

**Kawa Sushi, Inc. a.k.a. Kawa Sushi 8 Avenue Inc.
d/b/a Kawa Sushi Restaurant and 318 Restau-
rant Workers Union. Case 02–CA–039736**

February 28, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On September 19, 2012, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kawa

¹ In the absence of exceptions, we adopt the judge's finding that Yi Hui was not a statutory supervisor as well as his dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by interrogating employees without giving them the assurances required by *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent threatened employee Wen Dong Lin with discharge, we agree with the judge that Yi Hui, who made the threat, was an agent of the Respondent under Sec. 2(13) of the Act. In concluding that Yi Hui was an agent, however, we find it unnecessary to rely on her signatory status on the Respondent's bank account and liquor license.

Applying *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), we agree with the judge that the Respondent's refusal to reinstate Lin violated Sec. 8(a)(1). Contrary to the judge's recitation of the *Wright Line* standard, however, there is no requirement that the Acting General Counsel show, as an element of his initial burden, that there is a causal connection between the protected activity and the adverse action. The elements of the Acting General Counsel's initial burden are Sec. 7 activity by the employee, employer knowledge of that activity, and animus by the employer. See, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 592 fn. 5 (2011).

² In accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB 518 (2012), we shall order the Respondent to reimburse discriminate Lin an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him. Further, we shall order the Respondent to submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Lin, it will be allocated to the appropriate periods.

Sushi, Inc. a.k.a. Kawa Sushi 8 Avenue Inc. d/b/a Kawa Sushi Restaurant, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following after paragraph 2(b) and renumber subsequent paragraphs accordingly.

“(c) Reimburse Lin an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him.

“(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Lin, it will be allocated to the appropriate periods.”

2. Substitute the attached notice for that of the administrative law judge.

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 engage in concerted activities with other employees for your benefit and protection.

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

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

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

WE WILL make Wen Dong Lin whole for any loss of earnings and other benefits resulting from our refusal to reinstate him, less any net interim earnings, plus interest compounded daily.

WE WILL reimburse Wen Dong Lin an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him.

WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Wen Dong Lin, it will be allocated to the appropriate periods.

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

KAWA SUSHI INC. A.K.A. KAWA SUSHI 8 AVENUE INC. D/B/A KAWA SUSHI RESTAURANT

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

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in New York, New York, on March 20, 21, and 22, and April 25, 2012. The Union (318 Restaurant Workers Union) filed the charge on February 12, 2010, and the General Counsel issued an amended complaint on February 10, 2012.¹ The amended complaint alleged that the Respondent, Kawa Sushi, Inc. a.k.a Kawa Sushi 8 Avenue Inc. d/b/a Kawa Sushi Restaurant,² violated Section 8(a)(1) of the National Labor Relations Act (the Act) by suspending and refusing to reinstate Wen Dong Lin because he had participated in a protest of another employee's discharge. The amended complaint also alleges that the Respondent's owner and his wife made threatening statements to employees in violation of Section 8(a)(1) of the Act. At the hearing, counsel for the Acting General Counsel further amended the complaint to allege that the Respondent's owner violated Section 8(a)(1) during pretrial preparation by interrogating employees without giving them the assurances described in the Board's *Johnnie's Poultry* decision.³

On February 22, 2012, the Respondent filed its answer to the amended complaint denying that it committed the alleged unfair labor practices and asserting several affirmative defenses, including that the Charging Party and Lin had engaged in a conspiracy to cause the discharge of Lin in order to collect liquidated damages under a settlement agreement resolving a Fair Labor Standards Act (FLSA) lawsuit. The Respondent also asserted that the Respondent had suspended and refused to

¹ The Regional Director had initially dismissed the charge in its entirety on July 26, 2010. The instant complaint issued after the Office of Appeals remanded the case to the Region with instructions to issue the complaint. The name of the Respondent was amended at the hearing.

² The name of the Respondent was amended at the hearing.

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

reinstate Lin because he was involved in an altercation with another employee while at work during which he physically assaulted the other employee.

On the entire record,⁴ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a public restaurant serving and delivering food to individual customers at its 24 Eighth Avenue, New York, New York facility. The Respondent annually derives gross revenues in excess of \$500,000 from its business operations and annually purchases and receives at its facility goods valued in excess of \$5000 directly from points located outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Suspension and Termination of Wen Dong Lin*

1. The evidence

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

The events at issue in this proceeding took place in late 2009 through early 2010. During that time, the Respondent employed two chefs, two sushi chefs, four waiters, and four delivery workers. The alleged discriminatee, Wen Dong Lin, was one of the delivery workers. The evidence in the record reveals that many of the employees, not including Lin, were related to the owner's wife in some fashion. In addition to these employees, a woman identified in the record as "Alice" or "Agnes" also worked there as a cashier.

The parties stipulated that Wen Dong Lin was employed by the Respondent on two separate occasions. The first was from June 2005 until about September 2006. Lin testified that his first period of employment ended when his boss at the time, Yi Xiang Cao, told him not to come back to work the next day. There is no evidence in the record showing what, if anything,

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

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

preceded this termination. He returned to work in January 2008 as part of a settlement of the wage and hour litigation to be discussed, and continued to work at the restaurant until the incident at issue here. Timecards and testimony show that his last day of work was January 11, 2010.

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

Defendants shall not take any material actions adverse to Plaintiffs on account of the Plaintiffs' participation in this lawsuit or for their prior complaints about wages and working conditions. Any material adverse employment action not made for good cause will be deemed to be retaliation in violation of this Agreement. The following actions, if taken by Defendants within 12 months after the Effective Date, are examples of actions that will be deemed to be retaliatory regardless of whether good cause is alleged: Defendants' sale of any Kawa restaurant at which any Plaintiff is employed if Plaintiff cannot continue his employment at another Kawa location; Defendants' reduction of their delivery workforce below four (4) full-time delivery workers at the Kawa location at 24 Eight (sic) Avenue, New York, NY 10014; or Defendants' failure to continue to pay each Plaintiff a gross wage equivalent to at least \$1200 per month for 40 hours of work per week. Within the 12 months after the Effective Date, defendants also agree not to divert delivery orders from any Kawa location at which a Plaintiff is employed to any other Kawa location, and further agree that the Plaintiffs will be guaranteed an average of at least forty-five (45) deliveries per full day shift during each work week. **In the event that Defendants terminate a Plaintiff's employment without good cause, such Plaintiff will be entitled to recover liquidated damages in the amount of \$40,000, and all other remedies available under this Agreement or at law.** [Emphasis added.]

As noted, only three of the named plaintiffs accepted reinstatement as part of the settlement of the lawsuit, i.e., Wen Dong Lin, Tian Wen Ye, and Li Chuan Chen. Because the Respondent needed four delivery workers to satisfy the terms of the agreement, Lin, Tian, and Chen recruited De Quan Lu, an acquaintance at the Association, to come work for the Respondent. Lu had not been involved in the lawsuit and had nev-

er worked for the Respondent. The four delivery workers pooled tips with Tian Wen Ye being responsible for splitting the tips.

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

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

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

Wen Dong Lin testified that, on the day Tian Wen Ye was fired, he returned to the restaurant after making a delivery and found Tian standing outside. Tian told him that the boss was going to fire him. According to Lin, he went inside and asked Yi Feng and Yi Hui why they were firing Tian Wen Ye. Yi Feng replied that Tian Wen Ye didn't want to deliver an order. Lin testified further that Yi Hui then asked for Tian's timecard and told the cashier to calculate the money owed to Tian. Lin recalled that the cashier (Agnes or Alice) asked Yi Hui if it was

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

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

necessary to call the boss, referring to Yi Feng's partner, Yi Xiang Cao. According to Lin, Yi Hui said it was and then proceeded to talk to Cao on the phone. Lin claimed that he was able to hear both sides of the conversation because Yi Hui was speaking on a cordless phone and Cao was very loud. He testified that he heard Yi Hui say that she was going to fire Tian Wen Ye today. According to Lin, Cao asked why she was firing Tian and Yi Hui replied, "I am notifying you. Isn't Kawa Sushi managed by me? I'm just notifying you I have to fire him." Lin claims he heard Cao say, "[Y]ou do whatever you want." Lin testified further that he then followed Yi Feng and Yi Hui outside and saw Yi Hui hand the money over to Tian Wen Ye. He testified that something was said but he could not recall what it was.

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

There is no dispute that, after Tian Wen Ye's termination, the Union and the Association set up a picket line outside the restaurant to protest the termination and urge a boycott of the restaurant. The picketing commenced in mid-November 2009 and continued until about February 2010. The picketing usually occurred during the lunch business, between 12 noon and 2 p.m. Tian Wen Ye picketed a few days a week and was usually joined by supporters from the Union and the Association. Sometimes he was alone and at other times up to 10 people would be there picketing. The picketers held signs and handed out leaflets. There is also no dispute that the Respondent countered this demonstration by distributing its own flyers with the headline "Shame on you! Tian Wen Ye!?", giving its version of events leading up to Tian's discharge. There is disputed evidence, to be discussed, regarding whether De Quan Lu was one of the employees distributing this flyer on behalf of the Respondent.

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

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

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

Yi Feng testified that, although he was in the restaurant at the time, he did not see the altercation. He only saw that Lu was on the ground and that is why he had the cashier call the police. His wife, Yi Hui, testified that she was not present that day. The Respondent called Lu and two other employees to testify about the incident. Lu claimed he could not remember much of what happened that day, although he did remember that Lin hit him and that he had memory and other medical problems as a result. He ultimately conceded that he had a dispute with Lin

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

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

over tips which may have led Lin to hit him. At the same time, he claimed that his boss was behind the assault because of Lu's self-proclaimed status in the Association. Lu's testimony as to this incident and other events was not very credible. He was nonresponsive to both counsels, tended to give answers to questions that were not being asked, and gave rambling and sometimes incoherent responses. He also tended to describe events in a melodramatic fashion and was eager to portray himself as a victim.

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

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

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

The circumstances surrounding Lin's last day at work, in January 2010, are also unclear. Yi Feng denied that he "let Wen Dong Lin go." He also denied firing him. According to Yi Feng, he simply told Wen and Lu to settle their dispute and that they could not come back to work until they did. Yet, he never

explained why Wen Dong Lin worked for more than a month after the fight while Lu was out of work, and what happened on January 11, 2010, that caused Lin to stop working. Even Wen Dong Lin never clearly explained what happened on January 11 to cause him to stop working. He did say something about the boss and his wife bringing him his timecard to sign and telling him that Lu had sought a lawyer to file a case against Lin and that every time someone called the restaurant asking about Lu, it affected business. According to Lin, they told him to go talk with Lu to resolve the issue and then he could come back.

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

Wen Dong Lin testified that, after his court appearance, he telephoned the boss and told him that he had been to court and the case was settled. According to Lin, Yi Feng said whatever the judge said was none of his business and that Wen Dong Lin and De Quan Lu had to settle the issue between them. When Wen persisted in saying that the judge said there was nothing between them, Yi Feng claimed he was busy and hung up. Wen Dong Lin testified further that he went to the restaurant about 2 days after this phone call and spoke to Yi Feng. Lin reiterated his position that the dispute had been settled by the judge and asked to come back. Yi Feng again said that "after the issue between you and Lu are resolved, and then you can come back." When Lin said that the judge had already decided the matter, what more did Lin need to do to come back, Yi Feng replied that the judge's decision was none of his business, that Lin had to talk to and resolve the dispute with Lu. Yi Feng concluded the conversation saying he was busy and telling Lin to come back in a few minutes.

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

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

Counsel for the Acting General Counsel also offered testimony regarding efforts by Wen Dong Lin and representatives of the Association and the Union to resolve the dispute between

¹¹ Weng is the cousin of Yi Hui.

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

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

Lin and Lu, who both were members of these organizations. This testimony shows that, although Lin was always willing to resolve his differences with Lu, Lu expressed no interest in doing so. This evidence from the General Counsel's witnesses is consistent with Lu's own testimony in which he indicated no desire to settle with Lin and spoke of filing a lawsuit against him.

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

2. Analysis

a. The 8(a)(1) allegations

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

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

The fact that Yi Hui was not a supervisor does not end the inquiry because the Respondent would still be liable for statements she made to employees if she was its agent. The Board applies common law agency principles to determine whether a nonsupervisory employee is an agent of the employer and thus

whether the employee's conduct is attributable to the employer. If the employee was acting with the apparent authority of the employer with respect to the alleged conduct, then the employer is responsible for the conduct. Under the doctrine of apparent authority, "an agency relationship is established where a principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question." *L.B.&B. Associates, Inc.*, 346 NLRB 1025, 1029 fn. 17 (2006); *Fleming Cos.*, 336 NLRB 192 (2001), and cases cited therein. To determine whether the alleged agent had such apparent authority, the Board will consider "whether, under all the circumstances, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Id.* See also *D&F Industries*, 339 NLRB 618 (2003); *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998); *Delta Mechanical, Inc.*, 323 NLRB 76, 77-78 (1997).

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

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

Hui's open hostility to Wen Dong Lin colored her testimony and rendered it unreliable.

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

The complaint also alleges that Yi Feng threatened Lin with discharge for his support of Ye in early February when Lin returned to the restaurant after his court appearance and asked for his job back. This is based on Lin's testimony that, after Yi Feng told Lin he was busy and to come back in a few minutes, Lin went outside and joined Ye as he picketed. When he went back into the restaurant later, as directed by Yi Feng, Yi Feng essentially chased him out of the restaurant, saying, "[Y]ou have already picketed at the door, why do I hire you back?" Yi Feng denied making this statement. The statement attributed to Yi Feng by Lin, however, is similar in phraseology to the statement Yi Feng admitted making to Ye when he fired him, i.e., "[I]f you don't deliver the order, why should I hire you?" This similarity makes it more probable that Yi Feng would have used this phrasing than that Wen Dong Lin fabricated the statement. I thus credit Lin and find that Yi Feng in fact threatened Lin as alleged in the complaint.

*b. The Respondent's refusal to re-hire
Wen Dong Lin*

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

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

Because this case turns on the Respondent's motivation in denying Lin reinstatement to his job, the Board's decision in

Wright Line establishes the test to be applied to the facts here.¹⁴ Specifically, the General Counsel must show by a preponderance of the evidence that protected activity was a motivating factor in the employer's decision to take action against the employee. Once the General Counsel has met this burden, the burden shifts to the employer to show that it would have taken the same action even absent protected activity. In order to meet the initial burden, General Counsel must show that the employee engaged in activity that was protected by the Act, that the employer was aware of this activity and that there is a causal connection between the protected activity and the adverse action. *Metropolitan Transportation Services*, 351 NLRB 657 (2007). If the General Counsel meets this burden, the employer must do more than show that it had a legitimate reason to take the action it did. It must show, by a preponderance of the evidence, that it would have taken the same action even in the absence of protected activity. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

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

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

Yi Feng at first testified that he did not reinstate Wen Dong Lin because Lin never asked for his job back. Yi Feng ultimately admitted that he was aware of Lin's desire to return to work. This internal contradiction in his testimony raises doubts about the general credibility of Yi Feng's testimony. Yi Feng also testified that he took Lu back because Lu "begged" for his job and Yi Feng wanted to give him an opportunity because Lu had no job. Yi Feng never specifically said that he chose Lu over

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

Lin because he perceived Lu to be a victim of Lin's alleged aggression. In fact, Yi Feng had testified that he did not witness any assault by Lin. All he saw was Lu sitting on the ground. He did not know how he got there. Yi Feng was also aware that both men were issued summonses to appear in court. So he could not have believed that Lu was a mere victim. In fact, Yi Feng testified that he did not want Lu and Lin working together until they settled their dispute. The fact that he kept Lin working as a delivery worker while Lu was out for medical reasons suggest that Yi Feng was not too concerned with Lin's alleged aggression toward Lu. Rather, his main concern, as expressed in his testimony, was to avoid problems with the Union and the Association. Because the Respondent's asserted reasons for its treatment of Lin, vis a vis Lu, do not withstand scrutiny, I find that these reasons are a pretext to hide the true motivation behind the Respondent's refusal to reinstate Lin. The motivation, as explicitly stated to Wen Dong Lin by both Yi Feng and his wife, was Lin's support for Tian Wen Ye. The Respondent's refusal to reinstate Wen Dong Lin in February 2010 thus violated Section 8(a)(1) of the Act.

c. The alleged Johnnie's Poultry violation

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

REMEDY

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

The Respondent, having unlawfully refused to rehire Wen Dong Lin, must offer him reinstatement to his former position and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

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

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

ORDER

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

1. Cease and desist from

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

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

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

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

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

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

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

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

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

(e) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix B"¹⁷ in both English and Chinese. Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2009.

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

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

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an order of the National Labor Relations Board."