

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA OFFICE

**KAWA SUSHI, INC. a.k.a.
KAWA SUSHI 8 AVENUE INC. d/b/a
KAWA SUSHI RESTAURANT¹**

and

Case No. 2–CA–39736

318 RESTAURANT WORKERS UNION

Joane Si Ian Wong, Esq.
for the General Counsel.
Susan B. Papano, Esq.
for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in New York, New York on March 20, 21 and 22, and April 25, 2012. The Union (318 Restaurant Workers Union) filed the charge on February 12, 2010 and the General Counsel issued an amended complaint on February 10, 2012.² The amended complaint alleged that the Respondent, Kawa Sushi, Inc. a.k.a Kawa Sushi 8 Avenue Inc. d/b/a Kawa Sushi Restaurant, violated Section 8(a)(1) of the Act by suspending and refusing to reinstate Wen Dong Lin because he had participated in a protest of another employee’s discharge. The amended complaint also alleges that the Respondent’s owner and his wife made threatening statements to employees in violation of section 8(a)(1) of the Act. At the hearing, counsel for the Acting General Counsel further amended the complaint to allege that the Respondent’s owner violated Section 8(a)(1) during pre-trial preparation by interrogating employees without giving them the assurances described in the Board’s *Johnnie’s Poultry* decision.³

¹ The name of the Respondent was amended at the hearing.

² The Regional Director had initially dismissed the charge in its entirety on July 26, 2010. The instant complaint issued after the Office of Appeals remanded the case to the Region with instructions to issue the complaint.

³ *Johnnie’s Poultry*, 146 NLRB 770 (1964), enf. denied, 344 F.2d 617 (8th Cir. 1965).

On February 22, 2012, the Respondent filed its answer to the amended complaint denying that it committed the alleged unfair labor practices and asserting several affirmative defenses, including that the Charging Party and Lin had engaged in a conspiracy to cause the discharge of Lin in order to collect liquidated damages under a settlement agreement resolving a FLSA lawsuit. The Respondent also asserted that the Respondent had suspended and refused to reinstate Lin because he was involved in an altercation with another employee while at work during which he physically assaulted the other employee.

On the entire record⁴, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a public restaurant serving and delivering food to individual customers at its 24 Eighth Avenue, New York, New York facility. The Respondent annually derives gross revenues in excess of \$500,000 from its business operations and annually purchases and receives at its facility goods valued in excess of \$5,000 directly from points located outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Suspension and Termination of Wen Dong Lin

1. *The Evidence*

The Respondent operates a Japanese restaurant in a space of approximately 300 square feet consisting of a kitchen, sushi bar, dining room, and prep area where food is prepared for delivery. Yong Feng Wang and Yi Xiang Cao each own 50% of the corporation. A shareholder's agreement in evidence specifies that Wang has sole responsibility to manage the operation, including making all decisions regarding the employees. Wang's wife, Xiu Hui Weng, also works in the restaurant although her status is in dispute, with General Counsel alleging and the Respondent denying that she is a supervisor and agent of the Respondent.⁵

The events at issue in this proceeding took place in late 2009 through early 2010. During that time, the Respondent employed two chefs, two sushi chefs, four waiters and four

⁴ Counsel for the Acting General Counsel filed with her brief a motion to correct the transcript in accordance with a stipulation signed by both counsel. I shall grant the motion and the transcript shall be corrected as outlined in Appendix A.

⁵ Yong Feng Wang and Xiu Hui Weng are often referred to in the record as Yi Feng and Yi Hui.

delivery workers. The alleged discriminatee, Wen Dong Lin was one of the delivery workers. The evidence in the record reveals that many of the employees, not including Lin, were related to the owner’s wife in some fashion. In addition to these employees, a woman identified in the record as “Alice” or “Agnes” also worked there as a cashier.

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The parties stipulated that Wen Dong Lin was employed by the Respondent on two separate occasions. The first was from June 2005 until about September 2006. Lin testified that his first period of employment ended when his boss at the time, Yi Xiang Cao, told him not to come back to work the next day. There is no evidence in the record showing what, if anything, preceded this termination. He returned to work in January 2008 as part of a settlement of the wage and hour litigation to be discussed, and continued to work at the restaurant until the incident at issue here. Time cards and testimony show that his last day of work was January 11, 2010.

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In 2007, Wen Dong Lin joined with five other employees of the Respondent to file a lawsuit under the Fair Labor Standards Act (FLSA) alleging that the Respondent failed to pay them minimum wages and overtime as required by the statute.⁶ The employees were assisted in filing this lawsuit by the Chinese Staff and Workers Association, an organization that has been active in pursuing such lawsuits on behalf of employees working for Asian restaurants in New York City. On August 10, 2008, the lawsuit was settled with the Respondent agreeing to reinstate the named plaintiffs and to pay them \$210,000 plus \$10,000 in legal fees.⁷ The settlement agreement contained the following provision regarding retaliation:

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Defendants shall not take any material actions adverse to Plaintiffs on account of the Plaintiffs’ participation in this lawsuit or for their prior complaints about wages and working conditions. Any material adverse employment action not made for good cause will be deemed to be retaliation in violation of this Agreement. The following actions, if taken by Defendants within 12 months after the Effective Date, are examples of actions that will be deemed to be retaliatory regardless of whether good cause is alleged: Defendants’ sale of any Kawa restaurant at which any Plaintiff is employed if Plaintiff cannot continue his employment at another Kawa location; Defendants’ reduction of their delivery workforce below four (4) full-time delivery workers at the Kawa location at 24 Eight (sic) Avenue, New York, NY 10014; or Defendants’ failure to continue to pay each Plaintiff a gross wage equivalent to at least \$1200 per month for 40 hours of work per week. Within the 12 months after the Effective Date, defendants also agree not to divert delivery orders from any Kawa location at which a Plaintiff is employed to any other Kawa location, and further agree that the Plaintiffs will be guaranteed an average of at least forty-five (45) deliveries per full day shift during each work week. **In the event that Defendants terminate a Plaintiff’s employment without good cause, such Plaintiff will be**

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⁶ The other plaintiffs were Hong Sheng Han, Tian Wen Ye, Xiao Xiao Lian, Li C. Chen and Cai Shuang Chen.

⁷ Although the settlement agreement was not signed until August 2008, the Respondent reinstated Lin and two other plaintiffs in January 2008.

entitled to recover liquidated damages in the amount of \$40,000, and all other remedies available under this Agreement or at law. (emphasis added)

5 As noted, only three of the named plaintiffs accepted reinstatement as part of the
settlement of the lawsuit, i.e. Wen Dong Lin, Tian Wen Ye and Li Chuan Chen. Because the
Respondent needed four delivery workers to satisfy the terms of the agreement, Lin, Tian and
Chen recruited De Quan Lu, an acquaintance at the Association, to come work for the
Respondent. Lu had not been involved in the lawsuit and had never worked for the
10 Respondent. The four delivery workers pooled tips with Tian Wen Ye being responsible for
splitting the tips.

On October 22, 2009, the Respondent fired Tian Wen Ye. The record is not clear
regarding the circumstances surrounding the termination. Tian Wen Ye, who was subpoenaed
by the General Counsel to testify in this proceeding, professed a lack of recall regarding what
15 happened on the day he was fired. The General Counsel offered his pre-trial affidavit as a past
recollection recorded. In that affidavit, dated April 14, 2010, Tian stated that he returned to
the restaurant at 5:30 that day and found that his timecard was missing. When he asked the
boss' wife, Yi Hui, where the timecard was, she told him she had taken it and that he should
go home. When Tian asked Yi Hui why she wanted him to go home, she answered, "when we
20 asked you to make a delivery order, you didn't make it." Tian stated that he replied that he
hadn't refused, that he had been attacked and had called 911 to report it to the police and the
police had told him to stay where he was. He also told Yi Hui that one of the persons who
attacked him was her brother. According to the affidavit, Yi Hui told him it was his problem
and she didn't care. Even after being shown the affidavit, Tian Wen Ye claimed he could not
25 recall what happened that day.

Yi Feng, the Respondent's owner, testified that he terminated Tian because he refused
to make a delivery. According to Yi Feng, there was an order ready to deliver and he rang the
bell for a delivery worker to come and take the order. No one appeared. Yi Feng said he went
30 outside and found Tian Wen Ye talking on the phone. When he asked Tian to deliver the
order, Tian motioned with his hand to push him away, saying, "don't you see I'm making a
phone call." Yi Feng told Tian that the order was ready; of course he had to deliver it. When
Tian kept pushing his hand away, Yi Feng said, "if you don't deliver the order, why should I
hire you." He then went and asked Wen Dong Lin, who had just returned from another
35 delivery, to deliver the order. Yi Feng testified that later, when Tian came back into the
restaurant, he took his timecard and asked Tian to sign it, then counted the money and gave it
to Tian, telling him, "you don't deliver the order, why should I keep you."

It is not necessary for me to determine what actually happened when Tian Wen Ye
40 was fired, or whether the discharge was for cause or not, because the aspect of the unfair labor
practice charge related to his discharge was dismissed by the Region and apparently upheld
on appeal. What is at issue regarding Tian Wen Ye's discharge is the role, if any, played by
Yi Hui, the boss' wife, because the General Counsel relies upon her involvement in this
discharge as proof that she was a statutory supervisor.

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Wen Dong Lin testified that, on the day Tian Wen Ye was fired, he returned to the restaurant after making a delivery and found Tian standing outside. Tian told him that the boss was going to fire him. According to Lin, he went inside and asked Yi Feng and Yi Hui why they were firing Tian Wen Ye. Yi Feng replied that Tian Wen Ye didn't want to deliver an order. Lin testified further that Yi Hui then asked for Tian's timecard and told the cashier to calculate the money owed to Tian. Lin recalled that the cashier (Agnes or Alice) asked Yi Hui if it was necessary to call the boss, referring to Yi Feng's partner, Yi Xiang Cao. According to Lin, Yi Hui said it was and then proceeded to talk to Cao on the phone. Lin claimed that he was able to hear both sides of the conversation because Yi Hui was speaking on a cordless phone and Cao was very loud. He testified that he heard Yi Hui say that she was going to fire Tian Wen Ye today. According to Lin, Cao asked why she was firing Tian and Yi Hui replied, "I am notifying you. Isn't Kawa Sushi managed by me? I'm just notifying you I have to fire him." Lin claims he heard Cao say, "you do whatever you want." Lin testified further that he then followed Yi Feng and Yi Hui outside and saw Yi Hui hand the money over to Tian Wen Ye. He testified that something was said but he could not recall what it was.

Both Yi Feng and Yi Hui disputed this version of the events. Both denied that Yi Hui had any authority to terminate employees and denied that she was involved in the decision to terminate Tian Wen Ye. As noted above, in Yi Feng's version of the events that day, he was the one who dealt directly with Tian Wen Ye over the alleged refusal to deliver the order and he was the one who gave him his pay and told him not to come back. Tian Wen Ye was not helpful in resolving this factual dispute because he claimed no recollection of that day. Although his affidavit ascribes a primary role to Yi Hui in his termination, I cannot credit this statement over the live testimony of Yi Feng and Yi Hui, particularly where the only corroborating evidence was the testimony of Wen Dong Lin who had a financial stake in the outcome of this case. In any event, there is no dispute that Yi Feng was present when Tian Wen Ye was terminated and was involved in giving him his pay and telling him not to come back to work. I thus find the evidence offered by the General Counsel regarding Yi Hui's involvement in this discharge unreliable and insufficient to establish that she possessed or exercised supervisory authority within the meaning of the Act.⁸

There is no dispute that, after Tian Wen Ye's termination, the Union and the Association set up a picket line outside the restaurant to protest the termination and urge a boycott of the restaurant. The picketing commenced in mid-November 2009 and continued until about February 2010. The picketing usually occurred during the lunch business, between 12 noon and 2 pm. Tian Wen Ye picketed a few days a week and was usually joined by supporters from the Union and the Association. Sometimes he was alone and at other times up to ten people would be there picketing. The picketers held signs and handed out leaflets. There is also no dispute that the Respondent countered this demonstration by distributing its own flyers with the headline "Shame on you! Tian Wen Ye!", giving its version of events leading up to Tian's discharge. There is disputed evidence, to be discussed, regarding whether De Quan Lu was one of the employees distributing this flyer on behalf of the Respondent.

⁸ Even though she may not have been a statutory supervisor, the Respondent may still be liable for her statements and conduct as an apparent agent. This will be discussed in more detail later in this decision in connection with the alleged Section 8(a)(1) violation based upon Yi Hui's statements to employees.

It is undisputed that Wen Dong Lin often participated in the picketing with Tian Wen Ye while waiting for orders to deliver and that he was the only current employee of the Respondent to do so. According to Wen Dong Lin, both Yi Feng and Yi Hui asked him to pass out the Respondent’s leaflet countering Tian Wen Ye’s picketing. He recalled that they each made this request, at separate times and in separate locations in the restaurant, within a month of Tian Wen Ye’s termination. Wen Dong Lin also testified that he saw the other delivery workers, including De Quan Lu, passing out the Respondent’s leaflets. Wen Dong Lin testified that, on another occasion when he was outside the restaurant talking to Tian Wen Ye while he picketed, a waiter named Steven came out and told Lin that the boss’ wife wanted to speak to him. Lin immediately went into the restaurant and spoke to Yi Hui in the area where she packaged food for delivery. According to Lin, Yi Hui said, “if you support Tian Wen Ye, then you don’t work here.” Lin responded: “Tian Wen Ye didn’t do anything wrong. Why didn’t you hire him back.” Lin testified that Yi Hui replied that this was none of his business, to just do his own job. Wen Dong Lin also testified that he was treated differently after he began joining Tian Wen Ye on the picket line. According to Lin, he was assigned to deliver small orders and orders that were far from the restaurant, which adversely affected the amount he could earn in tips. Wen Dong Lin testified that, after Tian Wen Ye was terminated, the delivery workers stopped pooling tips and had to earn their own tips.⁹

There is no dispute that some kind of altercation occurred between Wen Dong Lin and De Quan Lu on December 1, 2009. The incident began as a dispute over who was going to deliver two orders, one going east and one going west. Lin testified that Lu took both orders to deliver. When Lin told Lu that if he took both orders, there would be nothing for him to deliver, Lu responded with a profanity referencing Lin’s mother. The two men argued for a time over the deliveries until Lu attempted to leave with both orders. After insisting that Lu apologize for the profane reference to Lin’s mother, and Lu refusing to do so, Lin attempted to grab the orders from Lu. According to Lin, Lu picked up a large stapler that was used to seal the bags for delivery and swung at Lin with it. As Lin attempted to fend off the stapler, Lu slowly sat down on the floor and then laid down. At that point, according to Lin, Yi Feng came out of the kitchen and told the cashier to call the police.¹⁰

Yi Feng testified that, although he was in the restaurant at the time, he did not see the altercation. He only saw that Lu was on the ground and that is why he had the cashier call the police. His wife, Yi Hui testified that she was not present that day. The Respondent called Lu and two other employees to testify about the incident. Lu claimed he could not remember much of what happened that day, although he did remember that Lin hit him and that he had memory and other medical problems as a result. He ultimately conceded that he had a dispute with Lin over tips which may have led Lin to hit him. At the same time, he claimed that his boss was behind the assault because of Lu’s self-proclaimed status in the Association. Lu’s testimony as to this incident and other events was not very credible. He was non-responsive to both counsels, tended to give answers to questions that were not being asked, and gave

⁹ One of Tian Wen Ye’s responsibilities before he was terminated was to collect the tips and distribute them to the delivery workers.

¹⁰ Wen Dong Lin testified that both Yi Feng and Yi Hui were present at the time of the altercation, as were the two cooks in the kitchen. Yi Hui denied that she was there.

rambling and sometimes incoherent responses. He also tended to describe events in a melodramatic fashion and was eager to portray himself as a victim.

5 The Respondent called Xin Jing Weng, one of its cooks, to testify about this incident.¹¹
Weng was in the kitchen at the time and testified that Lu and Lin were behind him separated
by some barriers so he could not really see what happened. However, he did hear them
quarrelling, using “scolding words” toward one another, and that he saw Lu fall down. On
persistent questioning by the Respondent’s counsel, he also claimed that he saw Lin hit Lu.
10 This despite his initial testimony that he was busy and not really paying much attention to
their quarrel.

Finally, on the last day of the hearing, the Respondent called Yong Di Lin back to the
stand to testify as to his observation of the incident.¹² On his second trip to the witness stand,
Yong Di Lin testified that, although he did not know who started the argument, it was over
15 deliveries. Yong Di Lin testified further that he did not see a stapler in Lu’s hands, but he did
see Wen Dong Lin hit Lu and he heard Lin say, “I can hit you whenever I want to.” Although
he claimed to be in close proximity to Lin and Lu, he did nothing to intervene or to assist Lu,
instead he grabbed the two orders that Lin and Lu had been fighting over and left to make the
deliveries.

20 There is no dispute that, after this altercation, the police arrived and, after talking to
Wen Dong Lin and De Quan Lu, both men were issued citations to appear in court. An
ambulance also came to the scene and, after paramedics examined Lu, he declined transport to
the hospital.¹³ The record is unclear exactly what happened next. Although the complaint
25 alleges that Lin was suspended as a result of the altercation, the documentary evidence
confirms that he continued to work until January 11, 2010, more than a month after he
allegedly hit Lu. At the same time, the evidence suggests that Lu did not return to work the
next day and remained out of work until February 15, 2010. Lu testified that, because of the
ailments he suffered as a result of Lin’s assault on him, he was unable to work for about a
30 month until his doctor told him he could go back to work. Even then, according to Lu, Yi
Feng did not let him return to work until after his court appearance.

The circumstances surrounding Lin’s last day at work, in January 2010, are also
unclear. Yi Feng denied that he “let Wen Dong Lin go.” He also denied firing him. According
35 to Yi Feng, he simply told Wen and Lu to settle their dispute and that they could not come
back to work until they did. Yet, he never explained why Wen Dong Lin worked for more
than a month after the fight while Lu was out of work, and what happened on January 11,
2010 that caused Lin to stop working. Even Wen Dong Lin never clearly explained what
happened on January 11 to cause him to stop working. He did say something about the boss
40 and his wife bringing him his timecard to sign and telling him that Lu had sought a lawyer to

¹¹ Weng is the cousin of Yi Hui.

¹² Yong Di Lin first testified on the third day of the trial before we adjourned for about a month.
That testimony was limited to his reciting a conversation he had with Tian Wen Ye, before Ye’s
termination, seeking money from the boss.

¹³ Contrary to the testimony of other witnesses for the Respondent, Yong Di Lin and Xin Jing
Weng claimed that they saw Lu carried out on a stretcher.

file a case against Lin and that every time someone called the restaurant asking about Lu, it affected business. According to Lin, they told him to go talk with Lu to resolve the issue and then he could come back.

5 Both Wen Dong Lin and De Quan Lu appeared before a judge, as required, on
February 1. The judge asked each man, through his attorney, if he wanted to resolve their
dispute. According to Wen, he advised the judge, through his attorney, that he did. He also
believed that Lu’s attorney had advised the judge of Lu’s desire to settle. Lu, on the other
10 hand, testified that he never agreed to settle his dispute with Lin. In any event, the charges
against both were dismissed and neither man had to pay a fine or return to court over this
incident.

15 Wen Dong Lin testified that, after his court appearance, he telephoned the boss and
told him that he had been to court and the case was settled. According to Lin, Yi Feng said
whatever the judge said was none of his business and that Wen Dong Lin and De Quan Lu
had to settle the issue between them. When Wen persisted in saying that the judge said there
was nothing between them, Yi Feng claimed he was busy and hung up. Wen Dong Lin
testified further that he went to the restaurant about two days after this phone call and spoke to
20 Yi Feng. Lin reiterated his position that the dispute had been settled by the judge and asked to
come back. Yi Feng again said that, “after the issue between you and Lu are resolved, and
then you can come back.” When Lin said that the judge had already decided the matter, what
more did Lin need to do to come back, Yi Feng replied that the judge’s decision was none of
his business, that Lin had to talk to and resolve the dispute with Lu. Yi Feng concluded the
conversation saying he was busy and telling Lin to come back in a few minutes.

25 Wen Dong Lin testified that, after his conversation, he went outside the restaurant and
saw that Tian Wen Ye was picketing. Lin joined Tian Wen Ye on the picket line for a few
minutes before returning to the restaurant to talk to Yi Feng. According to Lin, when he re-
entered the restaurant, Yi Feng said, “you have already picketed at the door, why do I hire you
30 back.” Lin testified that Yi Feng then asked him to leave and, at the same time, Yi Hui’s
younger brother also appeared and together with Yi Feng, they drove him out of the
restaurant, with Yi Feng saying, “get out, get out, our restaurant is not re-hiring you.”

35 Although Yi Feng initially testified that Wen Dong Lin never asked for his job back,
he ultimately conceded that Lin came back to the restaurant seeking his job back. Yi Feng did
not specifically deny the statements attributed to him by Lin during that visit. Yi Feng also
admitted that he did re-hire De Quan Lu in February 2010 after Lu “begged” him for a job.
According to Yi Feng, he rehired Lu to provide him an opportunity because he had no job.

40 Counsel for the Acting General Counsel also offered testimony regarding efforts by
Wen Dong Lin and representatives of the Association and the Union to resolve the dispute
between Lin and Lu, who both were members of these organizations. This testimony shows
that, although Lin was always willing to resolve his differences with Lu, Lu expressed no
interest in doing so. This evidence from the General Counsel’s witnesses is consistent with
45 Lu’s own testimony in which he indicated no desire to settle with Lin and spoke of filing a
lawsuit against him.

The Respondent also offered evidence to show that Lu was an active member of the association and Union who was held in high regard by these organizations and that Lu had been assigned to investigate the circumstances of Tian Wen Ye’s termination. This testimony, mostly from Lu himself, suggested that these organizations turned against Lu after he reported to them that Ye’s termination was justified. The purpose of this evidence was to show that the Respondent did not discriminate against Wen Dong Lin because of his status as a union member. While that might be relevant if the complaint alleged a violation of Section 8(a)(3), the complaint here only alleges that the Respondent violated Section 8(a)(1) by taking action against Lin because he engaged in protected concerted activity, i.e. by supporting another employee who was terminated.

2. *Analysis*

(a) The Section 8(a)(1) Allegations

The complaint alleges that, in or about late October or early November 2009, the Respondent threatened Wen Dong Lin with discharge if he engaged in protected concerted activity by supporting Tian Wen Ye’s picketing. This allegation is based on Lin’s testimony that Yi Hui told him, on one occasion when he was outside the restaurant talking to Tian Wen Ye while Ye picketed, “if you support Tian Wen Ye, then you don’t work here.” Yi Hui denied making this statement and no one else was identified as being present during the conversation. The Respondent also denied that Yi Hui was a supervisor or agent of the Respondent.

I have already found that the evidence offered by the General Counsel regarding Yi Hui’s involvement in Ye’s termination was unreliable and insufficient to establish her status as a statutory supervisor. Counsel for the Acting General Counsel also relied upon testimony from Lin that Yi Hui approved time off for him on one occasion and that she told Lin that she had hired two employees shortly after Ye was terminated. The testimony regarding Lin’s request for time off does not show the exercise of any independent judgment in the interest of the employer. She merely told Lin that, if he could find someone to cover his shift, he could go. When he found someone to work for him, she told him he could go. This one incident is insufficient to establish supervisory authority. With respect to the hiring of two employees, the only evidence of this is what Yi Hui allegedly told Lin. Because Lin’s testimony is uncorroborated by any other evidence, I am reluctant to rely upon it as proof of supervisory status. I thus find that the General Counsel has not met the burden of proof that Yi Hui was a statutory supervisor.

The fact that Yi Hui was not a supervisor does not end the inquiry because the Respondent would still be liable for statements she made to employees if she was its agent. The Board applies common law agency principles to determine whether a non-supervisory employee is an agent of the employer and thus whether the employee’s conduct is attributable to the employer. If the employee was acting with the apparent authority of the employer with respect to the alleged conduct, then the employer is responsible for the conduct. Under the doctrine of apparent authority, “an agency relationship is established where a principal’s

manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question.” *North Fork Services Joint Venture*, 346 NLRB 1025, 1029, fn. 17 (2006); *Fleming Cos.*, 336 NLRB 192 (2001) and cases cited therein. To determine whether the alleged agent had such apparent
 5 authority, the Board will consider “whether, under all the circumstances, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.” *Id.* See also, *D & F Industries, Inc.*, 339 NLRB No. 73 (July 14, 2003); *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998); *Delta Mechanical, Inc.*, 323 NLRB 76, 77-78 (1997).

10 Yi Hui was the wife of the Respondent’s owner. She worked in the restaurant on her own schedule and, until shortly before the hearing, did not punch a clock. There were times when her husband was not working and she would have been the only one in the restaurant with any authority. Yi Hui admitted that she signed the Respondent’s application for a liquor
 15 license and was a signatory on the Respondent’s business checking account. The fact that she gave permission to Lin to take time off is some indication that employees looked to here as someone with authority to speak and act for management. The presence of several of her relatives as employees would also convey to other employees that her status as the boss’ wife placed her in a position to affect the hiring of employees. I also note that, in the incident at
 20 issue here, Lin was summoned to come into the restaurant by another employee who told him the boss’ wife wanted to see him. Rather than ignore this request, Lin complied. His compliance indicates that Yi Hui was perceived as someone with authority over the employees. Finally, as will be discussed shortly, Yi Feng essentially ratified Yi Hui’s statement by making a similar statement at a later date. The evidence in the record,
 25 particularly her status as the wife of the owner, is sufficient to support a finding that Yi Hui was an agent of the Respondent when she made the statement attributed to her by Lin. *Emery’s Tin Shop, Inc.*, 306 NLRB 693 (1992); *Airborne Freight Corporation*, 263 NLRB 1376 (1982).

30 I find further that Lin’s testimony in this regard is more credible than Yi Hui’s denial. Although she denied making this statement to Lin, she volunteered that she said essentially the same thing to De Quan Lu, another employee. Specifically, she testified that she “joked”
 35 with Lu one time, saying: “Do you want to picket outside? You see. They picket outside. If you want to picket outside, then you don’t have to come to work today.” Whether this statement was made to Lin or Lu, it would still be a violation of the Act as it amounts to a threat of discharge for engaging in protected concerted activity. In any event, I found Yi Hui’s denial of Lin’s testimony incredible based on her demeanor. I note that, at the beginning of her testimony and for much of it, she appeared soft-spoken. However, whenever the
 40 questioning turned to Wen Dong Lin, she became animated and almost agitated, raising her voice and volunteering negative opinions about Lin as a person and a worker. Yi Hui’s open hostility to Wen dong Lin colored her testimony and rendered it unreliable.

45 Accordingly, based on the above, I find that the Respondent violated the Act as alleged when Yi Hui threatened Wen Dong Lin with discharge for supporting Tian Wen Ye’s picketing in protest of Ye’s discharge.

The complaint also alleges that Yi Feng threatened Lin with discharge for his support of Ye in early February when Lin returned to the restaurant after his court appearance and asked for his job back. This is based on Lin’s testimony that, after Yi Feng told Lin he was busy and to come back in a few minutes, Lin went outside and joined Ye as he picketed.

5 When he went back into the restaurant later, as directed by Yi Feng, Yi Feng essentially chased him out of the restaurant, saying, “you have already picketed at the door, why do I hire you back?” Yi Feng denied making this statement. The statement attributed to Yi Feng by Lin, however, is similar in phraseology to the statement Yi Feng admitted making to Ye when he fired him, i.e. “if you don’t deliver the order, why should I hire you?” This similarity
10 makes it more probable that Yi Feng would have used this phrasing than that Wen Dong Lin fabricated the statement. I thus credit Lin and find that Yi Feng in fact threatened Lin as alleged in the complaint.

(b) The Respondent’s Refusal to Re-hire Wen Dong Lin

15 The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by failing to reinstate Wen Dong Lin to his former position since about February 2010. The complaint also alleges that the Respondent suspended Wen Dong Lin on December 20, 2009 in violation of Section 8(a)(1) of the Act. The evidence establishes that Wen Dong Lin was
20 not suspended in December, after his altercation with De Quan Lu. It is undisputed that he continued to work without incident until January 11 and then, by his own testimony, was told not to come back because Lu had retained a lawyer. This evidence is insufficient to establish a violation of the Act and counsel for the Acting General Counsel concedes as much in her
25 brief.

The General Counsel’s theory of the case is that, even if the Respondent had lawfully suspended both Wen Dong Lin and De Quan Lu as a result of the December 1, 2009 incident, it violated the Act in February 2010 when it refused to reinstate Lin while reinstating Lu because the Respondent was motivated by Lin’s open support for Tian Wen Ye’s picketing
30 over his discharge. As noted previously, there is no dispute that Lin was the only employee of the Respondent to participate with Ye in the picketing of the restaurant. The Respondent, in defense, claims on the one hand that it did not refuse to reinstate Lin because he never asked for his job back. Alternatively, perhaps recognizing that the weight of the evidence and Yi Feng’s own testimony establishes that in fact Lin did seek reinstatement, the Respondent
35 argues that it made the choice to reinstate Lu and not Lin because Lin was the aggressor and Lu the victim during the December 1 altercation.

Because this case turns on the Respondent’s motivation in denying Lin reinstatement to his job, the Board’s decision in *Wright Line* establishes the test to be applied to the facts
40 here.¹⁴ Specifically, the General Counsel must show by a preponderance of the evidence that protected activity was a motivating factor in the employer’s decision to take action against the employee. Once the General counsel has met this burden, the burden shifts to the employer to show that it would have taken the same action even absent protected activity. In order to meet the initial burden, General Counsel must show that the employee engaged in activity that was

¹⁴ *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enfd. 622 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 988 (1982).

protected by the Act, that the employer was aware of this activity and that there is a causal connection between the protected activity and the adverse action. *Metropolitan Transportation Services*, 351 NLRB 657 (2007). If the General Counsel meets this burden, the employer must do more than show that it had a legitimate reason to take the action it did.
 5 It must show, by a preponderance of the evidence, that it would have taken the same action even in the absence of protected activity. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

Because there is no dispute that Wen Dong Lin joined Tian Wen Ye in his protest over
 10 Ye’s termination and because the evidence clearly establishes the Respondent’s knowledge of this activity, the General Counsel has satisfied the first two elements of a prima facie case. The Respondent’s animus toward this protected conduct is shown by the two unlawful threats made to Lin, by the boss and his wife, stating that the Respondent could not employ him if he picketed or supported Tian Wen Ye. Yi Hui’s similar statement to De Quan Lu is further
 15 evidence of the Respondent’s state of mind when it was dealing with the aftermath of the confrontation between Lin and Lu. These statements, particularly the one made by Yi Feng contemporaneous with his response to Lin’s request for reinstatement, are sufficient to meet the General Counsel’s burden of proof. *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162, 1162 fn. 2 (2005).

The Respondent attempted to show that it would have taken the same action even
 20 absent Lin’s support of Ye by showing that Lu was also an active member of the Union and Association whom the Respondent believed had been sent to work in its restaurant to monitor the Respondent’s compliance with the settlement agreement. When faced with a dispute
 25 between two active union members, the Respondent tried to avoid problems with the Union by sending both workers home until they settled their dispute. When the charges against both men were dropped and the Respondent was faced with having to make a choice whom to take back, the Respondent chose Lu because he was “the victim” in the December 1 altercation. This theory is not entirely supported by Yi Feng’s testimony.

Yi Feng at first testified that he did not reinstate Wen Dong Lin because Lin never
 30 asked for his job back. Yi Feng ultimately admitted that he was aware of Lin’s desire to return to work. This internal contradiction in his testimony raises doubt’s about the general credibility of Yi Feng’s testimony. Yi Feng also testified that he took Lu back because Lu
 35 “begged” for his job and Yi Feng wanted to give him an opportunity because Lu had no job. Yi Feng never specifically said that he chose Lu over Lin because he perceived Lu to be a victim of Lin’s alleged aggression. In fact, Yi Feng had testified that he did not witness any assault by Lin. All he saw was Lu sitting on the ground. He did not know how he got there. Yi
 40 Feng was also aware that both men were issued summonses to appear in court. So he could not have believed that Lu was a mere victim. In fact, Yi Feng testified that he did not want Lu and Lin working together until they settled their dispute. The fact that he kept Lin working as a delivery worker while Lu was out for medical reasons suggest that Yi Feng was not too concerned with Lin’s alleged aggression toward Lu. Rather, his main concern, as expressed in
 45 his testimony, was to avoid problems with the Union and the Association. Because the Respondent’s asserted reasons for its treatment of Lin, vis a vis Lu, do not withstand scrutiny, I find that these reasons are a pretext to hide the true motivation behind the Respondent’s

refusal to reinstate Lin. The motivation, as explicitly stated to Wen Dong Lin by both Yi Feng and his wife, was Lin’s support for Tian Wen Ye. The Respondent’s refusal to reinstate Wen Dong Lin in February 2010 thus violated Section 8(a)(1) of the Act.

5 (c) The Alleged *Johnnie’s Poultry* Violation

10 As noted at the beginning of this decision, counsel for the Acting General Counsel amended the complaint at the hearing to allege that the Respondent violated Section 8(a)(1) of the Act, during preparation for the hearing, by Yi Feng interrogating employees about their union activities and sympathies and the union activities and sympathies of other employees without giving them assurances against reprisal as described in the Board’s decision in *Johnnie’s Poultry*, supra. In support of this allegation, counsel for the Acting General Counsel relies on the testimony of De Quan Lu and Yi Feng regarding their conversation that led to Lu’s appearance as a witness in this hearing.

15 On cross-examination by counsel for the Acting General Counsel, Lu testified that Yi Feng asked him to speak to the Respondent’s attorney but did not tell Lu that he did not have to speak to her. When asked specifically what Yi Feng said to him, Lu testified that Yi Feng just said “the attorney asked you to testify and you go to the court to testify.” Lu testified 20 further that he did not meet with the attorney until he came to the Regional Office on the day of the hearing.¹⁵ Lu did not testify that Yi Feng asked him any questions about either his own or any other employee’s protected activities.

25 Counsel for the Acting General Counsel also questioned Yi Feng about his conversations with Lu before Lu testified. When counsel asked Yi Feng how Lu knew to come to the hearing to testify, Yi Feng responded: “I just told Lu, tomorrow you need to testify. Testify for me.” When counsel asked whether Yi Feng told Lu what he meant, Yi Feng testified as follows:

30 They messed up. They messed up, and Wen Dong Lin – Tian Wen Ye and Wen Dong Lin, they didn’t do the right thing. It’s not fair. You have to do some justice. You are part of 318 and you are in charge. You have to be fair.

35 Significantly, Yi Feng did not testify that he asked Lu any questions, either about his testimony or about his or other employees’ protected activities. The only “evidence” regarding any questioning of the employees was the statement by the Respondent’s counsel that she interviewed the employees, with the aid of an interpreter, in the week before the trial. There is no evidence, nor any allegation, that the attorney interrogated employees regarding their or other employees’ protected activities.

40 The Board, in *Johnnie’s Poultry*, supra, attempted to strike a balance between a respondent employer’s need to interview employees to investigate unfair labor practice charges or prepare for trial and the right of the employees to be free of coercion in the

¹⁵ This testimony was contradicted by the representations made on the record by the Respondent’s counsel that she interviewed Lu and the other employee witnesses, through an interpreter, at the restaurant.

exercise of their statutory rights. The Board in that case set forth a list of assurances that an employer or its legal representative had to give any employee before questioning them about union or other protected activities. An employer must (1) communicate to the employee the purpose of the questioning; (2) assure the employee that no reprisal will take place; (3) obtain the employee’s participation in the interview on a voluntary basis; (4) question the employee in a noncoercive manner in a context free from employer hostility to union organization; and (5) limit the questioning to topics necessary for the purpose stated without prying into other union matters, eliciting information concerning an employee’s subjective state of mind or otherwise interfering with the statutory rights of employees. 146 NLRB supra at 775.

The evidence relied upon by the Acting General Counsel to prove the alleged *Johnnie’s Poultry* violation is insufficient. Specifically, neither Lu nor Yi Feng ever testified that Yi Feng “interrogated” Lu regarding any activities protected by the Act. There is nothing in the record to contradict their testimony that Yi Feng merely told Lu to appear and testify. There was no testimony elicited regarding what, if anything, the Respondent’s counsel asked Lu in preparation for his testimony. Absent such evidence, I cannot find that an unlawful interrogation took place. Accordingly, I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. By threatening employees with discharge if they engaged in protected concerted activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By refusing, since in or about early February 2010, to reinstate Wen Dong Lin to his former delivery job because he engaged in concerted activities that were protected by the Act, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. The Respondent has not violated the Act in any other manner alleged in the amended complaint.

REMEDY

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

The Respondent, having unlawfully refused to rehire Wen Dong Lin, must offer him reinstatement to his former position and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8

(2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

5 The Acting General Counsel, in the amended complaint and on brief, has requested, as
an additional remedy, that the Respondent be ordered to reimburse Wen Dong Lin for the
difference in taxes owed upon receipt of a lump-sum payment and the taxes he would have
owed had there been no unlawful discharge. The Acting General Counsel also seeks an order
requiring that the Respondent submit to the Social Security Administration the appropriate
10 documentation so that Lin’s back pay, when paid, may be allocated to the appropriate
quarters. The Acting General Counsel argues that failure to include such provisions
effectively deprives a discriminatee of restoration of the status quo ante, the goal of the
Board’s remedial authority. Thus, the payment of a lump-sum back pay award will likely put
a discriminatee in a higher tax bracket than he would have been had he not been terminated
and had earned the back pay in the normal course of his employment. According to the Acting
15 General Counsel, when the Board previously considered and rejected such a remedial
provision, federal and many state income tax laws permitted income averaging in such
circumstances. As a result, the Board felt it unnecessary to include the relief sought here. See
Hendrickson Bros., Inc., 272 NLRB 438 (1985), enf. 762 F.2d 990 (2nd Cir. 1985); *Laborers
Local 282 (Austin Co.)*, 271 NLRB 878 (1984). In the years since the Board decided those
20 cases, Congress repealed income averaging and many states have followed suit. The Board
has not addressed the issue since the repeal of income averaging. While the Acting General
Counsel makes a persuasive argument in support of inclusion of a tax component in the
Board’s back pay orders, I shall not include it here. Such a change in the Board’s standard
remedy is best determined by the Board.

25 On these findings of fact and conclusions of law and on the entire record, I issue the
following recommended¹⁶

30 ORDER

The Respondent, Kawa Sushi Inc. a/k/a Kawa Sushi 8 Avenue Inc. d/b/a Kawa Sushi
Restaurant, New York, New York , its officers, agents, successors, and assigns, shall

35 1. Cease and desist from

(a) Threatening employees with discharge if they engage in protected concerted
activities.

40 (b) Refusing to reinstate employees who engage in protected concerted activities.

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

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the
findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be
adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

5 (a) Within 14 days from the date of the Board’s Order, offer Wen Dong Lin full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

10 (b) Make Wen Dong Lin whole for any loss of earnings and other benefits suffered as a result of the unlawful refusal to reinstate him in February 2010, in the manner set forth in the remedy section of the decision.

15 (c) Within 14 days from the date of the Board’s Order, remove from its files any reference to the unlawful refusal to reinstate Wen Dong Lin, and within 3 days thereafter notify Lin in writing that this has been done and that the refusal to reinstate him will not be used against him in any way.

20 (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.

25 (e) Within 14 days after service by the Region, post at its facility in New York, New York copies of the attached notice marked “Appendix B”¹⁷ in both English and Chinese. Copies of the notice, on forms provided by the Regional Director for Region 2, 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
30 to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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,
35 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 November 1, 2009.

40 (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.

17 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.”

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

5 Dated, Washington, D.C. September 19, 2012

10

Michael A. Marcionese
Administrative Law Judge

15

APPENDIX A

Corrections to the Transcript

1. p. 104 line 7, from “when *he* had to ask Yi Feng and Yi Hui” to “when *I* had to ask Yi Feng and Yi Hui”.
2. p. 122 line 6 -7, from “I said fuck you, what does that have to do with you,” to “He said fuck you, what does that have to do with you.”
3. p. 125 line 1, from “then *she* slowly sat down and lay on the floor” to “then *he* slowly ...” (“he” was referring to De Quan Lu.)
4. p. 205 line 25, “Okay. But you were a member of the Union when the case was settled, weren’t you?”
5. p. 499 line 11, from “118 Mulberry Street” to “180” Mulberry Street.
6. P.532, lines 14, and 15 from “. . . and then he fell down and then grabbed delivery and then left” to “and then he fell down and then *I* grabbed delivery and then left.”
7. p. 544, line 11, from “118 Mulberry” to “180” Mulberry.
8. p. 571, line 13, from “Yi Xiang” to “Xin Jin”
9. p. 594, lines 21 and 22, from “Lai Lee” to “Hui Ling”
10. p. 620, line13, from “Wen Dong Lin” to “Yong Di Lin”

APPENDIX B

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 threaten you with discharge if you engage in concerted activities with other employees for your benefit and protection.

WE WILL NOT refuse to reinstate you or otherwise take action against you if you engage in concerted activities with other employees for your benefit and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Wen Dong Lin full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Wen Dong Lin whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to our unlawful refusal to reinstate Wen Dong Lin, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to reinstate him will not be used against him in any way.

KAWA SUSHI INC. a.k.a KAWA SUSHI 8
AVENUE INC. d/b/a KAWA SUSHI
RESTAURANT

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

26 Federal Plaza, Room 3614, New York, NY 10278-0104
(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.