



Issue Date: 30 June 2016

Case Number: 2013-FLS-00004

In the Matter of:

**ZL RESTAURANT CORPORATION  
d/b/a FAMOUS WOK; and  
LIXIN ZHANG, an individual**

*Respondents*

**ORDER DENYING MOTION FOR RECONSIDERATION**

**Background**

This case arises under the Fair Labor Standards Act of 1938 (“FLSA”), as amended, 29 U.S.C. § 201 *et seq.*, and the regulations at 29 C.F.R. Parts 578 and 580. On January 31, 2013, the Office of Administrative Law Judges (“Office”) issued a *Notice of Docketing* in the above captioned case.<sup>1</sup> On May 29, 2013, this Office issued a notice scheduling the matter for hearing on July 9, 2013. The hearing was subsequently continued by separate order on June 20, 2013.

On October 17, 2013, the Office issued an *Order Granting Motion to Stay Proceedings* in this matter as a related action had commenced in the U.S. District Court for the District of New Mexico (Civil Action No. 1:13-cv-00075) (“District Court”) which could resolve several of the issues in the instant case.

On February 18, 2015, Complainant filed *Administrator’s Motion to Lift Stay*, stating that final judgment had been entered in District Court awarding Complainant compensatory damages of \$25,168.08, liquidated damages in the same amount, a permanent injunction prohibiting Lixin Zhang and ZL Restaurant Corporation (“Respondents”) from violating the FLSA, and attorneys’ fees and costs. Complainant also averred that a default judgment had previously been entered against ZL Restaurant Corporation d/b/a/ Famous Wok.

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<sup>1</sup> On January 4, 2013, the Administrator, Wage and Hour Division, U.S. Department of Labor (“Complainant”) filed an *Order of Reference* with this Office alleging Respondents owed civil penalties in the amount of \$2,200.00 for willfully and repeatedly violating the minimum wage and overtime compensation provisions of Sections 6 and 7 of the FLSA, 29 U.S.C. §§ 206, 207. According to the June 20, 2012 letter initiating the matter sent to Respondents by the Wage and Hour Division, U.S. Department of Labor, Albuquerque, New Mexico Office, Respondents failed to pay two employees \$22,378.24, the requisite minimum wage and/or overtime pay. Respondent Lixin Zhang filed an exception to the assessment on July 10, 2012 contesting the amount alleged due and assessed civil money penalty and “contest[ed] the calculation of any underpayments.” Respondent Lixin Zhang stated that the investigator assigned the case was “unwilling to provide any information as to the calculation of a shortage.”

On May 26, 2015, Complainant filed a *Motion for Summary Decision and Brief in Support* (“Motion”). Respondents filed a *Response to Motion for Summary Judgment* on June 23, 2015. On July 8, 2015, this Office issued an *Order Lifting the Stay of Proceedings* and an *Order to Show Cause* directing Respondents to file a responsive brief to Complainant’s Motion. On September 22, 2015, Respondents filed a *Memorandum in Opposition to the Motion for Summary Judgment* (“Opposition”). On October 20, 2015, Respondents filed a *Motion for Hearing*. On December 15, 2015, Complainant filed *Administrator’s Reply to Respondents’ Response to the Administrator’s Motion for Summary Decision* (“Reply”).

On December 29, 2015, I granted partial summary judgment and set a hearing date to resolve the remaining issues. I found that the final judgement entered in District Court had resolved the issue of whether Respondents violated sections 6 and 7 of the FLSA. The District Court’s findings also resolved the question of whether Respondents’ violations were repeated and willful. I found that Respondents’ behavior was deemed to be “repeated” under 29 C.F.R. § 578.3(b)(1) and (2) pursuant to the District Court’s findings that Respondents violated sections 6 and 7 in the time period corresponding to the Wage and Hour Division’s first investigation, and Respondents received notice of that violation. Additionally, I found that Respondents’ behavior was deemed to be “willful” pursuant to 29 C.F.R. § 578.3(c)(2) and (3) pursuant to the District Court’s findings that Respondents were informed by the Wage and Hour Division that their conduct was unlawful. I further found that Respondents either knew or were in reckless disregard of the requirements of the FLSA. Accordingly, I found that it was proper to assess civil money penalties. However, there remained the appropriateness of the amount of the assessed civil money penalty as this issue was not resolved by the U.S. District Court order. Therefore, Complainant’s motion for summary decision was granted only as to whether Respondents violated sections 6 and 7 of the FLSA, whether Respondents’ violations were repeated or willful and whether a civil money penalty was authorized. Complainant’s motion for summary decision was denied as to whether the \$2,200.00 assessed penalty is appropriate under 29 C.F.R. §578.4.

On February 23, 2016, after a continuance at Complainant’s request, I convened a formal hearing at the U.S. Historic Courthouse located at 421 Gold Ave, SW, in Albuquerque, New Mexico. The proceeding was limited to the issue of whether the \$2,200.00 assessed penalty was appropriate under the FLSA. Both parties were in attendance. An interpreter was also in attendance at Respondent’s request.<sup>2</sup> Both parties filed post-hearing briefs.

On May 24, 2016, I issued a decision and order reducing the civil money penalty assessed against Respondents Lixin Zhang and ZL Restaurant Corporation to a total amount of \$1000.00, to be paid to Complainants in two installments of \$500.00 each, with the first installment due 45 days after the date the order becomes final and the second 45 days thereafter. On June 2, 2016, this Office mailed a translated copy of the decision to Respondents.

On June 21, 2016, Respondents filed *Petition Review the Decision and Order Reducing Civil Money Penalty* (“Motion for Reconsideration”). Respondents request that this tribunal “reopen the case.” Respondents make the following arguments: (i) Respondents lack legal counsel and language barriers exist; (ii) a witness on Complainant’s witness list, George Watkins, was not a typo, but a “false witness”; (iii) Respondents were unaware of a second investigation; (iv)

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<sup>2</sup> Interpreter Jason Yuen interpreted the proceedings for Respondent from English to Mandarin and Cantonese.

Respondents deny doing anything “repeated and willful”; and (v) back wages were not calculated correctly by the investigator. Complainant has not filed a response.

### **Discussion**

When the OALJ Rules of Practice and Procedure are silent, the Federal Rules apply. 29 C.F.R. § 18.10(a). The OALJ Rules provide that a motion for reconsideration must be filed within 10 days of service of the decision, but do not supply a standard for granting reconsideration. 29 C.F.R. § 18.93. Federal Rule of Civil Procedure 60(b) lists relevant grounds for relief from an order. Those grounds include “mistake, inadvertence, surprise, or excusable neglect”; “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)”; “fraud . . . , misrepresentation, or misconduct by an opposing party”; and “any other reason that justifies relief.” Fed. R. Civ. P. 60(b).

Although Respondents proceeded pro se, and are afforded “a degree of adjudicative latitude,” *Hyman v. KD Resources, Inc., et al.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 8 (ARB Mar. 28, 2010) (internal citation omitted), they have not shown sufficient grounds for reconsideration. Respondents fully participated in the hearing through an interpreter, and raised the concerns in items (ii) through (v) at that time. There is no indication that there is newly discovered evidence that was unavailable at the time of the hearing, nor is there evidence of misconduct by Complainant or any other reason that reconsideration would be justified.

### **Order**

Based on the above, Respondents’ Motion for Reconsideration is hereby DENIED. Respondents may pursue an appeal before the Administrative Review Board (ARB), but that appeal must be sent directly to the ARB at the address listed below, or electronically filed in accordance with 29 C.F.R. § 580.13 as detailed in the Notice of Appeal Rights on the following page.

Administrative Review Board  
U.S. Department of Labor, Suite S-5220  
200 Constitution Avenue, NW  
Washington DC 20210

SO ORDERED:

**STEPHEN R. HENLEY**  
Chief Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Administrative Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 580.13. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents. Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

At the time you file the appeal with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 580.13.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no appeal is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 580.12(e).