

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

GLYPHS GARDEN INC. D/B/A SAIGON GRILL

and

**Case Nos. 2-CA-040429
2-CA-070237**

LOCAL 318, RESTAURANT WORKERS UNION

***Joane Si lan Wong and Nikhil A. Shimpi, Esqs.,
for the General Counsel.***

***Gregory Skiff and Eric Su, Esqs. (Tarter Krinsky & Drogin, LLP),
New York, NY, for the Respondent.***

Yvonne Brown, Esq. (Spivak Lipton, LLP), for the Union.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge and an amended charge filed in Case No. 2-CA-040429 on March 25, and May 24, 2011, respectively, and based on a charge and an amended charge filed in Case No. 2-CA-070237 on December 6, 2011, and on February 29, 2012, respectively, all filed by Local 318 Restaurant Workers Union (Union), a complaint was issued against Glyphs Garden Inc. d/b/a/ Saigon Grill (Respondent or Employer) on March 30, 2012.

This case involves employees who make deliveries of the Respondent's food products to customers in their homes. The complaint alleges that the Respondent threatened its employees (a) with discharge if they protested their working conditions including the work schedule and for protesting their terms and conditions of employment (b) that it would close its business if the Union became the delivery employees' collective-bargaining representative and (c) that it would be futile to select the Union as their bargaining representative. The complaint also alleges that the Respondent (a) interrogated its employees about their concerted decision to share tips and (b) promised its delivery employees more hours of work if they ceased engaging in the concerted activity of sharing tips. It is further alleged that the Respondent permitted the posting of a drawing on its front restaurant window which communicated a threat of physical violence to employees for protesting terms and conditions of employment.

It is also alleged that the Respondent unlawfully failed and refused to offer additional hours of work to tip-poolers Guo Zhong Wu and Rong Zheng because they concertedly decided to share their tips. Finally, it is alleged that the Respondent laid off Wu and Zheng because they concertedly decided to share their tips, because they supported the Union, and because they participated in NLRB proceedings. It is also alleged that the Respondent laid off Cheng Hui Li and Fa Kai Lin in order to conceal the layoffs of Wu and Zheng, and in furtherance of its discriminatory layoffs of Wu and Zheng.

The Respondent's answer denied the material allegations of the complaint, and on July 31, and August 1, 2, and 6-10, 2012, a hearing was held before me in New York, NY.¹ Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the brief filed by the General Counsel, I make the following:²

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Findings of Fact

I. Jurisdiction

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The Respondent, a restaurant serving Thai cuisine located at 620 Amsterdam Avenue, New York, NY, annually derives gross revenues in excess of \$500,000, and annually purchases and receives food and beverages, including alcoholic beverages, valued in excess of \$5,000 directly from Empire Merchants, an entity doing business in New York and New Jersey, and which purchases its supplies from points directly outside New York State. The Respondent admits and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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II. Labor Organization Status

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The Respondent denied the labor organization status of the Union. Nelson Mar, the president of the Union since 2003, testified that the Union maintains an office which it shares with the Chinese Staff and Workers Association (CSWA). The Union's purpose is to represent its members in "collective action, in their efforts to try to improve the working conditions in the workplace....." He also stated that the Union exists in part for the purpose of dealing with employers concerning working conditions, grievances, labor disputes, wages, rates of pay or hours of employment.

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At the time of the hearing, the Union has represented employees in at least two restaurants. The Union has filed LM-3 reports with the U.S. Department of Labor. The Union has an office, a constitution and bylaws, and has elected officers. Its membership is open to anyone who is working in the restaurant industry.

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On December 17, 2010, the Regional Director for Region 2 issued a Decision and Direction of Election following a hearing in a matter involving the Respondent and the Union. An election was directed in a unit of delivery workers, the unit involved herein. One of the issues in the hearing in that case was the labor organization status of the Union. One of the findings set forth in the Direction of Election was that the Union was a labor organization. No appeal was filed to the Direction of Election. I accordingly find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.³

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¹ Following the close of the hearing, pursuant to a procedure agreed to during the hearing, I received certain General Counsel exhibits in evidence. The Respondent made certain objections to some of the documents. Permission was granted to the parties to make arguments concerning those documents in their post hearing briefs.

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² The General Counsel's unopposed motion to correct the transcript is granted.

³ The Respondent attempted to prove that CSWA and the Union are one entity which acted collectively to destroy the Respondent. No credible evidence has been adduced in support of this theory.

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III. The Facts

A. Background

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1. Prior FLSA Litigation

10 In 2007, a lawsuit was brought by certain delivery employees against the Saigon Grill pursuant to the Fair Labor Standards Act. A judgment was rendered in the amount of about \$4.6 million in favor of the employees. At about the same time, the Board issued its Decision in a case awarding backpay and reinstatement to the workers.

An Agreement dated July 21, 2009 was received in evidence. It states as follows:

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This is to advise all SAIGON coworkers that you shall acknowledge and sign the following agreement:

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1. According to a judgment by the Federal Court, SAIGON must compensate its workers for their wage losses in the amount of \$4,600,000 in this civil case.

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2. The National Labor Relations Board requires SAIGON to compensate the laid-off workers for their time loss in the amount of \$800,000. The compensation to the 4 recalled workers for their time loss is \$30,000.

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3. Outcomes of consultations among the federal Court Judge, the civil litigation attorney of SAIGON’s workers, the National Labor Relations Board, the lawyer of Hispanic coworkers, the representatives of SAIGON workers, the representative of Union 318, the owner of SAIGION and his lawyer are as follows:

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4. As to the judgment of \$4,600,000 from the civil law suit, the negotiated and agreed amount is \$2,650,000 to the SAIGON workers, \$65,000 as lawyer fees, and \$35,000 to the Hispanic workers.

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- The money for the SAIGON workers in the amount of \$2,650,000 will be distributed to the workers according to the original per centage provided in the Judge’s decision.

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- When workers receive the check, they shall proceed according to what was committed previously, i.e., 30% of \$2,650,000 received from the civil case compensation shall be contributed as donations.

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5. The total amount from the 2 cases of the National Labor Relations Board is \$250,000 which will be proportionally distributed to the 22 laid-off workers who, in turn, will contribute 10% of that amount to the workers’ union.

The letter has spaces for the signatures of 36 employees. Xin Wei Lin, a member of the CSWA, testified that he signed the document. He stated that the Respondent owes him \$1

million. He was told by the Union’s agents that when he receives that money he has to return part of that sum to the CSWA.

2. The Purchase of the Respondent and its Operation

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A promissory note dated September 30, 2010 and signed by president Qiao Lin, states that Glyphs Garden, Inc., the borrower, promises to pay the lenders \$1million on September 30, 2011. Qiao Lin was identified as the brother of Bei Lin, the Respondent’s general manager. The lenders are identified as 38 individuals, one of whom, Xin Wei Lin, testified here.

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The Respondent opened its restaurant on October 1, 2010. Its general manager is Bei Lin who is also a shareholder, and according to him, is the “main person” at the Employer. He arranged the purchase of the Respondent and invested in its purchase. The Respondent employs a manager, Frank Chang, wait staff, delivery employees, a delivery head named Cheng Qin Lin, also known as “I-Bian” who arranged the orders and assigned them to the workers, cashiers, busboys and bartenders. When the Respondent opened for business, it had about 12 wait staff and about 10 delivery workers who delivered orders to customers by foot, bicycle or motorcycle.⁴

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Bei Lin testified that he purchased the restaurant from the Union, and he discussed the matter with Wing Lam, an official of the Union. Bei Lin stated that Lam suggested that all the delivery employees from the predecessor restaurant be rehired. Bei Lin agreed, but did not agree to rehire the waiters.

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The Respondent’s answer denied that Bei Lin was its president and statutory supervisor. The evidence establishes that Bei Lin purchased and owns the Respondent . I find and conclude that he is a supervisor of the Respondent pursuant to Section 2(11) of the Act.

B. Supervisory Status of Frank Chang

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Chang gave inconsistent testimony regarding his official capacity with the Employer. He first testified that he was never a shareholder in the Respondent, but then, in his pre-trial affidavit, he stated that he was the general manager of the Respondent and a minority shareholder therein.

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Frank Chang became the manager of the Respondent when it opened in October, 2010. He supervises the waiters, delivery employees, cashiers, busboys and bartenders. He sets the work schedules for the delivery employees.

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Regarding hiring, he stated that he does not hire or discharge workers, but he makes a recommendation to Bei Lin and communicates the decision to the employee. In this connection, he reviewed application forms received from applicants and interviewed them for hire. He placed an advertisement for additional delivery employees in a Chinese language newspaper.

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Regarding discharge, Chang stated that Bei Lin asked for a list of people to lay off because business was failing, and Chang compiled such a list. He also communicated to the workers Bei Lin’s decision as to termination.

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Chang was present at the Board for a hearing on the Union’s election petition on

⁴ All references to “employees” or “workers” hereafter will be to the delivery employees.

November 2, 2010. He signed an important Stipulation in the representation case on December 7, 2010 on behalf of the Employer, in which he stated the duties of certain employees, and identified who supervised them.

5 The evidence is clear that Chang, the main manager of the Respondent, who runs the day-to-day activities of the restaurant, is a statutory supervisor. He is involved in reviewing applications of candidates for hire, interviewing, and making recommendations for hire. He effectively recommended the layoffs of employees by giving a list of prospective layoff candidates to Bei Lin. Those recommendations were followed. I find and conclude that Chang is
10 a supervisor of the Respondent pursuant to Section 2(11) of the Act.

C. Agency Status of I-Bian

15 Chang stated in the Stipulation that he signed in the Representation case, that “the delivery workers are supervised by head delivery person, who reports directly to the manager of the restaurant.”

20 That supervisory head delivery person is I-Bian. As the head delivery person he distributes orders to the delivery people. The employees viewed I-Bian as their supervisor, as they checked with him about additional hours they wished to work, or to trade their work-days with other employees.

25 Employee Guo Zhong Wu testified that when the new schedule was issued, he asked I-Bian, “what’s happening with the work schedule here? The people who are not supposed to be working are working.”

30 Employee Wen Dong Lin stated that I-Bian monitored the attendance of the delivery employees, and that he asked I-Bian for a change of shift with another worker so that he could take the day off. I-Bian told him that if the other employee agreed with the change, he could switch his shift. Lin did not have to obtain approval from any other management person, nor did I-Bian have to check this arrangement with other management officials such as Bei Lin or Chang.

35 If the disputed employee was acting with the apparent authority of the employer with respect to the alleged conduct, then the employer is responsible for that person’s 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.” *L.B.&B. Associates, Inc.*, 346 NLRB 1025, 1029 fn. 17 (2006); *Fleming Cos.*, 336 NLRB 192 (2001). To
40 determine whether the alleged agent had such apparent 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.” *D&F Industries*, 339 NLRB 618 (2003); *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998); *Delta Mechanical, Inc.*, 323 NLRB 76, 77-78 (1997).

45 It is clear, and I find, that management officials Bei Lin and Chang placed I-Bian in a position where employees could reasonably believe that I-Bian acted in their behalf in his capacity as head of delivery. Thus, I-Bian directed employees as to their deliveries, and the workers sought instructions from him regarding their trading of shifts with other workers, and
50 also inquired of him as to why some employees were working when they were not scheduled to work. They therefore sought answers from I-Bian as the person in charge, and therefore it may be concluded that the employees could reasonably believe that I-Bian was acting with the

approval of the Employer in responding to those inquiries.

D. Employee Work Schedules and the Tip-Pooling

5 Guo Zhong Wu was hired on October 1, 2010 with about 8 other delivery workers, all of whom were referred by the CSWA. Four other delivery workers were hired within 10 days, also referred by the CSWA.

10 The workers' schedule was prepared by manager Frank Chang and Bei Lin, the owner of the Respondent. Each worker was identified on the schedule with his own letter code. The schedule provided for shifts from 11:00 a.m. to noon; 3:00 p.m. to 11:00 p.m. and 4:00 p.m. to midnight. The workers were told by Chang and Bei Lin which shift they would work. However, shortly after the schedule was posted, the workers were told to adjust the schedule as they saw fit, including exchanging shifts with each other, as needed.

15 On about October 9, 2010, the delivery workers decided to pool their tips. Wu stated that he and eight other employees decided to pool their tips so that the amount of tips between them would be equal, to ensure fairness among the delivery workers. The procedure, organized by Wu, was that each employee kept the tips that he earned from the deliveries he made until the end of the week. Wu stated that he was chosen to record the tips all the workers made. He recorded the tips at the end of the day in a book, but he also stated that each employee made his own entries. The record began to be kept on about October 9. At the end of the week, the eight workers equally divided the tips among themselves.

25 The notation made in the book each day included the code letter of the worker, the amount of tips received that day, and the number of orders delivered that day. Wu stated that since the book was kept on a rack where the delivery orders were kept, it was accessible to everyone, but he did not know if manager Chang looked at it.

30 Employee Rhong Zheng stated that in mid October, 2010, Bei Lin asked him why he wanted to pool his tips instead of keeping the individual tips that he earned. Zheng replied that he wanted "everything to be fair" and would continue to pool his tips with the other workers.

35 Wen Dong Lin testified that he arranged to change his shift with another worker. I-Bian, the delivery head, told him that if both workers agreed, they could change shifts. Similarly Rong Zheng testified that he asked president Bei Lin, if he could change shifts with another employee. Lin replied that he did not care as long as someone was there to cover the shift.

40 The Union filed a petition for an election for the delivery workers on October 13, 2010. On November 1, Wu and Wen Dong Lin testified at the NLRB hearing. Owner Bei Lin and manager Chang were present at the hearing. Wu stated that he changed shifts with Rong Zheng so that he (Wu) would be able to attend the hearing. Upon his return to the restaurant, Bei Lin asked Zheng who he changed shifts with that day. Zheng answered that he changed shifts with Wu. Bei Lin asked who gave him permission, and Zheng referred to their earlier conversation in which he was told by Bei Lin that he did not care who he transferred shifts with, as long as the work was done. Bei Lin then told Zheng that he was being warned that if he did not receive Bei Lin's permission to exchange shift the next time, he would be fired.

50 Wen Dong Lin testified that Bei Lin told him, on November 1, 2010, before he went to the Board to give his testimony, that there have been protests for three years at the restaurant and that he is not afraid. Bei Lin said that he would work until the restaurant closes. Following his return from the Board, Bei Lin told him that "we're from the same village. We're related. Why did

you go to the Labor Board? There was a protest for two to three years already. I'm not afraid of the union. At the worst situation I will just close the door to the business." Bei Lin denied threatening to close the restaurant because the employees sought help from the Board.

5 Wen Dong Lin stated that in early November, Bei Lin asked him how much money he could earn by pooling his tips with other employees. Lin stated that he could earn about \$1,900. Bei Lin responded that other workers were earning individual tips and asked him to think about that. "The Union is not going to guarantee your job. You think about this yourself."

10 Wen Dong Lin further testified that he saw Bei Lin and Chang speak with Xin Wei Lin, but did not hear their conversation. Xin Wei Lin came to him and said he [Wen Dong Lin] is a big shot now. Nobody would dare touch you." This conversation took place about 1½ hours after Wen Dong Lin returned to work from an NLRB hearing.

15 Bei Lin testified that he did not speak to Wu, or Xin Wei Lin, or manager Chang regarding tip-pooling. He stated that he did not care if employees pooled their tips. Similarly, Chang testified that he did not know if workers pooled their tips and he did not care if they did so. The Respondent's Policy document dated October 30, 2010 and signed by Chang states:

20 All distributions, including cash and credit card distributions, if it is deemed to be shared it should be shared together with employees of the same department. When an employee encounters employees from other departments who request sharing tips, he or she should immediately report to management department.
25 Such a request is a violation of the "Policies and Regulations" of this restaurant. Whoever involved in improper sharing of tips will be penalized, including immediate dismissal.

30 According to Chang, the above policy merely prohibited the pooling of tips between departments. In other words, kitchen employees were prohibited from sharing tips with delivery employees. Chang stated that such sharing of tips between departments did not take place.

35 I cannot credit the testimony of Bei Lin or Chang that they did not care if the employees pooled their tips. The record makes clear that employees were questioned as to whether they were engaging in tip-pooling, and, as set forth below, were promised more work hours if they stopped that practice, and were threatened with discharge if they continued to pool their tips. As set forth below, as testified by Wu and Zheng, when they asked for additional hours, Chang said that since they were tip-pooling, their current hours were the only ones he would permit them to work.

40 Employee Xin Wei Lin stated that when tip-pooling began he, along with all other workers began to pool their tips for the first few months. While he made more money at first, after three months he decided not to pool his tips because he believed that some delivery workers worked harder than others, and that it was not fair that their money was given to
45 workers who do not work as hard or who hide on rainy days rather than work. He said he felt "pressured" by the Union to pool his tips as that organization told him that tip-pooling would unite the workers. Xin Wei Lin stated that when he decided to stop pooling his tips, certain Union members were angry at him.

50 Similarly, Sheng Da Weng testified that some delivery employees would avoid making deliveries on rainy days, which affected the amount of deliveries that were made that day. In contrast, he made the same amount of deliveries on rainy days.

Zheng testified that when he pooled his tips he earned tips of about \$700 per week. However, when a number of employees stopped tip-pooling he only earned about \$350 per week. He noted that those who did not pool their tips made more money and worked more hours.

E. The Respondent Places an Advertisement to Hire Employees and a New Schedule is put into effect

Chang stated that October, 2010 was one of the best months for business. He placed an advertisement in the November 10, 2010 issue of a Chinese language newspaper which stated: “Looking to hire delivery person making delivery with bicycle and motorcycle, looking to hire several workers, plus cashier part-time...” Following the placement of the ad, five additional delivery employees were hired – one on November 10, one on November 11, one on November 15, and two on November 22.

Chang stated that he placed the advertisement because the delivery employees’ attitude toward work was poor and that they were not interested in working. Due to that attitude he had to hire more delivery workers. Chang stated that after the ad was placed, he hired about six additional delivery employees. Bei Lin testified that Chang told him that he placed the ad because customers frequently complained that their orders were not being delivered quickly enough and the solution to this problem was to hire more delivery workers. Employee Wu testified, in contrast, that he heard that, in mid November, 2010, Bei Lin told Xin Wei Lin that the Employer hired more workers in order to “force out” the people from the CSWA, reasoning that if those workers did not make enough money they would quit their jobs.

Prior to December 1, 2010, the workers’ schedule consisted of three shifts, from 11:15 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 4:00 p.m. to midnight. Zheng worked those three shifts.

After December 1, 2010, the employees’ work schedule was changed. Only two shifts were set: 11:00 a.m. to 2:30 p.m. and 5:30 p.m. to 10:00 p.m, totaling eight hours of work per employee per day, Monday to Sunday. Respondent also instituted a shift from 2:30 p.m. to 5:30 p.m and another shift from 10:00 p.m to midnight, but those extra shifts were not included in the new posted schedule.

Wu and Zheng testified that they worked the two new shifts, but did not work between 2:30 p.m. and 5:30 or 10:00 p.m. to midnight. They stated that those employees who did not support the Union, and those who did not pool their tips were permitted to work those hours.

Wu stated that the new schedule only applied to the workers who pooled their tips. He stated that others who did not pool their tips, but who kept their individual tips did not work according to this schedule. Rather, they worked 6 days per week and also worked from 2:30 p.m. to 5:30 p.m. and 10:00 p.m. to midnight. Wu stated that he asked employees who did not pool their tips whether they worked those extra shifts and they said they did. Those workers included Cheng Qin Lin, Xin Wei Lin, Xian Hua Zhuang, and Chang Ming Zou.

F. The failure and refusal to offer additional hours of work to Wu and Zheng

The complaint alleges that the Respondent failed and refused to offer additional hours of work to Guo Zhong Wu and Rong Zheng because they concertedly decided to share their tips.

Although the restaurant delivered food orders until midnight, the new schedule did not list the shift which covered the period from 2:30 p.m. to 5:30 p.m. or from 10:00 p.m. to midnight.

5 Rong Zheng testified that on December 10,⁵ Bei Lin asked “why do you like to pool your tips instead of making individual tips? Why don’t you keep your individual tips?” Zheng replied that he “insists on sharing tips. I want everything to be fair.” Zheng further stated that delivery head I-Bian asked “why do you like to pool your tips together? If you make individual tips you can work more hours and you can make more money; You can work between 2.30 and 5.30 and you can also work after 10.” Zheng replied that he wanted to share tips so that it would be fair and even for everyone. “I insist on pooling tips.” I-Bian then said “then you work less hours.” This supports Zheng’s further testimony that those extra shifts were not offered to the delivery employees who were Union members or those who pooled their tips.

15 Zheng testified that a couple of days after the change in schedule, he and Wu met with Chang. Zheng told Chang that it was unfair that some employees worked from 2:30 p.m. to 5:00 p.m. and from 10:00 p.m. to midnight, while he and others did not. He also accused Chang of discriminating against him because he was in the Union. Chang replied, according to Zheng, “since you’re tip-pooling, these are the only hours I will let you work. If you want to work, work; if you don’t, leave.” Chang denied the conversation adding that Wu and Zheng did not ask him if they could work during the hours at issue, and in fact telling him that they did not want to work those hours.

25 The Respondent’s records received in evidence show a distinct pattern relating to Wu, Zheng and others who always pooled their tips and others who did not.

30 Thus, those who continued to pool their tips and did not cease tip-pooling included Wu, Zheng, Yu Guan Liu, Wen Dong Lin, and Rui Guan Xie. They did not work additional hours from 2:30 p.m. to 5:30 p.m. or from 10:00 p.m. to midnight from January 1, 2011 to August 31, 2011, and were either discharged or not on the payroll after August 19, 2011.

35 In contrast, others who did not pool their tips at all, or who ceased pooling their tips, regularly worked those additional hours. As identified by Zheng, they are Guang Den Chen, Xin Wei Lin, Chang Ming Zou, Sheng Da Weng, Xian Hua Zhuang, Hui Hua Weng, and Cheng Hui Li. It must be noted that there were two employees, Guo Rong Li, and Shu Bao Zaho, who stopped tip pooling on Nov 22, 2010 and who were assigned work for those additional hours.

40 Zheng stated that he knew that the non-tip poolers worked those additional hours because he saw them at the restaurant since he ate his meal at 2:30 p.m. He also stated that those employees who did not pool their tips worked six days per week. He knew that because, since he works only five days per week, he occasionally went to the restaurant on the sixth day and saw them at work there.

45 Similarly, Wen Dong Lin testified that he saw the non tip-poolers work the extra hours because he was at the restaurant then and saw them making deliveries. He also stated that those who pool their tips work 5 days per week, while the non tip-poolers work 6 days per week.

50 ⁵ Zheng’s pre-trial affidavit states that this conversation occurred in December, 2010, but he testified that it occurred in October. His pre-trial affidavit would tend to be more accurate since it was given closer in time to the actual event, and I will use that date for the time of this conversation.

He also stated that he saw delivery workers who did not pool their tips work after 10:00 p.m. Lin specifically saw Xin Wei Lin and Cheng Hui Li making deliveries between 2:30 p.m. to 5:30 p.m. and after 10:00 p.m.

5 In addition, Jin Ming Cao, a waiter who was not hired by the Respondent, testified that in January or February, 2011, he was outside the restaurant and saw Xin Wei Lin, Chang Ming Zou, and Zhao Yu Dong make deliveries between 2:30 p.m. and 5:30 p.m., and also after 10:00 p.m.

10 Wu testified that he kept a notebook in which he recorded the names of employees who he believed worked during the hours that tip-poolers were not assigned to shifts.⁶ He asked those employees at 2:30 p.m., the lunch period for the tip-poolers, whether they would be staying for the 2:30 p.m. shift and they said they would. Just before he left work for the day, Wu asked Sheng Da Weng why he was not leaving. Weng replied that he had to work until the store closes at midnight.

15 Wu also overheard a conversation between I-Bian, Xin Wei Lin, Xian Hua Zhuang, and Chang Ming Zou, in which they decided who would work the additional hours – 2:30 p.m. to 5:30 p.m., and 10:00 p.m. to midnight each day. Wu stated that he saw them holding their own time schedule sheets and recording names on them. They spoke about how to “take turns” working those shifts, and said that they should discuss it among themselves.

20 Significantly, manager Chang confirmed Wu’s observation. Chang testified that I-Bian discussed with delivery employees their willingness to work when work was slow, and that they could sign up with I-Bian. This confirms that the periods of time at issue were considered slow by the Respondent, and an advantage was given to those who were chosen to work at those times. He stated that he did not tell anyone that if the delivery employees stopped pooling tips he would give them extra hours.

25 Sheng Da Weng testified that after he stopped tip-pooling, he worked the hours between 2:30 p.m and 5:30 p.m. and from 10:00 p.m. to midnight. He identified six or seven others who also worked those hours, none of whom pooled their tips. Significantly Weng testified that there was a written schedule for those hours for the non tip-poolers. Wen Dong Lin testified that after he began working according to the second schedule, he asked Chang for permission to work one extra day. He began working an extra day, comprising a sixth day of work for him. Weng’s testimony confirms that a special schedule was created for the non tip-poolers. He stated that a few of his “hard working” co-workers got together to work during 2:30 p.m. and 5:30 p.m. and from 10:00 p.m. to midnight. He stated that the workers just decided to work those hours and did not ask manager Chang or I-Bian. He added that he did not think that Wu or Zheng tried to work those hours. This testimony confirms the Respondent witnesses’ belief that the tip-poolers were not hard working – seeking to avoid work, not wanting to work in the rain, and taking excessive break time. However, there was no evidence of any disciplinary waning issued to tip-poolers because they took excessive breaks.

30 Lin stated that Chang did not condition his request for an extra day of work on his decision to pool his tips or not pool his tips, adding that neither Chang nor Bei Lin ever pressured him in any way to stop tip-pooling.

35 Sheng Da Weng stated that he was not told by Chang, Bei Lin, Xin Wei Lin or I-Bian,

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⁶ G.C. Exhibit 31.

5 that he could work those additional hours if he stopped pooling his tips. Nor was he told by them that he would be discharged if he continued to pool his tips, or that they preferred him to stop pooling his tips. Indeed, Bei Lin testified that he did not tell any delivery employees who pooled their tips that if they stopped tip-pooling he would give them more work hours or an extra day of work. He added that he does not decide who works during the hours of 2:30 p.m. and 5:30 p.m. and 10:00 p.m. to close and he does not know who is responsible for deciding who works those hours, stating that the responsibility for deciding such a matter is “divided clearly. Everyone is responsible for their own department. I don’t know.”

10 Bei Lin denied threatening any delivery employee who pooled his tips that he would lose his job if they continued to pool his tips, or that he would close the restaurant if the delivery employees supported the Union or pooled their tips.

15 Wu’s testimony that he complained to I-Bian about the extra hours of work given to the non tip-poolers lends credence to Wu’s testimony. Wu stated that he asked I-Bian what was happening with the work schedule since employees who are not supposed to be working are, in fact, working. I-Bian, in a telling admission, said that it was not him – it was the manager, Frank Chang, who was responsible. Chang was called into the discussion and he defensively said that this is his own schedule, and if Wu wanted to work he should work, and if he did not want to work, he should leave.

20 Zheng testified that the delivery workers ceased pooling their tips on about November 8, 2010. They included Xin Wei Lin, Xian Hua Zhuang, Chang Ming Zou, Sheng Da Weng, Guo Rong Li, and Shu Bao Zhao.

25 Wu stated that the workers who chose not to pool their tips received an extra day of work and were permitted to work from 2:30 p.m. to 5:30 p.m. and from 10 to 12 midnight. Sheng Da Weng conceded that after he ceased pooling his tips he worked those hours five days per week. However, he stated that he did not ask Chang to work those hours. He noted that a few employees discussed working those hours and that he “took it on his own” to work those hours because he and a few other workers created a schedule containing those hours. They punched a time card. Sheng Da Weng conceded that none of the workers who worked those hours pooled their tips. He identified them as: Xia Hua Zhuang, Xin Wei Lin, Chang Ming Zou, and Guang Den Chen.

30 35 No one told Wu that they chose not to pool their tips so that they could earn more money. He also stated that no one complained that since they were making more money individually they would not benefit by pooling their tips. Weng Sheng Da testified that he stopped pooling his tips because he worked harder and made more deliveries and earned more tips than the other employees.

40 45 Wu stated that he told Cheng Hui Li, shortly after he was hired in mid-November, that all 12 delivery employees pool their tips. Wu asked if he wanted to participate in the pooling program. Li at first agreed, but then two or three days later, told Wu that the boss would not permit him to pool his tips with the other workers.

50 Wu stated that Xin Wei Lin stopped tip-pooling on November 9. Prior to Lin’s cessation of tip-pooling, he told Wu that the boss would permit him to work an extra day if he would no longer participate in tip-pooling. Three other workers, Chang Ming Zou, Sheng Da Weng, and Xian Hua Zhuang, also stopped tip-pooling at about that time. Wu stated that Zhuang told him that if he stopped tip-pooling he could work one extra day, and greater hours, from 2:30 p.m. to 5:30 p.m., and from 10p.m. to midnight. Wu added that Guo Rong Li began tip-pooling when the

others did, but stopped pooling in late November, 2010.

Wu identified those who did not pool their tips, as follows: Hui Hua Weng, Cheng Qin Lin, Yuan Chen, Fa Kai Lin, Cheng Qin Lin, Zhao Yu Dong, De Quan Lu, and Tian Wen Ye.

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Wu stated that after the seven employees stopped pooling their tips, manager Chang asked him in late November, how he would file his taxes for those employees who pooled their tips. Wu replied that taxes would be filed based on an equal amount for each worker. Wu then told Chang the names of those who continued to pool their tips: Wu, Rong Zheng, Chang Ming Zou, Sheng Da Weng, and Xian Hua Zhuang.

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G. The Layoffs of Employees

The complaint alleges that the Respondent laid off Wu and Zheng because they concertedly decided to share their tips, because they supported the Union, and because they participated in NLRB proceedings. It is also alleged that the Respondent laid off Cheng Hui Li and Fai Kai Lin in order to conceal the layoffs of Wu and Zheng, and in furtherance of its discriminatory reasons for the layoffs of Wu and Zheng. All four layoffs occurred on August 19, 2011.

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1. The Layoffs of Guo Zhong Wu and Rong Zheng

Chang stated that in late December, 2010, he became aware that the Respondent's business had decreased in value. He stated that there was an \$80,000 difference between the state of the business in one month – from late October to late November, 2010. His pre-trial affidavit states that the business' revenues dropped drastically from \$500,000 in October 2010 to less than \$400,000 in December, 2010.

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Bei Lin stated that the Respondent did not pay its rent for about three months and the landlord sued it in about August, 2011. He and Chang spoke about the need to begin layoffs of kitchen employees, delivery employees and servers due to a lack of business. Chang testified that Bei Lin told him that there were too many employees and the business is not good; the rent was not paid in the months of July, August and September, 2011. Lin asked Chang for a list of employees to lay off, but Chang's pre-trial affidavit stated that he selected the four employees to be fired.

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Chang attributed the loss of business to picketing which began in November, 2010 and continued into 2011. However, no delivery employees were laid off at that time. Rather, nine months after the picketing began, the four employees were laid off.

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Chang stated that as a result of this business loss, he laid off Guo Zhong Wu, Rong Zheng, Cheng Hui Lli, and Fa Kai Lin on August 19, 2011, and others from other departments, such as waiters, cashiers, kitchen workers and busboys. Some were laid off and others quit after Chang and the worker spoke about it.

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Wu stated that shortly after 11:00 a.m. on March 26, in preparation for a press conference which was to take place outside the Employer's premises that day, a Union member was removing a table from a truck. He called to Wu to help him lower the table to the sidewalk, and Wu did so, which took less than one minute to accomplish. At the time, Wu was on company time, but stated that there was no business in the restaurant, adding that other employees were standing outside the restaurant, smoking, reading newspapers, and playing a game with coins. He stated that prior to his receipt of a written warning no one from

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management spoke to him about the incident.

5 Wu received a “serious warning” which stated that on March 26, 2011, at 12:30 p.m.
“during the time at work, he helped the 318 demonstrators to move things.” Chang testified that,
immediately after he gave Wu that warning, he wanted to fire him for helping the Union because
he believed that his act was “very significant” because he was helping others during his work
hours, but Bei Lin said that the union is picketing and that he should not fire him at that time.
10 Chang conceded that there is no policy against talking or assisting the Union in their picketing
activities during work hours. However, there was a policy at that time – a general concept
against employees talking with others during work time, “especially if it’s a group that was trying
to damage our restaurant.”

15 Chang testified that employees who are smoking on a break or playing a game present a
poor image of the restaurant. He further stated that an employee who was on company time and
helping pickets are assisting in a practice which takes revenue from the restaurant. He added
that he is not in favor of an employee who is not on working time and who pickets because he is
assisting in a practice that takes revenue from the restaurant and “doing things for other
20 people.” He added that an employee has a right to picket against the restaurant when he is not
working but it creates a “bad image.”

The Board election was held on March 31, 2011.

25 Wu received a “final warning” concerning a delivery on June 7, 2011, which stated that
he was not polite to a customer and spoke to him about not receiving a tip for the delivery. The
customer noted a \$1.00 “delivery charge” on the bill, asking Wu if that was his tip. Wu said that
the \$1.00 charge was for making a delivery beyond the normal 30 block delivery area. The
customer asked how much his tip should be and Wu said “maybe 10%.” The customer then said
30 that his tip is \$1.00, and then complained to management.

30 Chang questioned Wu about the incident and Wu gave the same account of the event.
Chang complained that Wu asked for a tip.

35 Wu stated that in about July, 2011, accompanied by Zheng, he complained to manager
Chang and president Bei Lin. Wu asked why 30 minutes was deducted from his pay since he
occasionally works overtime and is not paid extra for such work. Chang replied that Wu
occasionally arrives late to work and leaves work early. Wu denied such conduct, explaining
that sometimes he arrives early and works in the basement and forgets to punch his card.

40 Chang replied that he would not pay Wu any more, adding that Wu can work or leave if
he does not want to work. Zheng then said that what Chang was doing was not legal, and was a
“crime.” Chang said that that was all he would pay Wu. Chang asked Wu “what do you think of
the union; I know everything that is happening in here. Nothing is going to happen to me even if
I offend he delivery people or the waiters or waitresses. If you want to work, then work. If you
45 don’t, then just walk.”

50 It should be noted that the pre-trial affidavit of Zheng, who was present during that
conversation, states that “Frank [Chang] didn’t mention the Union during this conversation.”
Zheng explained that he looked at the affidavit, and it was read to him, but he did not listen to it
all or understand it fully. Nevertheless, he stated that the affidavit was truthful.

Chang testified that no delivery employee asked him if he could work between the hours

of 2:30 p.m. and 5:00 p.m., and 10:00 p.m. to close. However, he stated that when he made the schedule with those hours, neither Wu nor Zheng was willing to work those hours, and they never tried to work those hours.

5 Zheng testified about that conversation. Wu asked why he was not paid overtime for work performed over 40 hours. Chang replied that he does not pay overtime, and that if he wanted to work he could work, and if not, he could leave. Zheng said that he was violating the labor law and unfair to the “Union people.”

10 On August 19, 2011, Wu returned from making a delivery at 9:30 p.m. when Chang told him that he “needs to lay off people” because there was no business in the restaurant. Later in his testimony, Wu denied being told that the business was not doing well, but then admitted being told that that was the reason, as well as the fact that he received a warning.

15 Wu asked how he would decide who would be laid off. Chang replied that he could choose employees who were hired last, or those who received the most warnings. Chang then told Wu that he would be laid off. Wu protested that this was unfair and discrimination, since there were other workers who offend customers⁷ and steal money from them, sleep while at work, punch in other workers’ time cards⁸, and there are those for whom customers complain but they did not get a warning for such conduct.⁹ Chang replied that Wu spoke too much, and told him not to report to work the next day, asking him “don’t you like to testify and picket?”

20 Wu’s personnel file contained a notice of “temporary layoff (beginning on August 15). The salary is terminated after August 19. If there is a need in the future, the position will be restored immediately.” The notice bears a date of August 13, 2011, and stated that the reason for the layoff is that “he was given a warning twice. One of the first to be laid off.”

25 Chang’s pre-trial affidavit stated that “in December, 2010, I have previously given “Wu a verbal warning for talking to union people picketing during working hours.” Chang conceded telling Wu “these people came and picketed and you’re talking to them while you’re working”

30 Chang testified that Wu and Zheng were laid off for poor performance and other reasons, particularly the “biggest reason, damaging the reputation of the restaurant, offending customers and fighting.” Chang denied that their layoffs were related to their decision to pool their tips. He stated that he did not care if they pooled their tips, adding that he did not know that they were doing so.

35 In contrast, Chang’s pre-trial affidavit, given on November 26, 2010, stated that “the Restaurant’s 318 delivery employees have elected to share tips and the restaurant complies with the requirement as to tips. The restaurant’s two new delivery employees have elected to keep their own tips and the restaurant complies with their requirement as to tips.”

40 Zheng testified that during his employment he spoke about the Union and a guarantee of work two to three times per week at the restaurant door leading to the sidewalk. During his

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⁷ That employee was identified by Wu as Hui Hua Weng.

⁸ Sheng Da Weng was identified by Wu as the person who slept on the job and punched in other workers’ time cards.

50 ⁹ Wu stated that in about June, 2011 he heard Chang ask Sheng Da Weng why he lied to customers and received more money from them than was due. Chang told Weng not to do that again, but no warning was given.

employment, president Lin asked him why he did not choose to keep his individual tips. Zheng replied that he wanted to share the tips with his co-workers. Lin did not mention anything about the Union. Zheng’s pre-trial affidavit states that before he joined the Union, no one in management asked him about his tips, but soon after he joined the Union, in about October, 2010, the boss, asked him why he wanted to pool his tips. He did not mention the Union at that time.

Zheng stated that Xin Wei Lin and the boss told him that he could not engage in tip-pooling. In contrast, his pre-trial affidavit states that “at no time did any of the bosses tell me that I was not allowed to pool tips.”

Zheng’s personnel file contained a warning dated April 12, 2011 that he was “impolite to the customer and the customer complained.” This was a first warning, and the warning stated that he “was issued a warning not to make the mistake again.” His file contains another warning date August 13, 2011 which stated that “he was given a warning once. The customer complained. One of the first to be laid off.” A further explanation stated “the business is bad and layoffs shall be made for the time beginning on August 20. Salary is terminated after 8/19/11. If there is a need in the future, the position will be restored immediately.”

Zheng stated that he received both warnings when he was laid off on August 19. He did not see either warning prior to that day, and no management person told him about any customer complaints received against him. Zheng also stated that he was never disciplined for lateness, and was never told he came to work late.

2. The Layoffs of Cheng Hui Li and Fa Kai Lin

As noted above, the complaint alleges that Li and Lin were laid off in order to conceal the layoffs of Wu and Zheng, and in furtherance of the Respondent’s discriminatory reasons for the layoffs of Wu and Zheng.

Li and Lin were laid off on the same day as Wu and Zheng, August 19, 2011. Neither testified at the hearing.

Zheng testified that he was filling water pitchers at the wine bar about six feet away¹⁰ from Chang and Xin Wei Lin, the substitute delivery head, who were conversing. He overheard their conversation which was undertaken with their backs to Zheng. According to Zheng, Chang said that Wu and Zheng were “very problematic.” These two people are always looking for overtime wages and union and making complaints about overtime wages and complaining to the Labor Relation Board.” Chang said “set an example for these two people first. Fire these two people first.” Zheng heard Wei say “if you fire these two from the union, they’re going to come after us and sue us. If not, fire two other people not from the union, then it would be fair.” Zheng then heard Chang ask who should be fired first. Wei recommended Fa Kai Lin, and Cheng Hui Li. Chang told Wei that those two workers and Wu and Zheng spoke about the “union matters very often.”

Zheng testified that although Chang and Lin did not see him listening to their conversation, he stated in his pre-trial affidavit that Chang nodded to him during their talk and they stopped their conversation.

¹⁰ Zheng also testified that he was about 20 to 25 feet away from the two men.

Zheng testified that later that day, Chang told him that he did not have to come to work the next day and gave him two pieces of paper. In his pre-trial affidavit, Zheng stated that Chang said in a very loud voice, “you go up to the Labor Relations Board to testify, what’s so great about you?”

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Chang testified that he laid off Cheng Hui Li and Fa Kai Lin because they were the last hired. He also stated that they said that they were returning to China. He noted that Fa Kai Lin was impolite to customers on two occasions but was not laid off for that reason, noting that Fa Kai Lin quit on his own because he was planning to return to China.

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In his pre-trial affidavit, Chang stated that Li and Lin were hired in about the middle of November, 2010 and were the last hired delivery employees. He also noted that Li was late to work three times but was fired because he was the last hired. Chang conceded that a few employees were hired at about the same time as Fa Kai Lin and Cheng Hui Li – a little before or after them.

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H. Disparate Treatment

1. Sheng Da Weng

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Zheng stated that Chang spoke to Sheng Da Weng in February or March, 2011 about a customer complaint that Weng lied to a customer so that he could get more money. Weng was ordered to return the money to the customer. Zheng knows this because he read a note written by Chang concerning the incident. Zheng also heard Chang ask Weng why his time card was punched even before he arrived at work one day. Weng is still employed at the restaurant.

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Sheng Da Weng testified that a customer gave him a \$20.00 dollar bill, believing that it was a \$10.00 bill. The customer complained to Chang that he had given Weng an extra \$10.00, and Weng returned the \$10.00 to the customer. Weng explained that the manager did not discipline him because he returned the money to the customer.

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Chang testified concerning the same incident that a customer complained that she gave Weng \$40 for a \$25 bill and he did not give her any change. Chang asked Weng what happened and Weng said that he was about to give the customer her change when she closed the door. Chang asked Weng to return \$10 to the customer and he did so. The customer told Chang that it was the customer’s fault because she closed the door, thinking that he was giving Weng the balance of the money as a tip. Chang stated that since there was a misunderstanding between the customer and Weng the incident was not his fault, and he therefore did not give Weng a warning.

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Wu testified that in about June, 2011, he heard Chang ask Weng why he lied to the customer to receive more money. Weng did not reply, and Chang told him not to do that again. Weng told Wu that he did not receive a warning for that misconduct.

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2. Xian Hua Zhuang

Zhuang was arrested by the police after he allegedly assaulted a demonstrator outside the restaurant on July 29, 2012. Employee Cao stated that Chang watched the alleged assault from insider the Respondent’s premises. No disciplinary warning was issued to Zhuang, who is still employed by the Respondent.

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I. The Demonstrations

On November 23, 2010, the employees began picketing, protests and demonstrations on the street in front of the Respondent's restaurant. The demonstrations took place Wednesday through Sunday, from 12:30 p.m. to 2:00 p.m., and from 6:00 p.m. to 8:30 p.m..

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J. The Posters

The complaint alleges that the Respondent permitted the posting of a drawing on its front restaurant window which communicated a threat of physical violence to employees for protesting terms and conditions of employment.

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It is not alleged that the Respondent posted the drawings. The evidence does not establish that the Employer posted them. Rather, the complaint alleges only that the Respondent permitted the posting of the drawings. Owner Bei Lin denied knowing who posted the pictures, and denied asking anyone to post them. but stated that he saw some of them. Similarly, manager Chang stated that he saw some of the posters on the restaurant's windows. He stated that a waiter made one of the posters and Chang warned him for doing so. A warning was issued to waiter Zheng Xin Yuan on May 25, 2011, which stated "made picture of turtle to insult 318 Union."

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He stated that the Respondent has no policy concerning the positing of employee-drawn posters on its windows. He speculated that the waiters drew the posters in reaction to the picketing. Chang testified that none of the posters were posted by the Respondent, and he did not allow them to remain posted. He noted that all the posters were removed and discarded in March or April, 2011.

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Thirteen drawings were posted on various days on the restaurant's glass windows facing the outside of the restaurant. Some were posted on some days, and others on other days. Employees testified that they saw most or all of the posters.

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Jin Ming Cao began work at the Respondent on October 1, 2010. Although he worked for only two days he engaged in protests against the Employer beginning on November 23, 2010. He stated that in December, 2010, he saw signs in the restaurant windows which were posted for more than one month. They were posted by many people including a short, chubby curly haired manager, and a waiter and waitress during the time when the protests took place and removed when the demonstrators left. He also stated that Chang stood behind the waiter or waitress when the posters were mounted. They were posted for two to three weeks from January, 2011 to April, 2011.

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Thirteen posters, all of which were received in evidence, were posted on the restaurant's windows facing outward. Some of the posters, as described below, were humiliating and some depicted scenes of violence in what they said or what they portrayed.

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Although Bei Lin and I-Bian denied asking anyone to post the pictures, and denied authorizing their posting, nevertheless, they both admitted that they were aware that the posters were affixed to the restaurant's windows. In addition, witness Cao stated that manager Chang stood nearby when the poster depicting the turtle with blood was posted.

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Cao described one 8 x 10" poster, which was received in evidence, as having a picture of a turtle with a word in Chinese meaning "criminal" or "prisoner." A knife was at the turtle's head with blood on its blade. A red box inside the turtle signified "blood." Cao explained that to Chinese people, a turtle is offensive, insulting and means that someone is a "bastard." Chinese

figures on the poster indicate “danger.” He opined that the poster represented a serious threat to the protestors. Wu described it as “scary” and “horrifying.” Chang agreed that the poster said “danger.” Wu testified that this poster and others were posted on March 26, 2011 following a press conference at which the protestors spoke.

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Other posters were described as follows: A picture of a turtle with a sign hung on the turtle’s neck with the word “prisoner” in the sign. Also the numerals “318” was in the poster; a picture of a dog with the word “prisoner” and the numerals “318” on the poster; a picture of a pig with a sign that said “prisoner” with the words “318 danger”. Cao stated that to Chinese people, a pig signifies a stupid person and a low class animal; another poster said “shame on you union 318. Discriminate non-union worker!”; another poster says “none of the protestors ever worked at Saigon Grill Rehire ?X Retaliate?X”; a poster which states “No sweatshop here. Look at Sweat-Union 318”; another poster depicts a pig holding up a sign which says “you are not a person. You don’t want respect. You don’t want any faith or shame. The pig is wearing eyeglasses.” Cao stated that one protestor each day wore eyeglasses; another poster says “Union 318. How cheeky you are! Don’t you feel guilty for destroying people’s lifes”; picture of a turtle with a sign which says “prisoner” and a word which says do not be late again.” Cao interpreted this as meaning that occasionally the protestors would arrive later than usual to the restaurant; a poster which says “shame on you Union 318 for misleading our customers”; a picture of a chicken with a sign saying “animal.” Cao explained that to Chinese people, a chicken refers to a prostitute, and, if the poster was seen by a woman, it was a serious insult. There were many women on the protest line.

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Cao stated that of often, when Chang left the restaurant, he cursed at the protestors, saying that they are not human, they are chickens, and he called the men “animals”.

Analysis and Discussion

I. The Alleged Violations of Section 8(a)(1) of the Act

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A. The Alleged Threats to Discharge and to Close the Restaurant

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In early November, 2010, an NLRB hearing was held. Employee Wu testified at the hearing at which Respondent’s owner Bei Lin was present. Employee Wen Dong Lin credibly testified about Bei Lin’s comments to him before Bei Lin went to the hearing, and employees Lin and Zheng credibly testified about Bei Lin’s comments to them after he returned from the hearing.

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Wen Dong Lin testified that Bei Lin told him, before he went to the Board to give his testimony, that there have been protests for three years at the restaurant and that he is not afraid. He said that he would work until the restaurant closes. Following his return from the Board, Bei Lin said that “we’re from the same village. We’re related. Why did you go to the Labor Board? There was a protest for two to three years already. I’m not afraid of the union. At the worst situation I will just close the door to the business.”

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Zheng exchanged shifts with employee Wu so that Wu could attend the hearing. Zheng credibly testified that when Bei Lin returned from the hearing, he asked Zheng who gave him permission to switch shifts with Wu. Zheng explained that Bei Lin, himself, had told him that he could change shifts, and that he did not care as long as the shift was covered. In fact, Bei Lin had given such blanket permission in the past to Zheng.

According to Zheng’s credited testimony which was uncontradicted, Bei Lin told him that

he was warning him that if he did not get Bei Lin’s permission the next time, he would be fired.

5 Wu testified that in July, 2011, accompanied by Zheng, he asked manager Chang why he was not paid for overtime work, and Chang replied that he does not pay overtime, adding that if Wu wanted to work, he could do so, but if he did not want to work, he should leave.

10 Bei Lin denied threatening to close the restaurant because the employees sought help from the Board. However, the fact that two employees, Zheng and Lin testified to Bei Lin’s strong negative reaction to the Board hearing lends credence to the employees’ testimony.

15 Chang’s comments to Wu that he could leave constituted an unlawful threat of discharge to Wu for his concerted complaining that he did not receive overtime wages for overtime work. *Alton H. Piester, LLC*, 253 NLRB 370, 371 (2008).

20 I find that the threat to discharge Zheng violates the Act because it was a threat to discharge an employee for facilitating another worker’s ability to attend an NLRB hearing. Bei Lin had given Zheng permission in the past to switch shifts on his own as long as both workers agreed to the trade. The only apparent reason that Bei Lin warned Zheng this time about his alleged failure to obtain permission for the switch is Bei Lin’s effort to limit Wu’s ability to attend the Board hearing. The fact that Bei Lin was present at the hearing and was in a position to observe that Wu was there lends support to Zheng’s testimony.

25 I also find and conclude that Bei Lin’s threat to Lin that he would close the business was clearly related to the Union’s efforts in the employees’ behalf. Bei Lin told Lin that he was not afraid of the Union, it had been protesting for three years and in the worse case, he would closed the business. I accordingly find that the threat to close because of the Union’s activities in behalf of the employees violated the Act. The Board has held in *D & F Industries*, 339 NLRB 618, 643 (2003), that an employer violated the Act where its supervisor warned employees that it would “close the company in order to prove he was not afraid of the union....”

30 Wu credibly testified that he asked Chang certain questions as to why he was paid less than he should have been for the number of hours he was working. Chang stated that the amount of money he was receiving was all the money he would receive, and that if he wanted to work he could do so, and if not, he could leave.

35 **B. The Alleged Threat of Futility in Selecting a Bargaining Representative**

40 The complaint alleges that the Respondent threatened employees that it would be futile to select the Union as their bargaining representative.

45 As set forth above, Bei Lin asked Wen Dong Lin how much money he could earn by pooling his tips with other employees. Lin stated that he could earn about \$1,900. Bei Lin responded that other workers were earning individual tips and asked him to think about that. “The Union is not going to guarantee your job. You think about this yourself.”

50 Bei Lin clearly transmitted the message to Wen Dong Lin that Union representation and Lin’s concerted pooling his tips with his co-workers could be detrimental to his employment status. By telling Lin that other employees were not pooling their tips but receiving individual tips, Bei Lin made it clear that Lin should not engage in the concerted activity of pooling his tips, and that he should be concerned about his job. Bei Lin left the clear impression that it would be futile to continue his interest in the Union because the Union would not guarantee his job.

“The expression of an opinion is protected by Section 8(c) of the Act, as long as it ‘contains no threat of reprisal or force or promise of benefit.’ *Park N Fly*, 349 NLRB 132, 132-133 (2007). “An employer violates Section 8(a)(1) by threatening employees that attempt to secure union representation would be futile.” *Weldon, Wilams & Lick*, 348 NLRB 822, 824 (2006). The Board has found a threat of futility where the “message imparted to the employees ... that their wages and benefits were endangered, not because of the uncertainties of the collective-bargaining process, but simply because they selected the Union as their collective-bargaining representative.” *Federated Logistics & Operations*, 340 NLRB 255, 255 (2003).

C. The Alleged Interrogation

As set forth above, Rong Zheng testified that on December 10, owner Bei Lin asked “why do you like to pool your tips instead of making individual tips? Why don’t you keep your individual tips?” Zheng replied that he “insists on sharing tips. I want everything to be fair.” Zheng also testified that I-Bian asked him why he liked to pool his tips with other workers, adding that if he made individual tips he could work more hours, make more money, and work between 2:30 p.m. and 5:30 p.m., and also work after 10:00 p.m.

In determining whether questioning of employees coercively interferes with employee rights, the Board considers such factors as whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Metro One Loss Prevention Services Group (Guard Division NY), Inc.*, 356 NLRB No. 20, slip op. at 14 (2010); *Stoody Co.*, 320 NLRB 18, 18-19 (1995); *Rossmore House*, 269 NLRB 1176, 1177-1178 (1984).

“It is well established that interrogation of employees is not illegal per se. Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights.” *Rossmore House*, above, at 1177. The Board held, there, that the employer’s questioning of open and active union supporters about their union sentiments, in the absence of threats or promise, does not necessarily interfere with, restrain, or coerce employees in violation of their Section 7 rights. 1177-1178.

It is unquestioned that Zheng is an open, vocal supporter of the Union and of the concept of tip-pooling. However, here, I find that Bei Lin’s questioning of Zheng about why he wanted to pool his tips and not keep his individual tips goes to the heart of this case – the Respondent’s resistance to its employees’ efforts to engage in concerted activity by pooling their tips. Bei Lin’s probing of Zheng as to why he wanted to pool his tips was an attempt to convince him that he should keep his individual tips, thereby interfering with his concerted activity. Moreover, the interrogation was related to Bei Lin’s later unlawful conduct against Zheng in laying him off, and the other violations set forth herein.

D. The Promise of Additional Hours of Work if Employees Ceased Pooling Tips

Zheng gave uncontradicted testimony that on December 10, I-Bian asked him why he liked to pool his tips with other workers, adding that if he made individual tips he could work more hours, make more money, and work between 2:30 p.m. and 5:30 p.m., and also work after 10:00 p.m. When Zheng replied that he wanted to share tips so that it would be fair and even for everyone and that he insisted on pooling tips, I-Bian replied “then you work less hours.”

In addition to the fact that I-Bian did not testify, thereby making Zheng’s testimony undenied, the surrounding evidence supports a finding that this unlawful promise was made to

Zheng. Thus, Zheng stated that Bei Lin made a similar comment to him, asking why he wanted to pool his tips. In addition, there was evidence, detailed above, that employees who had once pooled their tips but had ceased doing so were working between 2:30 p.m. and 5:30 p.m. and from 10:00 p.m. to midnight pursuant to the new schedule, and pursuant to an arrangement with I-Bian.

I accordingly find and conclude that I-Bian's comments to Zheng constituted a promise that if he ceased pooling his tips he would be scheduled to work more hours. A violation of the Act is established where an employer promises additional hours of work in exchange for an employee's ceasing his interest in a union. *Sewell-Allen Big Star*, 294 NLRB 312, 354 (1989); *The Freeman Co.*, 194 NLRB 594, 607 (1971). The same principle applies where an offer of more hours is made if an employee ceases his concerted activities.

E. Permitting the Posting of a Drawing on the Respondent's Window

The complaint alleges that the Respondent permitted the posting of a drawing on its front restaurant window which communicated a threat of physical violence to employees for protesting terms and conditions of employment.

As set forth above, one of the numerous posters which were taped to the window of the restaurant facing outside, bore the picture of a turtle with a word in Chinese meaning "criminal" or "prisoner." A knife was at the turtle's head with blood on its blade. A red box inside the turtle signified "blood." Cao explained that for Chinese people, a turtle is offensive, insulting and means that someone is a "bastard." Chinese figures on the poster indicate danger. He opined that the poster represented a serious threat to the protestors. Wu described it as "scary" and "horrifying." Chang agreed that the poster said "danger" and that some of the posters were humiliating to the Union and in fact issued a warning to an employee who put up one of the posters.

The Respondent argues that when its attorney demanded that any posters be removed, it did so. However, this cannot condone the Respondent's actions in permitting the posters to be affixed to its windows before that time.

It is clear that the Respondent sought to make the point that its employees' involvement with the Union would subject them to possible violence – thus the reference to a turtle and a knife with blood on the knife. By permitting and condoning the posting and maintenance of the poster which depicted violence because of their union or concerted activities, the Respondent violated the Act. *Taylor Machine Products*, 317 NLRB 1187, 1209 (1995). Further, by permitting the posting of such a poster, the Respondent appealed to the employees' "predictable and understandable fear of ... violence." *Gold Kist, Inc.*, 341 NLRB 1040, 1042 (2004).

II. The Violations of Section 8(a)(1)(3) & (4) of the Act

A. The Failure and Refusal to Offer additional hours of work to Guo Zhong Wu and Rong Zheng

As set forth above, employees who did not engage in the concerted activity of pooling their tips attempted to work the additional hours of 2:30 p.m. to 5:30 p.m. and from 10:00 p.m. to midnight. Wu and Zheng learned that other employees who were not pooling their tips were working those hours and, because they did so, made more deliveries and more money.

I credit the testimony of Zheng that I-Bian told him that if he did not pool his tips he could

work those hours. I further credit the testimony of Zheng that they told Chang that it was unfair that others worked those hours and they did not. Chang told them that since they were pooling their tips they were not permitted to work those extra ours. The Respondent's records support such testimony. Further, witnesses stated that they saw the non tip-poolers working those hours.

I cannot credit the testimony of Chang or Bei Lin that no extra hours were offered to those who did not pool their tips. The testimony of the witnesses and the Respondent's records are to the contrary.

It is clear that more hours of work were available and those who did not pool their tips were working those additional hours. The Respondent's failure to offer additional hours of work to the employees who concertedly pooled their tips constitutes a violation of the Act.

B. The Layoffs of Guo Zhong Wu and Rong Zheng

The Act protects employees who are engaged in protected, concerted activity. Here, there can be no question that Wu and Zheng were engaged in such activity by agreeing with their co-workers to pool their tips, and when they actually pooled their tips with their fellow employees.

The question of whether the Respondent unlawfully laid off Wu and Zheng is governed by *Wright Line*, 251 NLRB 1083 (1980). Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the employment actions taken. Counsel must show union activity by the alleged discriminatees, employer knowledge of such activity, and union animus by the Respondent.

Once the General Counsel has made the requisite showing, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have laid off the employees even in the absence of their union activity.

To establish this affirmative defense "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have been taken even in the absence of the protected activity." *L.B.&B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006). "The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities." *Carpenter Technology Corp.*, 346 NLRB 764, 773 (2006).

Accordingly, the Respondent may present a good reason for its actions, but unless it can prove that it would have issued such discipline absent his union activities, the Respondent has not established its defense. "The policy and protection provided by the Act does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discipline is to retaliate for an employee's concerted activities. Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for taking the action in question; rather it "must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *North Carolina Prisoner Legal Services*, 351 NLRB 464, 469 fn. 17 (2007).

Here, Wu and Zheng engaged in protected, concerted activity by pooling their tips with their co-workers. The Respondent was aware that they were pooling their tips, as is evidenced by Wu giving Chang the names of the workers who were pooling their tips, including his name and Zheng's.

I credit Zheng’s significant testimony that he overheard a conversation between manager Chang and substitute delivery head Xin Wei Lin in Chang said that Wu and Zheng were “very problematic,” they were “always looking for overtime wages and union and making complaints about overtime wages and complaining to the Labor Relation Board.” Chang said “set an example for these two people first. Fire these two first....” Further evidence of unlawful animus is Zheng’s credible testimony that later that day, Chang told him not to come to work the next day, telling him “you go up to the Labor Relations Board to testify, what’s so great about you?” Chang also told Wu that day as he was laid off, “don’t you like to testify and picket?”

In addition, the Respondent was angry at Wu for helping a 318 member move a table from a truck to the sidewalk as a press conference was being set up. Chang testified that an employee who was on company time and helping pickets was taking revenue from the company. Chang held this view even though other employees were not physically working at the time that Wu helped move the table.

Indeed, Wu received a “serious warning” for helping the “318 demonstrators to move things” and Chang testified that, immediately after he gave Wu that warning, he wanted to fire him for helping the Union because he believed that his act was “very significant” because he was helping others during his work hours. In addition he believed that the Union was a group that was trying to damage the restaurant. Chang also demonstrated his animus toward the Union when he stated that an employee not on working time who pickets the company creates a “bad image” for the company.

The Respondent’s animus was further demonstrated in the testimony of the General Counsel’s witnesses. For example, Jin Ming Cao testified that he saw Chang take photographs of the demonstrators for three to four months after the protests began. Cao heard Chang say “fuck the union” and other curse words.

Wen Dong Lin stated that in October, 2010, he overheard Chang say to co-workers, that “I hate hiring the union members to work.”

Further, Zheng testified that in late January, he heard Chang tell I-Bian “if Xin Wei Lin or Zhao Yu Dong are late, you don’t have to write down anything. The boss will ... for them. You should pay attention to the members of the union if they are late, you should write it down.” Both Xin Wei Lin and Zhao Yu Dong ceased pooling their tips.

Moreover, animus toward the Union and the tip-pooling is established in Chang’s statements to Wu and Zheng that “since you’re tip-pooling these are the only hours I will let you work” in response to their request that they work the additional hours of 2:30 p.m. to 5:00 p.m., and from 10:00 p.m. to midnight. At the same time, he threatened to discharge them, saying “if you want to work, work; if you don’t, leave.”

Further animus has been expressed by the Respondent, as found above, in threatening to discharge Zheng for switching shifts with Wu, and Bei Lin’s statement to Lin that he is not afraid of the Union and, at the worst, he would close the restaurant.

I accordingly find and conclude that the General Counsel has proven that animus toward the employees engaging in the concerted activity of tip-pooling, their support of the Union and their activities on its behalf, and Wu’s testimony at the Board and Zheng’s permitting Wu to switch shifts with him, was a substantial or motivating factor in their layoffs. *Wright Line*, above.

C. The Respondent's Defenses

5 After the General Counsel has made her showing under *Wright Line*, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have laid off Wu and Zheng even in the absence of their concerted, union and testimonial activities.

10 The Respondent set forth a number of defenses to its layoff of Wu and Zheng. First, it claims that they were laid off because of a decline in revenue. But why were Wu and Zheng chosen? Bei Lin asked manager Chang, whose animus toward the two workers is well established, for a list of workers to be laid off. Wu and Zheng were on the list.

15 Then, the Respondent argued that they were laid off for performance reasons, then because they damaged the reputation of the restaurant, offended the customers and then, for fighting. Such shifting reasons for layoff within a context of animus support a finding of discriminatory layoff. *Portsmouth Ambulance Service*, 323 NLRB 311, 318 (1997).

20 As to their layoff for alleged performance reasons, the Respondent offered two warnings given to Zheng, one in April, 2011 which states that Zheng was allegedly impolite to a customer and the customer complained, and one in August, for a customer complaint. Significantly, Zheng testified that no one in management spoke to him about any customer complaint before he was laid off.

25 Wu received a warning related to his Union activity in helping a Union member move a table, which activity lasted less than one minute. He was not spoken to by management about the incident before he received the warning. Significantly, other employees were not working at the time that Wu helped the Union member – they were outside smoking, playing a game with coins or reading a newspaper. The warning drew Chang's rage because he believed that Wu was harming the restaurant's reputation by helping the Union member.

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The second warning that Wu received related to a customer complaint regarding a \$1.00 charge for a delivery out of the prescribed area for deliveries to be made. When the customer asked if that was the tip, Wu said that it was not and suggested a tip of perhaps 10%. Wu took no money from the customer. In fact, Chang testified that the customer said that Wu was "courteous." In contrast, however, Sheng Da Weng was not disciplined for improperly taking \$10.00 from a customer and then had to return it. Accordingly, the Respondent engaged in disparate treatment of Wu in laying him off allegedly for performance issues.

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40 As to the alleged damage to the reputation of the restaurant, Chang clearly relates that to employees who picketed and Wu, who helped a Union member move a table. Such activities were performed in aid of the Union and accordingly, were protected. A layoff for such reasons are not permissible defenses.

45 Regarding their layoff for alleged fighting, there was no evidence that Wu or Zheng fought with anyone, and they were not issued warnings for doing so. In contrast, employee Xian Hua Zhuang assaulted protester and former employee and demonstrator Jerry Weng in front of the restaurant. Chang was aware of the altercation, and the police arrested Zhuang. Nevertheless, no discipline was issued to Zhuang.

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I accordingly find and conclude that the Respondent has not established that it would have laid off Wu and Zheng even in the absence of their concerted activities, their union

activities, and for Zheng’s assistance to Wu in switching shifts with him and enabling him to attend the hearing at which he testified. *Wright Line*, above.

D. The Layoffs of Cheng Hui Li and Fa Kai Lin

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The complaint alleges that the Respondent laid off Cheng Hui Li and Fa Kai Lin in order to conceal the layoffs of Wu and Zheng, and in furtherance of its discriminatory reasons for the layoffs of Wu and Zheng.

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As set forth above, Zheng testified that he overheard Chang telling Xin Wei Lin, the substitute delivery head, that Zheng and Wu would be fired as “an example” because they were from the Union.” However, Lin told Chang that if they fired the two union members, the Respondent would be sued, and suggested that two people who were not from the union be fired, which would be “fair.”

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I find, from this credited testimony of Zheng, that the General Counsel has established that Li and Lin were laid off in order to unlawfully conceal the unlawful layoffs of Wu and Zheng. *Wright Line*, above.

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Chang testified that he laid off Cheng Hui Li and Fa Kai Lin because they were the last hired. Li was hired on November 10, 2010, and Lin was hired on November 22, 2010.

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However, Chang admitted that a different employee, Zhao Yu Dong, was hired in late December, 2010, after Li and Lin, but he was not laid off before Li and Lin because he was “different” as he drove a vehicle. However, Zheng testified that he drove a vehicle with foot pedals, a motorcycle and car. In addition, Chang added a new reason for the layoff of Li and Lin. He stated that Li told him he needed a break and Lin said that he was returning to China.

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Accordingly, Chang changed his reason for laying off Li and Lin. When confronted with the fact that they were not the last hired, Chang then claimed that they requested their layoffs. Again, this demonstrates that Chang shifted his reasons for laying off Li and Lin.

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I accordingly find that the Respondent has not met its burden of proof regarding the layoff of Li and Lin. *Wright Line*, above.

Conclusions of Law

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1. The Respondent, Glyphs Garden Inc. d/b/a/ Saigon Grill, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, Local 318, Restaurant Workers Union, is a labor organization within the meaning of Section 2(5) of the Act.

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3. The Respondent has violated Section 8(a)(1) of the Act by threatening its delivery employees with discharge if they protested their working conditions, including their work schedule and for protesting their terms and conditions of employment.

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4. The Respondent has violated Section 8(a)(1) of the Act by threatening to close its business if the Union became the delivery employees’ collective-bargaining representative.

5. The Respondent has violated Section 8(a)(1) of the Act by threatening its employees that it would be futile to select the Union as their bargaining representative.

6. The Respondent has violated Section 8(a)(1) of the Act by interrogating its employees about their concerted decision to share their tips and their concerted activity of sharing their tips.

5 7. The Respondent has violated Section 8(a)(1) of the Act by promising its delivery employees more hours of work if they ceased engaging in the concerted activity of sharing tips.

10 8. The Respondent has violated Section 8(a)(1) of the Act by permitting the posting of a drawing on its front restaurant window which communicated a threat of physical violence to employees for protesting terms and conditions of employment.

15 9. The Respondent has violated Section 8(a)(1) and (3) of the Act by failing and refusing to offer additional hours of work to Guo Zhong Wu and Rong Zheng who concertedly decided to share their tips.

10 10. The Respondent has violated Section 8(a)(1), (3) and (4) of the Act by laying off Guo Zhong Wu and Rong Zheng.

20 11. The Respondent has violated Section 8(a)(1), (3) and (4) of the Act by laying off Cheng Hui Li and Fa Kai Lin.

25 12. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

25 **Remedy**

30 The Respondent having discriminatorily laid off employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also be required to expunge from its files any reference to the unlawful discharges and to notify the discriminatees in writing that this has been done.

35 The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than one year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

40 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

45 **ORDER**

50 ¹¹ 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.

The Respondent, Glyphs Garden Inc. d/b/a/ Saigon Grill, New York, NY, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Threatening its delivery employees with discharge if they protest their working conditions, including their work schedule and for protesting their terms and conditions of employment.
- (b) Threatening to close its business if the Union became the delivery employees' collective-bargaining representative.
- (c) Threatening its employees that it would be futile to select the Union as their bargaining representative.
- (d) Coercively Interrogating its employees about their concerted decision to share their tips and their concerted activity of sharing their tips.
- (e) Promising its delivery employees more hours of work if they ceased engaging in the concerted activity of sharing tips.
- (f) Permitting the posting of a drawing on its front restaurant window which communicated a threat of physical violence to employees for protesting terms and conditions of employment.
- (g) Failing and refusing to offer additional hours of work to Guo Zhong Wu and Rong Zheng who concertedly decided to share their tips.
- (h) Laying off Guo Zhong Wu, Rong Zheng, Cheng Hui Li and Fa Kai Lin because they engaged in protected concerted activities, or for their Union activities, or because they filed charges or gave testimony under the Act.
- (i) 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.

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

(a) Within 14 days from the date of the Board's Order, offer Guo Zhong Wu, Rong Zheng, Cheng Hui Li and Fa Kai Lin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days of the date of this Order, make Guo Zhong Wu, Rong Zheng, Cheng Hui Li and Fa Kai Lin whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of the employees named in the paragraph 2(a) and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them 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, 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.

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(e) Within 14 days after service by the Region, post at its facility in New York, NY, copies of the attached notice marked "Appendix."¹² 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 in English and Chinese 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 November 1, 2010.

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(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.

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Dated, Washington, D.C. April 12, 2013

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Steven Davis
Administrative Law Judge

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¹² 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."

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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 threaten you with discharge if you protest your working conditions, including your work schedule and for protesting your terms and conditions of employment.

WE WILL NOT threaten to close our business if Local 318, Restaurant Workers Union became the delivery employees' collective-bargaining representative.

WE WILL NOT threaten you employees that it would be futile to select the Union as your bargaining representative.

WE WILL NOT coercively interrogate you about your concerted decision to share your tips and your concerted activity of sharing your tips.

WE WILL NOT promise our delivery employees more hours of work if they ceased engaging in the concerted activity of sharing tips.

WE WILL NOT permit the posting of a drawing on our front restaurant window which communicates a threat of physical violence to you for protesting terms and conditions of employment.

WE WILL NOT fail or refuse to offer additional hours of work to Guo Zhong Wu and Rong Zheng who concertedly decided to share their tips.

WE WILL NOT unlawfully lay off Guo Zhong Wu, Rong Zheng, Cheng Hui Li and Fa Kai Lin because they engaged in protected concerted activities, or for their Union activities, or because they filed charges or gave testimony under the Act.

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 the Board's Order, offer Guo Zhong Wu, Rong Zheng, Cheng Hui Li and Fa Kai Lin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL within 14 days of the date of the Board's Order, make Guo Zhong Wu, Rong Zheng, Cheng Hui Li and Fa Kai Lin whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of the employees named above, and, within 3 days thereafter, notify them in writing that this has been done and that their unlawful layoff I will not be used against them in any way.

GLYPHS GARDEN INC d/b/a SAIGON GRILL

(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.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

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.