

**Dickens, Inc. and Wenqing Lin.** Cases 29–CA–29080, 29–CA–29198, and 29–CA–29254

June 10, 2010

DECISION AND ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER  
AND PEARCE

On June 8, 2009, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge’s rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.<sup>2</sup>

Introduction

This case centers on the conduct of Respondent Dickens, Inc., by its owner James Chou, in allegedly retaliating against employees Wenqing Lin and Miaona Wu because Lin had prevailed in a prior unfair labor practice proceeding against the Respondent and because Wu had cooperated with the Board’s Regional Office in its investigation of that case.<sup>3</sup>

<sup>1</sup> The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent’s exceptions assert that the judge’s rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge’s decision and the entire record, we are satisfied that the Respondent’s contentions are without merit.

<sup>2</sup> Although the judge found that the Respondent unlawfully summoned the police on June 9, 2008, to harass Charging Party Wenqing Lin, his Conclusions of Law and recommended Order and notice state that the Respondent threatened Lin with arrest. Because there is no allegation and no factual finding of such a threat, we shall modify the Conclusions of Law, Order, and notice to reflect the violation actually found.

We agree with the judge that notices to employees must be posted in Chinese as well as English. Because a significant number of the Respondent’s employees speak Spanish, we find it appropriate to order the notices to be posted in Spanish as well.

<sup>3</sup> *Dickens, Inc.*, 352 NLRB 667 (2008), *enfd.* No. 08–4073 (2d Cir. October 31, 2008) (unpublished). In that case, Wu provided an affidavit to the General Counsel, but testified at the hearing for the Respondent. In his decision, Administrative Law Judge Steven Fish found that Respondent had violated Sec. 8(a)(1) by discharging Lin because he and Wu had concertedly complained about their bonuses. In so finding, Judge Fish credited Wu’s affidavit to the Board (stating that she asked Chou about increasing the employees’ bonuses) over her later testi-

The judge found that the Respondent violated Section 8(a)(1) of the Act by falsely accusing Lin of stealing and physically threatening Chou, and by summoning the police on June 9, 2008, with a false report of a physical threat.<sup>4</sup> He also found that the Respondent violated Section 8(a)(1) by laying off Lin, and violated Section 8(a)(4) and (1) by laying off Wu. The judge dismissed other allegations that the Respondent violated Section 8(a)(1) by threatening Lin with reprisals, threatening to impose more onerous working conditions on him, subjecting him to closer supervision, calling the police on July 3, 2008, and harassing him for taking his lunch at noon. The General Counsel did not except to the dismissals of those allegations.

The Respondent excepts to the judge’s failure to take into account evidence supporting a legitimate reason for selecting Lin and Wu for layoff. As explained in part 1 below, we find merit in this exception. The Respondent also contends that the judge’s conduct of the hearing prevented it from effectively presenting its case. For the reasons discussed in part 2 below, we reject this contention.

1. The layoffs of Lin and Wu

The judge found, and we agree, that the General Counsel showed that Lin’s and Wu’s protected activity was a substantial or motivating factor in the Respondent’s decision to select them for layoff.<sup>5</sup> The burden thus shifted

mony at the hearing (stating that she did not recall making the comment). Judge Fish found the affidavit to be more reliable than her testimony, based on his finding that “she felt intimidated to testify on behalf of Respondent.” 352 NLRB at 669.

<sup>4</sup> We adopt these findings for the reasons discussed in the judge’s decision. The Respondent excepts, arguing that its owner Chou did not have an opportunity to testify about these events because the judge terminated his testimony early. For the reasons discussed in part 2 below, we reject this assertion. The Respondent also argues that, contrary to the judge’s finding, it did assert an alternative version of the facts in its cross-examination of Lin and in its answer to the complaint. However, the Respondent presented no evidence at the hearing in support of its position. Accordingly, as stated in fn. 2 above, we find no basis for reversing the judge’s crediting of Lin’s testimony.

<sup>5</sup> *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393 (1983).

In making this finding, the judge used the term “prima facie showing.” The Board prefers to describe the General Counsel’s task as “a burden of persuasion.” See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), *enfd.* 127 F.3d 34 (5th Cir. 1997) (*per curiam*), discussing *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1340 fn. 8 (D.C. Cir. 1995).

The judge found that the evidence indicated that Chou had only reluctantly reinstated Lin and then sought to harass him into quitting. Indeed, on the day Chou reinstated Lin, Chou told Lin that he intended to “f—k” him. The judge also found that Chou harbored considerable resentment regarding the prior proceedings and held a grudge toward Wu for providing an affidavit in the prior Board proceedings. The

to the Respondent to prove that it would have taken the same action even absent Lin's and Wu's protected activity.<sup>6</sup> The judge found that the Respondent did not present any evidence demonstrating that it laid Lin or Wu off for reasons apart from their protected activities. He therefore found that the layoffs were unlawful.

The Respondent argues that the judge erred in finding that it had not put forth any evidence in support of its rebuttal case, because it had referred to Lin's and Wu's language skills as a factor in the layoff. We agree with the Respondent. At trial, the Respondent questioned Wu regarding how her lack of English could affect her ability to perform the work of "order picking" (gathering greeting cards from the warehouse to fill a customer order). Wu further testified that Chou told her on the day of the layoff that he selected her because she could not speak English and because she was the highest-paid employee. (The Respondent currently does not rely on the latter reason.) The Respondent also submitted into evidence a chart, prepared at an unspecified time, rating the employees on several different skills, including their ability to communicate in English. Lin and Wu had the lowest aggregate scores and were ranked last.

Thus, the judge erred in finding that the Respondent had not presented any evidence tending to demonstrate that it would have taken the same action absent Lin's and Wu's protected activity. Rather, the Respondent contended that it selected Lin and Wu for layoff at least in part because of their lack of facility in English, and it presented some evidence in support of that contention. The judge failed to assess this evidence to determine whether the Respondent had met its *Wright Line* rebuttal burden. Accordingly, we shall sever this issue and remand this portion of the case to the judge so that he can determine whether the Respondent actually relied on Lin's and Wu's lack of fluency in English in selecting them for layoff and, if so, whether the Respondent demonstrated that it would have laid them off even in the absence of their protected activities. We emphasize that "[a]n 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 taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for

judge pointed to testimony and other evidence that Chou constantly referred to the prior Board proceedings and railed about a crossed-out portion in Wu's affidavit stating that Chou did not allow Chinese employees to eat in the lunchroom. These circumstances indicate that hostility toward Lin's protected activity and Wu's participation in Board proceedings motivated the Respondent to lay the two employees off.

<sup>6</sup> *Wright Line*, supra, at 1089.

review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

## 2. The judge's conduct of the hearing

The Respondent argues that the judge made several errors in his conduct of the trial, by forcing Chou, acting pro se for the Respondent, to proceed without crucial evidence and by placing other limitations on Chou's presentation of the Respondent's case. Contrary to the Respondent's assertions, we find that the judge acted properly and within his discretion "[t]o regulate the course of the hearing" under Section 102.35(a)(6) of the Board's Rules and Regulations. In any event, a party urging reversal of a judge's evidentiary ruling must show that the judge's error prejudiced the party's substantive rights. *Cossentino Contracting Co.*, 351 NLRB 495, 495 fn. 1 (2007). Even assuming arguendo that the judge erred in his rulings, we find that the Respondent failed to show that any such errors prejudiced it in the presentation of its defense.

### a. The covert recordings

When Lin returned to work after his initial discharge, he carried a small digital recorder in his pocket and surreptitiously taped portions of the incidents that occurred at the Respondent's facility. Before cross-examining Lin, Chou requested all the covert recordings.<sup>7</sup> After the judge ordered counsel for the General Counsel to turn over all the recordings, there initially was some difficulty in turning over to Chou via email all of the recordings in digital audio file form.<sup>8</sup> When Chou received the digital files, he discovered that he could not play them on his computer. In order to expedite the progress of the trial, the judge ordered all original, unedited recordings to be played in open court directly from the portable digital device used by Lin to make the recordings. The hearing translator provided a simultaneous translation of the Chinese portions of the recordings. When the recordings had been played, Chou continued his cross-examination.<sup>9</sup>

Contrary to the Respondent's contentions, we find that the judge acted within his discretion in conducting the

<sup>7</sup> Recordings of contemporaneous events do not qualify as statements producible under the Board's *Jencks* rule. *Delta Mechanical, Inc.*, 323 NLRB 76, 77 (1997). See Board's Rules and Regulations § 102.118(b)-(d); see also *Jencks v. U.S.*, 353 U.S. 657, 667-672 (1957) (holding that a defendant has the right to inspect, for impeachment purposes, prior statements made to government agents by government witnesses).

<sup>8</sup> Counsel for the General Counsel did not have all of the recordings in his possession and had to obtain them from Lin. Further, counsel for the General Counsel initially failed to attach one section of the recordings to his email to the Respondent.

<sup>9</sup> Counsel for the General Counsel was later able to provide Chou with a complete set of recordings on a compact disc and a transcript of the playback (with translation).

trial in this commonsense manner. Rather than delay the hearing until usable copies of the recordings could be turned over to the Respondent, the judge gave Chou immediate access to the recordings by playing them in court with a simultaneous translation. If following this procedure (which Chou did not oppose at the hearing) caused problems for the Respondent, the Respondent has not identified them. The Respondent was given the opportunity to question Lin and the Respondent's exceptions do not state how having the recordings in its possession at the hearing would have changed its cross-examination of Lin. Nor has the Respondent presented any evidence contradicting the testimony of the General Counsel's witnesses that the recordings could support. Accordingly, we find that the Respondent has not met its obligation to "state with some particularity how it has been prejudiced" by the judge's supposed errors. *Monroe Mfg.*, 323 NLRB 24, 25–26 (1997) (judge's erroneous refusal to accept tape recordings into evidence not prejudicial where respondent failed to show how judge's findings would be contradicted by material on the tapes).

*b. Wu's affidavit*

At the end of counsel for the General Counsel's direct examination of Wu, Chou requested all *Jencks* statements provided by Wu. The record indicates that counsel for the General Counsel turned over a copy of the affidavit Wu gave in this case. The affidavit apparently was written in English. Chou did not question Wu regarding her affidavit, or contemporaneously ask if there was a Chinese version of it.<sup>10</sup> It was not until the close of the hearing, well after Wu testified, that Chou requested multiple documents, including the Chinese version of Wu's affidavit.

The Respondent contends that because Wu does not speak English, there must be a Chinese version of her affidavit, and that counsel for the General Counsel improperly failed to supply a copy of that version at the hearing. We reject the Respondent's argument that any such failure violated the General Counsel's obligations under *Jencks*.

First, because no one asked whether there was a Chinese version of Wu's affidavit until immediately before the judge closed the hearing, the record does not establish whether such a version even exists.

Second, even assuming arguendo that there was a Chinese version of Wu's affidavit, we find that the Respondent waived any objection to counsel for the General Counsel's failure to turn over that version by not objecting at the appropriate time. See *Longshoremen ILA Local 20 (Ryan-Walsh Stevedoring Co.)*, 323 NLRB 1115,

1120 (1997) (respondent waived the right to request witness affidavits by waiting until well after the commencement of its cross-examination).

Finally, the Respondent has not explained how being deprived of a Chinese version of the affidavit at the hearing prejudiced its cross-examination of Wu. The Respondent has never disputed the version of events testified to by Wu. Accordingly, we find that the Respondent has failed to demonstrate that it was prejudiced in this respect. Cf. *Cossentino Contracting Co.*, supra (reversal of evidentiary ruling appropriate only when it is both erroneous and prejudicial to the party's substantive rights).

*c. Chou's testimony*

The Respondent argues that the judge erred by forcing Chou to testify before he could finish cross-examining Lin, and by terminating Chou's testimony early. We find no merit in these arguments.

We find that the judge acted within his discretion by terminating Chou's cross-examination of Lin when he did. In *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1184 (2000), the Board adopted an administrative law judge's finding that he had the discretion to cut off cross-examination when the effort had ceased to develop new evidence or possible avenues of impeachment. In this case, the record confirms that the judge was justified in halting the cross-examination of Lin because Chou was repeating his lines of questioning and pursuing irrelevant areas of inquiry.

We also find that the judge acted appropriately in directing Chou to testify at this point. Because Chou was making no headway in his cross-examination of Lin, and in order to help him present his version of the relevant facts, the judge instructed Chou to present his own testimony in narrative form, and permitted him to testify without interruption from either the General Counsel or the judge. The judge told Chou that he could take 3 hours to testify and an additional 3 hours if necessary. The judge even instructed Chou regarding which areas of testimony would be relevant.<sup>11</sup>

<sup>11</sup> Thus, the record establishes that, far from unduly restricting Chou at the hearing, the judge appropriately afforded Chou, as a non-attorney, much greater leeway in presenting his case (and in cross-examining witnesses) than would normally be given to an attorney. See *Tri-State Transport Corp.*, 245 NLRB 1030, 1030 fn. 1 (1979) (it is appropriate for a judge to give a pro se respondent greater leeway), enf. denied on other grounds 649 F.3d 993 (4th Cir. 1981). Specifically, in addition to allowing Chou greater time to testify on his own behalf and providing him with greater leeway in cross-examining witnesses, on several occasions the judge informed Chou as to the type of evidence he should seek to present in rebutting the General Counsel's allegations.

<sup>10</sup> He did question her about her affidavits in the prior case.

Unfortunately, Chou failed to follow the judge's direction to address the issues in the case, or to controvert any of the General Counsel's evidence. Indeed, the record confirms the judge's description of Chou's testimony as largely "an incomprehensible monologue." Accordingly, after Chou had testified for 4 hours, the judge cut off his testimony.

Contrary to the Respondent's exceptions, we find that the judge acted within his discretion in ending Chou's testimony. As he did in terminating Chou's cross-examination of Lin, the judge acted appropriately in limiting Chou's direct testimony because it was unlikely that any additional testimony by Chou would provide probative evidence. See *University Medical Center*, 335 NLRB 1318, 1318 fn. 1 (2001), enfd. in relevant part 335 F.3d 1079 (D.C. Cir. 2003) (judge properly placed time limits on party's case).

In any event, the Respondent does not say what evidence Chou would have attempted to introduce had he been permitted to continue to cross-examine Lin, or what Chou would have testified to had he been allowed to continue with his own testimony. Thus, the Respondent has not shown that it was prejudiced by the termination of either Lin's cross-examination or Chou's testimony.

*d. Lin's daughter*

At the hearing, Chou attempted to call Lin's daughter, Sherry Lin, to testify as to whether she edited the recordings Lin had made. The judge refused to allow Lin to testify. He reasoned that her testimony as to her interactions with the recordings was not likely to be relevant, because the original, unedited recordings had already been played in open court and Chou had not introduced any evidence to controvert either what the recordings revealed or the testimony of the General Counsel's witnesses.

Contrary to the Respondent, we find that the judge acted properly in this regard. Chou never introduced any evidence to show that the testimony of Lin and Wu was inaccurate in any material respect, even though he had personally participated in each of the events at issue. In these circumstances, we agree with the judge's reasonable determination that Sherry Lin's testimony was unlikely to yield relevant evidence. Evidence that the tape recordings had been edited or altered would not be probative in the absence of any factual dispute about their subject matter. Moreover, the original, unedited recordings were played in their entirety during the hearing, and Chou was given the opportunity to question Lin, who created the recordings. Consequently, the Respondent has not shown prejudice as a result of the judge's ruling.

In sum, we find that the judge acted within the scope of his discretion in managing the conduct of the hearing. In any event, the Respondent has not shown how it was prejudiced as a result of any of the judge's rulings. We therefore find no merit in the Respondent's exceptions regarding the judge's conduct of the hearing.

AMENDED CONCLUSION OF LAW

3. By falsely accusing Wenquing Lin of stealing and assault, and by calling the police on June 9, 2008, to harass Lin, because of his protected activities, the Respondent has violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Dickens, Inc., Commack, New York, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Falsely accusing employees of theft and assault, or calling the police to harass them, because of their protected concerted activity.

(b) 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 after service by the Region, post at its Commack, New York facility, copies of the attached notice, in English, Cantonese, Mandarin, and Spanish, marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 9, 2008.

(b) 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 at-

<sup>12</sup> 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."

testing to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations that the Respondent violated Section 8(a)(1) and (4) by laying off employees Wenqing Lin and Miaona Wu are severed and remanded to the administrative law judge for consideration as discussed in the decision above.

IT IS FURTHER ORDERED that the judge shall make the credibility determinations and factual findings necessary to resolve those issues, and that he shall prepare and serve on the parties a supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and a recommended Order concerning the allegations, as appropriate on remand. Following service of the Supplemental Decision on all the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

#### 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 falsely accuse employees of theft or assault, or call the police to harass them, because of their protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

DICKENS, INC.

*Henry Powell, Esq.*, for the General Counsel.  
*James Chou*, for the Respondent.

#### DECISION

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York, on February 18, 19, 20, 26, and 27, and March 23, 2009. These charges were filed by Wenqing Lin on July 14, September 26, and October 31, 2008. The consolidated complaint was issued by the Regional Director on December 17, 2008. It alleged as follows:

1. That on or about June 9, 2008, the Respondent by James Chou, its owner, (a) belittled and threatened employee Wenqing Lin with reprisals, (b) threatened to impose more onerous working conditions on him by assigning him to clean the warehouse, (c) subjected him to closer supervision, (d) accused him of stealing, and (e) calling the police and falsely accusing him of threatening Chou with a box cutter.

2. That on or about June 12, 2008, the Respondent by Chou, harassed Lin for taking his lunch at noon.

3. That on or about July 3, 2008, the Respondent by Chou physically assaulted Lin and summoned the police.

4. That on or about July 3, 2008, the Respondent for discriminatory reasons, laid off Lin and Miaona Wu. More specifically, the General Counsel alleges that (a) the Respondent laid these individuals off because Lin had previously prevailed in a prior unfair labor practice proceeding and (b) that it laid off Wu because she had cooperated with the Board in the investigation of the prior unfair labor practice. Among other things, Wu gave an affidavit to the Board's Regional Office. As to Lin, it is alleged that the Respondent violated Section 8(a)(1) of the Act. As to Wu, it is alleged that the Respondent violated Section 8(a)(1) and (4) of the Act.

I note that the General Counsel's theory is that Lin and Wu were discriminatorily selected for layoff. He concedes that the Company's business was slow and he therefore is not contending that some layoffs were unwarranted by business conditions.

On the entire record,<sup>1</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

#### FINDINGS AND CONCLUSIONS

##### I. JURISDICTION

There is no dispute and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>1</sup> After the hearing closed there was a set of emails and letters between Chou, Powell, the reporting service, and myself regarding corrections of the transcript. For one thing, Chou made a motion that I order the reporting service to furnish him with copies of the audio files from which the transcript was typed. I rejected that motion. Nevertheless, based on these communications, the following is noted:

On May 14, 2009, Burke Reporting LLC sent a revised transcript of the fourth day of the hearing and put in a page 504A to reflect a change that was made after listening to the recording of that day's hearing.

The General Counsel did not object to Chou's suggested change to p. 456, L. 11 and this should now read: "Embarrassing to you, not me."

The General Counsel did not object to Chou's suggested change to p. 690, L. 1 and this is changed to read: "You swallowed the other page or you wiped your ass with that page?"

After reviewing the exchange of letters regarding the General Counsel's proposed changes I make the following correction. On p. 287, the transcript should read that Chou stated: "I am a very hyper person."

On p. 435, "Paul" should be changed to "Powell." But on the same page where I am being quoted as saying, "I expected Mr. [Powell] to e-mail you all your records and he, I guess, didn't" I am not going to change the word "didn't" to "did." In this regard, I note that whether or not the proposed change is granted, it is of no consequence to the outcome of this case.

## II. THE ALLEGED UNFAIR LABOR PRACTICE

## A. Background

The Respondent is a small enterprise located in Commack, New York, where it is engaged in the wholesale distribution of greeting cards and social stationary. Its owner is James Chou. He has a number of relatives employed in the business including his mother. The Company employs a group of office people, all or most of whom are of Chinese ancestry. It also has a warehouse where it employs a number of people, some of whom are Hispanic and some, including the alleged discriminatees, are Chinese. This results in a diversity of languages spoken at the company including English, Spanish, Mandarin, and Cantonese.<sup>2</sup>

Wenqing Lin has been employed by the Respondent as a warehouse employee since August 1, 1998.<sup>3</sup> Miaona (Anna) Wu has also been employed in the warehouse since 2000. Among other things, these employees have been assigned to pick orders and to place them into boxes that later are prepared for shipment.

Lin was discharged on October 2, 2006, and this was the subject of a proceeding before the NLRB in Case 29-CA-28229 that Lin filed on March 21, 2007.<sup>4</sup> In this regard, a complaint was issued on July 17, 2007, and a hearing was held before Administrative Law Judge Steven Fish on August 21 and 22, 2007.

On December 4, 2007, Judge Fish issued a Decision wherein he concluded that the Respondent violated Section 8(a)(1) of the Act by discharging Lin because of his protected concerted activity. In essence, he concluded that Lin, along with Wu, had concertedly complained about their bonuses on September 29, 2007, and that Chou discharged Lin because of this activity.

It is noted that in the investigation of the prior case, an affidavit was taken from Wu and that Judge Fish relied on this affidavit in concluding that on September 29, 2007, she and Lin had concertedly complained to Chou about their earnings.

While not relevant to that case, Wu's affidavit contained a paragraph that she crossed out and which seems to have incensed Chou when he became aware of it after the trial concluded in August 2007. In pertinent part, this paragraph stated:

Sometime after we moved to a new office, around August 2005, James stopped allowing all of the Chinese workers, including Liu, Lin and me, to eat at the big tables in the break room.

<sup>2</sup> In a letter to the EEOC dated April 16, 2007, Chou stated that at that time he had more than 40 people in the company.

<sup>3</sup> In 2002, there was a brief break in Lin's employment. According to Chou in his testimony in a prior case, he discharged Lin and only rehired him upon the urging of Lin's wife. Lin's version was that when he was out sick, Chou did not want to take him back and wanted to hire a younger worker. Lin agrees that he was rehired when his wife interceded with Chou. In the present proceeding, Chou sought to subpoena and examine Lin about the 2002 incident. I ruled that this would be irrelevant to the present case.

<sup>4</sup> Lin also filed a charge with the EEOC and the related New York agency on February 20, 2007, alleging that the Company had discriminated against him on account of his age.

In an email to the Regional Office of the NLRB dated August 27, 2007 (5 days after the hearing), Chou stated that he was very angry and humiliated by the allegation that he had threatened employees with discharge if they requested improvements in their pay. Chou stated that his "anger came back" when he got around to reading Wu's affidavit, wherein she stated that she did not remember Chou telling Lin that he would be fired if he discussed his pay and benefits with other employees. Chou further stated that Wu told him that some of the contents of her affidavit were never asked or discussed by her in her interview with the NLRB. He asserted that Wu told him that she signed the affidavit without reading it and that she was willing to tell this to the people who interviewed her or to testify about this in court.

As noted above, Judge Fish concluded that Wu's affidavit was reliable and that it should be relied upon to show that she and Lin had complained about their bonus pay on September 29, 2006. Based on her affidavit, taken together with the testimony of Lin, Judge Fish concluded that the Respondent had discharged Lin because of his concerted protected activity. Judge Fish also concluded, based on Chou's own testimony, that it was the events of September 29, 2006, that were the cause of Lin's discharge.<sup>5</sup>

In his exceptions to Judge Fish's decision, Chou, at page 23 of his brief, talked about the statements in Wu's affidavit dealing with lunch and begins to obsess about their supposed significance. This reads as follows:

*Absurd Remarks in Wu's Affidavit, such as "James stopped allowing all the Chinese workers, including Liu, Lin and me, to eat at the big tables in the break room."*

"James stopped allowing all the Chinese workers, including Liu, Lin and me, to eat at the big table in the break room."

This statement, crossed out on Wu's May 22, 2007 Affidavit to the Board, appears on the last page with the signatures of Wu and the NLRB agent Jeffery Trigilio. If Judge Fish was not aware that Respondent's brother, sister-in-law, cousin and his wife, nephew, son and mother are all working in Respondent's office/warehouse and are all Chinese, at least Judge Fish should remember the Chinese employees, Liu, Lin, Wu, Chang and Rhee and the employer, respondent Chou, all of whom spent 2 days in court with him. If the Chinese employees were not allowed to eat in the break room, then who was allowed to eat there? Who created such a degrading and humiliating accusation? It should be obvious that somebody either fabricated this accusation, or distorted Wu's words when preparing the Affidavit. How can Judge Fish then conclude in his Decision, "I find that the affidavit supplied by Wu to the Board to be more reliable than her testimony and I rely on said affidavit as substantive evidence.

Why was this claimed crossed out and by whom?

<sup>5</sup> I note that in the earlier case, Chou had contended that Lin, during this transaction, had questioned his truthfulness. Chou also contended, but Judge Fish rejected his assertion that Lin's actions on September 29 were unprotected.

If this accusation came directly from Wu, can her other statements in the Affidavit that are disadvantageous to Respondent be as “reliable” as Judge Fish claimed?

If this accusation was fabricated or influenced by somebody in the NLRB, can Judge Fish exclude the possibility that someone from the NLRB, who knows the intricacies of the law, planted one or two crucial, but untrue statements in Wu’s Affidavit, such as “I said, if it’s so busy, can you raise our bonus to .003 of the profits?”

#### B. *Lin Returns to Work*

Subsequent to the Order in the prior case, the Respondent made an offer of reinstatement to Lin.

Lin returned to work on June 9, 2008.

On the morning that Lin returned to work, Chou held a meeting in the warehouse and spoke to the employees in English and Chinese.<sup>6</sup>

At the outset of this meeting, Chou spoke to the employees in English about the unfair labor practice charge filed by Lin and the age discrimination claim he made at the EEOC. Chou then talked about the “assertion” that he did not allow the Chinese employees to eat in the breakroom. (Recall that this is the crossed out statement that was contained in Wu’s affidavit.) Much of the remainder of this portion describes the history of his business and his competition with much larger companies. Chou stated that the company did not discriminate against Asians, Jews, blacks, etc. and would not allow such discrimination. Chou stated that when Lin returned to work, he would be treated the same as the younger workers and would be given no special treatment on account of his age. Chou again referenced the claim that he did not allow Chinese people to eat in the breakroom. At this point, Chou took the employees over to another section of the building where he posted the NLRB notice and asked all the employees to sign it.

Chou then spoke to the Chinese employees in Mandarin. During this portion of the meeting, Chou said that he would make all of the court documents available to the employees. He said that he was still in the process of appealing the NLRB case and that “we have to trust each other; it is not like we sue you, you sue me.” At one point, Chou stated; “At a certain place there was a sign that says only dogs and certain people are not allowed to come into certain areas, but in our company it says we won’t allow the Chinese worker to eat at some [sic] place. I won’t allow this to happen to our company.” Chou went on to say that he would not discriminate against anyone, that he would treat everyone the same, that he would not let older people do less work than the younger workers and that he would not give any special treatment to Chinese workers. This latter remark was directed to Lin who was asked if he understood. Lin responded that he did.

<sup>6</sup> My factual conclusions regarding this meeting and subsequent meetings involving the various parties are based on the testimony of Wenqing Lin, Miaona Wu, and a set of recordings made by Lin. With respect to the recordings, Chou has asserted and continues to assert that Lin, his daughter and the General Counsel have conspired to “cut and paste” them to his detriment. Notwithstanding that claim, Chou has not offered, by way of his own testimony or the testimony of anyone else, any alternative version of the conversations.

Immediately thereafter, Chou called Lin into his office where they had a conversation in Mandarin. This was recorded by Lin.<sup>7</sup> Initially Chou said that people had to be responsible for whatever was said in the court and that the judgment was before the court. Chou told Lin that he would be the one to assign him his work every day. Chou then asked Lin if he had a recorder on him and Lin asked if he had to take off his clothes and let Chou check him out. Lin asked if he had to report to Chou when he came to work each day and asserted that this was not returning to work in the same state that he had worked before. Chou said “just go sue.” Lin asked if Chou was welcoming him back to work and Chou said in a sarcastic manner; “I love you, I want to kiss you.” At one point, Chou said that he would welcome Lin back “*but I’ll fuck you.*” Lin said that if Chou welcomed him back, he should act according to what the court says and that if he had to report to Chou every day, that would be different from what the court says. At this point, Chou started to make some odd noises whereupon Lin said “if you don’t welcome me back, I can leave.” Chou replied “you are so important to me . . . I love you; I want you to come back to work.” Lin stated that Chou cursed at him four times and that he was going to report this to his attorney. (Referring to the Board attorney.) At the end of this meeting, Nina appeared and Chou told Nina that she should have Lin clean the entire warehouse for the rest of the day.

In fact, Lin was not assigned to clean the warehouse either on this or any other day. And despite the assertion, on this single occasion, that Lin would have to report to Chou each day, this did not happen thereafter and Lin reported to Nina. Moreover, Nina thereafter, mainly had him do order picking and other duties that he had done before his previous discharge. In this regard, I do not think that the evidence sufficiently supports the General Counsel’s allegation that the Respondent either threatened to impose more onerous working conditions on Lin or that it, in fact, subjected him to closer supervision.

According to Lin, and not denied by Chou, at around 11:30 a.m., Chou came over to where he was opening boxes and essentially accused Lin of stealing some greeting cards. Lin denied that he had taken any of the cards. At this point, Chou additionally said that Lin should be careful about the way he was cutting open the boxes. Lin responded that he had worked there for many years and knew how to open the boxes. Lin states that he then stood up, put down the box cutter that he was using, and told Chou to stop harassing him. Chou responded by saying, “You can cheat,” and that he could file a complaint at the Labor Board. Lin stated that if Chou continued harassing him, he would have to stop working. Lin testified that another employee named Reina was present. He also testified that he

<sup>7</sup> All of the recordings were played in the court room on February 26, 2009. Some of the conversations recorded were in English and some were marred by extraneous noises. Those portions that were in Chinese were translated by the official interpreter while the recording was being played and a separate transcript was made of the translation. I note that as this was a simultaneous translation, I don’t think that it captured the entirety of the each transaction. But the essential parts are there.

did not wave the box cutter at Chou or make any threatening gestures or statements.

At around 2 p.m., two policemen came to the facility, approached Lin and made him put up his hands. These officers were called by Chou and they questioned Lin to the extent that they could. When Lin asked Chou what this was all about, Chou claimed that Lin had threatened him with a box cutter. At the end of this process, the officers left without arresting or giving a summons to Lin. And Lin, after being told by Chou to end his work day, waited for a ride to take him home.

Lin stayed at home for the next 2 days and returned to work on June 11, 2008.

On or about June 17, Lin went into the kitchen at about 12 noon to have his lunch. According to Lin, when he entered, Chou was having a meeting with some customers and told Lin that he was too early for lunch. After this, having taken offense, Lin told Nina that he would take his lunch at 1 p.m. The General Counsel alleges that the Respondent violated Section 8(a)(1) by harassing Lin for taking his lunch at noon. Based on Lin's testimony, I reject this contention as it seems to me that at most, Chou, being involved in a meeting with customers, rudely told Lin to leave the room.

On July 3, 2008, the Respondent laid off Lin and Wu. As noted above, the General Counsel, having reviewed some of the company's business records, concedes that business conditions were sufficiently poor so that some layoffs could be justified.<sup>8</sup> His theory is that even if layoffs were justified based on business conditions, the selection of Wu and Lin for layoffs was motivated by illegal and discriminatory reasons.

After being told that he was being laid off, Lin got really upset and followed Chou into his office demanding to know why he was being laid off. Chou, in turn told Lin to leave his office and when Lin refused, Chou pushed him. After some shouting and cursing, Lin left the office. Some time later, police officers were called and escorted Chou out of the plant. (They gave Lin and Wu a ride home.)

Based on the testimony of Lin, it is obvious that Chou reluctantly reinstated Lin after being ordered to do so by the Board. Indeed on the first day of his return, Chou, in effect, told Lin that he was going to "fuck" him every day that he came to work. I also conclude that Chou falsely accused Lin of stealing and that he brought in the police for no purpose other than to harass Lin to the point that Lin would quit his job.

As to Wu, the evidence shows that Chou became obsessed with the fact that in an affidavit that she gave to the Board, she stated (but then crossed out), that Chou did not allow the Chinese workers to eat in the breakroom. This seems to have festered in his imagination and was specifically brought up by him, no fewer than three times during the first day that Lin returned to work. Moreover, I conclude that Chou intensely resented that Judge Fish relied on Wu's affidavit in finding that Wu and Lin had engaged in protected concerted activities. I therefore conclude that the General Counsel has made out a

<sup>8</sup> Also the testimony of the General Counsel's witnesses suggests that business began to slow down in 2007 and 2008. For example, Wu testified that at some point, the employees were told that the company would no longer be able to afford to give paid holidays and vacations.

prima facie case that the Respondent chose Wu for layoff because Chou harbored resentment for the fact that she cooperated with the Board during the prior case and gave an affidavit to the Board which was relied upon to find him guilty of an unfair labor practice.

This brings us to some unusual happenings at the hearing.

Chou chose to represent himself at this hearing. At the beginning of the hearing, he indicated that he wanted to produce evidence that related to the prior case and I told him that I was not going to relitigate that case. By the second day of the hearing, and while "cross examining" Wu, it was apparent to me that Chou, although highly intelligent, was not realistically capable of conducting a defense.

By the third day of the hearing, while Chou was attempting to cross examine Lin, it became even more apparent to me that the hearing was not going well.

On the fourth day of the trial (held the following week), and after having ordered the General Counsel to turn over *all* recordings made by Lin, these recordings were played in court and a simultaneous translation was made of the Mandarin portions into English. One reason that I decided to play the recording, using the original recording device used by Lin, was that there was some difficulty in transferring the audio files from his device into an electronic file playable on a PC or a MacIntosh computer.<sup>9</sup> At the end of this day, I told Chou that for the next hearing day, which was going to be on February 26, I wanted him to tell me under oath his version of the events in this case. He stated that he did not want to do this.

A week later, on February 26, 2009, I told Chou that I was going to interrupt his cross-examination of Lin and that I was going to require him to give me his version of these events. He refused. I told him that I wanted him to do this because I wanted to know what if any facts were in dispute. He again refused. I told him that if he did not comply, I would close the hearing. Chou changed his mind.

I told Chou that I would give him 3 hours to testify without any interruption by me or the General Counsel.<sup>10</sup> I also told him if he needed more time at the end of 3 hours, I would extend the time. I told Chou that I thought he should focus on the events of June 9, when Lin returned to work, including the alleged box cutter incident; the incident that took place with Lin in the lunchroom; and all of the events that took place on July 3, 2008. I told him that he should talk about why he laid off Wu and Lin and describe what business conditions were like at the time. I finally told him that he could say anything he liked and that no one would interrupt him.

Except for a lunchbreak, Chou spoke for 4 hours. Apart from a largely incomprehensible monologue, Chou simply did not address any of the issues in this case and did not deny any of the testimony given by Wu or Lin. Nor did he offer any

<sup>9</sup> Eventually, and with the aid of the help desk in Washington D.C., the electronic files on Lin's recorder were translated into a form that could be put on a CD and played on both the General Counsel's and the Respondent's computers.

<sup>10</sup> I instructed the General Counsel to take notes and to make any objections after Chou finished. I also told the General Counsel that he could not interrupt while Chou was testifying.

alternative version of what we all heard on the recordings. In short, Chou did not controvert any of the evidence adduced by the General Counsel and did not offer any reasons for why he chose Wu and Lin for layoffs on July 3, 2008.

At the end of the day, I asked Chou if he had any other witnesses and he replied that he had plenty. I asked who they were and what he intended to have them testify about. He told me that he intended to subpoena Lin's wife and daughter. When asked what he expected them to say, Chou notified me that he would ask Lin's wife about an incident in 2002 when she asked him to rehire Lin. I told him that this subject had been discussed by Judge Fish in the prior case and that in any event, it would not be relevant here because of its remoteness to the events in the present case. When asked what he would ask Lin's daughter, Chou stated that he wanted to show that she edited the recordings. I advised Chou that I would be sending him a letter asking him to tell me who his witnesses were going to be and what they would be testifying about.

By letter dated March 3, 2009, I advised Chou that I wanted to know what witnesses he intended to call and what each person would be testifying about. I also advised him that he did not need to turn over any names to the General Counsel until we resumed the trial on March 23, 2009.

By communication dated March 16, 2009, Chou requested of Powell a group of subpoenas. Powell responded that the judge needed to approve them. By email dated March 18, I notified Powell that I was approving the issuance of the subpoenas and that he should send nine subpoenas duces tecum and nine subpoenas ad testificandum to the Respondent.

By letter dated March 17, 2009, Chou sent to "so called Judge Green" some kind of summary of what he considered to be the conspiracy to do him in.

By letter dated March 18, 2009, Chou sent me a letter which, among other things, included a list of questions that he wanted to ask of Sherry Lin, who is Lin's daughter. All of these related to her role in the recordings.

By letter dated March 22, 2009, Chou sent me a letter (received on Monday, March 23), setting forth the names of the other witnesses that he intended to call and a list of the questions he intended to ask them.

Finally, we all were gathered together to resume the hearing on Monday, March 23, 2009.

At the opening, I told Chou that his proposed questions to Sherry Lin were irrelevant because he neither controverted the testimony of Lin or Wu and he did not offer any alternative version of the recordings or of their testimony. I ruled that any evidence that Lin could offer about how the recordings were made, edited, and/or transmitted would not be relevant to this case and that I would not permit Chou to call her as a witness.

I then had an opportunity to review a document submitted to me that morning regarding who Chou intended to call as his witnesses and the questions that he proposed to ask them. I ruled that he could call any employees or persons and ask them certain questions that I considered to be relevant to the case at hand. For example I ruled that Chou could call Jay Levitt, who allegedly was present in the lunchroom when Lin came in on June 17, 2008. I ruled that he could call any person who was present during June 9 or July 3 to testify about the events that

occurred on those days. In the same vein, I ruled that he could call the police officers that came to the plant on those days and ask them to testify about what happened. I ruled that he could call Nina, the warehouse manager, to testify about what happened on June 9, and whether she had expressed any concern about talking to or supervising Lin. I ruled that he could call Steve Shih to testify about what he heard or saw on July 3, when he apparently acted as a translator for Lin when the police arrived. I ruled that he could ask any employees about what work they did and what work they observed being done by Lin before and after his return to work on June 9.

Chou insisted that he had not been given all of the materials from Powell. As Powell had turned over all statements producible under Section 102.118 of the Board Rules and Regulations and further turned over recordings and a translation, I don't know what Chou means. He also insisted that he wanted to first cross-examine Lin before calling any of his own witnesses. I told Chou that as he did not controvert any of Lin's testimony (or the recordings), there was no point in further cross-examination of him and that he was finished.

Finally, I told Chou that it was his time to call witnesses. At 10:50 a.m. I advised Chou that he had until 11:10 a.m. to make up his mind and that if he did not call any witnesses I was going to close the hearing. At 11:10, when asked if he was ready to call a witness, Chou said "yes" and "no." This not being a sufficient answer, I noted that the police officers were in the room and asked Officer Carbone to come to the witness stand. Chou objected and reasserted that his legal rights were being undermined. I asked again if he wanted to ask Officer Carbone any questions and Chou responded with some kind of rant. At this point, I closed the hearing.

#### Analysis

As noted above, I have concluded that the evidence presented by the General Counsel, establishes that he has made out a prima facie showing that the Respondent selected Lin for termination on July 3, 2008, because of Lin's protected activity that occurred in the prior case. It has been demonstrated to me that Chou reluctantly reinstated Lin and that he sought to force Lin to leave as soon as possible.

By the same token I have concluded that the General Counsel has made out a prima facie showing that the Respondent selected Wu for termination on July 3, 2008, because Chou objected to and was obsessed by the fact that she gave an affidavit in the previous case; that this affidavit was used to conclude that he had violated the Act; and that the affidavit had the crossed out statement, that Chou did not allow the Chinese employees to eat in the lunchroom.

Having established a prima facie case, the burden shifts to the Respondent to establish that it would have laid off or terminated these employees for legitimate reasons, separate and apart from their protected concerted activities. (Or in the case of Wu, because she had cooperated with the Board in the investigation of the prior case.) *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

As the Respondent has not presented or was unwilling to present evidence showing a legitimate business reason for its decision to lay off these employees on July 3, 2008, I conclude

that it violated Section 8(a)(1) of the Act in the case of Wenqing Lin and Section 8(a)(1) and (4) of the Act in the case of Miaona Wu.

I also conclude that the Respondent violated the Act by falsely accusing Lin of attacking him and of stealing greeting cards and by calling the police on June 9, 2008.

As to the contention that on June 9, Chou threatened to impose more onerous working conditions on Lin and subjected him to closer supervision, I don't think that the evidence is sufficient to support these particular allegations. While it is correct that Chou told Lin that he should spend the rest of the day cleaning the warehouse, this was not carried out and in fact, Lin was assigned to open boxes of greeting cards, a task that he had done prior to his return to work. I also do not think that the evidence is sufficient to support the contention that Lin was subjected to closer supervision. Again, it is correct that Chou told Lin that he would have to report each day to Chou. But, when things settled down a bit, Lin essentially reported to work each day and received his instructions from Nina, the warehouse manager.

The General Counsel alleges that the Respondent harassed Lin for taking his lunch at noon. This incident involved a situation where Lin went into the lunchroom at or around noon and was told by Chou to leave. At the time, Chou was having a meeting in the room with some customers. As such, I do not view his instruction to Chou to leave as being discriminatorily motivated or otherwise unlawful under this Act.

The General Counsel further alleges that on July 3, 2009, the Respondent violated the Act by physically assaulting Lin and summoning the police. These events occurred after Lin had been told of his termination and after Lin and Chou became embroiled in a confrontation in the latter's office. Obviously, the entire transaction was provoked by what I have construed to be an illegal termination. But the evidence shows that Lin followed Chou back to his office and insisted on remaining there when Chou demanded that he leave. At most, Lin testified that Chou shoved him, and it seems that this was an attempt by Chou to have Lin leave his office. In any event, I do not think that the shove was particularly forceful. (Lin, a somewhat aged man, did not fall down or suffer any injury.) Further, when Lin refused to go, Chou asked for the assistance of the local police and two officers came to the facility where they convinced Lin

to leave. Based on this set of facts, and notwithstanding that I have concluded that the terminations of Lin and Wu violated the Act, I do not conclude that the General Counsel should prevail on these particular allegations.

#### CONCLUSIONS OF LAW

1. By discharging Wenqing Lin because of his protected concerted activities, the Respondent has violated Section 8(a)(1) of the Act.

2. By discharging Miaona Wu because she gave an affidavit to and cooperated with the National Labor Relations Board in a prior proceeding, the Respondent has violated Section 8(a)(1) and (4) of the Act.

3. By threatening to have Wenqing Lin arrested and by falsely accusing him of stealing and assault, because of Lin's protected concerted activities, the Respondent has violated Section 8(a)(1) of the Act.

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

5. Except as specifically found herein, I recommend that the other unfair labor practice allegations be dismissed.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In view of the above, I shall recommend that the Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates of discharge to the date of proper offers 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 (2987).

The Respondent, having violated the Act on a previous occasion, I conclude that a broad remedy is appropriate.

As a significant percentage of the Respondent's employees are Chinese speaking, it is recommended that the notices be in Chinese and English.

[Recommended Order omitted from publication.]