant employed waiters, busboys, headwaiters, dishwashers, cooks, and other kitchen personnel. Headwaiters and waiters both performed the same work of serving customers, but the headwaiters had added responsibilities of resolving problems, reporting them to Tsoi, and at times being in charge when Tsoi was not present. Also the headwaiters wore black suits with a long tie, while waiters wore white shirts, long sleeve jackets, black pants, and a bow tie.

Respondent 8th Avenue employed seven full-time waiters and three part-time waiters. The full-time waiters worked 10 hours a day, 6 days a week. The part-time waiters worked 1 or 2 days a week. The full-time waiters included Yang who began working there in 1999, Song Bo Huang who was hired in September 1997, Lian Fu Liang who began in 1991, Xia Ming Tan who started in 1996, and Xin Che Chen who was hired in 1997.

The headwaiters employed by Respondent 8th Avenue were Eric Ren, Fa Min Liu, Anthony Zhou, and King Chen. Respondent 8th Avenue employed full-time busboys, Jun Jie Liang, and Jue Hui Mei, as well as several part-time busboys who worked on weekends.

In May 2003,[2] Respondent 8th Avenue decided to close its restaurant because business was bad and in order to renovate

[1] The correct name of the Respondent is U Ocean Palace Pavilion, Inc. The caption is amended to reflect the correct name of Respondent.

[2] All dates hereinafter are in 2003, unless otherwise indicated.

the facility. Tsoi notified the employees of the restaurant in mid-May. Yang in the presence of waiters Xia Ming Tan and Kai Cheng Hui, asked Tsoi if he intended to hire any of the employees at the Avenue U restaurant. Tsoi replied that "it would be difficult to hire all the employees at Avenue U, because there are so many people." However, Tsoi did say that when Respondent 8th Avenue finishes its renovations, it would hire employees back. On another occasion in May, Lian Fu Liang, in the presence of Xia Ming Tan and Song Bo, Huang asked Tsoi, "if the restaurant is going to close, are you going to let us work at the Avenue U restaurant?" Tsoi smiled and made no response.

Also in May, Yang, and several other employees including Lian Fu Liang, Xia Ce Chen, and Xia Ming Tan went to the Chinese Workers Association and met with Wing Lam. They discussed complaints that the employees had about the restaurant's failure to pay them minimum wages. They discussed suing Respondent 8th Avenue and designated Chen, Liang, and Yang to be spokespersons for the group. Toward the end of May, Yang overheard a customer at the restaurant telling Tsoi and Fa Min Liu that he had heard a rumor that some employees were going to sue Respondent 8th Avenue with the help of the Chinese Staff Association, and asked if they were afraid. Tsoi and Liu both responded, "We're going to close so we are not afraid."

On June 1, the restaurant closed. Yang, Huang, Tan, Mei, Chen, and Lian Fu Liang worked until the closure. Jun Tie Liang was on a leave of absence since March 16. When Liang left to go to China to deal with personal matters, Tsoi told him that he could have his job back upon his return. Liang returned to the United States on May 4, but due to the SARS epidemic, he complied with quarantine guidelines and remained at home for 12 days. He then contacted Liu who told him to start work the next Friday. However, before his start day, Liu phoned Liang and informed him since the restaurant was closing, he should not return to work.

On June 25, a lawsuit was filed in the United States District Court by seven plaintiffs, Yang, Chen, Tan, Mei, Huang, Lian Fu Liang, and Jun Jie Liang, herein collectively called the plaintiffs or discriminatees, against Respondent 8th Avenue plus several individuals including Tsoi, Ng, and Liu. The complaint makes a number of allegations, including the failure to pay minimum wages, failure to pay overtime, and illegally withholding tips from the salaries of employees. Respondents did not receive notice of the lawsuit until July 4, 2003.

Shortly thereafter, one of the plaintiffs in the lawsuit, Xin Chi Chen, received a phone call from Zen Lau, a former headwaiter at Respondent 8th Avenue. Lau told Chen that he had been authorized by Respondent 8th Avenue to mediate between the plaintiffs and Respondent, in an attempt to settle the lawsuit. A meeting was set up for July 10, at the Ming 2 Restaurant in Brooklyn. All of the plaintiffs, with the exception of Tan were present, along with Lau. Lau informed the plaintiffs that he was representing the restaurant to negotiate with the employees. Lau told the plaintiffs that the restaurant would compensate the employees and agree to employ them either at the Avenue U restaurant or at the 8th Avenue restaurant when it reopens. Yang replied on behalf of the plaintiffs that the plaintiffs would like to be hired at Avenue U first, and then talk about compensation. Lau replied that he would have to consult with the owners.

The next day, July 11, Lau telephoned Yang and informed him that he (Lau) had spoken to the owners and that the owners requested that the plaintiffs withdraw their lawsuit, change lawyers, and the plaintiffs would be hired either at Avenue U or 8th Avenue, and the employees will be compensated in the amount deemed appropriate. Yang replied that the plaintiffs would not agree to withdraw the lawsuit or switch lawyers.

Shortly thereafter, Tsoi[3] telephoned Yang and asked to meet with the plaintiffs. A meeting was set up for July 23, also at the Ming restaurant. All of the plaintiffs were present, along with Tsoi and Ng representing Respondents. Yang requested that Respondent hire the plaintiffs back at Avenue U and then they would discuss compensation. Tsoi replied that he wanted all issues to be resolved at one time. Yang stated that the plaintiffs were seeking $2 million as compensation. Tsoi responded that this was too high. With respect to hiring, Tsoi stated that the restaurant had no openings at that time.

The parties met again on July 25. Tsoi stated that if the plaintiffs wanted to work at Avenue U, they must resolve the compensation issue first. Yang replied that Respondent should hire the employees back first and then discuss compensation. Ng responded that if the lawsuit was settled, the employees could go back to work at Avenue U, and added that Respondent would compensate them at the vacation rate in place at Respondent 8th Avenue for the time that they were out of work. The parties talked again about the amount of compensation, but were unable to agree on an amount. Yang mentioned that he had heard that Tsoi had hired some former 8th Avenue employees at Avenue U. Tsoi answered that he had hired Kai Cheng Hiu and Jin Man Li at Avenue U. Yang stated that Tsoi "hired those people that did not sue you, but you did not hire anybody who sue you. This is very unfair to us."

On September 11, Tsoi telephoned Yang. He offered a certain amount of money to the employees to settle the case, but stated that he would not hire the employees back.

On September 13, Yang called Tsoi and informed him that the plaintiffs had rejected Respondent's offer. Yang added that Tsoi had previously told the employees that he would hire them back, and now he was refusing to hire them. Tsoi responded, "Since you are still suing us then how are we going to hire you back?" Yang again mentioned that Tsoi had hired other individuals at Avenue U who had worked at 8th Avenue. Yang repeated this was unfair, and said that the plaintiffs would "continue to sue." Tsoi answered, "you can sue whatever you like in the United States."[4]

[3] Tsoi had spoken to Lau and was informed that the plaintiffs had asked to be hired at Avenue U.

[4] The above recitation of my factual findings is based on a compilation of the credited portions of the testimony of Yang, Tsoi, Lian Fu Liang, and Xia Ming Tan. I note that Ng did not testify, and I find it appropriate to draw an adverse inference against Respondent for Ng's failure to testify. *United Parcel Service of Ohio,* 321 NLRB 300 fn. 1 (1996), *International Automated Machine,* 285 NLRB 1122 (1987). While for the most part I have credited Yang's version of the conversations, I do not credit his assertion that Tsoi said on September 13 that

These and other discussions failed to resolve the lawsuit, which is still pending. None of the plaintiffs have received unconditional offers to work at Avenue U. However, Song Bo Huang one of the plaintiffs did have a discussion with representatives of Respondent Avenue U, but in the context of Huang withdrawing from the lawsuit. Sometime in August, Huang was working at a restaurant in Chinatown where he met Ng. Ng said that since they were colleagues for so many years, he hoped that they could settle the lawsuit between them. Huang replied "fine," and Ng said that Tsoi would be contacting him. A few days later, Tsoi called Huang on the phone and told him that if Huang wanted to settle the case, he (Tsoi) would hire an attorney for Huang and sign a settlement agreement. They arranged to meet about a week later. At that time, Tsoi and Jimmy Ching picked up Huang in Tsoi's car and drove him to see an attorney. Tsoi remained in the car, and Huang and Ching went into speak to the attorney. Ching translated for Huang since Huang does not speak English. The lawyer asked (through Ching) his name, date of birth, and where he had worked, and then Ching and the lawyer spoke in English, and Huang did not understand what was said. Ching told Huang that the lawyer was going to prepare a settlement for him to sign, but did not say what the agreement was going to include. Huang replied, O.K., prepare the agreement and he would take a look at it. No agreement was prepared or shown to Huang.

After leaving the lawyers office, on the way home, in the presence of Ching, Tsoi informed Huang that if he signed the settlement agreement, and settle the case, Huang could return to work at Avenue U. Huang asked, "[W]hat about my own lawyer?" Tsoi replied that his lawyer would take care of it.

Huang never received a copy of the settlement agreement from the lawyer, but in late August, Tsoi called Huang on the phone, and said that he was going to pick Huang up and bring him to see another lawyer. Huang asked, "Why aren't they going to see the same lawyer?" Tsoi responded that "we changed to another lawyer." Tsoi picked Huang up again and drive him to the second lawyer, and told him that this lawyer would be preparing a settlement for him to sign. On this occasion, a female whom Huang did not know served as a translator for him in his discussions with the lawyer. The woman informed Huang that the lawyer would prepare a document settling the case for him to sign. However, Huang never received a copy of the agreement from the lawyer. There was no discussion of Huang returning to work at Avenue U on that day. Tsoi again drove Huang home after the meeting, but they did not discuss the settlement or the possibility of Huang returning to work on the way home. At the end of August, Tsoi called Huang and asked him to sign the settlement when he is free. Huang replied, "No, I cannot." There were no further discussions between Huang and any representatives of Respondents concerning settlement or with respect to hiring at Avenue U.[5]

The parties stipulated that Respondent Avenue U hired the following former employees of Respondent 8th Avenue, to work at the Avenue U restaurant on the following dates. Eric Ren, June 9, waiter and bartender; Fa Min Liu, July 1, headwaiter; Anthony Zhou, July 1, headwaiter; and Kai Cheng Hui, July 15, waiter and catering chef.

The General Counsel adduced evidence from some of the plaintiffs concerning Respondent's allegedly hiring former 8th Avenue employees at Avenue U. Xia Ming Tan, who was employed by Respondent 8th Avenue as a waiter, testified that after the 8th Avenue restaurant closed, he went to the Avenue U restaurant to eat. He asserts that he observed Jin Man Li, who had been employed at 8th Avenue as a waiter and busboy, working at Avenue U as a waiter serving a party. Tan further testified that at the end of the night, he spoke to Jin Man Li on the street and asked Li whether he was working at Avenue U full time. According to Tan, Li replied, "yes" that he worked full time from 1 until 11 p.m., and that he started working at Avenue U in September. Further, Yang testified that in his

"it is not difficult for the company to hire you back." I find it highly unlikely that Tsoi would make such a comment, since it is clear based on evidence detailed below, that there was no need for any new employees at Avenue U at the time, and Tsoi would not be able to hire seven new employees without considerable difficulty.

[5] My findings with respect to the meetings and discussions between Huang and representatives of Respondents is based on the credited testimony of Huang. Tsoi testified that it was Huang who had initiated the settlement discussion, in conversations with Ng, where Huang allegedly told Ng that he was sorry about the lawsuit because he considered that Respondents were "good bosses," and he wanted to withdraw his case. Tsoi added that Huang then called and said that "he was sorry," and wanted to withdraw from the lawsuit. Tsoi replied that he would arrange for a lawyer to help Huang withdraw. Tsoi then arranged for Huang to meet with a lawyer, but according to Tsoi, the lawyer did not want to take the case. Therefore, he arranged for a second lawyer to meet with Huang. However, Tsoi asserts that after meeting with the second lawyer, Huang would not sign the agreement and would not withdraw, because the other plaintiffs pressured Huang not to withdraw. Tsoi further asserts that after one of the two meetings with the lawyer, which one he wasn't sure, on the way home to Huang's house, he told Huang that there was an opening at Avenue U, and asked if Huang was interested in going back. According to Tsoi, Huang made no response at that time. However Tsoi contends that a few weeks later, Tsoi called Huang and asked him if he wanted to return to work. Tsoi asserts that Huang replied that he would not accept the job, because he had a better job as a manager.

As noted above, I have credited Huang's version of events, and do not credit Tsoi's account as set forth above. In addition to comparative demeanor considerations, I rely upon the failure of Respondents to call either Ng or Ching to corroborate Tsoi's testimony in several significant areas with respect to these events, particularly whether Huang initiated the settlement talks (Ng), and whether Tsoi offered a job to Huang, independent of him having to withdraw from the lawsuit (Ching). Furthermore, I find It implausible that Huang would wish to withdraw from the lawsuit simply because Respondent's were "good bosses," without some compensation or an agreement for a job. Finally, Tsoi's testimony is not persuasive, since Huang already had the job as manager at another restaurant in August, when he went to see the lawyers. Therefore, Tsoi's testimony that when he made the offer to Huang, and Huang gave no response makes little sense. Since Huang already had the other job in August, it is not likely that he would wait several weeks to respond to the offer, as Tsoi asserted. Further, I find it more likely, that Tsoi, who was in the midst of negotiations with the plaintiffs, which were not going well (plaintiffs had requested over $2 million as compensation, plus immediate jobs at Avenue U for all seven of them), decided to try to "divide and conquer," and persuade one of the plaintiffs (Huang) to withdraw from the lawsuit, with the promise of a job at Avenue U as an incentive.

September conversation with Tsoi as detailed above, Tsoi told him that Respondent Avenue U had hired two former 8th Avenue employees, Jin Man Li and Kai Cheng Hui to work at Avenue U.

Jun Jie Liang testified that in mid-August, he passed by the Avenue U restaurant on two or three occasions, and observed Jin Man Li working at the restaurant wearing a busboy uniform of black vest and white shirt. Liang further asserts and Li had also worked as a busboy along with Liang at 8th Avenue, and that Li had been a busboy at 8th Avenue prior to the commencement of Liang's employment at that restaurant. Liang also contends that after seeing Li working at Avenue U, he called Li on Li's cell phone. According to Liang, Li told Liang that he was working at Avenue U full time.

Tan also testified that in mid-October he met Yan Sen Huang (Wong) who had been previously employed at 8th Avenue as a waitress, at a video store. According to Tan, Huang told him that she was working at Avenue U as a waitress. He further states that he did not ask, nor did Huang tell him, whether Huang was a full-time or part-time employee at Avenue U.

Tan and Liang both testified concerning Zi Hui Zhang who had been employed at 8th Avenue as a busboy, working at Avenue U. Tan testified that he met Zhang in the street in mid-December, and that Zhang told him that he was working at Avenue U, and that he was working a full-time schedule at Avenue U since September. Liang testified that he observed Zhang on several occasions working as a busboy at Avenue U in September and October.[6] Liang added that on one of these occasions, Zhang came out of the restaurant and spoke to him. According to Liang, Zhang said that he was working at Avenue U full time as a busboy. Liang also testified that he observed an individual named Kun Wang Li working at Avenue U as a busboy, and Tan testified about seeing someone named Kun Moon Li working at Avenue U as a waiter. However, upon further examination about their observations, it appears that they were both referring to Jin Man Li.

The General Counsel also introduced into the record quarterly New York State reports filed by Respondent Avenue U covering the periods from April 1 through December 31. These documents reveal 35 employees reported for the second quarter (April 1 through June 30). The third quarter report (July 1 through September 30) reported 41 employees, including 10 new names not listed on the previous report. These 10 new names included Tsoi, Ren, and Anthony Zhou. None of the names mentioned by General Counsel's witnesses are included, but there are some names that bear some similarity to the names mentioned by these witnesses, such as Kam Y. Wong and Chao Y. Li, and Lin Y. Zhuo. The fourth quarter report lists 47 employees, including Kai Chen Hui. These records do not include classifications or job titles for any of the employees on these documents.

Tsoi testified extensively concerning Respondent Avenue U's hiring decisions in the summer and fall of 2003. According to Tsoi, Respondent Avenue U employed approximately 40 full-time and 10 part-time employees, when the 8th Avenue restaurant closed on June 1. At that time, Avenue U had no openings for waiters or busboys. However, there were two openings for chefs and one dishwasher, and these openings were filled with employees from 8th Avenue. In early June, Ching notified Tsoi that four waiters at Avenue U had tendered their resignations and there would therefore be four vacancies sometime in June at the restaurant. Accordingly, Tsoi and Ching discussed how to fill these four jobs. They discussed the pros and cons of all the waiters and busboys at 8th Avenue, and concluded that Respondent Avenue U would offer jobs as waiters to Fa Min Liu, Anthony Zhou, Eric Ren, and Kai Ching Hui.

Liu was selected because he had been a headwaiter at 8th Avenue, since 1992, and had worked there for 14 years in total. Liu was fluent in Spanish, which was significant since the restaurant serves Spanish-speaking customers. Liu testified and Tsoi confirmed that he Liu had asked Ching for a job at Avenue U, and in early June that Ching had notified Liu that he would be hired as a waiter. He began his employment at Avenue U on July 1.

Zhou had worked at 8th Avenue since 1990, where he also was employed as a headwaiter. He was selected, according to Tsoi because he had considerable experience in setting up banquets and because he is the godson of Ng (a shareholder of both restaurants). Zhou corroborated Tsoi's testimony that Zhou had asked Tsoi in late May for a job at Avenue U, and that Tsoi told him at that time, that if there were vacancies at Avenue U, he would see if he could arrange that Zhou was offered a job in mid-June, and started at Avenue U on July 1.

Eric Ren had previously worked at Avenue U starting in 1996 as a waiter and bartender. In June 2001, Ren was transferred to the 8th Avenue restaurant. Tsoi told Ren at the time, that if he was not happy at 8th Avenue, that he could transfer back to Avenue U. In late May, Ren asked Tsoi if he could return to work at Avenue U. Tsoi answered if there was a vacancy available, Tsoi would be offered a job. Tsoi testified that when he and Ching discussed hiring in early June they selected Ren because Respondent's had promised him a transfer back to Avenue U where he had worked previously, and because Ren also had skills as a bartender. Ren started working at Avenue U on or about June 15.[7]

Respondent Avenue U also selected Kai Ching Hui to work at the restaurant. Hui also had previously worked at Avenue U in 1995 for a period of 9 months. He began his employment at 8th Avenue in July 1994, where he was employed as a waiter and a catering chef. He asked Tsoi for a job at Avenue U in mid-June. Tsoi replied that he would consider hiring Hui and would let him know. A few days later, Tsoi called Hui and offered him a job at Avenue U starting immediately. Hui accepted the position, but informed Tsoi that he had a vacation planned with his family and asked if he could start on July 23. Tsoi answered, "no problem," and Hui commenced working for

[6] Tan did not testify whether or not Zhang told him what job Zhang was performing at Avenue U.

[7] I note however that Eric Ren's name did not appear on Respondent Avenue U's reporting form to New York State until the third quarter of 2003.

Respondent Avenue U on July 23.[8] He was chosen, according to Tsoi because he had previously worked at Avenue U, and because he also serves as catering chef.

As noted Tsoi also testified that he and Ching in June discussed each of the other former 8th Avenue employees including the plaintiffs and concluded that the four individuals selected were better employees. Tsoi testified that he and Ching discussed some of the deficiencies in the performance of the plaintiffs, and asserted that these reasons, as well as the superior qualifications of the four employees hired motivated Respondent not to hire the plaintiffs to work at Avenue U to fill these openings. The primary problem with the plaintiffs, according to Tsoi was that all seven of them were abusive to Eric Ren, who as noted was a headwaiter at 8th Avenue, and who was hired to work at Avenue U as a waiter. According to Tsoi, Ren had been complaining to Tsoi for about a year that all seven plaintiffs had been mistreating him and it was getting worse. At one point in early 2003, Tsoi claims that Ren threatened to quit because of the mistreatment. The mistreatment consisted of calling him by a "fukanese" nickname which means "shit," and at lunchtime, taking food away from the table, so that Ren was unable to get anything to eat. Further, Tsoi testified that in March 2003, he observed an incident, where Lian Fu Liang had attempted to hit Ren with a chair, because Ren had advised Tsoi that a customer had complained about slow service, and Liang had failed to put in the order in the kitchen. According to Tsoi, he intervened and stopped Liang from hitting Ren with a chair. Tsoi told Liang to stop harassing Ren, but took no other action against Liang at that time. Shortly thereafter, according to Tsoi, Liang told Tsoi that he and other unnamed individuals would quit unless Tsoi fired Ren.

While Liang denied that he ever attempted to hit Ren with a chair, and other plaintiffs claimed to have no knowledge of this incident, Ren corroborated Tsoi's version of events. He testified that he had reported to Tsoi that a customer had complained to him about slow service, and after checking with the kitchen, Ren discovered that Lian Fu Liang had forgotten to place the order. Liang was enraged that Ren had reported him to Tsoi, and picked up a chair over his head and was about to hit Ren, when Tsoi yelled at Liang to "stop." Liang then put the chair down. Ren also testified that after this incident he told Tsoi that he wanted to resign because of this incident and other mistreatment by employees, and Tsoi told him to stay on as an employee, and he would do his best to stop the mistreatment by his fellow workers.

Ren also provided some corroboration to Tsoi's testimony about mistreatment by the plaintiffs. In that regard, Tsoi testified that all seven plaintiffs had called Ren "shit," and took away his food. The only other specific incident of mistreatment testified to by Tsoi, was the aforementioned chair incident involving Lian Fu Liang. Ren testified generally that all five waiters who were plaintiffs,[9] called him "fukanese-shit," and that in 2002, Chen had threatened to beat him like a dog. Ren also testified that the two busboys, Jun Je Liang and Jun Hei Mei called him dog and would not help him. Ren also testified that he overheard Chen talking to Mei on several occasions, saying that they hated Ren and that after the restaurant closed they were going to beat him.

Kai Chung Hui also testified that while he was employed at 8th Avenue, he heard Lian Fu Liang and Jung Mei call Ren names such as "bastard" and "dog" in the dining room and the kitchen. Hui also testified that he complained about this treatment of Ren to Tsoi, and told him that employees should not be using such language towards coworkers. He asked Tsoi what Tsoi was going to do to resolve the matter. Tsoi replied that all workers have families and he didn't want to fire anyone. But he would attempt to stop this problem and speak to the employees. Liu testified that he heard Chen, Mei, and Lian Fu Liang call Ren "fukanese—shit," but provided no further details as to when and how often he heard these statements made.

All of the plaintiffs testified and denied that they ever called Ren any names or made any abusive comments towards him or about him, and denied that Tsoi or any representative of Respondent had accused them of engaging in such conduct.[10] Tsoi also provided testimony concerning other alleged deficiencies in performance of the plaintiffs, which he contends was discussed by him and Ching in considering whether or not to offer jobs to the plaintiffs when it had four openings in June. With respect to Yang, Tsoi asserted that Yang had some merit and some shortcomings and had been working for a long period of time, but compared to the four individuals selected, Yang was "not as good as them." Specifically in addition to allegedly mistreating Ren, Tsoi contends that Yang had a lateness problem, in that he would be late in opening the restaurant, which was one of his responsibilities. According to Tsoi, this would happen one or twice a week, and started "a long time ago, I don't recall." Tsoi contends that employees and customers would report to him that Yang was opening the restaurant late, since Tsoi was not present at the restaurant at the time. Tsoi never took any disciplinary action against Yang for this conduct. Nor does the record disclose any evidence that Tsoi ever even spoke to Yang about this problem.

Tsoi also testified that Lian Fu Liang had a "gambling problem," and that Tsoi had been receiving phone calls from credit card companies seeking to collect money from Liang. According to Tsoi these calls were received from credit companies starting in April. Tsoi would pick up the phone and then give the phone to Liang. However, Tsoi admitted that he never told Liang that these calls were a problem or took any action against him for this conduct.

Liu testified that Liang gambled and owed people money and one occasion, when he did not recall, someone walked into the restaurant and yelled at Liang asking him to pay money.

Liang admitted that he had credit card debt, but denied ever being aware that any credit card company had called him at the

[8] Hui's name did not appear on Respondent Avenue U's withholding filings for the third quarter of 2003. According to Tsoi, Hui had asked him not to put his name on the list, because he was collecting unemployment insurance. Therefore, Tsoi paid Hui in cash for this period of the time. Hui was reported as an employee in the last quarter of 2003.

[9] These five are Yang, Huang, Tan, Chen, and Lian Fu Liang.

[10] Tsoi testified that he asked all of the plaintiffs not to bother Ren anymore, but he did not fire anyone.

restaurant to try to collect money from him. Tsoi testified also that Chen also owed people money, and one time people came to look for him at the restaurant to collect money and Chen was out of work for 3 days as a result. Chen denied that anyone ever came to the restaurant to try to collect money from him. However, Chen admitted that in March of 2003, an individual who Chen described as a "gangster" and member of a gang, used slang language and cursed at Chen. Chen asserts that when he complained to King Chen, the headwaiter in charge of the restaurant at the time and asked King Chen to call police, King Chen told Chen that the individual was a gangster, but refused to report the "gangster's" conduct to the police. Therefore, according to Chen, he asked for a day and half off from work because of this incident.

Finally, Tsoi testified that Xia Ming Tan had a poor attitude at work and customers had complained about him three or four times over the past 2 years. According to Tsoi he informed Tan about these complaints and told him to change his work habits and treat customers better. Tsoi also stated that Tan would go home for lunch and come back late every day for the past 2 years, and that he brought this to Tan's attention and told him to come to work on time. However, as with the other complaints about the employees' performance, Tsoi did not take any disciplinary action against Tan.

Tsoi also furnished testimony that after the four openings for waiters that were filled in June, Respondent has had only one more full-time position available. That was according to Tsoi in August, and because of increased business, the waiter position was open. Tsoi asserts that he and Ching discussed the opening and decided to offer the job to Huang, because among the seven plaintiffs, his performance was better and his treatment of Ren "even though it was not good, but he was not so wild." Tsoi further testified that after Huang turned down the offer, he and Ching discussed whom to offer the position to. Tsoi claims that Ching suggested that Respondent Avenue U hire Zi Hui Zhang for this position. Zhang had been employed at 8th Avenue as a dishwasher and then a busboy, but had no experience as a waiter. Tsoi asserts that he and Ching discussed whether to hire any of the plaintiffs for this position, but decided that "Zhang was a better candidate." Tsoi did not specify why they felt that Zhang was a "better candidate," but did state that since Ren was working at Avenue U, he and Ching felt "if we hired any of them back it would be trouble." Tsoi further testified that this lawsuit filed by the plaintiffs was not a factor in Respondent's Avenue U's decision not to offer this job to any of them."[11]

Tsoi did admit that Respondent Avenue U hired three part-time employees in August or September. They included according to Tsoi, two part-time busboys, both of whom had worked part-time (weekends) at 8th Avenue, and a waitress, who was also hired to work only on weekends, as she had at 8th Avenue. According to Tsoi, the names of the two busboys were "Ah Man," and Ah Hong," and the waitress was named "Ah Fen." Tsoi further asserts that he discussed with Ching whether or not to hire any of the plaintiffs for these part-time positions. Tsoi responded that they considered it, and "we felt those people that we hired worked better, that's why we scheduled them."

An examination of the above-described quarterly tax reports, does not list any of the names mentioned by Tsoi. Tsoi was asked where in Respondent Avenue U's records does the name of Zhang appear. He looked at the records, and stated that he believed that Zhang was listed on the report as Quan Zi Hui, but he wasn't certain, and admitted that Ching would have better knowledge than Tsoi as to this question.

III. ANALYSIS

In *FES,* 331 NLRB 9 (2000), the Board set forth the analytical framework for refusal-to-hire violations. The General Counsel must show that:

> (1) that the Respondent was hiring or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

In contrast, to establish a discriminatory refusal to consider, the General Counsel must show that (1) the Respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.

Once this is established, the burden shifts to the employer to show that it would not have considered the applicants even in the absence of their union activity or affiliation. Similarly, once the elements of a refusal-to-hire violation are established the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

The Board concluded further in *FES* that, in a discriminatory hiring case, whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits. The General Counsel must show that there was at least one available opening for the applicants. He must show at the hearing on the merits the number of openings that were available. However, where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings. Once the compliance proceedings determine which applicants must be offered jobs and backpay, the remaining applicants would be entitled to a refusal to consider remedy. Id. at 14.

In applying these principles to the instant case, the complaint alleges and the General Counsel asserts that Respondent Avenue U refused to hire seven individuals, because they filed a lawsuit against Respondent 8th Avenue. There is no question that Respondent Avenue U was hiring employees in the months of June through September, and the seven alleged discriminatees, (five waiters and two busboys) were qualified to fill these openings, since they had been employed by Respondent 8th Avenue in these positions.

[11] As noted above, Ching did not testify.

The question then becomes whether the General Counsel has met its burden of proof that the employees' activities in filing a lawsuit was a motivating factor in Respondent Avenue U's decision not to hire them for these openings. It is clear and not disputed by Respondents that the action of the employees in filing a lawsuit against Respondent 8th Avenue for failure to pay overtime, wages and tips to employees constitutes protected concerted activity. *Le Madri Restaurant,* 331 NLRB 269, 275 (2000); *Trinity Trucking & Materials Co.,* 221 NLRB 364, 365, supp. 227 NLRB 792 (1977), enfd. 567 F.2d 391 (7th Cir. (1977).

That leaves the most significant issue to be resolved, whether the General Counsel has established that the conduct of the employees in filing the lawsuit was a motivating factor in Respondent Avenue U's hiring decisions. In order to determine that issue it is necessary to decide whether it is appropriate for me to consider evidence concerning the discussions between agents and officials of Respondent Avenue U and the employee plaintiffs involving the settlement of the lawsuit. Respondent Avenue U contends that such evidence is inadmissible under Section 408 of the Federal Rules of Evidence. *Pierce v. F. R. Tripler & Co.,* 955 F.2d 820, 826–829 (2d Cir. 1992), *Wan Sun Penny v. Winthrop University Hospital,* 883 F.Supp. 834, 846–847 (F.D.N.Y. 1995); *Red Ball Interior Demolition v. Palmadessa,* 908 F.Supp 1226, 1241 (S.D.N.Y. 1995); *Concrete Sand & Gravel, Inc.,* 274 NLRB 574, 575 fn. l (1985).

However, Board precedent, supported by the courts, establishes that settlement discussions are excludable only if such evidence is offered to prove liability of the claim under negotiation. *Laborers Local 860 (Anthony Allega Cement Contractor),* 336 NLRB 358, 361 fn 17 (2001); *Cirker Moving & Storage Co.,* 313 NLRB 1318, 1326 (1994) (offer of reinstatement made to employee conditioned on resigning as shop steward admissible, even though statement made in settlement negotiations over employees discharge grievance); *Miami Systems Corp.,* 320 NLRB 71 (1995) enf. in pert. part 111 F.3d 1289, 1293–1294 (6th Cir. 1997); (evidence that Employer threatened to terminate the third shift, made in discussions on grievance concerning third shift work being performed by supervisors); *Jenmar Corp,* 301 NLRB 623, 631 (1971); *Starter v. Converse,* 170 F.3d 286, 293 (2d Cir. 1999); *Trebar Sportswear v. Limited,* 865 F.2d 506, 510 (2d Cir. 1989); *Vulcan Hart Corp. v. NLRB,* 718 F.2d 269, 277 (8th Cir 1983) (discussion of reinstatement during discharge grievance admissible, since not offered to prove liability of claim under discussion), *Broadcast Capital v. Summa Medical,* 972 F.2d 1183, 1194 (10th Cir. 1992); *Catullo v. Metzmer,* 834 F.2d 1075, 1079 (1st Cir. 1987); *Cates v. Morgan Portable Building,* 780 F.2d 683, 691 (7th Cir. 1985).

Here, the evidence relied upon by the General Counsel is not being offered to establish liability on the claims alleged in the lawsuit. Thus, the statements cannot be construed as admissions that there is validity to the lawsuit. However, the statements concerning Respondent Avenue U's response to the repeated requests by the plaintiffs for jobs at the Avenue U restaurant, are relevant to an entirely different claim, and the claim in dispute in this case, whether or not the failure to hire them is motivated by protected conduct.

The cases cited by Respondents as outlined above are not dispositive, as they either are consistent with the above principles, *Pierce*, supra, and *Winthrop,* supra, both of which involve the exclusion of settlement discussions of the same claim, or are District Court opinions, with little precedential value. *Red Ball,* supra; *New Jersey Turnpike*, supra. Respondent Avenue U also cites *Concrete Sand,* supra, a case decided by the Board. However this decision is inapposite. *Cirker Moving,* supra at 1326. In *Concrete Sand,* the complaint alleged that the employer violated Section 8(1)(1) and (5) by repudiating an existing contract and failing to apply the contract to employees. The case also involved alter ego issues and a refusal to supply information. The parties met to try to settle these allegations as well as other proceedings between the parties. During these meetings, they allegedly agreed on terms for a new collective-bargaining agreement, which the employer subsequently refused to execute. This latter refusal was alleged as a separate violation of Section 8(a)(1) and (5) of the Act. The administrative law judge refused to admit evidence concerning this alleged agreement and the refusal to execute same, based on 408 of the Federal Rules, and therefore dismissed the complaint allegations. The Board, in a 2–1 decision affirmed the Judge's decision, finding that the alleged new collective-bargaining agreements "were so closely intertwined" with the unfair labor practices then under discussion that they cannot be separated therefrom. The dissent disagreed, finding that the refusal to execute evidence was offered for "another purpose," and was a different claim that the underlying matters under discussion. While I believe that the dissent in *Concrete Sand* represents current law more accurately, as reflected in the cases cited above, particularly *Cirker,* supra; *Miami Systems,* supra; and *Vulcan Hart,* supra, I also find *Concrete Sand* to be distinguishable. There as noted, the matters being discussed were issues involved in the unfair labor proceeding, and involved violations of the same section of the Act, as the matters excluded. In fact the administrative law judge and the Board found that the employer therein violated Section 8(a)(1) and (5) of the Act by failing to abide by the contract signed covering unit employees. Thus, the excluded evidence, involved an attempt to settle these very claims, and which were consolidated for trial with those cases. Thus, in those circumstances, the Board's finding that the cases "were so closely intertwined," can be justified. See *Cirker,* supra, where the Board distinguished *Concrete Sand,* on these grounds.

Here, on the on the other hand, there is no unfair labor practice charge concerning the allegations involved in the lawsuit, and no consolidated complaint. Therefore the cases are not "so clearly intertwined," but are clearly distinct. The merits of the plaintiffs' lawsuit are not at issue in this proceeding, but rather Respondent Avenue U's alleged retaliation against the employees for filing the lawsuit. Thus the cases that I have cited are dispositive, and permit the receipt of the evidence to establish the motivation for Respondent Avenue U's refusal to hire the plaintiffs in the lawsuit. *Cirker,* supra*, Vulcan Hart,* supra*; Miami Systems, Inc.*, supra.

Therefore, based on the evidence disclosed during these negotiations, Respondent Avenue U repeatedly offered to hire these employees if they withdrew and or settled their lawsuit

again Respondent 8th Avenue, and Tsoi told Yang after he once again requested jobs for all the plaintiffs, independent of the negotiations, "since you are still suing us then how are we going to hire you back?" This evidence, particularly the latter comment by Tsoi represents substantial evidence of animus towards the employees for their participation in the lawsuit, as well as evidence that the failure to hire them was motivated by the fact that they were continuing to pursue their lawsuit.

However, as the Respondent Avenue U correctly observes, the evidence discloses, and I find that Respondent Avenue U had made commitments to hire four waiters at Avenue U, prior to the filing of the lawsuit.

In this regard, I find the testimony of Tsoi corroborated by the testimony of the employees hired for these jobs, establishes that Respondent Avenue U had informed all four of them in June that they were hired at Avenue U, and that two were to start on July 1, and a third Hui started on July 23, because he had a vacation planned with his family.

Further while the lawsuit was filed on June 25, Tsoi testified that Respondent Avenue U did not receive notification of the lawsuit until July 4. Since the General Counsel adduced no evidence to contradict Tsoi's testimony in this regard, I credit same and conclude that Respondent Avenue U did not receive notice of the lawsuit until July 4, after three of the four new hires had started.

The General Counsel argues in this regard that Respondent Avenue U became aware of the lawsuit in May, based on the testimony of Yang, who overheard a customer telling Tsoi and Fa Min Liu that employees were going to sue Respondent 8th Avenue with the help of the Chinese Staff Association. However, this evidence is of no help to the General Counsel. There is no evidence that Respondent's officials were aware in May of which employees were going to participate in the lawsuit. Thus, the fact that Respondent's officials knew that some employees may have been intending to sue is not significant, since the basis of the General Counsel's case is that Respondent Avenue U hired only employees who did not participate in the lawsuit. Indeed, Avenue U did hire four employees from 8th Avenue in June, but there is no evidence that in June, it knew which employees were intending to participate in the lawsuit.

Accordingly, I find that the significant date establishing knowledge of the plaintiffs' participation in the lawsuit, was July 4. By this date, three of the new hires had already started, and a fourth had been offered and accepted a job, but did not start until July 23, because of that individual's vacation plans. In these circumstances, the General Counsel has failed to establish that in July, when the plaintiffs applied for jobs, Respondent Avenue U was hiring, since commitments were made to hire for all jobs prior to the time that Respondent Avenue U became aware of the employees' participation in the lawsuit. Thus, the General Counsel has not established that Respondent Avenue U was hiring in July, and the complaint must be dismissed as to the complaint allegation that Respondent Avenue U unlawfully refused to hire in July. *Colburn Electric Co.,* 334 NLRB 532, 535 (2001). Moreover, to the extent that the General Counsel asserts that some employees asked for jobs in May, such evidence is not significant, since at that time, Respondent Avenue U had no knowledge of which employees were involved with the lawsuit. Therefore, the General Counsel has not established that the failure to hire the plaintiffs in July was motivated by any protected conduct engaged in by the employees.

Furthermore, I also conclude that Respondent Avenue U has adduced persuasive and credible evidence that it selected the four former 8th Avenue employees, because it considered them to be superior employees to the plaintiffs. Of the four employees hired, three of them had been headwaiters at 8th Avenue, which is a quasi-supervisory position, with some additional responsibilities. Further, all of them had extensive experience, and additional skills such as fluency in Spanish (Liu), experience in setting up banquets (Zhou), ability to serve as bartender, plus previous experience working at Avenue U (Ren), and experience as a catering chef, plus previous experience working at Avenue U (Hui). Additionally, Zhou was the godson of Ng, one of the shareholders of both restaurants.

Tsoi also testified that he and Ching also discussed all of the 8th Avenue employees' performance, including the plaintiffs, in June, and considered certain deficiencies in their performance in deciding that the four employees hired were better workers. I credit Tsoi's testimony in this regard only in part. I credit Tsoi that some of the plaintiffs engaged in "mistreatment" of Ren by calling him names such as "fukanese—shit" and "dog," and that Lian Fu Liang in March 2003, threatened to hit Ren with a chair, but was prevented from doing so by Tsoi.

While Liang denied that he engaged in the latter conduct, and other employees testified that they never saw or heard about such an incident, I credit the testimony of Tsoi, which was corroborated by Ren. I do not believe that is likely that Respondent Avenue U would simply make up such an incident, as the General Counsel seems to be contending.

With respect to testimony concerning the plaintiffs calling Ren names, I credit Ren and Tsoi only to the extent that they testified that Lian Fu Liang, Mei, and Chen called him names. I find that the testimony of Tsoi and Ren, elicited by leading questions, that all of seven of the plaintiffs engaged in this conduct to be exaggerated and unconvincing. I find it unlikely, and too coincidental, that all seven of the plaintiffs, and no other employees would have called Ren names, as Ren and Tsoi testified. However, I note that Hui credibly testified that he heard Lian Fu Liang, Mei, and Chen call Ren names, and in fact complained to Tsoi about such conduct and asked Tsoi what he was going to do to resolve the matter. I therefore credit Tsoi and Ren only to the extent that they are corroborated by Hui, and find that Lian Fu Liang, Mei, and Chan called Ren names at the 8th Avenue restaurant.

Tsoi also testified about other alleged problems in the performance of Yang, Tan, and Lian Fu Liang. I do not credit Tsoi's testimony as to these allegations. As to Yang, Tsoi testified that Yang was late in opening the restaurant which had been one of his responsibilities. Tsoi testified that this conduct started "a long time ago," and admitted not only that he never took any action against Yang for this conduct, but never even spoke to Yang about the problem. I find Tsoi's testimony about these matters to be unconvincing, and conclude even if true, that he did not discuss this issue with Ching in June, and that it was not a factor in deciding not to hire Yang in June.

Rather, I find that Tsoi while testifying was simply dredging up all possible problems with the performance of Yang in order to justify its refusal to hire him even though this factor was not in fact considered when the decision was made. I also rely in this regard the failure of Respondent Avenue U to call Ching as a witness to corroborate Tsoi's testimony in this regard.

Similarly, with respect to the testimony of Tsoi that Lian Fu Liang and Chen owed money to people and that these people looked for them at the restaurant to collect the debts, I also find that these matters even if true, were not considered by Respondent Avenue U in deciding not to hire them. Once more, Tsoi admitted that he never told either of these employees that Respondent 8th Avenue had a problem with any one coming to the restaurant looking for them to collect money, and I do not believe that these issues would have been discussed by Ching and Tsoi or considered in the decision not to hire them.

Finally, with respect to the alleged complaints about Tan concerning poor attitude and lateness, I make similar findings, since this conduct allegedly occurred over a 2-year period, and Respondent took no action against Tan. Further, as above, I also rely on the failure of Respondent Avenue U to call Ching as a witness to corroborate Tsoi's testimony concerning these issues, and conclude that an adverse inference is appropriate, that if called Ching would not have testified favorably to Respondent on these matters.

In any event, as detailed above, I conclude that the General Counsel has not established that Respondent Avenue U refused to hire any of the plaintiffs in July, as alleged in the complaint, because they filed a lawsuit. Therefore the complaint must be dismissed, as to this time period.

However, that is not the end of the inquiry. The evidence discloses that Respondent Avenue U had another opening for a waiter in August. Initially, it offered this position to Huang, one of the plaintiffs, but as I have found above, only on condition that he sign a settlement agreement withdrawing from the lawsuit. Thus, the conduct of Respondent Avenue U in conditioning the job offer to Huang on his withdrawal from or settling the lawsuit is unlawful in and of itself. *Cirker,* supra; (conditioning reinstatement on employee resigning shop steward's position unlawful), and is significant evidence that Respondent Avenue U refused to hire any of the plaintiffs for this position, because they participated in the lawsuit. Respondent Avenue U argues that the offer to Huang of a job, even in the context of discussing settling the lawsuit, belies the General Counsel's contention that the status of plaintiffs in the lawsuit, motivated Respondent's decision to refuse them jobs. I disagree, and find to the contrary, that this evidence reinforces the conclusion that I draw that animus towards the employees' filing of the lawsuit contributed to Respondent Avenue U's decision not to hire Huang, as well as the other plaintiffs. Further evidence pointing to this conclusion is the statement made by Tsoi to Yang when Yang again asked for jobs for the plaintiffs in early September, after rejecting Respondent Avenue U's settlement offer. Tsoi responded, "Since you are still suing us then how are we going to hire you back?" This remark amounts to an outright confession of Respondent's intention to retaliate against the employees because they engaged in protected conduct. *American Petrofina Co. of Texas,* 247 NLRB 183, 191 (1980); *NLRB v. John Langenbacher,* 398 F.2d 459, 463 (2d Cir. 1968).

Once the General Counsel has demonstrated, as it has that protected conduct contributed to the refusal to hire for this position, the burden shifts to Respondent Avenue U to show that it would not have hired the applicants even in the absence of their protected activity. Respondent has fallen far short of its burden in that regard. Tsoi testified as noted that it offered the job to Huang, because among the plaintiffs, his performance was better and his treatment of Ren "even though it was not good, but he was not so wild." Whether this testimony is accurate or not, in fact as I have found above, the offer to Huang was unlawfully conditioned on Huang withdrawing from or settling the lawsuit. Thus, the offer does not relieve Respondent Avenue U of liability.

Tsoi also testified that after Huang turned down the offer, he and Ching discussed whom to offer the job to, and Ching allegedly suggested hiring Zhang for the position. Tsoi added that he and Ching discussed hiring the other plaintiffs and concluded that "Zhang was a better candidate." No testimony was offered as to why Tsoi and Ching considered Zhang a better candidate, but Tsoi also asserted that they felt that since Ren was working at Avenue U, "if we hired any of them back it would be trouble."

I find this testimony to be unconvincing and not credible, and far from sufficient to meet Respondent Avenue U's burden of proof. I note that Tsoi provided no explanation for why he and Ching considered Zhang a "better candidate" than any of the plaintiffs. More significantly, Zhang had no experience as a waiter, having been employed only as a dishwasher and busboy while employed at 8th Avenue. The failure to hire any of the plaintiffs, five of whom were experienced waiters who had worked at 8th Avenue, and instead selecting someone with no experience as a waiter is highly indicative of discriminatory treatment, *Adair Express L.L.C.,* 335 NLRB 1224, 1228 (2001), and demonstrates that Ching and Tsoi considered Zhang a "better candidate," only because he was not among the employees who had filed suit against Respondent 8th Avenue.[12]

While Tsoi testified that he and Ching felt that since Ren was working at Avenue U and there "might be trouble," if the other plaintiffs were hired, I find this testimony not credible. I note particularly the failure of Respondent Avenue U to call Ching as a witness to corroborate Tsoi's version of their discussion and their decision. According to Tsoi, it was Ching who suggested hiring Zhang, rather than the other plaintiffs. I find that testimony incredible in and of itself, since Zhang was a former employee at 8th Avenue, where Tsoi was in charge, and where

[12] In this regard, I am cognizant of the fact that the General Counsel withdrew its complaint allegation that Respondent Avenue U and Respondent 8th Avenue are single employers. However, this is not significant, since it is clear that Tsoi, the individual involved in hiring decisions for Avenue U, was a shareholder of both companies. Indeed the record discloses that Tsoi referred to employees as "suing us," which demonstrates that in Tsoi's mind the restaurants were one in the same. In any event the record is clear that since Tsoi and Ng are shareholders of both restaurants, it is obvious that they were upset about the lawsuit, and were motivated by the employees' participation in the lawsuit, in refusing to hire them at Avenue U.

Ching was apparently not involved. Therefore, I find it unlikely that Ching would have recommended Zhang or felt that Zhang was a "better candidate," as Tsoi testified. The failure of Respondent Avenue U to call Ching as a witness permits me to draw an adverse inference, which I shall do, that his testimony would not be favorable to Respondent Avenue U as to these issues. *United Parcel,* supra; *International Automated,* supra.

I also note that I have found above, that Tsoi's testimony that all of the plaintiffs were involved in "mistreating" Ren was not accurate, and that only Lian Fu Liang, Mei, and Chen had called him names. Therefore Huang, Yang, Tan, and Jun Je Liang did not engage in any mistreatment of Ren. Thus, Tsoi's testimony that Respondent Avenue U did not hire any of the plaintiffs because of possible potential problems with Ren cannot be accepted. Rather, in my judgment, the evidence discloses that once Huang refused to withdraw from the lawsuit, in order to be hired, Respondent Avenue U decided not to even bother considering any of the other plaintiffs for the job, since it knew or believed that none of them would withdraw either. Therefore, I conclude that at that point, Respondent Avenue U, excluded all of the plaintiffs from the hiring process, and refused to consider any of them for employment, while instead choosing to hire someone with no previous experience as a waiter, over five experienced waiters.

Accordingly, based upon the foregoing analysis and authorities, I conclude that Respondent Avenue U has violated Section 8(a)(1) of the Act by refusing to consider and refusing to hire the seven plaintiffs for this open position in August, because they engaged in protected concerted activity of filing a lawsuit against Respondent 8th Avenue.

Based upon this finding that the hiring for at least one available opening was discriminatorily motivated, a finding of refusal to hire is warranted. *FES,* supra. Since the number of applicants exceeds the number of available jobs, a compliance proceeding is necessary to determine which of the seven plaintiffs are entitled to backpay and instatement to this position. [13] The remaining applicants are entitled to a refusal to consider remedy. *FES*, supra at 14.

The evidence also discloses that Respondent Avenue U hired several other employees in August or September. Unfortunately, the record as to which employees were hired, when they started, what job they were hired for and whether they were full or part time positions is not clear. Testimony was given by some of the plaintiffs concerning their observation of employees working at Avenue U, who had previously worked at 8th Avenue. Tan and Jun Jie Liang both testified that they observed Jin Man Li working at Avenue U, and that Jin Man Li told them that he was working full time for Respondent Avenue U. However, Tan testified that he saw Jin Man Li working as a waiter and that Li had worked at 8th Avenue as a waiter and a busboy. Jun Jie Liang on the other hand, testified that Li had been a busboy at 8th Avenue, and he observed him working at Avenue U as a busboy. Finally, Yang testified that Tsoi in the course of settlement discussions, admitted that Respondent Avenue U hired two former 8th Avenue employees, including Jin Man Li. However, Yang did not testify whether or not Tsoi mentioned the job that Li was performing at Avenue U or whether it was full or part time. Further Yang did not testify as to what job Jin Man Li performed at 8th Avenue.

To further complicate the issue, Tsoi did not testify about hiring anyone named Jin Man Li, nor did he deny hiring such individual, or indicate what job Li performed at 8th Avenue. However, Tsoi did testify that Respondent did not hire any full-time employees, but did hire two part-time busboys. The record is further confused by the fact that the records produced by Respondent Avenue U makes no mention of Jin Man Li, or any of the names mentioned by Tsoi as the busboys hired by Respondent Avenue U.

Further, Tan testified that he met Yan Sen Huang (Wong) who had been employed at 8th Avenue as a waitress. She told him that she was working at Avenue U as a waitress, but did not tell him whether she was working full or part-time at Avenue U. Tan also did not testify whether or not Huang was working full or part time while working at 8th Avenue. Tsoi admitted that Respondent Avenue U hired a waitress who had previously worked at 8th Avenue, but asserts that it was for a part-time position, and that she had also worked part time while at 8th Avenue. However, the name given by Tsoi for this employee was "Ah Fen," and as in the case of the two busboys that Tsoi admitted to hiring, neither the name mentioned by Tsoi nor Tan appeared in the records submitted by Respondent Avenue U.

Respondent Avenue U argues that although there might be some confusion in the names, that all of the employees hired were part time, as testified to by Tsoi, and that the testimony of the plaintiffs should be rejected as based on hearsay.

As for the hearsay contention, the Board receives and relies on hearsay testimony, when it is corroborated and relevant. *Dauman Pallet Inc.,* 314 NLRB, 185, 186 (1994). Here, Tan and Jun Jie Liang testified that they observed Jin Man Li working at Avenue U, and Yang corroborates that testimony by the admission from Tsoi that Respondent Avenue U hired such an individual. I therefore find that Respondent Avenue U did hire Jin Man Li in either August or September. It may be as Respondent Avenue U contends that Jin Man Li is one of the two busboys that Tsoi admitted that Respondent Avenue U hired, who he referred to as "Ah Man" and "Ah Hong." I need not decide that issue, since I conclude that Respondent Avenue U did hire someone named Jin Man Li. However, I find the record incomplete and uncertain as to what job he was performing or whether the position was full or part time, in view of the conflicting testimony described above. However, for reasons described below, I need not resolve this issue.

Similarly, it is unclear as to the name or status of the waitress who Tsoi admits that Respondent Avenue U hired in August or September. I note that Tan testified that the waitress was named Yan Sen Huang (Wong) and Tsoi testified that it was "Ah Fen." It may very well be as Respondent Avenue U con-

[13] The fact that Respondent Avenue U had initially offered the position to Huang, albeit conditionally, should be taken into account during the compliance proceeding. *Little Rock Electrical Contractors,* 336 NLRB 146 fn. 3 (2001). If compliance determines that Huang should be offered the position, and Huang declines the unconditional offer, then compliance should decide which of the other plaintiffs should be offered the position.

tends, that the waitress hired is one and the same person, and she worked part time as testified to by Tsoi.

As noted above, it is difficult to resolve the issues of precisely who else was hired by Respondent Avenue U in August and September, for what jobs or whether they were full or part time. The issues are made more complicated by the difficulty in deciphering the names, probably due to in part to the fact that Chinese names have three parts, and nicknames are frequently used.[14] Further the records produced by Respondent Avenue U do not contain any of these names mentioned by either Tsoi or the employees, and in fact also are admittedly not accurate in other respects, since employees whom there is no dispute about, do not appear in the records, such as Zhang.

However, notwithstanding the above-described contradictions and omissions in the record, Tsoi admits that Respondent Avenue U hired three employees in August or September, who had formerly been employed at Respondent 8th Avenue, two busboys and one waitress, and that it did not offer any of these positions to any of the plaintiffs. I shall decide the issues of refusal to hire and refusal to consider for hire the plaintiffs for these positions, based upon that testimony, while not necessarily crediting Tsoi as to the status or title of these employees.

I conclude that even crediting Tsoi's testimony that all three hires were part time, that the failure to offer these jobs to the plaintiff was unlawful. Under the *FES* criteria discussed above, it is clear and admitted that Respondent Avenue U was hiring, and that the plaintiffs were qualified to fill the positions. While the plaintiffs may all have worked full-time positions while at 8th Avenue U, Respondent Avenue U does not contend that they were not qualified to work part-time at positions doing the same work.

As to the third prong of the *FES* test, I conclude that the evidence discloses that the animus towards the plaintiffs' participation in the lawsuit, contributed to Respondent Avenue U's decision not to hire the applicants for these positions. The evidence supporting that conclusion is the same evidence supporting the refusal to hire for the waiter position in August, as detailed above. Respondent Avenue U by Tsoi told Yang when he again asked for jobs for all of the plaintiffs, that "since you are suing us then how are we going to hire your back." This statement is sufficient in and of itself to establish that the lawsuit contributed to the decision not to hire the employees for these positions. The discriminatory refusal to hire for the waiter position in August that I have found above, is further support for such a conclusion.

Therefore, the burden then shifts to Respondent Avenue U to prove that it would not have hired the employees absent their protected conduct. In this regard, Tsoi testified that he and Ching discussed whether to hire any of the plaintiffs for these open positions, and concluded not to do so, because "we felt that those people that we hired worked better, that's why we scheduled them."

I find this testimony unpersuasive and woefully insufficient to meet Respondent Avenue U's burden of proof. Tsoi provided no details as to why he and Ching considered the three hires "better" workers than any of the plaintiffs. Once again I find the failure of Respondent Avenue U to call Ching as a witness to corroborate Tsoi's testimony in this regard to be particularly damaging to Respondent Avenue U's ability to meet its burden of proof. Further, I deem it once again appropriate to draw an adverse against Respondent Avenue U for the failure to call Ching and conclude that his testimony would be unfavorable to Respondent Avenue U as to these issues. *United Parcel,* supra; *International Automated,* supra.

I note that Respondent Avenue U's counsel asked Tsoi whether to his knowledge, the plaintiffs were interested in part time work? Tsoi replied, "I don't know." However, this testimony is also insufficient to meet Respondent Avenue U's burden of proof. Significantly, Tsoi did not testify that Respondent Avenue U did not offer the part-time positions to the plaintiffs, because it didn't think that they would be interested in part-time jobs or because they did not make a specific application for part-time positions. He simply testified that he and Ching considered the employees chosen to be "better." I find that testimony not to be credible for the reasons discussed above, and conclude that as was the case with the waiter opening in August, that Respondent Avenue U did not even consider the plaintiffs for these jobs, and excluded them from the hiring process, because of the lawsuit filed by them against Respondent 8th Avenue, and the failure of the employees to settle or withdraw that lawsuit. It may very well be that none of the plaintiffs would have been interested in part-time positions, and would not have accepted an offer for such jobs. But Respondent Avenue U never put them to the test, and I find that the failure of Respondent Avenue U to do so was not based on the fact that the jobs were part-time positions, but instead was motivated by the employees' participation in the lawsuit. Since a refusal to hire employees for part-time positions can be unlawful, if motivated by protected conduct, *Rainbow Shops,* 303 NLRB 78 (1991), I conclude that the failure of Respondent Avenue U to offer these three jobs to the plaintiffs is violative of Section 8(a)(1) of the Act.

Having so found, that makes a total of four available jobs that Respondent U has discriminatorily failed to offer to the plaintiffs. Once again I shall leave to the compliance stage of this case the issues of which employees would have been chosen for these jobs. *FES,* supra. Since as I have detailed above the record is uncertain as to whether these positions were for waiters (or waitresses) or busboy positions, or whether they were full or part-time positions, I shall leave for compliance the resolution of these issues as well.

For the remaining discriminatees, who are not selected for the four positions after a compliance investigation, a refusal to consider remedy, as discussed more fully in the remedy section is appropriate.

The General Counsel argues that a refusal to hire finding should be made with respect to a number of new hires as disclosed in Respondent Avenue U's records, who were hired in the third and fourth quarter of 2003, the General Counsel points out that the records disclose that it hired 17 new employees during this period. She also points out that Respondent Avenue U offered no testimony concerning the classifications of these employees. However, as Respondent U correctly points out,

[14] Indeed the record discloses that Tsoi is referred to "Danny," which is not his Chinese name.

the restaurant has a number of different types of employees such as dishwashers, chefs, and other kitchen staff who are not waiters or busboys. Since it is the General Counsel's burden to prove the existence of available jobs for the discriminatees, I cannot assume that some or any of these jobs were waiter or busboy positions. I therefore cannot find as the General Counsel argues a refusal to hire violation as to all of the discriminatees.

However, since I shall recommend a refusal to consider remedy, requiring compliance proceedings, I do deem it appropriate to recommend that compliance investigate this issue and determine whether any of these new hires were waiters or busboys, and if so whether Respondent Avenue U refused to consider or to hire them for unlawful reasons. While ordinarily under *FES,* supra, the refusal to consider remedy applies to hires after the start of the hearing, I believe in the circumstances of this case, an exception is warranted. As noted above, the record is deficient in accurately detailing who Respondent Avenue U hired and for what positions. The records provided by Respondent Avenue U do not appear to be complete and they do not establish what jobs were performed by the employees or whether they are full or part time. Further, the issues are also complicated by confusion over Chinese names from the witnesses who testified. In such circumstances, I find that since I am already ordering a refusal to consider remedy for the three discriminatees that compliance determines would not have been selected for the four available positions, for which I have found an unlawful refusal to hire, I believe that it is appropriate to permit compliance to consider these hires as part of a refusal to consider remedy, as well as any other hires that may have occurred in 2004, both before or after the trial commenced. In such cases, compliance will determine whether any of the positions were for waiters or busboys. If so, then Respondent Avenue U will have the opportunity to demonstrate that it would not have hired the discriminatees, to fill these openings, even in the absence of its earlier refusal to consider them or in the absence of their protected conduct. *FES,* supra at 15.

CONCLUSIONS OF LAW

1. Respondent Avenue U is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By failing and refusing to hire or to consider for hire, Zi Zhen Yang, Soon Bo Huang, Lian Fu Liang, Xia Ming Tan, Jun Jie Liang, Xin Ce Chen, and Jue Hui Mei since August 2003, because they concertedly filed a lawsuit against Respondent No. 1 Ocean Palace Restaurant Inc., Respondent Avenue U violated Section 8(a)(1) of the Act.

3. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent Avenue U has not violated the Act by refusing to hire or consider for hire the above named individuals in July 2003, as alleged in the complaint.

5. The complaint allegations against Respondent 8th Avenue are hereby dismissed.[15]

REMEDY

Having found that Respondent Avenue U has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the polices of the Act.

As I have discussed above in the analysis section, where, as here, it is concluded that Respondent Avenue U has unlawfully refused to hire applicants for unlawful reasons, and the number of applicants exceeds the number of jobs available, a compliance proceeding shall be used to determine which of the applicants would have been hired. *FES,* supra; see also *Stamford Taxi,* 332 NLRB 1372, 1376 (2000). Thus, since there are seven discriminatees, and I have found that there were four available jobs in August and September, a compliance proceeding will be required to decide which of the seven would have been hired for each of the four available positions. For the four discriminatees who compliance determines should receive instatement offers, they shall also be made whole for any wages and benefits lost as a result of the refusal to hire them as computed in *F. W. Woolworth, Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 7173 (1987).

With respect to the remaining three discriminatees, they shall be entitled to a refusal to consider remedy, which requires that Respondent Avenue U be required to consider these discriminatees for any openings arising after August 2003, in accord with nondiscriminatory criteria and notify the discriminatees, the Charging Party, and the Regional Director of any future openings for which the discriminatees applied or substantially equivalent positions. The intent of such an order is to put the discriminatees in the pool of candidates for any openings that arise after Respondent Avenue U's unlawful refusal to consider them. *FES,* supra at 15*, Stamford Taxi,* supra.[16]

As noted above, at the compliance proceeding, once the General Counsel establishes that these jobs existed and the discriminatees were qualified to fill them, then Respondent Avenue U has the burden to show that it would not have hired the discriminatees to fill these openings even in the absence of its earlier refusal to consider them on the basis of their protected conduct. *FES,* supra at 15.

[Recommended Order omitted from publication.]

---

[15] This finding is warranted, since the General Counsel has withdrawn the single employer allegations in the complaint, and there is no evidence or allegation that Respondent 8th Avenue violated the Act in any manner.

[16] While I note that *FES* restricts the refusal to consider remedy for openings that occur after the commencement of the hearing, it also permits such a remedy for openings that arise before the hearing that the General Counsel neither knew about or should have known about. I find that based on this record, with the records submitted by Respondent Avenue U not being complete and accurate, plus the confusion concerning Chinese names, that the General Counsel did not know or should have known about openings that developed from August 2003 to date. Therefore a refusal to consider remedy is available for any such jobs filled by Respondent Avenue U for waiters or busboys during this period.