

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

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JI SHIANG, INC.

Case No.: 29-CA-29927

and

LOCAL 318, RESTAURANT WORKERS' UNION  
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**JI SHIANG, INC.'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S  
SUPPLEMENTAL DECISION**

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## **I. Statement of the Case**

On May 12, 2011, the Regional Director issued the Amended Compliance Specification and on May 31, 2011, Respondent filed an Answer to the Amended Compliance Specification. On June 9, 2011, a hearing was held before Administrative Law Judge Lauren Esposito regarding the Amended Compliance Specification. On July 27, 2011, the ALJ issued a decision in favor of the General Counsel and against Ji Shiang, Inc. The ALJ determined that Respondent owes Li Rong Gao \$36,838.89 and Xiao Hong Zheng \$30,364.88. ALJD 5:4.

On June 8, 2011, a day prior to the hearing, the General Counsel advised Respondent that she would move to make another amendment to the Amended Compliance Specification. At the hearing on June 9, 2011, despite Respondent's objections, ALJ Esposito granted the General Counsel's motion to amend the Amended Compliance Specification. To note, Respondent has never had the opportunity to submit an answer to the Amended Compliance Specification with the amendments made on June 9, 2011.

Among other things, Respondent disputes the backpay period, the computation of backpay, interim earnings, and the Regional Director's computation of net backpay owed to the alleged discriminatees Li Rong Gao ("Gao") and Xiao Hong Zheng ("Zheng").

## **II. Facts**

Respondent began operating a restaurant on or about June 2, 2009. Alleged discriminatees Gao and Zheng both applied for positions with Respondent but were not offered employment. Respondent has maintained that the reason for not hiring respondents was previous misconduct which Respondent's owner, Feng Lin, had observed when he was employed at a different restaurant. Mr. Lin articulated legitimate reasons for not hiring Gao and Zheng. As to

Zheng, Mr. Lin stated that she was not a diligent worker, would make phone calls during work time, she got into an argument with a manager, and she would gossip behind co-workers' backs. With regard to Gao, Mr. Lin stated he did not hire her because she spit into the sink at the tea station, she drank alcohol while working, she gambled to the point it affected her work, and she once had her brother-in-law make threats to her co-worker. It is undisputed that Respondent offered Gao and Zheng employment on August 2, 2010. They were hired as a waitress and a captain, respectively.

Respondent's payment policy with regard to captains and wait staff was to pay them the federal and state mandated minimum wage. Respondent paid the minimum wage according to the tip credit, which was \$4.60 and \$4.65 in direct wages during the relevant time period. The remaining portion of the minimum wage (\$7.25) consisted of tips the captains and wait staff earned. Respondent only agreed to pay its wait staff and captains the minimum wage and nothing more or less than \$7.25 between combined tips and direct wages.

### **III. Argument**

#### **A. Backpay Period**

Respondent concedes that the backpay period for Gao ended on August 1, 2011. However, with regard to Zheng, the backpay period should end on the same date, August 1, 2011, not February 13, 2011, as the ALJ determined. ALJD 3:39. Zheng was hired by Respondent and began working on August 2, 2011 at the position of captain, the position she previously held at a restaurant under different ownership but located at the same place where Respondent operated a restaurant.

The determination that Zheng's backpay period did not end on August 1, 2010 is based upon the General Counsel's allegation that Zheng did not work the same amount of hours as the other captain employed by Respondent. First, Respondent was only required to reinstate Zheng, there was no order that she work exactly the same amount of hours as any other employee of Respondent. Second, in hiring Zheng in August 2010, Respondent was forced to expand its work staff despite already having all the employees it required to run its restaurant. Respondent did not require Zheng to work additional hours because Respondent's business was such that it did not require so many captains for so many hours. Respondent was entitled to operate its business as it wished to. Respondent was not required to have Zheng work at the restaurant when she was not needed. This would have only resulted in financial losses to Respondent, as it would have too many employees working when it did not require that many employees.

Accordingly, Zheng's backpay period should end on August 1, 2010, the date that Respondent hired her since she was placed in a substantially similar position.

## **B. Computation of Backpay**

Respondent maintains that the gross backpay computation is improper. The ALJ determined that tips should be included in the backpay calculation. ALJD 3:31. Gao and Zheng were paid according to the tip credit under New York State law. Once Gao and Zheng were hired on August 2, 2010, they were paid the minimum wage of \$7.25 per hour, with \$4.65 by way of direct wages and the remaining \$2.60 coming in the form of tips. To note, from June 2, 2009 until July 23, 2009, the minimum wage was only \$7.15. The tip credit only requires employees to be paid \$7.25 when combining tips and direct wages.

Gao and Zheng's backpay must be calculated at the minimum wage rate which was the agreed upon rate of pay for them as well as for all wait staff and captains working for Respondent. The weekly average rate that the General Counsel has calculated includes tips that go above and beyond what Respondent was required to pay Gao and Zheng. During the backpay period, Gao and Zheng should only be owed the relevant minimum wage rate per hour. They are not owed any rate that would include any amount of speculative tips on top of the minimum wage.

Additionally, by taking the average of their "comparable" workers' weekly wage rates, the General Counsel incorrectly assumes the amount of tips that Gao and Zheng would have earned. The ALJ determined this was reasonable. ALJD 3:26. This is improper since there is no accurate way to predict the amount of tips they would have received, especially in light of the fact that the restaurant was not having much financial success during the relevant time period.

Finally, the calculations for backpay during the period from June 1, 2009 through June 30, 2009 are based upon the weekly compensation Gao and Zheng would have earned working for a different restaurant owned by a different entity. Respondent is a different and separate entity from the Perfect Team Corp. entity which had previously owned a restaurant. Therefore, it is not proper to calculate any backpay based upon what Gao and Zheng would have earned working for any other entity.

### **1. Unrecorded Tips Should Not be Included in Backpay**

The ALJ found that General Counsel's backpay calculations were reasonable. However, during the June 9, 2011 hearing, Ellen Farben, a Field Examiner for the National Labor Relations Board was called to testify. Ms Farben testified that she was the individual who actually made

the computations of backpay in this matter. During her testimony, Ms. Farben stated that she computed backpay for Gao and Zheng by using the average weekly earning of comparable employees during the backpay period. Ms. Farben then added that amount to the average weekly tips earned by the comparable employees.

In calculating the average weekly tips earned by comparable employees, Ms. Farben testified that she averaged the amount of tips stated in the payroll records provided by Respondent and then added another \$200 each for Gao and Zheng for each week. Ms. Farben stated that she did so because she was advised by the General Counsel that she should do so. Apparently, the General Counsel believes that \$200 in tips were earned by comparable employees each week which were not stated on the payroll and which the employees received off of the books.

The General Counsel did not provide Ms. Farben any evidence that \$200 in tips were paid off of the books. Ms. Farben admitted that she had absolutely no personal knowledge that such an amount was paid off the books. Ms. Farben failed to interview any employees or seek any evidence to substantiate the General Counsel's claim that \$200 in tips were paid off the books. Nonetheless, with absolutely no factual basis for doing so, Ms. Farben calculated backpay by adding \$200 per week each for Gao and Zheng based upon the General Counsel's baseless claim.

There has been no evidence produced which supports the claim that \$200 per week in tips were paid off of the books. Accordingly, the backpay calculations should be reduced by \$200 per week for Gao and Zheng (\$400 per week total).

### **C. Interim Earnings**

The calculation of interim earnings is incorrect and has not been sufficiently proven by the General Counsel. First, Gao and Zheng were required to make a good faith effort to search for jobs during the relevant time period in order to mitigate their damages. There is no evidence that Gao made such an effort to mitigate her damages. There is absolutely no evidence that she looked for jobs during the backpay period. Since Gao did not prove that she attempted to mitigate her own damages, she should not be entitled to recover backpay.

Second, although Zheng had a job for a portion of the relevant backpay period, there has been no explanation for the reason that she stopped working at Jin Hua Restaurant Inc. Zheng could have been fired for misconduct or voluntarily quit her job. Since Zheng has not explained her lack of employment during the 2<sup>nd</sup> and 3<sup>rd</sup> quarters of 2010, she has not sufficiently mitigated her damages during that time period and should not be entitled to recover during that backpay period.

Third, Gao and Zheng both obtained collateral income during the relevant time period. For example, both Gao and Zheng earned significant income from unemployment benefits. This collateral source of income must be accounted for and should be part of their interim earnings.

### **D. Net Backpay**

Based upon the foregoing, the calculation of net backpay is incorrect and should be decreased accordingly.

#### **IV. Conclusion**

Accordingly, Gao and Zheng are not entitled to the amount awarded to them by the ALJ. The backpay period for Zheng should end on August 1, 2010, the day she was hired by Respondent. The backpay calculations are incorrect and take into account money that the General Counsel has not proved that comparable employees earned. Finally, the interim earnings for both Gao and Zheng should be much higher than calculated. Accordingly, Respondent respectfully requests that the Board rule that the Administrative Law Judge's decision is contract to fact and law, and accordingly reverse the decision consistent with the statements set forth herein.

Dated: August 24, 2011  
New York, New York

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