

PACIFIC WORLD BUILDING MANAGEMENT AND GENERAL SERVICES, INC. AND MANUEL DIMACULANGAN, PETITIONERS, VS. NATIONAL LABOR RELATIONS COMMISSION AND JOVIE J. VEGA, RESPONDENTS.

Ponente: BALTAZAR-PADILLA, J.

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BALTAZAR-PADILLA, J.:

This petition[1] for certiorari under Rule 65 of the Rules of Court impugns the Decision[2] dated April 26, 2013 of the National Labor Relations Commission (NLRC) and its Resolution[3] dated March 19, 2014 in NLRC LAC No. 10-002988-12.

The facts of the case as culled from the records are as follows:

Petitioner Pacific World Building Management and General Services, Inc. (hereinafter, “Pacific”) is an independent contractor engaged in the business of providing janitorial and messengerial services while petitioner Manuel Dimaculangan is its President.

On October 2, 2000, petitioner Pacific employed respondent Jovie J. Vega as motorized messenger for its client Bank of Commerce (hereinafter, “BOC”) located in Pasig City.

On October 26, 2011, petitioners received a letter dated October 25, 2011 from Albert T. Janbahab, the Head of the General Services Division of BOC. In the said letter, Janbahab, requested petitioner Pacific for the termination of the service of respondent Vega as motorized messenger for the BOC, viz -

“We received your letter dated October 18, 2011 on the incident involving Mr. Jovie Vega, who was dispatched to deliver documents on October 14 and was late in returning to the Bank.

The Bank finds your explanation of the delay unacceptable, considering that Mr. Vega was even on a motorcycle. As such, we reiterate our previous demand that the assignment of Mr. Vega as motorized messenger of the Bank be immediately and permanently terminated and that a new messenger be assigned to take the place at no cost on the part of the Bank.”[4]

On October 27, 2011, respondent Vega was placed on a floating status.[5]

On May 2, 2012, respondent Vega filed a complaint for illegal dismissal with monetary claims against petitioners.[6]

In his position paper,[7] respondent Vega alleged that he was hired on October 2, 2000 earning a salary of P404.00 daily; that on October 27, 2011, he was asked to report at petitioners' office where he was informed that the BOC to which he was assigned no longer wanted his service; that since then, he had been out of work; that he later learned that petitioners assigned his previous work at BOC to another messenger; that he often reported at petitioners' office hoping to be given new assignment but no attention was given to him. Consequently, he filed a complaint for illegal dismissal with monetary claims against petitioners.

On the other hand, petitioners admitted that respondent Vega was employed by petitioner Pacific as motorized messenger and was formerly assigned at the BOC's main office in Pasig City; that BOC through Albert T. Janbahab requested respondent Vega's immediate and permanent termination from his work; that because of the said request, they pulled out respondent Vega from BOC. A memorandum dated October 27, 2011 was issued, placing respondent Vega on a floating status, viz -

“Please be informed that you have been placed on a float status for a period of six (6) months effective October 27, 2011, in accordance with the existing rules and regulations of the Department of Labor and Employment. This is due to the client request for your replacement as Motorized Messenger.

In the meantime, we are looking if there are vacancies in our existing clients where we can place you. We will also be looking for new clients so that you can continue working with our Company.”[8]

Petitioners denied dismissing respondent Vega alleging that the latter was directed by Erick C. Dilig, Messengerial Supervisor of petitioner Pacific, to report to work on January 9, 2012 but he declined. Respondent Vega told Dilig that he cannot report for work as a motorized messenger since he already sold his motorcycle. Consequently, the available position supposedly reserved for respondent Vega was assigned to another who has a service motorcycle. In April 2012, Dilig again texted respondent Vega directing him to report for a possible position as a motorized messenger for Equicom Bank, another client of petitioner Pacific. However, after the qualifying interview, Equicom Bank did not choose respondent Vega for the position and so he was again placed on reserved status.

Petitioners contended that it cannot be said that respondent Vega had been illegally dismissed since they provided him with a new assignment before the lapse of the six (6) month-period. His posting to a new assignment did not materialize for reason attributable to him.

During the mandatory conference, petitioners offered respondent Vega a new assignment as motorized messenger but he refused to accept the same.[9]

On August 31, 2012, the Labor Arbiter rendered a judgment[10] which decreed as follows -

“WHEREFORE, premises considered, judgment is hereby rendered, finding the respondents guilty of illegal dismissal. Accordingly, respondents are hereby ordered to immediately reinstate complainant to his former position without loss of seniority rights and other privileges (sic) and pay him full backwages from date of his dismissal up to his actual reinstatement, which is now amounting to P124,098.76 and attorney's fees equivalent to ten percent thereof or in the amount of P12,409.87.

Backwages

10/27/11 – 8/31/12 =

P404 x 26 x 7.17

P75,313.68

6/3/12 – 8/31/12 =

P426 x 26 x 2.93

P32,452.68

P107,766.36

13th mo. Pay

$P107,766.36 / 12 =$

P 8,980.53

SILP

$P404 \times 5/12 \times 7.17 =$

P 1,206.95

$P426 \times 5/12 \times 2.93 =$

P 520.08

P 1,727.03

COLA

10/27/11 – 6/2/12

$P22 \times 26 \times 7.17 =$

P 4,101.24

6/3/12 – 8/31/12

$P20 \times 26 \times 2.93 =$

P 1,523.60

P 5,624.84

TOTAL

P124,098.76

10% Attorney's fees

P 12,409.87

GRAND TOTAL

P136,508.63

All other claims are dismissed for lack of merit.

SO ORDERED.”[11]

The Labor Arbiter ruled that respondent Vega was illegally dismissed since he was placed on a floating status without justifiable reason. Considering that no evidence was adduced to show that there was a surplus of manpower as against the available assignments or posts, petitioners need not make respondent Vega wait for a period of six months before he could be re-assigned to another client of petitioner Pacific.

On appeal filed before the NLRC, herein petitioners assailed the Labor Arbiter's decision on the ground of serious error in law in holding that respondent Vega was illegally dismissed and should be reinstated, as well as in awarding him backwages and attorney's fees. They claimed that they were justified in placing respondent Vega on a floating status. There was a valid demand on the part of the BOC to terminate his service and it was unfortunate that it had been difficult to immediately provide him a new posting since the BOC accounts already constitute more than 90% of petitioners' business.

Citing *Pido vs. NLRC*,^[12] petitioners argued that they are not required under the law to prove that petitioner Pacific has a surplus of manpower before it could put respondent Vega on a floating status. In the said case, the Supreme Court held that -

“Verily, a floating status requires the dire exigency of the employer's bona fide suspension of operation of a business or undertaking. In security services, this happens when the security agency's clients which do not renew their contracts are more than those that do and the new ones that the agency gets. Also, in instances when contracts for security services stipulate that the client may request the agency for the replacement of the guards assigned to it even for want of cause, the replaced security guard may be placed on temporary "off-detail" if there are no available posts under respondent's existing contracts.”^[13]

Petitioners emphasized that although respondent Vega was placed on a floating status on October 27, 2011, the same lasted only for over two (2) months as he was already directed to report to work on January 9, 2012. Due to his own fault as he already sold his motorcycle, he was not able to get the job as motorized messenger. Also, notwithstanding that respondent Vega already sold his motorcycle, petitioners did not dismiss him. In fact, after the holy week of 2012, he was directed by petitioner Pacific to report for a possible assignment in Equicom Bank. It was just unfortunate that the said bank did not choose him for the position. Considering that respondent Vega was not illegally dismissed, it was erroneous for the Labor Arbiter to order his reinstatement and payment of backwages and attorney's fees.

On April 26, 2013,^[14] the NLRC sustained the finding of the Labor Arbiter that respondent Vega was illegally dismissed because petitioners failed to re-deploy him within six months from the date he was placed on floating status. It ruled, citing *Valdez vs. NLRC*,^[15] that “[u]nder Article 286 of the Labor Code, the bona fide suspension of the operation of a business or undertaking for a period not exceeding six months shall not terminate employment. Consequently, when the bona fide suspension of the operation of a business or undertaking exceeds six months, then the employment of the employee shall be deemed terminated. By the same token and applying said rule by analogy, if the employee was forced to remain without work or assignment for a period exceeding six months, then he is in effect constructively dismissed.” The NLRC held that the fact that respondent Vega was made to report for a possible assignment in Equicom Bank in April, 2012 did not toll the running of the six-month period. It emphasized that respondent Vega was not given a new assignment when he applied at that time with the said bank. At the time he filed the complaint on May 2, 2012, respondent Vega was still on floating status. Since it has been more than 6 months that respondent Vega was not given a new assignment, he is deemed to have been constructively dismissed.

The NLRC did not give credence to petitioners' claim that they required respondent Vega to report on January 9, 2012 through a text message sent by Dilig on January 6, 2012. Since respondent Vega denied having received such message, petitioners' claim that they contacted respondent Vega to report for work on January 9, 2012

remains as mere allegation. Bare allegations, unsubstantiated by evidence, are not equivalent to proof.

Having found respondent Vega to have been illegally dismissed, the NLRC declared him entitled to reinstatement without loss of seniority rights and other privileges; full backwages inclusive of allowances; and to other benefits or their monetary equivalent computed from the time his compensation was withheld from him until the time of his actual reinstatement. However, it held that the computation of the monetary award should be reckoned not from the time that he was pulled out from his post on October 27, 2011 but upon the lapse of the six month floating status period which was on April 28, 2012. This is so because there was no evidence that there was an available post where respondent Vega could be assigned while he was on floating status. The law recognizes the placing of an employee under floating status provided it should not last for more than 6 months. For the duration that an employee is placed on floating status, he is not entitled to receive any salary or financial benefit.[16]

Thus, the judgment rendered by the Labor Arbiter was modified by the NLRC as follows:

“WHEREFORE, premises considered, the Decision dated August 31, 2012 is hereby MODIFIED. The award of backwages is provisionally computed as follows:

Backwages

4/48/12 – 6/2/12

P404 x 26 x 1.13

=

P11,869.52

6/3/12 – 8/31/12

P426 x 26 x 9.77

=

P108,212.68

P120,082.04

13th mo. Pay

P120,082.04/12 [sic]

P 10,006.84

SILP

P404 X 26 X 1.13

=

P 190.22

P426 x 26 x 9.77

=

P 1,734.18

P 1,924.40

COLA

4/28/12 – 6/2/12

P22 X 26 X 1.13

=

P 646.36

6/3/12 – 10/31/12

P20 X 26 X 4.93

=

P 2,563.60

11/1/12 – 3/26/13

P30 X 26 X 4.83

=

P 3,767.40

P 6,977.36

TOTAL

P138,990.64

10% Attorney's fees

P 13,899.06

GRAND TOTAL

P152,889.70

SO ORDERED.”[17]

Petitioners' Motion for Reconsideration was denied by the NLRC on March 19, 2014.[18]

Hence, this recourse hinged on the following grounds:

“A.

WITH DUE RESPECT, THE NLRC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN AFFIRMING THE DECISION OF THE LABOR ARBITER IN HOLDING THAT RESPONDENT VEGA WAS ILLEGALLY DISMISSED[;]

B.

WITH DUE RESPECT, THE NLRC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN AFFIRMING THE DECISION OF THE LABOR ARBITER IN AWARDING BACKWAGES AND ATTORNEY'S FEES IN FAVOR OF RESPONDENT VEGA[; AND]

C.

ASSUMING, ARGUENDO, THAT THE AWARD OF BACKWAGES AND ATTORNEY'S FEES IN FAVOR OF RESPONDENT VEGA IS WITH BASIS, STILL, WITH DUE RESPECT, THE NLRC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN ITS ERRONEOUS RE-COMPUTATION OF THE SAME.”[19]

Petitioners insist that the NLRC acted with grave abuse of discretion when it did not consider the Affidavit executed by Dilig as evidence to prove that respondent Vega was indeed directed to report to work on January 9, 2012. The NLRC should not have disregarded the sworn statement of Dilig since it was not shown that he had ill-motive to fabricate his allegations therein. Executing an affidavit is Dilig's way to prove that he personally texted and called respondent Vega about his re-assignment. It is well-settled that affidavits are admissible in proceedings conducted before the Labor Arbiter.[20]

Petitioners maintain that the record of the instant case is bereft of any indication that petitioner Pacific intended to terminate or prevent respondent Vega from returning to work. There is no illegal dismissal to speak of where an employee was not notified that he had been dismissed from his employment nor was he prevented from returning to his work. Since respondent Vega was not illegally terminated from work, there is no basis for the awarding of backwages and attorney's fees.

Finally, petitioners contend that even assuming that they are liable for backwages and attorney's fees, the total monetary award computed by the NLRC should be modified for being erroneous. In its decision, the NLRC awarded backwages from June 3, 2012 (6/3/12) to August 31, 2012 (8/31/12). Clearly, the period is just less than three (3) months or 2.77 months only. However, the NLRC computed the backwages from June 3, 2012 to August

31, 2012 by multiplying respondent Vega's daily salary by 9.77 months instead of 2.77 months only. The correct computation should be $P426 \times 26 \times 2.77 = P30,680.52$. Adding the amount of backwages from June 3, 2012 to August 31, 2012 (P30,680.52) to backwages from April 28, 2012 to June 2, 2012 (P11,869.52), the total amount of backwages should be P42,550.04 and not P120,082.04. It goes without saying that the computation of attorney's fees was likewise erroneous since the same was based on erroneous computation of backwages.

The petition is impressed with merit.

The NLRC acted with grave abuse of discretion when it disregarded the affidavit of Dilig. In *Great Pacific Life Employees Union, et al. vs. Great Pacific Life Assurance Corporation, et al.*, [21] (hereinafter, "GREPALIFE case") the High Court had the occasion to rule that:

"xxx while it is true that affidavits may be regarded as infirm evidence before the regular courts unless the affiants are presented on the stand, such affidavits by themselves are acceptable in proceedings before the Labor Arbiter. Under Sec. 7, Rule V, of the New Rules of Procedure of the NLRC, these proceedings, save for the constitutional requirements of due process, are not to be strictly governed by the technicalities of law and procedural rules. Section 3, par. 2, of the same Rule, provides that verified position papers are to be accompanied by all supporting documents including the affidavits of the parties' respective witnesses in lieu of direct testimony. It is therefore a clear mandate that the Labor Arbiter may employ all reasonable means to ascertain the facts of the controversy before him."

In GREPALIFE case, petitioner therein assailed the weakness of the affidavits of two security guards which unanimously narrated the incidents that justified petitioner's dismissal. However, said petitioner did not present any countervailing evidence to refute the allegations in the affidavits of the two (2) security guards presented before the Labor Arbiter which established reasonable ground for his dismissal. Similarly, in this case, respondent Vega did not bother to refute the allegation in the affidavit of Dilig that he was directed to report to work on January 9, 2012 and that he refused to show up for the re-assignment as motorized messenger because he already sold his motorcycle. Inasmuch as there was no counter-affidavit offered to disprove the allegation of Dilig, the NLRC should have regarded the affidavit of Dilig in resolving the case.

In *Oriental Shipmanagement Co., Inc. vs. Bastol*, [22] it was ruled that -

"In sum, it can be properly said that the proceedings before the Labor Arbiter are non-litigious in nature and the technicalities of law and procedure, and the rules obtaining in the courts of law are not applicable. Thus, the rules allow the admission of affidavits by the Labor Arbiter as evidence despite the fact that the affiants were not presented for cross-examination by the counsel for the adverse party. To require otherwise would be to negate the rationale and purpose of the summary nature of the administrative proceedings and to make mandatory the application of the technical rules of evidence. What the other party should do is to present counter-affidavits instead of merely objecting on the ground that the affidavits are hearsay."

In his Affidavit, Dilig made the following allegations under oath, viz -

"1. I am currently holding a position of a supervisor at the Pacific World Building Management and General Services, Inc.[.] (the 'Company'). On 6 January 2012, I was instructed by our Operation Officer, Roy E. Tungol, to inform Jovie Vega, one of our motorized messengers on reserved status, to report for work on 9 January 2012.

2. Accordingly, using my cellphone with smart number 09189076894, I texted Mr. Vega's cellphone with smart number 09196803247, to report for work on 9 January 2012.

3. In addition, I made a call to Mr. Vega telling that he could report to work on 9 January 2012 (Monday).

4. However, Mr. Vega replied that he already sold his service motorcycle. I told him that he needed to have his

service motorcycle since his position is a motorized messenger. Since he did not have a motorcycle, he did not or failed to report for work as instructed. I was constrained to give the available position reserved for him to someone with a service motorcycle.

5. After the holy week in April 2012, upon the instruction of Mr. Tungol, I again texted Mr. Vega to report as one of the possible choices for a position of a motorized messenger at Equicom Bank, another client of the Company.

6. After the interview, however, Equicom Bank did not choose him for the position of a motorized passenger. As such, we were constrained to put him again on reserved status. After a week, it appears that he already filed a complaint against the Company.”[23]

Respondent Vega did not present any evidence to support his allegation that he did not receive text message or call from his supervisor Dilig directing him to report to work on January 9, 2012 and April, 2012. As opposed to the positive assertion of Dilig that he communicated with respondent Vega and the latter's denial, the former's positive testimony should prevail. In *Apo Cement Corporation vs. Baptisma*,^[24] the High Court emphasized that a positive testimony overcomes a negative one particularly when no affidavit was executed to attest to the truthfulness of the negative statement, thus -

“Moreover, as between the positive testimony of Lobitaña that he gave respondent commissions and/or “kickbacks” on two separate occasions, and the negative testimony of respondent’s witnesses Cedeño and Banzon that no such meeting took place, we are more inclined to give credence to the former. It bears stressing that a positive testimony prevails over a negative one, more especially in this case where respondent’s witnesses did not even execute affidavits to attest to the truthfulness of their statements. Thus, it was error on the part of the Labor Arbiter and the CA to disregard the testimony of Lobitaña.”

Considering the evidence at hand, WE find that respondent Vega was not illegally dismissed. Petitioner Pacific was not able to assign him to a new post due to his own fault. He deliberately refused to accept the offer to work on January 9, 2012 because he already sold his motorcycle. Without his motorcycle, petitioner Pacific cannot assign him as motorized messenger to its clients. Notably, respondent Vega was directed to report for his new assignment on January 9, 2012 which was only barely three (3) months from the time that he was placed on floating status. In *Sebuguero vs. NLRC*,^[25] it was held that the placement of the employee on a floating status should not last for more than six months. After six months, the employee should be recalled for work, or for a new assignment; otherwise, he is deemed terminated. In the present case, he was offered a new assignment before the lapse of six months from the time he was placed on floating status. Petitioner Pacific cannot be faulted for respondent Vega's lack of assignment, since it was the latter who declined the position because he had no motorcycle that he could use as motorized messenger. Petitioner Pacific was not remiss in its obligation to look for a possible post for respondent Vega. In fact, he was even informed by petitioner Pacific of the possible assignment in Equicom Bank in April, 2012 after he refused to report for work on January 9, 2012. Respondent Vega was even interviewed and it was just unfortunate that Equicom Bank did not choose respondent Vega for the position.

According to NLRC, respondent Vega is considered to have been illegally dismissed because when he filed his complaint on May 2, 2012, more than six (6) months had lapsed from the time he was placed on floating status on October 27, 2011.

In *Exocet Security and Allied Services Corporation, et al. vs. Serrano*,^[26] the Supreme Court stressed that it is indubitably unfair to instantly declare the mere lapse of the six-month period of floating status as a case of constructive dismissal, without looking into the peculiar circumstances that resulted in the employee’s failure to assume another post.

In the extant case, WE reiterate that petitioners cannot be faulted for respondent Vega's lack of assignment for more than 6 months. It was evident that petitioners tried to observe the mandate of the law by offering new assignments during the six-month period. Further, the fact that petitioners offered respondent Vega new assignment at the preliminary conference conducted below, evinced a sincere desire on their part to retain respondent Vega in their employ and strengthens this Court's finding that there was no dismissal to speak of in the first place. Inasmuch as it cannot be said that respondent Vega was dismissed, there is no basis in awarding backwages and attorney's fees in his favor.

Mere absence or failure to report for work, even after notice to return, is not tantamount to abandonment either. In the instant case, other than Vega's failure to report back to work after suspension, petitioners failed to present any evidence which tend to show his intent to abandon his work. It is a settled rule that mere absence or failure to report for work is not enough to amount to abandonment of work. There must be a concurrence of the intention to abandon and some overt acts from which an employee may be deduced as having no more intention to work.[27]

It is well-settled that where there is lack of evidence of dismissal and lack of intent on the part of the respondent to abandon his work, the remedy is reinstatement but without backwages.[28]

Clearly, it was grave abuse of discretion on the part of the NLRC to declare that petitioners illegally dismissed respondent Vega. The rule in appeals in labor cases provides that the Court of Appeals can grant a petition for certiorari if it finds that the NLRC, in its assailed decision or resolution, committed grave abuse of discretion by capriciously, whimsically or arbitrarily disregarding evidence which is material or decisive of the controversy so as to oust the latter of jurisdiction.[29]

WHEREFORE, on account of the foregoing considerations, the petition is GRANTED. The Decision of the NLRC dated April 26, 2013 and its Resolution of March 19, 2014 in NLRC LAC No. 10-002988-12 are hereby ANNULLED and SET ASIDE.

Accordingly, a new judgment is hereby entered dismissing private respondent Jovie J. Vega's complaint for want of merit. Consequently, private respondent Jovie J. Vega is ordered REINSTATED WITHOUT BACKWAGES.

SO ORDERED.

Tijam, N.G., (Chairperson) and Garcia-Fernandez, M.V.,[*] JJ., concur.

[*]Vice J. Agnex Reyes Carpio, who is on leave, per Office Order No. 511-14-RSF, dated December 5, 2014.

[1] Rollo,pp.3-18

[2] Id.,pp.19-28

[3] Id.,pp.29-33

[4] Id.,p.85

[5] Id.,p.86

[6] Id.,p.25

[7] Id.,pp.42-44

[8] Id.,p.54

[9] Id.,p.22

[10] Id.,pp.63-69

[11] Id.,pp.67-68

[12] Id.,p.79

[13] Rollo,pp.79-80

[14] Id.,pp. 19-28

[15] G.R. No. 125028, February 9, 1998.

[16] Rollo,p.26

[17] Id.,pp.26-27

[18] Id.,pp.29-33

[19] Id.,p.6

[20] Great Pacific Life Employees Union, et al. vs. Great Pacific Life Assurance Corporation, et al., G.R. No. 126717, February 11, 1999.

[21] Supra.

[22] G.R. No. 186289, June 29, 2010

[23] Rollo,p.87

[24] G.R. No. 176671, June 20, 2012

[25] G.R. No. 115394, September 27, 1995, 248 SCRA 532. See also Agro Commercial Security Services Agency, Inc. vs. NLRC, G.R. Nos. 82823-24, July 31, 1989, 175 SCRA 790.

[26] G.R. No. 198538, September 29, 2014.

[27] Aliten vs. U-Need Lumber & Hardware, G.R. No. 168931, September 12, 2006.

[28] See Exodus International Construction Corp. vs. Biscocho, G.R. No.166109, February 23, 2011.

[29] See Norkis Trading Corporation vs. Buenavista, et al., G.R. 182018, October 10, 2012 citing AMA Computer College, Inc. vs. Garcia, G.R. No. 166703, April 14, 2008.

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