# Cao v. Wu Liang Ye Lexington Rest., Inc.

United States District Court for the Southern District of New York

September 30, 2010, Decided; September 30, 2010, Filed

08 Civ. 3725 (DC)

**Reporter**
2010 U.S. Dist. LEXIS 109373 *; 2010 WL 4159391

JIN M. CAO et al., Plaintiffs, - against - WU LIANG YE LEXINGTON RESTAURANT, INC. et al., Defendants.

**Counsel:** **[*1]** For Plaintiff: Jane H. Yoon, Esq., Russell Capone, Esq., Brooke A. Russakoff, Esq., DAVIS POLK & WARDWELL, LLP, New York, New York; Kenneth Kimerling, Esq., ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, New York, New York.

JIAN LI, Defendant, Pro se, Hollis, New York.

SUSAN LI, Defendant, Pro se, Hollis, New York.

**Judges:** DENNY CHIN, United States Circuit Judge.

**Opinion by:** DENNY CHIN

## Opinion

**MEMORANDUM DECISION**

CHIN, Circuit Judge

On October 8, 2009, the Court entered a default against defendants Wu Liang Ye U.S.A., Inc., Jian Li, and Susan Li in this case brought pursuant to the Fair Labor Standards Act, *29 U.S.C. § 201 et seq.* (the "FLSA"), and the New York State Labor Law, *N.Y. Lab. Law § 1 et seq*. (the "Labor Law"). Plaintiffs are twenty-four waiters, delivery workers, and a food packer who worked at two Wu Liang Ye Sichuanese restaurants on the east side of Manhattan (the "Restaurants"). Before the Court is plaintiffs' application for: (1) minimum wage and overtime pay under the FLSA; (2) minimum wage, overtime pay, and spread-of-hours compensation under the Labor Law; (3) compensation for the purchase and maintenance of bicycles and uniforms; (4) the return of deductions taken from their tips; (5) liquidated **[*2]** damages under both the FLSA and the Labor Law; (6) prejudgment interest; and (7) attorneys' fees. Plaintiffs have submitted their damages calculations for the above. Jian Li and Susan Li (the "Lis") oppose plaintiffs' application for damages on several grounds, including that plaintiffs' calculations are inflated and that liquidated damages are not appropriate because their violations of the FLSA and the Labor Law were not willful. Plaintiffs' application are granted to the extent set forth below. [1]

DISCUSSION

**A. The Damages Period**

The limitations period for claims brought pursuant to the FLSA is two years, but where defendants willfully violate the statute, the period is three years. *29 U.S.C. § 255(a)*. Claims brought pursuant to the Labor Law are subject to a six-year limitations period. *N.Y. Lab. Law §§ 198(3)*, *663(3)*. Plaintiffs argue that the doctrine of equitable tolling should be applied to extend the limitations period to cover their full period of employment. In support, **[*3]** plaintiffs claim that equitable tolling is warranted because defendants failed to comply with the requirement that employers subject to FLSA's minimum wage provisions "post and keep posted a notice explaining the [FLSA] . . . in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy." *29 C.F.R. § 516.4*. I disagree.

"Equitable tolling allows courts to extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances." *Johnson v. Nyack Hosp., 86 F.3d 8, 12 (2d Cir. 1996)*. It is, however, "a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato, 549 U.S. 384, 396, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007)*; *see Zerilli-Edelglass v. New York City Transit Auth., 333 F.3d 74, 80 (2d Cir. 2003)*

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[1] The defaulted corporate defendants, Wu Liang Ye Lexington Restaurant, Inc., Wu Liang Ye 86 Restaurant, Inc., and Wu Liang Ye U.S.A., Inc., have not submitted any opposition to plaintiffs' application for damages.

("[E]quitable tolling is only appropriate in rare and exceptional circumstances in which a party is prevented in some extraordinary way from exercising his rights.") (citation omitted).

The circumstances here are not extraordinary and do not warrant equitable tolling. Plaintiffs complain that defendants never told them they were entitled to overtime pay and **[*4]** never posted the required notice explaining the FSLA's minimum wage provisions. There is no allegation that defendants engaged in anything more, *e.g.*, some sort of deception. Accordingly, the circumstances are not extraordinary and equitable relief is not warranted. *Amendola v. Bristol-Myers Squibb Co., 558 F. Supp. 2d 459, 479 (S.D.N.Y. 2008)* ("To hold that a failure to disclose that an employee is entitled to overtime pay is sufficient to work an equitable toll would be tantamount to holding that the statute is tolled in all or substantially all cases seeking unpaid overtime.") (internal quotation marks omitted).

I hold that plaintiffs are entitled to the longer three-year FSLA limitations period because the record clearly demonstrates the "willful" nature of defendants' violation of the FLSA. First, defendants defaulted and thus plaintiffs' allegations that the FLSA violations were willful are deemed admitted. Second, defendants conceded that they made no effort to learn about the FLSA's requirements until shortly before this action was filed. *See McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988)* (willful violation is one where "the employer either knew or showed reckless **[*5]** disregard for the matter of whether its conduct was prohibited by the statute"). Accordingly, the appropriate limitations period for plaintiffs' FLSA claims is three years.

**B. Minimum Wage And Overtime Damages**

Plaintiffs assert claims for denial of minimum wages and overtime under the FLSA, *29 U.S.C. § 206* and *207(a)(1)*, and under the Labor Law, *N.Y. Lab. Law §§ 652(4)*, *650* and N.Y.C.R.R. tit. 12 §§ 137-1.3 and 1.4. Plaintiffs also seek damages for "spread of hours" compensation under N.Y.C.R.R. tit. 12 §§ 137-1.7, *142-2.4*, for workdays on which the time between the start and end of their work exceeded ten hours.

**1. Plaintiffs Are Entitled To Recover Unpaid Wages At The Ordinary Statutory Minimum Wage**

With the exception of plaintiff Yun H. Chai, each of the plaintiffs worked as either a waiter or deliveryman and received a significant percentage of his income in the form of tips. The tip credit provision of the FLSA permits employers to pay tipped employees at an hourly rate below the minimum wage if the employee's wages and tips, added together, meet or exceed the minimum wage. *29 U.S.C. § 203(m)*. To be eligible for the tip credit, however, the employer must first notify the employees **[*6]** of its intention to include tip income when calculating wages actually paid for minimum wages purposes. *Yu G. Ke, et. al, v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 254 (S.D.N.Y. 2008)*. In this case, defendants failed to give plaintiffs notice of FLSA's tip credit provision. (Compl. ¶ 41; S. Li Dep. at 91:17-93:6; J. Li Dep. at 144:4-23).

Similarly, the Labor Law allows employers to pay tipped workers in the food service industry a lower minimum wage. *See N.Y. Lab. Law § 652(4)*. An employer may receive the benefit of this tip credit only if the employer provides "to each employee a statement with every payment of wages listing . . . allowances . . . claimed as part of the minimum wage" and "maintain[s] and preserve[s] for not less than six years weekly payroll records which shall show for each employee . . . allowances . . . claimed as part of the minimum wage." *Padilla v. Manlapaz, 643 F. Supp. 2d 302, 309-10 (E.D.N.Y. 2009)* (quoting N.Y. Comp. Codes R. & Regs. tit. 12, §§ 137-2.1 and 2.2).

Because defendants did not satisfy these requirements, plaintiffs are entitled to recover damages based on the ordinary minimum wage rather than the "tipped minimum wage." Accordingly, to calculate **[*7]** plaintiffs' damages arising from defendants' minimum wage, overtime, and spread-of hours violations, the full minimum wage should be used rather than the lower minimum wage for tipped workers. [2]

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[2] The federal minimum wage is intended to be a floor, not a ceiling on the amount an employee is entitled to receive. *See 29 U.S.C. § 218(a)*. New York State minimum wage levels exceeded federal levels at various times during the period of plaintiffs' employment, such as between January 1, 2005, through the commencement of this action on April 18, 2008. Accordingly, the higher of the FLSA or the Labor Law minimum wage level shall be used to calculate plaintiffs' damages for unpaid wages and overtime under the FLSA and the Labor Law. Obviously, plaintiffs are not entitled to recover twice for the same injury; they will, however, be able to take advantage of the higher measure of damages.

2. Plaintiffs Are Entitled To Overtime Pay Under The FLSA And The Labor Law

Both the FLSA and the Labor Law require employers to pay their employees an overtime rate of one-and-a-half times the regular pay for each hour of work over forty hours in a week. *29 U.S.C. § 206*; *N.Y. Lab. Law § 650 et. seq.*, N.Y. Comp. Codes R. & Regs. tit. 12, § 137-1.3. **[*8]** Plaintiffs submitted declarations showing that they regularly worked more than forty hours per week without overtime pay. Plaintiffs are therefore entitled to recover overtime pay at the increased rate for their unpaid overtime hours within the applicable limitations periods.

Although plaintiffs are entitled to recover unpaid minimum wages and overtime pay under both the FLSA and the Labor Law, they may not recover twice. Accordingly, plaintiffs' damages for unpaid minimum wages and overtime should be calculated based on the Labor Law's six-year limitations period. The same damages arising from violations of the FLSA should not be included in plaintiffs' damages calculations to the extent they are duplicative.

**3. Plaintiffs Are Entitled To Recover Unpaid Spread-of-Hours Compensation Under The Labor Law**

In addition to minimum wage and overtime pay, the Labor Law provides that any restaurant employee whose workday is longer than ten hours "shall receive one hour's pay at the basic minimum hourly wage rate before allowances, in addition to the minimum wage otherwise required." N.Y. Comp. Codes R. & Regs. tit. 12, § 137-1.7. The "spread-of-hours" wage is defined as the number of hours from **[*9]** the time an employee starts his workday until the time the employee finishes his workday, including working and non-working time (such as meal breaks or time-off between split shifts). *Id*. § 137-3.11.

Although plaintiffs regularly worked more than ten hours in a day, defendants never paid the required spread-of-hours-pay, (Compl. ¶¶ 49-53; S. Li. Dep. at 59:19-61:16, 104:2-20; J. Li Dep. at 190:4-6). Plaintiffs are therefore entitled to spread-of-hours compensation for each shift they worked that exceeded ten hours. [3]

[3] Defendants failed to maintain required employment records that would precisely indicate the shifts and hours worked and pay received by plaintiffs. (*E.g.*, Yoon Decl. ¶ 5.) Accordingly, certain approximations are necessary to calculate plaintiffs' damages. *See* *Reich v. Southern New Eng. Telcoms. Corp.., 121 F.3d 58, 70 n.3 (2d Cir. 1997)* (district court did not err in awarding damages that "might have been somewhat generous" because the award was reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records"). Each plaintiff has submitted a declaration with a description of his typical weekly work **[*10]** schedule and the amount he was paid each month. The Court accepts the approximations set forth in plaintiffs' declarations.

**C. Damages For Unlawful Tip Deductions**

Both New York law and the FLSA limit an employer's ability to deduct amounts from an employee's tips. Under the FLSA, employers may not require that their employees give any money back to them, such that an employees' resulting compensation falls below the minimum wage. *See* *29 C.F.R. § 531.35*. The FLSA's requirement that wages be paid "free and clear" means that any money an employee "'kicks back' directly or indirectly to the employer or another person for the employer's benefit" must be excluded from calculation of the employee's wages. *Id*.

Under New York Law, an employer may not deduct amounts from an employee's wages unless those deductions are either "made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency," or "expressly authorized in writing by the employee and are for the benefit of the employee." *N.Y. Lab. Law § 193(1)*. Additionally, New York law provides that an employer may not demand or accept "directly or indirectly, any part of the gratuities, received by an **[*11]** employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee." *N.Y. Lab. Law § 196-d*.

Defendants made two types of unlawful deductions from plaintiffs' tips in violation of FLSA and the Labor Law. First, until May 2007, defendants withheld ten percent of all tips received on credit cards from delivery workers and waiters. (Compl. ¶ 59; S. Li. Dep. at 72:23-78:3; J. Li. Dep. at 22:21-24:3). Employers are entitled to deduct from credit card tips only the processing fee that the employer pays to third party credit card processors. See New York State Department of Labor Division of Labor Standards, Guidelines For Investigators: Minimum Wage Order For Restaurant Industry, Effective January 1, 1987. Defendants' credit card processing fee was well below ten percent, although the exact amount is unclear. (J. Li. Dep. at 161:17-163:12 (stating that the processing fee was "[s]omewhere around 2 percent"); S.

Li. Dep. at 77:9-78:13 (noting that the range of fee rates is "[t]hree to five percent")). Plaintiffs propose that the Court use a three percent processing fee for purposes of calculating damages and assert that this is the industry norm. This appears **[*12]** to be a reasonable figure particularly in light of the Lis' deposition testimony. Accordingly, plaintiffs' damages for defendants' deductions from credit card tips should be calculated based on a processing fee of three percent.

Defendants also unlawfully required waiters to remit 12 to 15 percent of all tips they received. (Compl. ¶ 60; J. Li Dep. at 128:17-131:7; S. Li. Dep. at 78:14-85:18; J. Cao Dep. at 13:10-14:6, 16:20-17:7). Susan Li conceded that the deductions were either kept by defendants or were used to pay the busboys' wages, thereby impermissibly transferring money from waiters to busboys to support the busboys' base pay. *See* Hai Ming Lu v. Jing Fong Restaurant, Inc., 503 F. Supp. 2d 706, 710-11 (S.D.N.Y. 2007).

Plaintiffs are therefore entitled to the return of the unlawful deductions made from their tips during the limitations period. Accordingly, that amount shall be included in the calculation of damages.

**D. Damages For Money Spent On Tools Of The Trade**

Plaintiffs seek damages for the money spent on bicycles used by the delivery workers and uniforms worn by the waiters. The FLSA prohibits employers from requiring employees to purchase the tools of their trade or give **[*13]** any money back to their employers, "when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act." 29 C.F.R. § 531.35. Employment-related expenses that may not reduce an employee's wages below the statutory minimum include "facilities" that are "primarily for the benefit or convenience of the employer." 29 C.F.R. § 531.3(d)(1).

**1. Bicycles**

Under the circumstances, I find that the plaintiff delivery workers are entitled to damages for the cost of acquiring and maintaining the bicycles they used for their delivery work. *E.g.,* Saigon Grill, 595 F. Supp. 2d at 257-58 (bicycles were "tools of the trade" for restaurant delivery workers where the "primary role of these men was to deliver hot meals to hungry and often impatient customers over a large geographic expanse"). Plaintiffs have established that the plaintiff delivery workers were required to purchase bicycles, which were used and specifically required for their delivery work. Because plaintiffs were not reimbursed for the costs of the bicycles and the necessary repairs, and because they were paid below minimum wage, they are entitled to recover damages for those **[*14]** amounts.

Defendants point out that there is no documentation to support plaintiffs' estimates of the amount they spent on bicycles and repairs and argue that plaintiffs' estimates are inflated. In some instances, I agree that the estimates are high. Some plaintiffs have sought more than one thousand dollars in bicycle expenses in a single year. (*See, e.g*, Qi Weng Decl. ¶¶ 3, 14 ("While working at the Restaurant [from January 1, 2007, to February 29, 2008], I spent approximately $1500 on bicycles and bicycle repairs."). This seems excessive. Without a detailed explanation to support plaintiffs' expense estimates to enable the Court to evaluate the reasonableness of the amounts purportedly spent, I limit plaintiffs' damages for bicycle expenses to $500 per year, to cover the cost of one bicycle and maintenance and repairs for one year.

**2. Uniforms**

Under New York law, an employer is responsible for the cost of purchasing and maintaining a required uniform. *See* N.Y. Comp. Codes R & Regs. tit. 12 § 137-1.8. A "required uniform" refers to any "clothing worn by an employee, at the request of an employer, while performing job-related duties" unless such "clothing . . . may be worn as part of **[*15]** an employee's ordinary wardrobe." *Id*. at § 137-3.13. Plaintiff waiters were required to wear a white shirt, black pants, a tie, and a red vest. (*See* Cao Decl. ¶ 16). The only item that arguably could not have been worn as part of the employee's ordinary wardrobe, the red vest, was provided by defendants. (*Id*.). There is no evidence in the record that plaintiff waiters incurred any expenses to acquire or clean their red vests. Accordingly, I find that plaintiffs are not entitled to damages for uniform expenses. Hai Ming Lu v. Jing Fong Restaurant, Inc., 503 F. Supp. 2d 706, 712 (S.D.N.Y. 2007) (granting summary judgment because white shirts, black pants, black socks, and black shoes that wait staff was required to wear was not a "uniform").

**E. Liquidated Damages**

Both the FLSA and the Labor Law provide for the payment of liquidated damages in appropriate circumstances to employees who have been denied payment of minimum wages or overtime. Under the FLSA, liquidated damages are compensatory, rather than punitive. *See* Saigon Grill, 595 F. Supp. 2d at 260-62. In contrast, liquidated damages under the Labor Law are punitive "to deter an employer's willful withholding of wages due." Reilly v NatWest Mkts. Group Inc., 181 F.3d 253, 265 (2d Cir. 1999). **[*16]** Because liquidated damages under the FLSA and the Labor Law serve fundamentally different purposes, a plaintiff may recover liquidated damages under both the FLSA and the Labor Law. Saigon Grill, 595 F. Supp. 2d at 261-62.

**1. FLSA Liquidated Damages**

Under the FLSA, a plaintiff who demonstrates that he was improperly denied either minimum wages or overtime may recover, in addition to reimbursement of unpaid wages, an amount equal to the unpaid wages unless the employer demonstrates that it acted in good faith and had reasonable grounds for believing that it had not violated the FLSA. Saigon Grill, 595 F. Supp. 2d at 261 (citing 29 U.S.C. §§ 216(b), 260). "[T]he employer bears the burden of establishing, by plain and substantial evidence, subjective good faith and objective reasonableness. . . . The burden, under 29 U.S.C. § 260, is a difficult one to meet, however, and 'double damages are the norm, single damages the exception.'" *Id*. (quoting Reich v. Southern New England Telecomm. Corp., 121 F.3d 58, 71 (2d Cir. 1997)).

As set forth above, defendants' violations of the FLSA were willful. Indeed, defendants defaulted on the allegations in the complaint, including the allegations of lack **[*17]** of good faith (Compl. ¶¶ 43, 48, 53, 64, 66, 69, 70, 74, 77, 81, 85, 90). Moreover, defendants failed to plead good faith as an affirmative defense in their answer and admitted during discovery that they never attempted to even learn about the requirements of the FLSA until shortly before this action was filed. (S. Li. Dep. at 32:22-33:7; J. Li Dep. at 41:12-41:18, 122:20-123:4, 123:10-124:8). Accordingly, plaintiffs are entitled to liquidated damages under the FLSA arising from defendants' minimum wage and overtime pay violations, unlawful deductions for the purchase and maintenance of bicycles, and unlawful deductions from tips.

**2. Labor Law Liquidated Damages**

The Labor Law allows a worker to recover 25 percent of his unpaid wages as liquidated damages where his employer's violation was willful. N.Y. Lab. Law §§ 198(1-a), 663(1). A willful violation is one where "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988). Defendants' assertion that they were simply unaware of the federal and state wage and hour laws (*e.g.*, Decl. of J. Li in Opposition to Pl.'s **[*18]** Damages ("J. Li. Decl") ¶¶ 12-14) is not enough to shield them from liquidated damages. Given their many years in the restaurant industry, their ignorance amounts to reckless disregard of the applicable law and is sufficient to establish a willful violation. *See* Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 141-42 (2d Cir. 1999). Accordingly, plaintiffs are entitled to liquidated damages under New York law arising from defendants' minimum wage and overtime pay violations, unlawful deductions for the purchase and maintenance of bicycles, unlawful deductions from tips, and spread-of-hours violations.

**F. Prejudgment Interest**

Finally, plaintiffs seek prejudgment interest at the statutory rate of nine percent on their spread-of-hours claims under the Labor Law. (Mem. Of Law In Support of Pl.'s App. For Damages, at 28-29). N.Y. C.P.L.R. §§ 5001, 5004. I agree that they are entitled to that interest and award it.

**G. Which Defendants Are Liable**

Under both the FLSA and the Labor Law, personal liability may be imposed on employers for wage and hour violations. Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 192 (S.D.N.Y. 2003). The FLSA defines an employer as "any person acting directly **[*19]** or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). "The Supreme Court has emphasized the 'expansiveness' of the FLSA's definition of employer . . . . Above and beyond the plain language . . . the remedial nature of the statute further warrants an expansive interpretation of its provisions so that they will have 'the widest possible impact' in the national economy." Saigon Grill, 595 F. Supp. 2d at 264 (quoting Herman v. RSR Sec. Services Ltd., 172 F.3d 132, 139 (2d Cir. 1999)).

The Second Circuit looks at the "economic reality" of the

relationship between the individual defendant and the business to determine whether a defendant is an employer for FLSA purposes. *RSR Sec. Servs., 172 F.3d at 139*. The Court looks at whether the defendant has power to hire and fire the employees, supervises or controls employee work schedule and performance, determines compensation and methods of payment, and whether the defendant maintains employment records. *Id.; Saigon Grill, 595 F. Supp. 2d at 264*. This list is neither exclusive nor exhaustive, as a defendant need not satisfy any particular factor or all the above factors to qualify as an employer; no one **[*20]** factor is dispositive, and any other relevant factor may also be considered. *See Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61, 71 (2d Cir. 2003)*.

Because the Lis have defaulted in this action, plaintiff's allegations that they were "employers" and therefore personally liable are deemed admitted. (Compl. ¶¶ 17-20). In any event, the Lis' deposition testimony confirms their status as plaintiffs' employers under the FLSA and the Labor Law. (J. Li. Dep. at 30:25-31:15, 128:13-16, 129:20-23; S. Li Dep. at 17:14-18:5, 21:3-16, 29:23-30:16, 33:8-37:10). Accordingly, both Jian Li and Susan Li are personally liable for the damages attributable to the periods during which they served as an "employer."

Jian Li was an employer at the Restaurants beginning on or about August 1, 2001. Jian Li asserts that he was no longer involved in the day-to-day management of the Restaurants after he suffered a leg injury in April 2006 and should not be considered an employer during that period. I reject this argument. Even after his leg injury, Jian Li remained the senior manager of the Restaurants and an active participant in the Restaurants' business decisions, including setting employee wages and maintaining **[*21]** employment records. (*See* J. Li Decl. ¶ 10; J. Li Dep. at 44:10-18; S. Li Dep. at 33:8-34:11). Accordingly, Jian Li is personally liable even for the period following his leg injury. *See Herman v. RSR Sec. Services Ltd, 172 F.3d 132, 139 (2d Cir. 1999)* ("Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA.").

Susan Li was an employer at the Lexington Avenue restaurant starting from January 1, 2003, and at the 86th Street restaurant, beginning on January 1, 2006, In her opposition to plaintiffs' application for damages, Li asserts that she should not be personally liable because when she became manager of the Lexington Restaurant, the "salaries and wages, and the method of payment were already determined by the previous managers of the restaurant" and that she was not "personally involved in making any decisions regarding workers' salaries and wages, work schedules and working conditions." (S. Li Decl. ¶ 3). Her argument is not convincing. Even if she had not defaulted on plaintiffs' claims that she is personally liable, the evidence in the record demonstrates that she was an employer for FLSA purposes **[*22]** because she was involved in decisions to hire and fire employees, she determined employee wages, set employee schedules, and supervised employees to ensure they performed their jobs satisfactorily. (S. Li Dep. at 29:23-30:16, 34:12-37:10; S. Li Decl. ¶ 3; J. Li Decl ¶¶ 48-49). She is therefore an employer for FLSA purposes and is personally liable for damages.

**H. Attorneys' Fees**

Plaintiffs are prevailing parties and thus they are entitled to recover reasonable attorneys' fees. *29 U.S.C. § 216(b)*; *N.Y. Lab. Law §§ 198(1-2)*, *663(1)*. In the Second Circuit, attorneys' fees awards are now calculated based on the "presumptively reasonable fee" approach adopted in *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 522 F.3d 182, 190 & n.4 (2d Cir. 2008)*. The court sets a "reasonable hourly rate," bearing in mind all the case-specific variables, and the court then uses that reasonable hourly rate to calculate the "presumptively reasonable fee" by multiplying the rate by the number of hours reasonably expended. *Arbor Hill, 522 F.3d at 190*; *see Porzig v. Dresdner, Kleinwort, Benson, North America LLC, 497 F.3d 133, 141 (2d Cir. 2007)* ("The presumptively reasonable fee analysis **[*23]** involves determining the reasonable hourly rate for each attorney and the reasonable number of hours expended, and multiplying the two figures together to obtain the presumptively reasonable fee award.").

The hours worked by plaintiffs' counsel are reasonable. Although plaintiffs' counsel was involved for a significantly longer period, plaintiffs seek fees only for the period from October 1, 2008 through and including October 8, 2009. Defendants argue that the hours spent on the case are unreasonable because, for example, time was spent on irrelevant issues and "many hours [were] spent by many lawyers on [the] same issues." (J. Li. Decl. ¶¶ 61-62). I reject the arguments. Moreover, plaintiffs have already reduced the number of hours involved by limiting their recovery to the period from October 1, 2008, to October 8, 2009. Accordingly, the Court will not reduce the number of hours for which

plaintiffs will be compensated.

The rates requested by plaintiffs for their attorneys and legal assistants are also reasonable. To determine a reasonable hourly rate, district courts look at "the prevailing hourly rate in the district where it sits," as well as "what a reasonable, paying client would **[*24]** be willing to pay" and other factors such as the complexity and time demands of the case. *Arbor Hill, 522 F.3d at 183-84*. The rates sought by plaintiffs' counsel ($400 for partners, $350 for litigation counsel, $300 for associates with three to seven years experience, and $200 for associates with one to two years experience) are consistent with (or lower than) the rates used in other cases involving attorney fee awards to large New York firms on pro bono matters. *See LV v. New York City Dep't of Educ., 700 F. Supp. 2d 510, 518-25 (S.D.N.Y 2010)*.

Finally, the costs sought by plaintiffs ($6,184.08) are also reasonable. Plaintiffs are entitled to recover "those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients." *LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 763 (2d Cir. 1998)*. Here, plaintiffs only seek costs related to court filings, transcription services, and interpreter/translator fees.

This case involved numerous plaintiffs, most of whom do not speak English fluently, and there was significant discovery and preparation for trial. Based on the circumstances, the Court finds that these fees and costs are reasonable. Accordingly, I find that **[*25]** plaintiffs are entitled to $335,145 in attorneys' fees and $6,184.08 in costs.

## CONCLUSION

For the reasons set forth above, plaintiffs' application for damages is granted in all respects except: (1) plaintiffs' claims are not subject to equitable tolling; (2) plaintiff deliverymen's damages for the cost of acquiring and maintaining the bicycles they used for their delivery work are limited to $500 per year; and (3) plaintiff waiters are not entitled to damages for the cost of the clothing they wore. Plaintiffs shall submit a proposed final judgment against all defendants implementing this decision with revised damages calculations based on the rulings herein by October 8, 2010. [4] Defendants shall submit any opposition on or before October 15, 2010.

SO ORDERED.

Dated: New York, New York

September 30, 2010

/s/ Denny Chin

DENNY CHIN

United States Circuit Judge

Sitting by designation

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[4] The proposed final judgment shall include a revised caption to correct the names of plaintiffs Wen Zhang Zhang and Guo Yong Liu to read Wen Z. Zhang and Guo Y. Liu (their names are currently erroneously listed in the caption as Zhang W. Zhang and Guo T. Liu). Additionally, plaintiffs Geng Di Weng and Quan Zhong Li are hereby dismissed from this action because of their failure to submit declarations in support of damages and to respond to inquiries **[*26]** from their counsel.