UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

EAST VILLAGE GRAND SICHUAN INC. D/B/A
GRAND SICHUAN RESTAURANT

And **Case 02-CA-143468**

CHINESE STAFF & WORKERS ASSOCIATION

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION

Dated at New York, New York
This 8th Day of April 2016.

Joane Si Ian Wong
Counsel for General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10278

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I. STATEMENT OF THE CASE

The Administrative Law Judge Steven Davis accurately set forth the Statement of the Case in his Decision dated January 14, 2016 (the "ALJD") except that he inadvertently stated that the first day of the trial was on Sunday, November 8, 2015, when the trial actually commenced on Monday, November 9, 2015.

On February 11, 2016, Respondent filed Exceptions ("Respondent's Exceptions").[1] Respondent did not file a separate brief in support of its exceptions. Pursuant to Section 102.46(f)(2) of the Rules and Regulations of the National Labor Relations Board (the "Board"), Counsel for the General Counsel ("General Counsel") requested an extension of time to file the answering brief and cross exceptions, from February 25th to April 8th The Board granted this request. Pursuant to Section 102.46(d), the General Counsel files this Answering Brief to Respondent's Exceptions to the ALJD.

It is the General Counsel's position that the ALJD was correct as to the conclusions of fact and law except to some inadvertent mistakes of facts in the record and to the General Counsel's argument that the Board's remedy should require the filing of the SSA report with the Region rather than the SSA and ought to include interim search-for-work and work-related expenses, to which the General Counsel filed limited cross exceptions, with a brief in support, simultaneously with this Answering Brief. The Board should reject Respondent's Exceptions to the ALJD. Instead, the General Counsel urges the Board to examine General Counsel's legal argument advanced in this Answering brief in support of the ALJ's finding of a Section 8(a)(1)

[1] Pursuant to Section 102.46(c)(2) of the Board's Rules and Regulations, any brief in support of Exceptions shall contain a specification to the questions involved and a reference to the specific exceptions to which they relate. Despite this rule, Respondent fails to refer to any specific exceptions in its legal argument. For this reason, General Counsel addresses arguments made in Respondent's legal argument when discussing the exceptions to which the arguments presumably relate.

violation, and to modify the ALJD as urged in the General Counsel's Limited Cross Exceptions and Brief in Support of the Limited Cross Exceptions.

II. STATEMENT OF THE ISSUES

Respondent excepted to Judge Davis' conclusions of law and factual findings that:

(1) Respondent's discharge of Fang Xiao ("Xiao") violated Section 8(a)(1) of the Act.

(2) (a) Xiao was an employee of Respondent on January 2, 2015;

(b) Xiao's FLSA lawsuit was a "concerted activity"; and

(c) Respondent terminated Xiao because of "concerted activity."

Therefore, the essential issue raised was whether the General Counsel presented evidence of concerted activity and the termination was for that concerted activity. The General Counsel's argument will address Respondent's Exceptions the following:

1. Whether the ALJ properly did not question Xiao's employee status on January 2, 2015. (Respondent's Exception 2(a))

2. Whether the ALJ properly concluded that Xiao's filing of the FLSA lawsuit was concerted activity. (Respondent's Exception 2(b))

3. Whether the ALJ properly concluded that Respondent terminated Xiao for the protected concerted activity of filing the FLSA lawsuit, in violation of Section 8(a)(1). (Respondent's Exceptions 1 and 2(c))

III. STATEMENT OF THE FACTS[2]

The facts have been completely and accurately set forth in the ALJD with the exception of a few inadvertent mistakes, which have been addressed in the General Counsel's limited cross exceptions and brief. The ALJ misspelled discriminatee Fang Xiao's name throughout the decision and it should be changed from "Xaio" to "Xiao." The ALJ incorrectly stated that Xiao worked in a different restaurant after she returned from China in March 2012. Rather, the record showed that after Xiao returned from China in March 2012, she worked for the Respondent for about one week before she left New York to work at a friend's restaurant. (ALJD 2:43-45; Tr. 67-68) Most importantly, the ALJ inadvertently stated in his Analysis that Manager Wang visited Xiao at her home in June 2014 after she was injured by her co-worker, even though the ALJ correctly recited in the Facts that it was owner Xiao Tu Zhang who visited Xiao Fang. (ALJD 4:19-29; ALJD 9:6-11; Tr. 87-93)

It is important to note that Respondent presented no witnesses or evidence to challenge General Counsel's prima facie case. Rather, Respondent merely relied on evidence entered into the record by General Counsel to support its only argument that Xiao abandoned her job because she was not in contact with Respondent in November and December 2014. Therefore, the record evidence and factual findings by ALJ Davis are undisputed.

[2] The Administrative Law Judge's Decsion will be referenced as "ALJD page(s): line(s)." The hearing transcript will be referenced as "Tr.____." General Counsel's and Respondent's exhibits will be referenced as "GC Exh.____" and as "R Exh.____", respectively.

IV. ARGUMENT

A. The ALJ Properly Did Not Question Xiao's Employee Status On January 2, 2015. (Respondent's Exception 2(a))

Respondent argued that Xiao was not an employee on January 2, 2015, the date Xiao asked to be put back on the work schedule. Corroborated and undisputed testimony showed manager Wen Yan Gao ("Sister Gao") said to Xiao in a very loud and high pitched voice, "[Y]ou coming back to work? You suing the Boss? You suing the restaurant, and now you want coming back to the restaurant to work? This is not right. Go look for your lawyer. You want to come back to work?" (ALJD 6:25-28)

In Respondent's Exception 2(a), it argued for the first time that the Xiao was not an employee on January 2, 2015 because Xiao was not an employee as per the Merriam-Webster Dictionary, which defined an employee as "a person who works for another person or for a company for wages or a salary." Under this definition, Respondent argued, Xiao was not an employee since her injury on May 28, 2014, because she neither worked for nor received wages or salary from the Respondent.

First of all, the Section 2(3) of the NLRA defines an employee as follows:

> "The term 'employee' shall include any employee, and shall not be limited to employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment "[3]

The NLRB has always followed its own definition in prosecuting cases under the NLRA and there is no reason to do otherwise now.

[3] 29 U.S.C. §152(3).

Secondly, an injured worker remains an employee of his or her employer after a work related injury. It also goes without saying that an employee of an employer remains an employee until the employee quits or the employer lawfully terminates the employee. Here, the undisputed record shows Xiao was injured at work on May 28, 2014 and as late as December 18, 2014, just two weeks before Xiao asked to be put back on the work schedule, Respondent was filling out worker compensation forms related to Xiao's work injury. (Tr. 203, GC Exh. 12) Furthermore, the ALJ found and the record clearly showed that after Xiao's injury, she never quit her job and she was never told that she was terminated until January 2, 2015. (ALJD 9:48 to ALJD10:2)

Contrary to Respondent's assertion that no admissible evidence was entered into the record showing Respondent would employ Xiao or treated her as an employee while she was injured, the record showed, and the ALJ correctly found, owner Xiao Tu Zhang repeatedly called Xiao to see when she was ready to return to work. Zhang only stopped calling Xiao after he learned that she was at the premises of the Chinese Staff and Workers Association ("Association").[4] (ALJD 9: 6-11; Tr. 91-92) Xiao's presentation of her doctor's notes to Respondent each month from June through October 2014 was clear evidence that Xiao acted as an employee because it showed she had every intention to return to work. (ALJD 4:33-51; 9:42-52)

Respondent's repeated argument that Xiao abandoned her job because she did not visit the restaurant in November and December 2014 is of no moment because, as the ALJ correctly found, (1) from November through December 2014, Xiao was not notified that she was

[4] This Answering Brief and related documents will refer to The Chinese Staff and Workers Association as "Association" even though the ALJD referred to it as the "Union" because it is a workers' advocacy organization that helps workers file charges and employed related lawsuits, as well as engage in other forms of organizing, such as community organizing, to better workers' lives. However, it is not a traditional labor organization that represents its members in collective bargaining. To use the term "Union" to refer to it may be confusing. Respondent referred to it as the "Association" in its exceptions.

discharged or that she had been replaced; (2) Sister Gao said nothing to Xiao on January 2 concerning her alleged abandonment of her job based on being absent from work for too long a period of time; and (3) Xiao was absent from work for about one year from March 2012 through early 2013 with no evidence that she was in contact with Respondent during that time but Respondent called and asked her to return to work. (ALJD 8:46-52 to ALJD 9:1-4; 9: 48-52) Rather, the record shows that Respondent has had a practice of letting employees leave to visit China for a lengthy period of time and still return to work for Respondent. Xiao went back to China for about a month from March to April 2012, and returned in April to work for Respondent for one week when she returned to New York. (Tr. 67-69) A similar finding was made by ALJ Judge Michael Rosas in the 2013 ULP hearing. There, Judge Rosas found Respondent had a longstanding practice of permitting employees to travel to China for weeks or months at a time and returning to resume their jobs.[5] When Respondent's past practice of condoning employees' long absence from the restaurant is juxtaposed to Respondent's present repeated assertion of Xiao's job abandonment, Respondent's inconsistent or shifting reasons for its actions supports the reasonable inference that the reasons offered are pretext designed to mask

[5] In August 2012, the Chinese Staff and Workers Association ("Association"), a worker advocacy organization, filed a charge with Case No. 02-CA-086946 against Respondent, alleging unlawful termination of certain delivery workers, including Chang Hui Lin ("Lin"), and the unlawful discipline of Xing Duan Jiang ("Jiang"), because they discussed taking legal actions against Respondent for unpaid minimum and overtime wages. On November 15, 2012, after the charge was filed, workers commenced an action for unpaid wages in the United District Court for the Southern District of New York. In February 2013, a Complaint was issued by Region 2 of the NLRB. In June 2013, a hearing was held ("2013 ULP hearing"). Thereafter, in a decision dated November 6, 2013, Administrative Law Judge Michael A. Rosas found: (1) employees engaged in protected concerted activities when they discussed unpaid wages with each other; (2) Respondent had knowledge of employees' discussions because employees were observed in discussion during their break time, and employees refused to sign certain forms which omitted wage information directly relating to unpaid wage claims that employees were trying to resolve with Respondent; and (3) Respondent harbored animus, which included statements suggesting that the discriminatees pursue legal action to recoup the unpaid wages. ALJ Rosas ordered reinstatement, backpay and a notice posting, among other things. See JD-81-12 (2013); GC Exh. 4.

Judge Rosas found the Respondent had a longstanding practice of permitting employees to travel to China for weeks or months at a time and returning to resume their jobs. See JD-81-13 (2013), lines 28-34 on page 11.

an unlawful motive.[6] Therefore, Respondent's Exception 2(a) that Xiao was not an employee of Respondent after her injury should be rejected.

B. The ALJ Properly Concluded That Xiao's Filing Of The FLSA Lawsuit Was Concerted Activity. (Respondent's Exception 2(b))

Respondent argued that Xiao's filing of an individual FLSA claim does not constitute "concerted action" protected under the Act. The General Counsel makes two factually supported legal arguments that Xiao's lawsuit was protected concerted activity. First, Xiao's lawsuit was a logical outgrowth and continuation of her concerted activities throughout her employment with the Respondent. Second, Respondent terminated Xiao as a preemptive strike to prevent other workers from being emboldened to join Xiao's lawsuit or to file similar individual wage and hour lawsuits against the Respondent.

(1) Xiao's Lawsuit Was A Logical Outgrowth Of Prior Protected Concerted Activities

The discussion of wages among employees is considered "at the core of Section 7 rights" because wages, "probably the most critical element in employment," are "the grist on which concerted activity feeds."[7] Such discussions about wages are often the precursor to organizing and seeking union assistance.[8] Discussions that cumulate in conduct in preparation to filing a Fair Labor Standards Act (FLSA) lawsuit, such as discussions of wages among employees, is

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[6] *InterDisciplinary Advantage, Inc.*, 349 NLRB 480, 506 (2007), citing *Mt. Clements General Hospital*, 344 NLRB 450, 458 (2005).

[7] *Paraxel International*, 356 NLRB No. 82 (2011) (quoting *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996); *Whittaker Corp.*, 289 NLRB 933, 933-934 (1998)).

[8] *Valley Slurry Seal Co.*, 343 NLRB 233, 245 (2004); *Automatic Screw Products Co.*, 306 NLRB 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992); *Triana Industries*, Inc. 245 NLRB 1258 (1979).

concerted activity for mutual aid or protection protected by Section 7.[9] In that regard, the Board had consistently held for decades that concerted legal action addressing wages, hours or working conditions is protected by Section 7.[10] Such legal actions are central to the Act's purpose.[11]

The Board had also found that where employees have discussed shared concerns regarding working conditions among themselves and one employee continues to express this concern on his or her own, the Board will find that the employee was continuing a course of concerted activity.[12] In such circumstances, the individual's activities are considered concerted because they are the "logical outgrowth of concerns expressed by the employees collectively."[13]

Here, the undisputed record evidence showed, and the ALJ found, that throughout Xiao's employment at Respondent's, she engaged in concerted activities by discussing wage concerns

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[9] *Saigon Gourmet Restaurant, Inc. d/b/a Saigon Grill Restaurant*, 353 NLRB No. 110 (2009); *Igramo Enterprise, Inc.*, 351 NLRB No. 99 (2008); *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162 (2005); *Kysor Industrial Corp.*, 309 NLRB 237 (1992); *Salt River Valley Water Users Assoc.*, 99 NLRB 849, 853 (1952). See generally *Eastex, Inc., v. NLRB*, 437 U.S. 556, 563-578 and n.15 (1978) ("It has been held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.").

[10] *D.R. Horton,* 357 NLRB No. 184, *slip op.* at 2 fn. 4 and cited cases (2012), *enf. denied in part* 737 F.3d 344 (5th Cir. 2013).

[11] See *generally Eastex, Inc., v. NLRB*, 437 U.S. 556 (1978); and *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

[12] See, e.g. *Five Star Transportation, Inc.*, 349 NLRB 42, 43-44, 47 (2007) (after meeting as a group to discuss a change in bus contractors, drivers' individual letters to school committee expressed common desire to retain negotiated terms and conditions of employment and therefore constituted protected concerted activity), *enforced*, 522 F.3d 46 (1st Cir. 2008); *Needell & McGlone, P.C.*, 311 NLRB 455, 456 (1993) (employee was engaged in protected concerted activity when she complained about preferential treatment accorded a fellow secretary because her complaint was the logical outgrowth of concerns discussed by her and her coworkers and raised by the employee at a staff meeting), *enforced mem.*, 22 F.3d 303 (3d Cir. 1994); *JMC Transport*, 272 NLRB 545, 545 n. 2 (1984) (finding protected truck driver's lone protest to management regarding a discrepancy in his paycheck where it "grew out of an earlier concerted complaint regarding the same subject matter, i.e., the change in pay structure"), *enforced*, 776 F.2d 612 (6th Cir. 1985).

[13] *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038-39 (1992) (four employees' individual decisions to refuse overtime work were logical outgrowth of concerns they expressed as a group over new scheduling policy), *enforced*, 53 F.3d 261 (9th Cir. 1995); See, e.g., *Compuware Corp.*, 320 NLRB 101, 103 (1995) (employee bringing up collective grievances on his own engaged in concerted activity), enforced, 134 F.3d 1285 (6th Cir. 1998), cert. denied, 523 U.S. 1123 (1998); *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (employee's call to DOL regarding employer's new lunch-hour policy "logically grew out of employees' concerted efforts" protesting the new policy and was a continuation of that concerted activity).

with her Fuzhounese[14] coworkers.[15] (ALJD 7:10-28) In 2012, Xiao openly took breaks with her Fuzhounese co-workers Chang Hui Lin ("Lin"), Xing Duan Jiang ("Jiang") and Xue Qin Tang ("Tang") once or twice a week to talk about their working conditions. As a result of those discussions during their breaks, in November 2012, Lin, Jiang, Tang and four others filed a federal lawsuit under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") against the Respondent and its owners alleging as violations the same matters they spoke about ("November 2012 lawsuit"). (ALJD 2:34-37; 7:10-13) Xiao was not a part of this November 2012 lawsuit because she went to China for a month, and she quit to work for a friend for the rest of 2012 after she worked for the Respondent for a week in April 2012 when she returned from China. (ALJD 2:39-44) Although Fang Xiao was not part of that November 2012 lawsuit, she was indisputably a part of the group discussion leading up to the November 2012 lawsuit and Respondent was fully aware of her association with the group. (ALJD 7:10-13)

When Xiao returned to work for Respondent in early 2013, she continued to openly engage in concerted activities by conversing with her Fuzhounese co-workers once or twice a week concerning their working conditions. (ALJD 3: 12-13) Between March 2013 and March 2014, Manager Wang repeatedly warned her not to associate with Lin, Jiang and Tang who were

[14] Also spelled "Foochownese."

[15] Respondent challenged the relevancy of the acts of Xiao's co-workers and the statements by Manager Wang to Xiao months before Respondent discharged Xiao. It is the General Counsel's position that Xiao's association and concerted activity with her co-workers are always relevant when it was precisely that association and concerted activity that contributed to Respondent's decision to fire her. The statements made by Manager Wang towards Xiao demonstrated Respondent's animus toward employees' concerted activity of going to the Association and filing lawsuits against the Respondent. Such animus evidence is always relevant.

Respondent cited *Bruce Packing Co. Inc. v. NLRB*, 795 F.3d 18 (D.C. Cir. 2015) for the proposition that the ALJ improperly allowed General Counsel to "expand the basis of her claim" by allowing evidence that went back to 2012. In *Bruce Packing,* the Court found that due process was violated because a new allegation was added at the end of an unfair labor practice hearing, after the Employer had rested its defense, which gave no opportunity to the Employer to rebut the new allegation with relevant witnesses who had already testified. *Bruce Packing* is distinguishable because Respondent was well aware of the allegations in the Complaint, and all of General Counsel's evidence in support of those allegations was presented during General Counsel's case to which Respondent had a full and fair opportunity to rebut with its defense.

suing the Respondent and who were part of the Association. He told her the Boss would not like her to associate with them, would not like her for doing so. Despite these warnings that she stays away from those employees, Xiao told Manager Wang that she would continue to take breaks with them and that he should not bother them. Based on this record, Judge Davis concluded that "[h]er insistence that she would disobey his order to disassociate with them made it clear that she was *in league* with them in their attempts to remedy the alleged improper workplace issues they faced." (Emphasis added) (ALJD 7:33-41)

Then in February or March 2014, Xiao spoke to co-worker and busboy AhYing about two or three times concerning the need to receive a greater portion of the tips because busboys were only earning one half of the amount of tips that waiters earned. In late March or April 2014, Xiao asked Sister Gao to "increase the tips." (ALJD 2:11 and 3:49-52) Judge Davis concluded that her request, which reflected the complaints of other workers that their tips were unlawfully inadequate, was also concerted because it addressed the wage concerns of other employees.[16] Judge Davis further noted that the federal lawsuit that Xiao filed individually alleged that they were not paid their proper tips. (ALJD 7: 15-19)

After Xiao's work injury in May 2014, she sought the assistance of the Association, just as her Fuzhounese coworkers Lin, Jiang and Tang had done in the past before they filed their November 2012 lawsuit.[17] In the end of July 2014, when owner Xiao Tu Zhang found out that Xiao was at the Association's premise, he stopped calling Xiao to inquire when she would be returning to work. It was then, in August 2014, that Xiao began soliciting her coworkers Ah Ying, Min Fu, and Lin to sue the restaurant for minimum wage, overtime, and other unpaid

[16] *Salisbury Hotel*, 283 NLRB 685, 686-687 (1987).

[17] The Union filed the ULP charge in August 2012 and then Lin, Jiang, Tang and others filed the November 2012 lawsuit. JD-81-12 (2013); GC Exh. 4.

wages just as her Fuzhounese coworkers had done in November 2012. Although neither Ah Ying, Min Fu, or Lin agreed to join her to file a lawsuit at that time, they listened. Min Fu even said "let me think about it" and "may be when I no longer work at the Restaurant." (ALJD 5:31-52; Tr. 91-92; 221-222)

It is well established that solicited employees do not have to agree with the soliciting employee or join that employee's cause in order for the activity to be concerted.[18] Soliciting the support of co-workers regarding workplace concerns, even if the soliciting employee did not intend to pursue a joint complaint, constitute concerted activity.[19] These cases are grounded in the long standing "solidarity" principle in which the Section 7 framework created by Congress was meant to address when employees "band together" to address their terms and conditions of employment with their employer.[20] "[M]ak[ing] common cause with a fellow workman over his separate grievance" is a hallmark of such solidarity, even if "only one of them. has any immediate stake in the outcome."[21] By soliciting assistance from coworkers to raise an employee's own immediate work related concerns to management, an employee is requesting that his coworkers exercise vigilance against the employer's perceived unjust practices.[22] The Board had found that "[t]he 'mutual aid or protection' element is satisfied by the implicit promise of future reciprocation, when one employee answers another's call for assistance, even

[18] See *Mushroom Transportation*, 330 F.2d 683, 685 (1964); *Circle K Corp.*, 305 NLRB 932, 933 (1991); *Whittaker Corp.*, 289 NLRB at 934; and *El Gran Combo*, 284 NLRB 115 at 1117 (1987).

[19] *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014) (employee who sought co-worker signatures on a statement which she used to raise a sexual harassment complaint to her employer engaged in concerted activity).

[20] *City Disposal Systems*, 465 U.S. 822, 835 (1984).

[21] *NLRB v. Peter Cailler Kohler Swiss Chocholate Co.*, 130 F.2d 503, 505 (2d Cir. 1942).

[22] See *El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1005 fn. 4 (1st Cir. 1988), *quoting NLRB v. J. Weingarten Inc.*, 420 U.S. 251, at 260-261 (1975).

if that promise is rarely (or never) called upon."[23] Even though Xiao's coworkers did not immediately join Xiao in filing a lawsuit together, Xiao was clearly making a common cause with her co-workers, and requesting them to exercise vigilance against Respondent's violations of wage and hour laws for the purpose of their mutual aid and protection. Therefore, Xiao's soliciting her co-workers to file a lawsuit together is concerted activities.

When Xiao eventually filed her federal lawsuit in November 2014, it was a logical outgrowth of her concerted activities with her Fuzhounese co-workers to better their lot as working people throughout her employment. Xiao's lawsuit alleged the **same** workplace violations as the November 2012 lawsuit, including violations of minimum wage, overtime, spread of hours, tip retention, and unlawful deductions for the purpose of "tools of the trade." In essence Xiao's lawsuit was a continuation of her expressing a group concern on her own, and a logical outgrowth of concerns expressed by employees collectively - that despite the earlier lawsuit, the wage issues and working conditions at the Restaurant had not changed. This is a reasonable and necessary conclusion because it is often the stepping forward of one or more workers expressing a common complaint that paves the way for other workers to follow suit. Here, in April 2015, Lin joined Xiao's lawsuit through an amendment to her complaint; and in August 2015, Min Fu filed his own lawsuit alleging the **same** employment-related violations, including Respondent's failure to pay minimum wage, overtime, spread of hours, tip retention, as well as unlawful deductions for the purchase of "tools of the trade."[24] (ALJD 5:48-49, 51-52; Tr. 104 and 227; GC Exh. 7, 8, 9, 10a and 10b) The sum total of the lawsuits, filed as individual

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[23] *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014).

[24] On April 30, 2015, an amended complaint was filed by Margaret McIntyre, adding Chang Hui Lin to Fang Xiao's lawsuit. (GC Exh. 9) In August 2015, Min Fu filed his wage and hour lawsuit that was similar to Fang Xiao's lawsuit. (GC Exh. 10a and 10b; Tr. 227) Min Fu testified that he wanted to join Fang Xiao's lawsuit after he quit his job in March 2015 but his lawyer told him that he could not join Fang Xiao's lawsuit but he does not know the details as to why. (Tr. 223)

lawsuits, amended complaints adding additional employees to the individual lawsuits, or class or collective actions, that expressed a common complaint is yet another expression of employees' collective protest of working conditions seeking improvements from their employer.

(2) Respondent Terminated Xiao As A Preemptive Strike To Prevent Other Workers From Being Emboldened To Join Xiao's Lawsuit Or To File Similar Individual Wage And Hour Lawsuits Against the Respondent.

The Board had found that an employer violates Section 8(a)(1) by terminating an employee in order to prevent future protected activity because "the suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity."[25] A practice of refusing to hire union members is akin to erecting "a dam at the source of supply" of potential, protected activity.[26] Similarly, "if an employer acts to prevent concerted protected activity – to "nip it in the bud" – that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more."[27]

Here, although the ALJ did not analyze Xiao's discharge under this alternative theory, he clearly laid out the facts in support of it. Xiao is Fuzhounese and she openly engaged in concerted activity by discussing work related concerns with her Fuzhounese co-workers throughout her employment with the Respondent. (ALJD 2: 24-32) Some of those co-workers filed the November 2012 federal lawsuit against Respondent. (ALJD 2: 34-41) Since the November 2012 lawsuit, Sister Gao repeatedly told employees that the "Fuzhounese speakers, they are united, they want to sue the restaurant to make money." After each of the Fuzhounese

[25] *Parexel International*, 356 NLRB No. 82 (2011).

[26] *Phelp Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

[27] *Parexel*, supra.

employees left the employ of Respondent, Sister Gao would say to employees that the Fuzhounese would sue the restaurant and sue her, but that she would "fight to the end." (ALJD 6:5-18) When after Xiao's work injury, she told owner Xiao Tu Zhang that she was at the Association's premises, he stopped calling her to find out how she was feeling to assess when she could return to work. After Xiao filed her federal lawsuit in November 2014, Sister Gao's friendly attitude of hoping Xiao would return to work also changed because Xiao, a Fuzhounese, filed a lawsuit against the restaurant.[28] Based on these facts, the ALJ concluded that Respondent held animus toward Xiao and her Fuzhounese co-workers because of their concerted actions of discussing wage concerns and filing federal lawsuits about those concerns. (ALJD 7:49-51)

Making good Sister Gao's word that she would "fight to the end" with those who file lawsuits against the restaurant is to "nip it in the bud" any such concerted actions. By making good on Sister Gao's word to "fight to the end," Respondent retaliated against Xiao by discharging her on January 2, 2015 for filing a lawsuit, and to use her termination to set an example to prevent future concerted activity by her co-workers. Respondent's tactic succeeded because both Lin and Min Fu, a coworker who worked as a waiter, filed a lawsuit making the same allegations against Respondent only after they stopped working for Respondent. (ALJD 5:42-48; Tr. 219) Ah Ying and others who are still working for Respondent have not joined Xiao's lawsuit or filed their own lawsuit. (ALJD 5:42-52) As cited in the ALJD, Sister Gao spoke in a very loud and high pitch voice in front of all the wait staff at the restaurant when she fired Xiao on January 2, 2015, for filing a lawsuit against Respondent. (ALJD 6:20-34) Sister

[28] Respondent argued that there was no evidence that Sister Gao made statements that associated Xiao with the actions of other employees. This argument necessarily fails because Sister Gao's repeated reference to the Fuzhounese with the propensity to sue the restaurant, that she would not be like Boss Zhang who dealt with the November 2012 lawsuit by some of the Fuzhounese, and that she would "fight to the end," linked the actions of Xiao who filed a lawsuit in November 2014 and her Fuzhounese co-workers who filed a lawsuit in November 2012. Again, all the lawsuits alleged the same employment violations by Respondent.

Gao's statement that Xiao is suing the restaurant and the boss but wants to return to work, adding "this is not right," conveyed a clear message to employees that filing a lawsuit and simultaneously working for Respondent is incompatible. Such logic sends a clear message to employees that filing lawsuits against Respondent means discharge, and has the result of "discouraging employees from engaging in these or other concerted activities," as alleged in the Complaint. See paragraph 6(d) of General Counsel's Complaint in GC Exh. 1(e). Therefore, Respondent's termination of Xiao interfered with and restrained employees' exercise of Section 7 rights and it's unlawful without more.

C. The ALJ Properly Concluded That Respondent Terminated Xiao For Protected Concerted Activity, In Violation Of Section 8(a)(1). (Respondent's Exceptions 1 And 2(c))

As discussed above, the ALJ properly concluded that Xiao engaged in the protected concerted activity of filing the employment related federal lawsuit, or alternatively Xiao was fired as a preemptive strike to prevent future protected concerted activities of employees.

Respondent did not except to the element of Respondent's knowledge of Xiao's protected concerted activities, which the ALJ properly found and detailed in his decision, including Respondent's knowledge of Xiao's concerted activities of talking about wage concerns with her Fuzhounese co-workers throughout her employment with Respondent, her going to the Association after her May 2014 work injury, and her November 2014 federal lawsuit. (ALJD 7:33-47; 9:9-11)

The record evidence and the ALJD contradict Respondent's argument that there was no evidence of animus against Xiao's concerted activities. In fact, there was abundant evidence of animus. Manager Wang, an admitted supervisor, repeatedly told Xiao that "the Boss will not like you" for associating with the workers who sued the Respondent. This is admissions that

Xiao Tu Zhang, also known as "Boss Zhang" to employees, held animus against employees who sued. It is irrelevant that Manager Wang left the employ of Respondent two months before Xiao's work injury, and 11 months before Xiao was fired by Sister Gao because Board precedent does not require direct evidence that the manager who took an adverse employment action against an employee personally knew of that employee's concerted activity. Rather, the Board imputes a manager's or supervisor's knowledge of an employee's concerted activities to the decision maker, unless the employer affirmatively establishes a basis for negating such imputation.[29] Respondent clearly did not meet its burden of negating such imputation as it rested without putting on a defense. In any event, there is independent evidence of animus. Boss Zhang[30] stopped calling Xiao after he learned that she was at the Association's premises - the Association that was the Charging Party in all charges filed at the NLRB against the Respondent, and was known to help workers file lawsuit against employers in the Chinese community for wage and hour violations. (ALJD 5:31-52; Tr. 91-93; GC Exh. 1 and 4) Moreover, the ALJ found Sister Gao, who made the decision to fire Xiao, held animus against Xiao's concerted activity. ALJ Davis concluded, "Respondent's animus toward Xiao and her Fuzhounese co-workers is also amply demonstrated by Sister Gao's telling Min Fu that the Fuzhounese speakers are untied and want to sue the restaurant, and that she would "fight to the end." (ALJD 7:48-51) Most importantly, Sister Gao's statement to Xiao when she terminated her was in itself sufficient evidence of animus. As ALJ Davis concluded, "Respondent's knowledge that she brought a lawsuit against the Respondent, and its animus toward her for doing so is established in Sister

[29] See, e.g., *State Plaza Hotel*, 347 NLRB 755, 756 (2006). Compare *Music Express East, Inc.*, 340 NLRB 1063, 1064 (2003) (declining to impute supervisor's knowledge to employer because supervisor supported the union and did not relay knowledge to decisionmaker); *Ready Mixed Concrete Co.*, 317 NLRB 1140, 1144, fn. 18 (1995) (no imputation where employer proved that supervisor did not share his knowledge with other supervisors and did not take part in decision), enfd. 81 F.3d 1546 (6th Cir. 1996).

[30] Owner Xiao Tu Zhang's Chinese name and Nickname has been stipulated to and has been entered into the record as the "Name Chart" in GC Exhibit 11. His nickname is "Boss Zhang."

Gao's angry refusal to permit her to return to work, saying that she sued the restaurant and now wants to work for it? Gao's adding that 'this is not right' demonstrates Sister Gao's animus toward Xiao because she filed the lawsuit." (ALJD 7:43-47)

Therefore, the ALJ properly found that Respondent discharged Xiao because she filed a federal lawsuit alleging that it failed to lawfully compensate her, in violation of Section 8(a)(1) of the Act.

Under *Wright Line*, if the General Counsel sustains his initial burden, the burden shifts to the employer to persuade by a preponderance of the evidence, not merely that it could have taken the same action for legitimate reasons, but that it actually would have done so in the absence of the protected conduct.[31] Here, Respondent advanced only one reason for Xiao's discharge - Xiao abandoned her job by not contacting the Respondent for two months. As discussed extensively by ALJ Davis, Xiao was absent from work for nearly one year and she was invited to return to work for the Respondent after that lengthy absence. (ALJD 2: 41-51 to 3:1; ALJD 9:52 to 10:2) Moreover, as discussed before, Respondent had a practice of allowing its employees to be absent from work for a lengthy period of time and then to return to work so Respondent never frowned upon employees' lengthy absence even when the employee was employed elsewhere. Such inconsistent or shifting reasons for Respondent's actions after Xiao filed her lawsuit support the reasonable inference that they are pretext designed to mask an unlawful motive.[32] Therefore, based on the record, Respondent could not show that it actually would have terminated Xiao even in the absence of the protected conduct and the ALJ correctly found Respondent' fired Xiao because of her filing a lawsuit as articulated loudly by Sister Gao.[33]

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[31] *Dish Network, LLC*, 363 NLRB No. 141, fn 1 (2016).
[32] *InterDisciplinary Advantage,* supra.
[33] This is not a refusal-to-rehire case because Xiao was not fired until January 2, 2015, as argued in response to Respondent's Exception 2(a).

V. CONCLUSION AND REMEDY

For the foregoing reasons, the General Counsel urges finding Respondent's contentions in its Exceptions are without merit. The ALJ properly found Respondent violated Section 8(a)(1) of the Act by discharging Fang Xiao. Accordingly, the ALJ's decision, findings, and conclusions of law and recommended remedy should be adopted, except as to the corrections and modifications urged in General Counsel's Limited Cross Exceptions and as advanced in this Answering Brief to Respondent's Exceptions.

Dated at New York, New York,
This 8th day of April 2016.

Respectfully submitted,

Joane Si Ian Wong
Counsel for General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10278
Telephone: 212.264.8426
Email: joane.wong@nlrb.gov

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

EAST VILLAGE GRAND SICHUAN INC. D/B/A
GRAND SICHUAN RESTAURANT

And **Case 02-CA-143468**

CHINESE STAFF & WORKERS ASSOCIATION

AFFIDAVIT OF SERVICE

I, the undersigned, certify that the *Counsel for General Counsel's Limited Cross Exceptions to the ALJD, Brief in Support of Limited Cross Exceptions to the ALJD, and Answering Brief to Respondent's Exceptions to the ALJD* were served on the parties on Friday, April 08, 2016, as follows:

By E-filing
Gary Shinners, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington D.C., 20570-0001

By Email to gearonlaw@aol.com
Thomas D. Gearon, Esq.
The Law Office of Thomas D. Gearon, P.C.
136-20 38th Avenue, Suite 9-I
Flushing, NY 11354
Tel: (718) 395-8628
Fax: (718) 395-8629

By Email to mem@memcintyre.com
Margaret McIntyre
Attorney at Law
299 Broadway, Suite 1310
New York, New York 10007
Tel: (212) 227-9987
Fax: (917) 809-6704

Joane Si Ian Wong, Esq.
Counsel for General Counsel