Department of Labor and Employment
National Labor Relations Commission
RESEARCH, INFORMATION & PUBLICATION DIVISION
Quezon City

No. VII **N L R C L A W R E P O R T** **July 2013**

ABANDONMENT; CONSTRUCTIVE DISMISSAL

Tan Brothers Corporation of Basilan City vs. Escudero
G.R. No. 188711, July 3, 2013
J. Jose P. Perez

Facts:

Respondent was hired as bookkeeper by petitioners. On September 1, 2004, respondent filed against petitioners a complaint for illegal dismissal, underpayment of wages, cost of living allowance and 13th month pay. In support of the complaint, respondent alleged in her position paper that, starting July 2003, her monthly salary of P2,500.00 was not paid on time by petitioners. After having the corporation's office remodeled in the early part of 2004, petitioners allegedly rented out the office space respondent used to occupy and ceased giving her further assignments. Eventually constrained to stop reporting for work because of her dire financial condition, respondent claimed that petitioners "shrewdly maneuvered" her illegal dismissal from employment. In its position paper, on the other hand, petitioners averred that respondent was paid a daily wage of P155.00, and she abandoned her employment when she stopped reporting for work in July 2003. Aside from taking with her most of the corporation's payrolls, vouchers and other material documents evidencing due payment of wages and labor standard benefits, petitioners maintained that, without its knowledge and consent, respondent appropriated for herself an Olivetti typewriter worth P15,000.00. With respondent's refusal to heed its demands for the return of the typewriter, petitioners asseverated that it was left with no choice but to lodge a complaint with the barangay authorities. The LA rendered a decision, finding petitioners guilty of constructively dismissing respondent from employment. On appeal, the Labor Arbiter's decision was affirmed *in toto.*

Issues:

(a) Will the defense of abandonment prosper?
(b) Was respondent constructively dismissed?

Ruling:

a) No. As defined under established jurisprudence, abandonment is the deliberate and unjustified refusal of an employee to resume his employment ***(DUP Sound Phils. V. Court of Appeals, G.R. No. 168317, November 21, 2011)***. It constitutes neglect of duty and is a just cause for termination of employment under paragraph (b) of Article 282 of the Labor Code ***(CRC Agricultural Trading v. NLRC, G.R. No. 177664, December 23, 2009)***. To constitute abandonment, however, there must be a clear and deliberate intent to discontinue one's employment without any intention of returning. In this regard, two elements must concur: (1) failure to report for work or absence without valid or justifiable reason, and (2)

a clear intention to sever the employer-employee relationship, with the second element as the more determinative factor and being manifested by some overt acts. Otherwise stated, absence must be accompanied by overt acts unerringly pointing to the fact that the employee simply does not want to work anymore. It has been ruled that the employer has the burden of proof to show a deliberate and unjustified refusal of the employee to resume his employment without any intention of returning ***(Henlin Panay Company v. NLRC, G.R. No. 180718, October 23, 2009).***

On the theory that the same is proof enough of the desire to return to work ***(Pentagon Steel Corporation v. Court of Appeals, G.R. No. 174141, June 26, 2009)***, the immediate filing of a complaint for illegal dismissal – more so when it includes a prayer for reinstatement – has been held to be totally inconsistent with a charge of abandonment ***(Chavez v. NLRC, 489 Phil. 444, 460 [2005])***.While it is true that respondent's complaint prayed for separation pay in lieu of reinstatement, petitioners loses sight of the fact, however, that it had the burden of proving its own allegation that respondent had abandoned her employment in July 2003. As allegation is not evidence, the rule has always been to the effect that a party alleging a critical fact must support his allegation with substantial evidence which has been construed to mean such relevant evidence as a reasonable mind will accept as adequate to support a conclusion ***(Ingusan v. Court of Appeals, 505 Phil. 518, 524 [2005])***. It is, on the other hand, doctrinal that abandonment is a matter of intention ***(Macahilig v. NLRC, G.R. No. 158095, November 23, 2007)*** and cannot, for said reason, be lightly inferred, much less legally presumed from certain equivocal acts ***(Garden of Memories Park v. NLRC, G.R. No. 160278, February 8, 2012)***. Viewed in the light of respondent's persistence in reporting for work despite the irregular payment of her salaries starting July 2003, the Court found that her subsequent failure to do so as a consequence of petitioners' non-payment of her salaries in May 2004 is hardly evincive of an intention to abandon her employment. Indeed, mere absence or failure to report for work, even after a notice to return work has been served, is not enough to amount to an abandonment of employment ***(New Ever marketing, Inc. v. Court of Appeals, 501 Phil. 575, 586 [2005])***.

b) Yes. Constructive dismissal occurs when there is cessation of work because continued employment is rendered impossible, unreasonable, or unlikely as when there is a demotion in rank or diminution in pay or when a clear discrimination, insensibility, or disdain by an employer becomes unbearable to the employee leaving the latter with no other option but to quit ***(The University of Immaculate Conception v. NLRC, G.R. No. 181146, January 26, 2011)***. The test is whether a reasonable person in the employee's position would have felt compelled to give up his position under the circumstances ***(Philippine Veterans Bank v. NLRC, G.R. No. 188882, March 30, 2010)***. Much though petitioners may now be inclined to disparage the same as mere alibis, the fact that respondent was deprived of office space, was not given further work assignment and was not paid her salaries until she was left with no choice but stop reporting for work all combine to make out a clear case of constructive dismissal.

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BOND; VERIFICATION & CERTIFICATION AGAINS FORUM SHOPPING; PROJECT EMPLOYEE

Pasos vs. Philippine National Construction Corporation
G.R. No. 192394, July 3, 2013
J. Martin S. Villarama, Jr.

Facts:

Petitioner started working for respondent on April 26, 1996. Based ·on the respondent's "Personnel Action Form Appointment for Project Employment" dated April 30, 1996, petitioner was designated as "Clerk II (Accounting)" and was assigned to the "NAIA – II Project." It was likewise stated therein on April 26, 1996 to July 25, 1996. Petitioner's employment, however, did not end on July 25, 1996 but was extended until August 4, 1998, or more than two years later, based on the "Personnel Action Form – Project Employment" dated July 7, 1998. Based on respondent's "Appointment for Project Employment" dated November 11, 1998, petitioner was rehired on even date as "Accounting Clerk (Reliever)" and assigned to the "PCSO – Q.I. Project." It was stated therein that his employment shall end on February 11, 1999 and may be terminated for cause or in accordance with the provisions of Article 282 of the Labor Code, as amended. However, said employment did not actually end on February 11, 1999 but was extended until February 19, 1999 based on the "Personnel Action Form-Project Employment" dated February 17, 1999. On February 23, 1999, petitioner was again hired by respondent as "Accounting Clerk" and was assigned to the "SM-Project" based on the "Appointment for Project Employment" dated February 18, 1999. It did not specify the date when his employment will end but it was stated therein that it will be "co-terminus with the completion of the project." Said employment supposedly ended on August 19, 1999 per "Personnel Action Form – Project Employment" dated August 18, 1999, where it was stated, "[t]ermination of [petitioner's] project employment due to completion of assigned phase/stage of work or project effective at the close of office hour[s] on 19 August 1999." However, it appears that said employment was extended per "Appointment for Project employment" dated August 20, 1999 as petitioner was again appointed as "Accounting Clerk" for "SM Project (Package II)." It did not state a specific date up to when his extended employment will be, but it provided that it will be "co-terminus with the x x x project." In "Personnel Action Form – Project Employment" dated October 17, 2000, it appears that such extension would eventually end on October 19, 2000.

Despite the termination of his employment on October 19, 2000, petitioner claims that his superior instructed him to report for work the following day, intimating to him that he will again be employed for the succeeding SM projects. For purposes of reemployment, he then underwent a medical examination which allegedly revealed that he had pneumonitis. Petitioner was advised by respondent's physician to take a 14-day sick leave. On November 27, 2000, after serving his sick leave, petitioner claims that he was again referred for medical examination where it was revealed that he contracted Koch's disease. He was then required to take a 60-day leave of absence. The following day, he submitted his application for sick leave but respondent's Project Personnel Officer told him that he was not entitled to sick leave because he was not a regular employee. Petitioner still served a 60-day sick leave and underwent another medical examination on February 16, 2001. He was then given a clean bill of health and was given a medical clearance that he was fit to work.

Petitioner claims that after he presented his medical clearance to the Project Personnel Officer on even date, he was informed that his services were already terminated on October 19, 2000 and he was already replaced due to expiration of his contract. This prompted petitioner on February 18, 2003 to file a complaint for illegal dismissal with a prayer for reinstatement and back wages. He argued that he is

deemed a regular employee of respondent due to his prolonged employment as a project employee as well as the failure on the part of respondent to report his termination every time a project is completed. He further contended that his termination without the benefit of an administrative investigation was tantamount to an illegal dismissal. Respondent countered that petitioner was hired as a project employee in several projects with specific dates of engagement and termination and had full knowledge and consent that his appointment was only for the duration of each project. It further contended that it had sufficiently complied with the reportorial requirements to the DOLE

The Labor Arbiter rendered a Decision in favor of petitioner. On appeal of the respondent, petitioner moved to dismiss respondent's appeal contending that the supersedeas bond in the amount of P422,630.41 filed by the latter was insufficient considering that the Labor Arbiter's monetary award is P460,292.41. He also argued that the person who verified the appeal, Mr. Erece, Jr., Personnel Services Department Head of respondent, has no authority to file the same for and in behalf of respondent.

Issues:

(a) Should an appeal be dismissed outright if the appeal bond filed is less than the adjudged amount?
(b) Can the head of the personnel department sign the verification and certification on behalf of the corporation sans any board resolution or secretary's certificate authorizing such officer to do the same?
(c) Is petitioner a regular employee and not a mere project employee and thus can only be dismissed for cause?

Ruling:

(a) No. The perfection of an appeal within the reglementary period and in the manner prescribed by law is jurisdictional, and noncompliance with such legal requirement is fatal and effectively renders the judgment final and executory. As provided in Article 223 of the Labor Code, as amended, in case of a judgment involving a monetary award, an appeal by the employer may be perfected only upon the posting of a cash or surety bond issued by a reputable bonding company duly accredited by the Commission in the amount equivalent to the monetary award in the judgment appealed from. However, not only in one case has the Court relaxed this requirement in order to bring about the immediate and appropriate resolution of cases on the merits. In *Quiambao v. National Labor Relations Commission*, the Court allowed the relaxation of the requirement when there is substantial compliance with the rule. Likewise, in *Ong v. Court of Appeals*, the Court held that the bond requirement on appeals may be relaxed when there is substantial compliance with the Rules of Procedure of the NLRC or when the appellant shows willingness to post a partial bond. The Court held that "[w]hile the bond requirement on appeals involving monetary awards has been relaxed in certain cases, this can only be done where there was substantial compliance of the Rules or where the appellants, at the very least, exhibited willingness to pay by posting a partial bond." In the instant case, the Labor Arbiter in his decision ordered respondent to pay petitioner back wages amounting to P422,630.41 and separation pay of P37,662 or a total of P460,292.41. When respondent filed an appeal bond amounting to P422,630.41 or **at least 90% of the adjudged amount**, there is no question that this is substantial compliance with the requirement that allows relaxation of the rules.

(b) Yes. It has been the constant holding of the Court in cases instituted by corporations that an individual corporate officer cannot exercise any corporate power pertaining to the corporation without authority from the board of directors pursuant to Section 23, in relation to Section 25 of the Corporation Code which clearly enunciates that all corporate powers are exercised, all business conducted, and all properties controlled by the board of directors. However, the Court in many cases recognized the authority of some corporate officers to sign the verification and certification against forum-shopping. Some of these cases were enumerated in *Cagayan Valley Drug Corporation v. Commissioner of Internal Revenue* which was cited by the appellate court: "In *Mactan-Cebu International Airport Authority v. CA*,

we recognized the authority of a general manager or acting general manager to sign the verification and certificate against forum shopping; in *Pfizer v. Galan*, we upheld the validity of a verification signed by an "employment specialist" who had not even presented any proof of her authority to represent the company; in *Novelty Philippines, Inc. v. CA*, we ruled that a personnel officer who signed the petition but did not attach the authority from the company is authorized to sign the verification and non-forum shopping certificate; and in *Lepanto Consolidated Mining Company v. WMC Resources International Pty. Ltd.* (*Lepanto*), we ruled that the Chairperson of the Board and President of the Company can sign the verification and certificate against non-forum shopping even without the submission of the board's authorization. In sum, we have held that the following officials or employees of the company can sign the verification and certification without need of a board resolution: (1) the Chairperson of the Board of Directors, (2) the President of a corporation, (3) the General Manager or Acting General Manager, (4) Personnel Officer, and (5) an Employment Specialist in a labor case. While the above cases do not provide a complete listing of authorized signatories to the verification and certification required by the rules, the determination of the sufficiency of the authority was done on a case to case basis. The rationale applied in the foregoing cases is to justify the authority of corporate officers or representatives of the corporation to sign the verification or certificate against forum shopping, being "in a position to verify the truthfulness and correctness of the allegations in the petition." (Citations omitted.)

While the Court agree with petitioner that in *Cagayan Valley,* the requisite board resolution was submitted though belatedly unlike in the instant case, this Court still recognizes the authority of Mr. Erece, Jr. to sign the verification and certification on behalf of respondent sans a board resolution or secretary's certificate as the Court allowed in *Pfizer, Inc. v. Galan*, one of the cases cited in *Cagayan Valley*. In *Pfizer,* the Court ruled as valid the verification signed by an employment specialist as she was in a position to verify the truthfulness and correctness of the allegations in the petition despite the fact that no board resolution authorizing her was ever submitted by Pfizer, Inc. even belatedly. The Court believe that like the employment specialist in Pfizer, Mr. Erece, Jr. too, as head of the Personnel Services Department of respondent, was in a position to assure that the allegations in the pleading have been prepared in good faith and are true and correct.

Even assuming that the verification in the appeal filed by respondent is defective, it is well settled that rules of procedure in labor cases maybe relaxed. As provided in Article 221 of the Labor Code, as amended, "rules of evidence prevailing in courts of law or equity shall not be controlling and it is the spirit and intention of this Code that the Commission and its members and the Labor Arbiters shall use every and all reasonable means to ascertain the facts in each case speedily and objectively and without regard to technicalities of law or procedure, all in the interest of due process." Moreover, the requirement of verification is merely formal and not jurisdictional. As held in ***Pacquing v. Coca-Cola Philippines, Inc., G.R. No. 157966, January 31, 2008***: "As to the defective verification in the appeal memorandum before the NLRC, the same liberality applies. After all, the requirement regarding verification of a pleading is formal, not jurisdictional. Such requirement is simply a condition affecting the form of pleading, the noncompliance of which does not necessarily render the pleading fatally defective. Verification is simply intended to secure an assurance that the allegations in the pleading are true and correct and not the product of the imagination or a matter of speculation, and that the pleading is filed in good faith. The court or tribunal may order the correction of the pleading if verification is lacking or act on the pleading although it is not verified, if the attending circumstances are such that strict compliance with the rules may be dispensed with in order that the ends of justice may thereby be served."

(c) Regular employee. In the instant case, the appointments issued to petitioner indicated that he was hired for specific projects. The Court is convinced however that although he started as a project employee, he eventually became a regular employee of respondent. Under Article 280 of the Labor Code, as amended, a project employee is one whose "employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of

the employee or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season." Thus, the principal test used to determine whether employees are project employees is whether or not the employees were assigned to carry out a specific project or undertaking, the duration or scope of which was specified at the time the employees were engaged for that project ***(Goma vs. Pamplona Plantation, Inc., G.R. No. 160905, July 4, 2008 & Hanjin Heavy Industries and Construction Co., Ltd. Vs. Ibanez, G.R. No. 170181, June 26, 2008)***. In the case at bar, petitioner worked continuously for more than two years after the supposed three-month duration of his project employment for the NAIA II Project. While his appointment for said project allowed such extension since it specifically provided that in case his "services are still needed beyond the validity of [the] contract, the Company shall extend [his] services," there was no subsequent contract or appointment that specified a particular duration for the extension. His services were just extended indefinitely until "Personnel Action Form – Project Employment" dated July 7, 1998 was issued to him which provided that his employment will end a few weeks later or on August 4, 1998. While for first three months, petitioner can be considered a project employee of respondent, his employment thereafter, when his services were extended without any specification of as to the duration, made him a regular employee of respondent. And his status as a regular employee was not affected by the fact that he was assigned to several other projects and there were intervals in between said projects since he enjoys security of tenure.

Verily, failure of an employer to file termination reports after every project completion proves that an employee is not a project employee. In this case, records clearly show that respondent did not report the termination of petitioner's supposed project employment for the NAIA II Project to the DOLE. Department Order No. 19, or the "Guidelines Governing the Employment of Workers in the Construction Industry," requires employers to submit a report of an employee's termination to the nearest public employment office every time an employee's employment is terminated due to a completion of a project. Respondent submitted as evidence of its compliance with the requirement supposed photocopies of its termination reports, each listing petitioner as among the employees affected. Unfortunately, none of the reports submitted pertain to the NAIA II Project. Moreover, DOLE NCR verified that petitioner is not included in the list of affected workers based on the termination reports filed by respondent on August 11, 17, 20 and 24, 1998 for petitioner's supposed dismissal from the NAIA II Project effective August 4, 1998. This certification from DOLE was not refuted by respondent. In *Tomas Lao Construction v. NLRC*, the Court emphasized the indispensability of the reportorial requirement: "*Moreover, if private respondents were indeed employed as "project employees," petitioners should have submitted a report of termination to the nearest public employment office every time their employment was terminated due to completion of each construction project. The records show that they did not. Policy Instruction No. 20 is explicit that employers of project employees are exempted from the clearance requirement but not from the submission of termination report. We have consistently held that failure of the employer to file termination reports after every project completion proves that the employees are not project employees. Nowhere in the New Labor Code is it provided that the reportorial requirement is dispensed with. The fact is that Department Order No. 19 superseding Policy Instruction No. 20 expressly provides that the report of termination is one of the indicators of project employment.*"

Finally, petitioner's regular employment was terminated by respondent due to contract expiration or project completion, which are both not among the just or authorized causes provided in the Labor Code, as amended, for dismissing a regular employee. Thus, petitioner was illegally dismissed. Article 279 of the Labor Code, as amended, provides that an illegally dismissed employee is entitled to reinstatement, full back wages, inclusive of allowances, and to his other benefits or their monetary equivalent from the time his compensation was withheld from him up to the time of his actual reinstatement. The Court agrees with petitioner that there was no basis for the Labor Arbiter's finding of strained relations and order of separation pay in lieu of reinstatement. This was neither alleged nor proved. Moreover, it has long been settled that the doctrine of strained relations should be strictly applied so as not to deprive an illegally dismissed employee of his right to reinstatement.

As held in *Globe-Mackay Cable and Radio Corporation v. NLRC:* "*Obviously, the principle of 'strained relations' cannot be applied indiscriminately. Otherwise, reinstatement can never be possible simply because some hostility is invariably engendered between the parties as a result of litigation. That is human nature. Besides, no strained relations should arise from a valid and legal act of asserting one's right; otherwise an employee who shall assert his right could be easily separated from the service, by merely paying his separation pay on the pretext that his relationship with his employer had already become strained.*" As to the back wages due petitioner, there is likewise no basis in deducting therefrom back wages equivalent to six months "representing the maximum period of confinement [respondent] can require him to undergo medical treatment." Besides, petitioner was not dismissed on the ground of disease but expiration of term of project employment. Regarding moral and exemplary damages, the Court rules that petitioner is not entitled to them. Worth reiterating is the rule that moral damages are recoverable where the dismissal of the employee was attended by bad faith or fraud or constituted an act oppressive to labor, or was done in a manner contrary to morals, good customs, or public policy. Likewise, exemplary damages may be awarded if the dismissal was effected in a wanton, oppressive or malevolent manner. Apart from his allegations, petitioner did not present any evidence to prove that his dismissal was attended with bad faith or was done oppressively. Petitioner is also entitled to attorney's fees in the amount of ten percent (10%) of his total monetary award, having been forced to litigate in order to seek redress of his grievances, as provided in Article 111 of the Labor Code, as amended, and following this Court's pronouncement in ***Exodus International Construction Corporation v. Biscocho, G.R. No. 166109, February 23, 2011***. In line with current jurisprudence, the award of back wages shall earn legal interest at the rate of six percent (6%) per annum from the date of petitioner's dismissal until the finality of this decision ***(Torres v. Rural Bank of San Juan, Inc., G.R. No. 184520, March 13, 2013)***. Thereafter, it shall earn 12% legal interest until fully paid in accordance with the guidelines in *Eastern Shipping Lines, Inc. v. Court of Appeals.*

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ABANDONMENT ; SOLIDARY LIABILITY

Fernandez and Beltran vs. Newfield Staff Solutions, Inc.
G.R. No. 201979, July 10, 2013
J. Martin S. Villarama, Jr.

Facts:

Respondent corporation hired petitioner as Recruitment Manager starting September 30, 2008. Respondent also hired petitioner Beltran as probationary Recruitment Specialist starting October 7, 2008. Petitioners guaranteed to perform their tasks for six months and breach of this guarantee would make them liable for liquidated damages. It was further provided in their employment agreements that if they want to terminate their employment agreements after the "guaranteed period of engagement," they should send a written notice 45 days before the effective date of termination. They should also surrender any equipment issued to them and secure a clearance. If they fail to comply, respondent can refuse to issue a clearance and to release any amount due them. On October 17, 2008, Lopez, Jr., respondent's General Manager, asked petitioners to come to his office and terminated their employment on the ground that they failed to perform satisfactorily. Lopez, Jr. ordered them to immediately turn over the records in their possession to their successors. A week later, petitioners received Lopez, Jr.'s return-to-work letters dated October 22, 2008. The letters stated that they did not report since October 20, 2008 without resigning, in violation of their employment agreements. They were directed to report and explain their failure to file resignation letters. Eventually, they filed a complaint for illegal dismissal. In their verified joint position paper, respondents stated that petitioners signed fixed-term employment agreements where they agreed to

perform their tasks for six months. They also agreed to give a written notice 45 days in advance if they want to terminate their employment agreements. But they never complied with their undertakings. Three weeks after working for respondent, petitioner Fernandez did not report for work. She never bothered to communicate with respondents despite the return-to-work letter. Hence, respondent declared her absent without official leave (AWOL) and terminated her employment on the ground of breach of contract. Similarly, respondent declared petitioner Beltran AWOL and terminated her employment on the ground of breach of contract. Beltran stopped reporting two weeks after she was hired and never bothered to communicate with respondents despite the return-to-work letter. Thus, respondent claims that petitioners abandoned their jobs.

Issues:

(a) Was there abandonment?
(b) Were petitioners illegally dismissed?
(c) Is Lopez, Jr. solidary liable with the corporation?

Ruling:

(a) None. Abandonment is a form of neglect of duty, one of the just causes for an employer to terminate an employee ***(Galang v. Malasugui, G.R. No. 174173, March 7, 2012)***. For abandonment to exist, two factors must be present: (1) the failure to report for work or absence without valid or justifiable reason; and (2) a clear intention to sever the employer-employee relationship, with the second element as the more determinative factor being manifested by some overt acts ***(Josan, JPS, Santiago Cargo Movers v. Aduna, G.R. No. 190794, February 22, 2012)***. Since both factors are not present, petitioners are not guilty of abandonment. One, petitioners were absent because Lopez, Jr. had fired them. Thus, it cannot fault them for refusing to comply with the return to-work letters and responding instead with their demand letters. Neither can they be accused of being AWOL or of breaching their employment agreements. Indeed, as stated above, respondents cannot claim that no evidence shows that petitioners were forced not to report for work. Two, petitioners' protest of their dismissal by sending demand letters and filing a complaint for illegal dismissal with prayer for reinstatement shows that petitioners have no intention to sever the employment relationship. Employees who take steps to protest their dismissal cannot logically be said to have abandoned their work. A charge of abandonment is totally inconsistent with the immediate filing of a complaint for illegal dismissal. The filing thereof is proof enough of one's desire to return to work, thus negating any suggestion of abandonment.

(b) Yes. Petitioners were illegally dismissed since there is no just cause for their dismissal. Under Article 279 of the Labor Code, as amended, an employee unjustly dismissed from work is entitled to reinstatement and full back wages from the time his compensation was withheld from him up to the time of his actual reinstatement. However, the NLRC's award of back wages for six months is binding on petitioners who no longer contested and are therefore presumed to have accepted the adjudication in the NLRC decision and resolution. This is in accord with the doctrine that a party who has not appealed cannot obtain from the appellate court any affirmative relief other than the ones granted in the appealed decision ***(Filflex Industrial & Manufacturing Corp. v. NLRC, G.R. No. 115395, February 12, 1998)***. Similarly, the award of separation pay which was affirmed by the NLRC is binding on petitioners who even admitted that reinstatement is no longer possible.

(c) No. The dispositive portion of the Labor Arbiter's decision, as affirmed and modified by the NLRC, stated that "respondents are ordered to pay" petitioners. This gives the impression that Lopez, Jr. is solidarily liable with the corporation. In ***Grandteq Industrial Steel Products, Inc. v. Estrella, G.R. No. 192416, March 23, 2011***, the Court discussed how corporate agents incur solidary liability, as follows: "There is solidary liability when the obligation expressly so states, when the law so provides, or *when the nature of the obligation so requires*. In *MAM Realty Development Corporation v. NLRC*, the solidary liability of corporate officers in labor disputes was discussed in this wise: "A corporation, being a

juridical entity, may act only through its directors, officers and employees. Obligations incurred by them, acting as such corporate agents, are not theirs but the direct accountabilities of the corporation they represent. True, solidary liability may at times be incurred but only when exceptional circumstances warrant such as, generally, in the following cases: I. When directors and trustees or, in appropriate cases, the officers of a corporation - (a) vote for or assent to *patently* unlawful acts of the corporation; (b) act in *bad faith* or with *gross negligence* in directing the corporate affairs; *x x x x*. In labor cases, for instance, the Court has held corporate directors and officers solidarily liable with the corporation for the termination of employment of employees done with malice or in bad faith." Bad faith does not connote bad judgment or negligence; It Imports dishonest purpose or some moral obliquity and conscious doing of wrong; it means breach of a known duty through some motive or interest or ill will; it partakes of the nature of fraud. To sustain such a finding, there should be evidence on record that an officer or director acted maliciously or in bad faith in terminating the employee. But here, the Labor Arbiter and NLRC have not found Lopez, Jr. guilty of malice or bad faith. Thus, there is no basis to hold Lopez, Jr. solidarily liable with the corporation. Payment of the judgment award is the direct accountability of the corporation. Newfield.

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LOSS OF TRUST AND CONFIDENCE

Martinez vs. Central Pangasinan Electric Cooperative, Inc.
G.R. No. 192306, July 15, 2013
J. Estella M. Perlas-Bernabe

Facts:

Respondent employed petitioner on a contractual basis and, was subsequently regularized as a billing clerk at the former's main Designated Acting Member. On January 7, 2002, respondent gave petitioner the position of teller. On April 26, 2002, respondent's Internal Audit Department (IAD) conducted a cash count audit, the IAD Officer-in-Charge, analyzed the audit results and concluded that there was an error in the count of cashier for Area VI, regarding the breakdown of collection turned over by petitioner for April 23, 2002. Specifically, it was erroneously recorded that petitioner remitted 390 pieces of P500-bills, instead of the correct number which was just 290, and issued a handwritten temporary receipt for P406,130.31 instead of P360,447.13. Upon noting that the issued Official Receipts Nos. 77365-77367 for the amount of P360,447.139 with corresponding remittance stubs for petitioner's April 23, 2002 collections, it was concluded that petitioner's overage for the same day in the amount of P45,682.58 is questionable. It was noted that petitioner committed a shortage in the amount of P44,846.77, considering that the latter's total accountability for the said date is in the amount of P212,258.56 but his actual cash count only amounted to P167,411.79. In view of such audit, petitioner was required to submit explanation letter. He further admitted the existence of such shortage and tried to offset the same with his alleged overage on April 23, 2002. On June 30 2002, the Company's Grievance Committee submitted its report recommending petitioner's termination from employment on the ground of loss of trust and confidence as well as the filing of the appropriate case in court. On November 26, 2002, petitioner was dismissed from service, prompting him to file a complaint for illegal dismissal.

Issue:

Is petitioner's dismissal on the ground of loss of trust and confidence valid?

Ruling:

Yes. To validly dismiss an employee on the ground of loss of trust and confidence under Article 296(c) (formerly Article 282[c]) of the Labor Code, the following guidelines must be observed: (*1*) the

employee concerned must be holding a position of trust and confidence; and (*2*) there must be an act that would justify the loss of trust and confidence ***(Philippine Plaza Holdings, Inc. v. Epicospe, G.R. No. 192826, February 27, 2013)***. Anent the first requisite, it is noteworthy to mention that there are two classes of positions of trust, namely: (*1*) managerial employees whose primary duty consists of the management of the establishment in which they are employed or of a department or a subdivision thereof, and to other officers or members of the managerial staff; and (*2*) fiduciary rank-and-file employees such as cashiers, auditors, property custodians, or those who, in the normal exercise of their functions, regularly handle significant amounts of money or property. These employees, though rank-and-file, are routinely charged with the care and custody of the employer's money or property, and are thus classified as occupying positions of trust and confidence. Being an employee tasked to collect payments and remit the same to respondent, petitioner belongs to the latter class and thus, occupies a position of trust and confidence. Anent the second requisite, the audit report conducted on petitioner's cash count revealed that he had a shortage in the amount of P44,846.77 in his remittance for April 25, 2002. When asked to explain such shortage, petitioner not only admitted the same but even tried to exculpate himself from liability by attempting to offset said shortage with his alleged overage on April 23, 2002 in the amount of P45,682.58. This practice should never be countenanced because it would allow the employees to patch up inaccuracies or even their own wrongdoings and thus, the true revenues or losses of the company will never be correctly identified. Verily, this irregular practice would be detrimental to the interests of the employer whose bread and butter depend solely on realized profits. Perforce, petitioner's failure to properly account for his shortage of such a significant amount is enough reason for respondent to lose trust and confidence in him.

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ALLEGATIONS/AVERMENT IN THE COMPLAINT
ABANDONMENT; LOSS OF TRUST & CONFIDENCE

Samar-Med Distribution vs. NLRC and Gutang
G.R. No. 162385, July 15, 2013
J. Lucas M. Bersamin

Facts:

Respondent was hired by petitioner with the task of supervising the company's sales personnel and sales agents, and of representing in transactions with the government in Region VIII. On August 16, 1996, respondent filed a complaint for money claims against petitioner, and claimed that petitioner had difficulty paying his compensation during his employment, resulting in his not being paid salaries; that petitioner made illegal deductions; that he had no knowledge of any infraction that had caused his dismissal; that he did not receive any notice informing him of the cessation of petitioner's business operations; and that he had been compelled to look for other sources of income beginning on March 26, 1996 in order to survive. Petitioner denied liability for respondent's monetary claims, contending that respondent was not his employee but an employee of the City Council of Manila; that respondent had approached and asked him if he could assist in the operation of the business in order to have extra income; that respondent was thus permitted to sell petitioner's products in his own hometown; that respondent stopped selling and no longer returned to Manila after he was tasked to conduct an investigation of the shortage in sales collections; that there was no dismissal of respondent, to speak of, but abandonment on his part; and that the complaint was a harassment suit to retaliate for the criminal case they had meanwhile filed against respondent for misappropriating petitioner's funds. The LA ruled in favor of respondent for illegal dismissal. Petitioner argues that respondent's complaint did not include "illegal dismissal" as his cause of action, thus, no cause of action for illegal dismissal.

Issues:

(a) Was respondent's dismissal a proper issue even if he had not raised it in his complaint?

(b) Was respondent's dismissal justified on the ground of the latter's abandonment and/or breach of trust and confidence?

Ruling:

(a) Yes. In this case, the complaint of respondent was a mere checklist of possible causes of action that he might have against petitioner. Such manner of preparing the complaint was obviously designed to facilitate the filing of complaints by employees and laborers who are thereby enabled to expediently set forth their grievances in a general manner ***(Tegimenta Chemical Phils. V. Buensalida, G.R. No. 176466, June 17, 2008)***. But the non inclusion in the complaint of the issue on the dismissal did not necessarily mean that the validity of the dismissal could not be an issue. The rules of the NLRC require the submission of verified position papers by the parties should they fail to agree upon an amicable settlement, and bar the inclusion of any cause of action not mentioned in the complaint or position paper from the time of their submission by the parties. In view of this, respondent's cause of action should be ascertained not from a reading of his complaint alone but also from a consideration and evaluation of both his complaint and position paper. With respondent's position paper having alleged not only the bases for his money claims, but also that he had been "compelled to look for other sources of income in order to survive" and that his employment had not been formally terminated, thereby entitling him to "full backwages aside from his other claims for unpaid monies," the consideration and ruling on the propriety of respondent's dismissal by the Labor Arbiter and the NLRC were proper.

(b) The *onus* of proving that an employee was not dismissed or, if dismissed, his dismissal was not illegal fully rests on the employer, and the failure to discharge the *onus* would mean that the dismissal was not justified and was illegal. In respondent's case, petitioner tendered no showing outside of his mere allegations to substantiate his averment of abandonment by respondent. Moreover, although respondent had undoubtedly stopped working for the petitioner, his doing so had been for a justifiable reason, consisting in the nonpayment of his salary since November 1995 and his being forced to stop working for petitioner to enable him to seek employment elsewhere, albeit temporarily, in order to survive.

However, it must be noted that respondent was a managerial employee whom the petitioner had vested with confidence on delicate matters, such as the custody, handling, care and protection of the petitioner's properties and funds, as well as its operations and transactions in Region VIII. Respondent was shown to have failed to account for and to turn over his sales collections. In that regard, petitioner's filing of the criminal case against respondent and the public prosecutor's finding of a *prima facie* case for the offense charged after preliminary investigation amounted to substantial evidence of respondent's breach of the trust and confidence reposed in him, a just cause to terminate the employment based on loss of trust and confidence.

Under Article 282(*c*) of the *Labor Code*, an employer may terminate an employee's employment on the ground of the latter's fraud or willful breach of the trust and confidence reposed in him. For loss of trust and confidence to constitute a sufficient ground for termination, the employer must have a reasonable ground to believe, if not to entertain the moral conviction, that the employee was responsible for the misconduct, and that the nature of his participation therein rendered him absolutely unworthy of the trust and confidence demanded by his position ***(Jerusalem v. Keppel Mone Bank, G.R. No. 169564, April 6, 2011)***. Those requirements were undeniably met in respondent's case.

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CLOSURE OF ESTABLISHMENT

Zuellig Freight and Cargo Systems vs. NLRC and San Miguel
G.R. No. 157900, July 22, 2013
J. Lucas M. Bersamin

Facts:

Respondent brought a complaint for unfair labor practice, illegal dismissal, non-payment of salaries and moral damages against petitioner, formerly known as Zeta. He alleged that he had been a checker/customs representative of Zeta since December 16, 1985; that in January 1994, he and other employees of Zeta were informed that Zeta would cease operations, and that all affected employees, including him, would be separated; that by letter dated February 28, 1994, Zeta informed him of his termination effective March 31, 1994; that he reluctantly accepted his separation pay subject to the standing offer to be hired to his former position by petitioner; and that on April 15, 1994, he was summarily terminated, without any valid cause and due process. Respondent contended that the amendments of the articles of incorporation of Zeta were for the purpose of changing the corporate name, broadening the primary functions, and increasing the capital stock; and that such amendment could not mean that Zeta had been thereby dissolved. On its part, petitioner countered that respondent's termination from Zeta had been for a cause; that its non-acceptance of him had not been by any means irregular or discriminatory; that its predecessor-in-interest had complied with the requirements for termination due to the cessation of business operations; that it had no obligation to employ respondent in the exercise of its valid management prerogative; that all employees had been given sufficient time to make their decision whether to accept its offer of employment or not, but he had not responded to its offer within the time set; that because of his failure to meet the deadline, the offer had expired; that he had nonetheless been hired on a temporary basis; and that when it decided to hire another employee instead of respondent, such decision was not arbitrary because of seniority considerations.

Issue:

Was the cessation of business of Zeta a *bona fide* closure to be regarded as a valid ground for the termination of employment of respondent within the ambit of Article 283 of the Labor Code?

Ruling:

No. Article 283 provides that the employer may also terminate the employment of any employee due to the installation of labor-saving devices, redundancy, retrenchment to prevent losses *or the closing or cessation of operation of the establishment or undertaking unless the closing is for the purpose of circumventing the provisions of this Title, by serving a written notice on the workers and the Department of Labor and Employment at least one (1) month before the intended date thereof.* Verily, the amendments of the articles of incorporation of Zeta to change the corporate name to Zuellig Freight and Cargo Systems, Inc. did not produce the dissolution of the former as a corporation. For sure, the *Corporation Code* defined and delineated the different modes of dissolving a corporation, and amendment of the articles of incorporation was not one of such modes. The effect of the change of name was not a change of the corporate being, for, as well stated in *Philippine First Insurance Co., Inc. v. Hartigan*: "The changing of the name of a corporation is no more the creation of a corporation than the changing of the name of a natural person is begetting of a natural person. The act, in both cases, would seem to be what the language which we use to designate it imports – a change of *name*, and not a change of *being*."

The consequences, legal and otherwise, of the change of name were similarly dealt with in ***P.C. Javier & Sons, Inc. v. Court of Appeals, G.R. No. 129552, June 29, 2005***, with the Court holding thusly: "From the foregoing documents, it cannot be denied that petitioner corporation was aware of First Summa

Savings and Mortgage Bank's change of corporate name to PAIC Savings and Mortgage Bank, Inc. Knowing fully well of such change, petitioner corporation has no valid reason not to pay because the IGLF loans were applied with and obtained from First Summa Savings and Mortgage Bank. First Summa Savings and Mortgage Bank and PAIC Savings and Mortgage Bank, Inc., are one and the same bank to which petitioner corporation is indebted. *A change in the corporate name does not make a new corporation, whether effected by a special act or under a general law. It has no effect on the identity of the corporation, or on its property, rights, or liabilities. The corporation, upon such change in its name, is in no sense a new corporation, nor the successor of the original corporation. It is the same corporation with a different name, and its character is in no respect changed.*

In short, Zeta and petitioner remained one and the same corporation. The change of name did not give petitioner the license to terminate employees of Zeta like respondent without just or authorized cause. The situation was not similar to that of an enterprise buying the business of another company where the purchasing company had no obligation to rehire terminated employees of the latter. Petitioner, despite its new name, was the mere continuation of Zeta's corporate being, and still held the obligation to honor all of Zeta's obligations, one of which was to respect respondent's security of tenure. The dismissal of respondent from employment on the pretext that petitioner, being a different corporation, had no obligation to accept him as its employee, was illegal and ineffectual.

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TERMINATION OF PROBATIONARY EMPLOYEE

Abbott Laboratories Philippines, et. al. vs. Alcaraz
G.R. No. 192571, July 23, 2013
J. Estella M. Perlas-Bernabe

Facts:

On June 27, 2004, petitioner Abbott caused the publication in a major broadsheet newspaper of its need for a Medical and Regulatory Affairs Manager (Regulatory Affairs Manager). Respondent – who was then a Regulatory Affairs and Information Manager of a company like Abbott – showed interest and submitted her application. On December 7, 2004, Abbott formally offered respondent the abovementioned position. In Abbott's offer sheet, it was stated that respondent was to be employed on a probationary basis. Later that day, she accepted the said offer and received an e-mail from Abbott's Recruitment Office confirming the same. Attached to the Abbott's e-mail were its organizational chart and a job description of respondent's work. On February 12, 2005, respondent signed an employment contract which stated, *inter alia*, that she was to be placed on probation for a period of six (6) months beginning February 15, 2005 to August 14, 2005. The said contract was also signed by Abbott's General Manager. During respondent's pre-employment orientation, the Transition Manager, briefed her on her duties and responsibilities as Regulatory Affairs Manager. On March 3, 2005, Abbott's Human Resources Director, sent respondent an e-mail which contained an explanation of the procedure for evaluating the performance of probationary employees and further indicated that Abbott had only one evaluation system for all of its employees. Respondent was also given copies of Abbott's Code of Conduct and Probationary Performance Standards and Evaluation (PPSE) and Performance Excellence Orientation Modules (Performance Modules) which she had to apply in line with her task of evaluating the staff. Abbott's PPSE procedure mandates that the job performance of a probationary employee should be formally reviewed and discussed with the employee at least twice: first on the third month and second on the fifth month from the date of employment. The necessary Performance Improvement Plan should also be made during the third-month review in case of a gap between the employee's performance and the standards set. These performance standards should be discussed in detail with the employee within the first two (2)

weeks on the job. It was equally required that a signed copy of the PPSE form must be submitted to Abbott's Human Resources Department (HRD) and shall serve as documentation of the employee's performance during his/her probationary period. This shall form the basis for recommending the confirmation or termination of the probationary employment.

During the course of her employment, respondent noticed that some of the staff had disciplinary problems. Thus, she would reprimand them for their unprofessional behavior such as non-observance of the dress code, moonlighting, and disrespect of Abbott officers. However, respondent's method of management was considered to be "too strict." On April 12, 2005, respondent received an e-mail from HR requesting immediate action on the staff's performance evaluation as their probationary periods were about to end. This respondent eventually submitted. On May 16, 2005, respondent was called to a meeting where she was informed that she failed to meet the regularization standards for the position of Regulatory Affairs Manager. Thereafter, respondent was requested to tender her resignation, else they be forced to terminate her services. She was also told that, regardless of her choice, she should no longer report for work and was asked to surrender her office identification cards. She requested to be given one week to decide on the same, but to no avail. Respondent felt that she was unjustly terminated from her employment and thus, filed a complaint for illegal dismissal. Abbott maintained that respondent was validly terminated from her probationary employment given her failure to satisfy the prescribed standards for her regularization which were made known to her at the time of her engagement. The LA dismissed respondent's complaint for lack of merit. On appeal, the NLRC reversed the findings of the LA and ruled that there was no evidence showing that respondent had been apprised of her probationary status and the requirements which she should have complied with in order to be a regular employee.

Issues:

(a) Was respondent sufficiently informed of the reasonable standards to qualify her as a regular employee?
(b) Was respondent validly terminated from her employment?

Ruling:

(a) Yes. A probationary employee, like a regular employee, enjoys security of tenure. However, in cases of probationary employment, aside from just or authorized causes of termination, an additional ground is provided under Article 295 of the Labor Code, *i.e.*, the probationary employee may also be terminated for failure to qualify as a regular employee in accordance with the reasonable standards made known by the employer to the employee at the time of the engagement ***(Robinsons Galleria v. Ranchez, G.R. No. 177937, January 19, 2011)***. Thus, the services of an employee who has been engaged on probationary basis may be terminated for any of the following: (*a*) a just or (*b*) an authorized cause; and (*c*) when he fails to qualify as a regular employee in accordance with reasonable standards prescribed by the employer

Corollary thereto, Section 6(d), Rule I, Book VI of the Implementing Rules of the Labor Code provides that if the employer fails to inform the probationary employee of the reasonable standards upon which the regularization would be based on at the time of the engagement, then the said employee shall be deemed a regular employee, *viz.*: *"(d) In all cases of probationary employment, the employer shall make known to the employee the standards under which he will qualify as a regular employee at the time of his engagement. Where no standards are made known to the employee at that time, he shall be deemed a regular employee."* In other words, the employer is made to comply with two (2) requirements when dealing with a probationary employee: ***first***, the employer must communicate the regularization standards to the probationary employee; and ***second,*** the employer must make such communication at the time of the probationary employee's engagement. If the employer fails to comply with either, the employee is deemed as a regular and not a probationary employee.

Keeping with these rules, an employer is deemed to have made known the standards that would qualify a probationary employee to be a regular employee when it has exerted reasonable efforts to apprise the employee of what he is expected to do or accomplish during the trial period of probation. This goes without saying that the employee is sufficiently made aware of his probationary status as well as the length of time of the probation. The exception to the foregoing is when the job is self-descriptive in nature, for instance, in the case of maids, cooks, drivers, or messengers. Also, in *Aberdeen Court, Inc. v. Agustin*, it has been held that the rule on notifying a probationary employee of the standards of regularization should not be used to exculpate an employee who acts in a manner contrary to basic knowledge and common sense in regard to which there is no need to spell out a policy or standard to be met. In the same light, an employee's failure to perform the duties and responsibilities which have been clearly made known to him constitutes a justifiable basis for a probationary employee's non regularization.

In this case, a punctilious examination of the records reveals that Abott had indeed complied with the above-stated requirements. This conclusion is largely impelled by the fact that Abott clearly conveyed to respondent her duties and responsibilities as Regulatory Affairs Manager prior to, during the time of her engagement, and the incipient stages of her employment. On this score, the Court finds it apt to detail not only the incidents which point out to the efforts made by Abbott but also those circumstances which would show that respondent was well apprised of her employer's expectations that would, in turn, determine her regularization. Verily, basic knowledge and common sense dictate that the adequate performance of one's duties is, by and of itself, an inherent and implied standard for a probationary employee to be regularized; such is a regularization standard which need not be literally spelled out or mapped into technical indicators in every case. In this regard, it must be observed that the assessment of adequate duty performance is in the nature of a management prerogative which when reasonably exercised – as Abbott did in this case – should be respected. This is especially true of a managerial employee like respondent who was tasked with the vital responsibility of handling the personnel and important matters of her department. In fine, the Court rules that respondent's status as a probationary employee and her consequent dismissal must stand.

Consequently, in holding that respondent was illegally dismissed due to her status as a regular and not a probationary employee, the Court finds that the NLRC committed a grave abuse of discretion. To elucidate, records show that the NLRC based its decision on the premise that respondent's receipt of her job description and Abbott's Code of Conduct and Performance Modules was not equivalent to being actually informed of the performance standards upon which she should have been evaluated on. It, however, overlooked the legal implication of the other attendant circumstances as detailed herein which should have warranted a contrary finding that respondent was indeed a probationary and not a regular employee – more particularly the fact that she was well-aware of her duties and responsibilities and that her failure to adequately perform the same would lead to her non-regularization and eventually, her termination.

(b) A different procedure is applied when terminating a probationary employee; the usual two-notice rule does not govern. Section 2, Rule I, Book VI of the Implementing Rules of the Labor Code states that "[i]f the termination is brought about by the x x x failure of an employee to meet the standards of the employer in case of probationary employment, it shall be sufficient that a written notice is served the employee, within a reasonable time from the effective date of termination."

In this case, respondent's dismissal was effected through a letter dated May 19, 2005 which she received on May 23, 2005 and again on May 27, 2005. Stated therein were the reasons for her termination, *i.e.*, that after proper evaluation, Abbott determined that she failed to meet the reasonable standards for her regularization considering her lack of time and people management and decision-making skills, which are necessary in the performance of her functions as Regulatory Affairs Manager.

Undeniably, this written notice sufficiently meets the criteria set forth above, thereby legitimizing the cause and manner of respondent's dismissal as a probationary employee under the parameters set by the Labor Code.

Nonetheless, despite the existence of a sufficient ground to terminate respondent's employment and Abbott's compliance with the Labor Code termination procedure, it is readily apparent that Abbott breached its contractual obligation to respondent when it failed to abide by its own procedure in evaluating the performance of a probationary employee. Veritably, a company policy partakes of the nature of an implied contract between the employer and employee. In ***Parts Depot, Inc. v. Beiswenger, 170 S.W. 3d 354 (Ky. 2005)***, it has been held that: [E]mployer statements of policy . . . can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee, and contains no reference to a specific employee, his job description or compensation, and although no reference was made to the policy statement in pre-employment interviews and the employee does not learn of its existence until after his hiring. Toussaint, 292 N.W. 2d at 892. The principle is akin to estoppel. *Once an employer establishes an express personnel policy and the employee continues to work while the policy remains in effect, the policy is deemed an implied contract for so long as it remains in effect. If the employer unilaterally changes the policy, the terms of the implied contract are also thereby changed*. (Emphasis and underscoring supplied.)

Hence, given such nature, company personnel policies create an obligation on the part of both the employee and the employer to abide by the same. Records show that Abbott's PPSE procedure mandates, *inter alia*, that the job performance of a probationary employee should be formally reviewed and discussed with the employee at least twice: first on the third month and second on the fifth month from the date of employment. Abbott is also required to come up with a Performance Improvement Plan during the third month review to bridge the gap between the employee's performance and the standards set, if any. In addition, a signed copy of the PPSE form should be submitted to Abbott's HRD as the same would serve as basis for recommending the confirmation or termination of the probationary employment. In this case, it is apparent that Abbott failed to follow the above-stated procedure in evaluating respondent. For one, there lies a hiatus of evidence that a signed copy of respondent's PPSE form was submitted to the HRD. It was not even shown that a PPSE form was completed to formally assess her performance. Neither was the performance evaluation discussed with her during the third and fifth months of her employment. Nor did Abbott come up with the necessary Performance Improvement Plan to properly gauge respondent's performance with the set company standards.

While it is Abbott's management prerogative to promulgate its own company rules and even subsequently amend them, this right equally demands that when it does create its own policies and thereafter notify its employee of the same, it accords upon itself the obligation to faithfully implement them. Indeed, a contrary interpretation would entail a disharmonious relationship in the work place for the laborer should never be mired by the uncertainty of flimsy rules in which the latter's labor rights and duties would, to some extent, depend. In this light, while there lies due cause to terminate respondent's probationary employment for her failure to meet the standards required for her regularization, and while it must be further pointed out that Abbott had satisfied its statutory duty to serve a written notice of termination, the fact that it violated its own company procedure renders the termination of respondent's employment procedurally infirm, warranting the payment of nominal damages. A further exposition is apropos.

Case law has settled that an employer who terminates an employee for a valid cause but does so through invalid procedure is liable to pay the latter nominal damages. In *Agabon v. NLRC* (*Agabon*), the Court pronounced that where the dismissal is for a just cause, the lack of statutory due process should not

nullify the dismissal, or render it illegal, or ineffectual. However, the employer should indemnify the employee for the violation of his statutory rights. Thus, in *Agabon*, the employer was ordered to pay the employee nominal damages in the amount of P30,000.00. Proceeding from the same *ratio*, the Court modified *Agabon* in the case of *Jaka Food Processing Corporation v. Pacot* (*Jaka*) where it created a distinction between procedurally defective dismissals due to a just cause, on one hand, and those due to an authorized cause, on the other. It was explained that if the dismissal is based on a just cause under Article 282 of the Labor Code (now Article 296) but the employer failed to comply with the notice requirement, the sanction to be imposed upon him should be *tempered* because the dismissal process was, in effect, initiated by an act imputable to the employee; if the dismissal is based on an authorized cause under Article 283 (now Article 297) but the employer failed to comply with the notice requirement, the sanction should be *stiffer* because the dismissal process was initiated by the employer's exercise of his management prerogative. Hence, in *Jaka*, where the employee was dismissed for an authorized cause of retrenchment – as contradistinguished from the employee in *Agabon* who was dismissed for a just cause of neglect of duty – the Court ordered the employer to pay the employee nominal damages at the higher amount of P50,000.00. Evidently, the sanctions imposed in both *Agabon* and *Jaka* proceed from the necessity to deter employers from future violations of the statutory due process rights of employees. In similar regard, the Court deems it proper to apply the same principle to the case at bar for the reason that an employer's contractual breach of its own company procedure – albeit not statutory in source – has the parallel effect of violating the laborer's rights. Suffice it to state, the contract is the law between the parties and thus, breaches of the same impel recompense to vindicate a right that has been violated. Consequently, while the Court is wont to uphold the dismissal of respondent because a valid cause exists, the payment of nominal damages on account of Abbott's contractual breach is warranted in accordance with Article 2221 of the Civil Code. Anent the proper amount of damages to be awarded, the Court observes that respondent's dismissal proceeded from her failure to comply with the standards required for her regularization. As such, it is undeniable that the dismissal process was, in effect, initiated by an act imputable to the employee, akin to dismissals due to just causes under Article 296 of the Labor Code. Therefore, the Court deems it appropriate to fix the amount of nominal damages at the amount of P30,000.00, consistent with its rulings in both *Agabon* and *Jaka*.

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UNFAIR LABOR PRACTICE: OUTSOURCING

BPI Employees Union-Davao City-FUBU vs. BPI, et. al.
G.R. No. 174912, July 24, 2013
J. Jose C. Mendoza

Facts:

BOMC, which was created pursuant to Central Bank Circular No. 1388, Series of 1993, and primarily engaged in providing and/or handling support services for banks and other financial institutions, is a subsidiary of the BPI operating and functioning as an entirely separate and distinct entity. A service agreement between BPI and BOMC was initially implemented in BPI's Metro Manila branches. In this agreement, BOMC undertook to provide services such as check clearing, delivery of bank statements, fund transfers, card production, operations accounting and control, and cash servicing, conformably with BSP Circular No. 1388. Not a single BPI employee was displaced and those performing the functions, which were transferred to BOMC, were given other assignments. The Manila chapter of BPI Employees Union then filed a complaint for unfair labor practice. On January 1, 1996, the service agreement was likewise implemented in Davao City. Later, a merger between BPI and FEBTC took effect on April 10, 2000 with BPI as the surviving corporation. Thereafter, BPI's cashiering function and FEBTC's cashiering, distribution and bookkeeping functions were handled by BOMC. Consequently, twelve (12)

former FEBTC employees were transferred to BOMC to complete the latter's service complement. BPI Davao's rank and file collective bargaining agent, BPI Employees Union Davao City-FUBU *(Union)*, objected to the transfer of the functions and the twelve (12) personnel to BOMC contending that the functions rightfully belonged to the BPI employees and that the Union was deprived of membership of former FEBTC personnel who, by virtue of the merger, would have formed part of the bargaining unit represented by the Union pursuant to its union shop provision in the CBA. The Union is of the position that the outsourcing of jobs included in the existing bargaining unit to BOMC is a breach of the union-shop agreement in the CBA. In transferring the former employees of FEBTC to BOMC instead of absorbing them in BPI as the surviving corporation in the merger, the number of positions covered by the bargaining unit was decreased, resulting in the reduction of the Union's membership. For the Union, BPI's act of arbitrarily outsourcing functions formerly performed by the Union members and, in fact, transferring a number of its members beyond the ambit of the Union, is a violation of the CBA and interfered with the employees' right to self organization, and claims that it is unfair labor practice for an employer to outsource the positions in the existing bargaining unit. Rule on the contentions of the Union.

Issue:

Is it unfair labor practice for employer to outsource the positions in the existing bargaining unit?

Ruling:

No. The rule now is covered by Article 261 of the Labor Code, which provides that violations of a Collective Bargaining Agreement, except those which are gross in character, shall no longer be treated as unfair labor practice and shall be resolved as grievances under the Collective Bargaining Agreement. For purposes of this article, gross violations of Collective Bargaining Agreement shall mean flagrant and/or malicious refusal to comply with the *economic provisions* of such agreement. Clearly, only gross violations of the economic provisions of the CBA are treated as ULP. Otherwise, they are mere grievances.

In the present case, the alleged violation of the union shop agreement in the CBA, even assuming it was malicious and flagrant, is not a violation of an economic provision in the agreement. The provisions relied upon by the Union were those articles referring to the recognition of the union as the sole and exclusive bargaining representative of all rank-and-file employees, as well as the articles on union security, specifically, the maintenance of membership in good standing as a condition for continued employment and the union shop clause. It failed to take into consideration its recognition of the bank's exclusive rights and prerogatives, likewise provided in the CBA, which included the hiring of employees, promotion, transfers, and dismissals for just cause and the maintenance of order, discipline and efficiency in its operations.

The Union, however, insists that jobs being outsourced to BOMC were included in the existing bargaining unit, thus, resulting in a reduction of a number of positions in such unit. The reduction interfered with the employees' right to self-organization because the power of a union primarily depends on its strength in number. It is incomprehensible how the "reduction of positions in the collective bargaining unit" interferes with the employees' right to self-organization because the employees themselves were neither transferred nor dismissed from the service. The union has not presented even an iota of evidence that petitioner bank has started to terminate certain employees, members of the union. In fact, what appears is that the Bank has exerted utmost diligence, care and effort to see to it that no union member has been terminated. In the process of the consolidation or merger of the two banks which resulted in increased diversification of functions, some of these non-banking functions were merely transferred to the BOMC without affecting the union membership. BPI stresses that not a single employee or union member was or would be dislocated or terminated from their employment as a result of the Service Agreement. Neither had it resulted in any diminution of salaries and benefits nor led to any reduction of union membership. As far as the twelve (12) former FEBTC employees are concerned, the

Union failed to substantially prove that their transfer, made to complete BOMC's service complement, was motivated by ill will, anti-unionism or bad faith so as to affect or interfere with the employees' right to self-organization.

It is to be emphasized that contracting out of services is not illegal *per se*. It is an exercise of business judgment or management prerogative. Absent proof that the management acted in a malicious or arbitrary manner, the Court will not interfere with the exercise of judgment by an employer. In this case, bad faith cannot be attributed to BPI because its actions were authorized by CBP Circular No. 1388, Series of 1993 issued by the Monetary Board of the then Central Bank of the Philippines *(now Bangko Sentral ng Pilipinas)*. The circular covered amendments in Book I of the Manual of Regulations for Banks and Other Financial Intermediaries, particularly on the matter of bank service contracts. A finding of ULP necessarily requires the alleging party to prove it with substantial evidence. Unfortunately, the Union failed to discharge this burden.

Verily, in one case, the Court held that it is management prerogative to farm out any of its activities, *regardless of whether such activity is peripheral or core in nature* ***(Alviado v. Procter & Gamble Phils., Inc., G.R. No. 160506, March 9, 2010)***. What is of primordial importance is that the service agreement does not violate the employee's right to security of tenure and payment of benefits to which he is entitled under the law. Furthermore, the outsourcing must not squarely fall under labor-only contracting where the contractor or sub contractor merely recruits, supplies or places workers to perform a job, work or service for a principal or if any of the following elements are present: (a) The contractor or subcontractor does not have substantial capital or investment which relates to the job, work or service to be performed and the employees recruited, supplied or placed by such contractor or subcontractor are performing activities which are directly related to the main business of the principal; or (b) The contractor does not exercise the right to control over the performance of the work of the contractual employee.

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CLOSURE OF BUSINESS; RETRENCHMENT

Manila Polo Club Employees' Union (MPCEU) FUR-TUCP vs.
Manila Polo Club, Inc.
G.R. No. 172846, July 24, 2013
J. Diosdado M. Peralta

It is apparent from the records that this case involves a closure of business undertaking, not retrenchment. The legal requirements and consequences of these two authorized causes in the termination of employment are discernible. We distinguished, in ***Alabang Country Club Inc. v. NLRC, 503 Phil. 937 (2005)***:

x x x While retrenchment and closure of a business establishment or undertaking are often used interchangeably and are interrelated, they are actually two separate and independent authorized causes for termination of employment.

Retrenchment is the *reduction of personnel* for the purpose of cutting down on costs of operations in terms of salaries and wages resorted to by an employer because of losses in operation of a business occasioned by lack of work and considerable reduction in the volume of business.

Closure of a business or undertaking due to business losses is the reversal of fortune of the employer whereby there is a *complete cessation of business operations* to prevent further financial drain upon an employer who cannot pay anymore his employees since business has already stopped.

One of the prerogatives of management is the decision to close the entire establishment or to close or abolish a department or section thereof for economic reasons, such as to minimize expenses and reduce capitalization.

While the Labor Code provides for the payment of separation package in case of retrenchment to prevent losses, it does not obligate the employer for the payment thereof if there is closure of business due to serious losses.

Likewise, the case of ***Eastridge Golf Club, Inc. v. Eastridge Golf Club, Inc., Labor-Union, Super, G.R. No. 166760, August 22, 2008***, stressed the differences:

Retrenchment or lay-off is the termination of employment initiated by the employer, through no fault of the employees and without prejudice to the latter, during periods of business recession, industrial depression, or seasonal fluctuations, or during lulls occasioned by lack of orders, shortage of materials, conversion of the plant for a new production program or the introduction of new methods or more efficient machinery, or of automation. It is an exercise of management prerogative which the Court upholds if compliant with certain substantive and procedural requirements, namely:

1. That retrenchment is necessary to prevent losses and it is proven, by sufficient and convincing evidence such as the employer's financial statements audited by an independent and credible external auditor, that such losses are substantial and not merely flimsy and actual or reasonably imminent; and that retrenchment is the only effective measure to prevent such imminent losses;

2. That written notice is served on to the employees and the DOLE at least one (1) month prior to the intended date of retrenchment; and

3. That the retrenched employees receive separation pay equivalent to one (1) month pay or at least one-half (1/2) month pay for every year of service, whichever is higher.

The employer must prove compliance with all the foregoing requirements. Failure to prove the first requirement will render the retrenchment illegal and make the employer liable for the reinstatement of its employees and payment of full backwages. However, were the retrenchment undertaken by the employer is *bona fide*, the same will not be invalidated by the latter's failure to serve prior notice on the employees and the DOLE; the employer will only be liable in nominal damages, the reasonable rate of which the Court *En Banc* has set at P50,000.00 for each employee.

Closure or cessation of business is the complete or partial cessation of the operations and/or shut-down of the establishment of the employer. It is carried out to either stave off the financial ruin or promote the business interest of the employer.

Unlike retrenchment, closure or cessation of business, as an authorized cause of termination of employment, need not depend for validity on evidence of actual or imminent reversal of the employer's fortune. Article 283 authorizes termination of employment due to business closure, regardless of the underlying reasons and motivations therefor, be it financial losses or not.

To be precise, closure or cessation of an employer’s business operations, whether in whole or in part, is governed by Article 283 of the Labor Code, as amended. In ***Industrial Timber Corporation v.***

Ababon, 515 Phil. 805 (2006), the Court explained the above-quoted provision in this wise: "A reading of the foregoing law shows that a partial or total closure or cessation of operations of establishment or undertaking may either be due to serious business losses or financial reverses or otherwise. Under the first kind, the employer must sufficiently and convincingly prove its allegation of substantial losses, while under the second kind, the employer can lawfully close shop anytime as long as cessation of or withdrawal from business operations was *bona fide* in character and not impelled by a motive to defeat or circumvent the tenurial rights of employees, and as long as he pays his employees their termination pay in the amount corresponding to their length of service. Just as no law forces anyone to go into business, no law can compel anybody to continue the same. It would be stretching the intent and spirit of the law if a court interferes with management's prerogative to close or cease its business operations just because the business is not suffering from any loss or because of the desire to provide the workers continued employment. In sum, under Article 283 of the Labor Code, three requirements are necessary for a valid cessation of business operations: (a) service of a written notice to the employees and to the DOLE at least one month before the intended date thereof; (b) the cessation of business must be *bona fide* in character; and (c) payment to the employees of termination pay amounting to one month pay or at least one-half month pay for every year of service, whichever is higher.

Based on the above and cases ***(****See also* ***Marc II Marketing, Inc. v. Joson, G.R. No. 171993, December 12, 2011)*** of similar import, the Court summarized as follows: (a) Closure or cessation of operations of establishment or undertaking may either be partial or total; (b) Closure or cessation of operations of establishment or undertaking may or may not be due to serious business losses or financial reverses. However, in both instances, proof must be shown that: (1) it was done in good faith to advance the employer's interest and not for the purpose of defeating or circumventing the rights of employees under the law or a valid agreement; and (2) a written notice on the affected employees and the DOLE is served at least one month before the intended date of termination of employment; (c) The employer can lawfully close shop even if not due to serious business losses or financial reverses but separation pay, which is equivalent to at least one month pay as provided for by Article 283 of the Labor Code, as amended, must be given to all the affected employees; (d) If the closure or cessation of operations of establishment or undertaking is due to serious business losses or financial reverses, the employer must prove such allegation in order to avoid the payment of separation pay. Otherwise, the affected employees are entitled to separation pay; and (e) The burden of proving compliance with all the above-stated falls upon the employer.

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DISABILITY BENEFITS

Manota, et. al. vs. Avantgarde Shipping Corporation, et. al.
G.R. No. 179607, July 24, 2013
J. Diosdado M. Peralta

The employment of seafarers, including claims for death and disability benefits, is governed by the contracts they sign every time they are hired or rehired, and as long as the stipulations therein are not contrary to law, morals, public order, or public policy, they have the force of law between the parties ***(Crew and Ship Management International, Inc. v. Soria, G.R. No. 175491, December 10, 2012)***.

Based on the foregoing provision, it must be shown that the injury or illness was contracted during the term of the employment contract. The unqualified phrase "during the term" covered all injuries or illnesses occurring during the lifetime of the contract ***(Wallem Maritime Services, Inc. v. Tanawan, G.R. No. 160444, August 29, 2012)***.

It is mandatory for a seaman to submit himself to a post employment medical examination within three (3) working days from his arrival in the Philippines before his right to a claim for disability or death benefits can prosper. The provision, however, admits of exception, *i.e.*, when the seafarer is physically incapacitated to do so, but there must be a written notice to the agency within the same period for the seaman to be considered to have complied with the 3-day rule. The 3-day mandatory reporting requirement must be strictly observed since within 3 days from repatriation, it would be fairly manageable for the physician to identify whether the disease for which the seaman died was contracted during the term of his employment or that his working conditions increased the risk of contracting the ailment ***(Crew and Ship Management International, Inc. v. Soria, supra.)***.

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PROJECT EMPLOYEE

D.M. Consunji Corporation vs. Bello
G.R. No. 159371, July 29, 2013
J. Lucas M. Bersamin

A project employee is, therefore, one who is hired for a specific project or undertaking, and the completion or termination of such project or undertaking has been determined at the time of engagement of the employee. It is settled that the extension of the employment of a project employee long after the supposed project has been completed removes the employee from the scope of a project employee and makes him a regular employee. In this regard, the length of time of the employee's service, while not a controlling determinant of project employment, is a strong factor in determining whether he was hired for a specific undertaking or in fact tasked to perform functions vital, necessary and indispensable to the usual business or trade of the employer. Verily, the principal test for determining whether an employee is a project employee, as distinguished from a regular employee, is whether or not he is assigned to carry out a specific project or undertaking, the duration and scope of which are specified at the time he is engaged for the project.

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FLOATING STATUS

Cañedo vs. Kampilan Security and Detective Agency, Inc.
G.R. No. 179326, July 31, 2013
J. Mariano C. Del Castillo

Such a "floating status" is lawful and not unusual for security guards employed in security agencies as their assignments primarily depend on the contracts entered into by the agency with third parties. A floating status can ripen into constructive dismissal only when it goes beyond the six-month period allowed by law.

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