

MEGAFORCE SECURITY AND ALLIED SERVICES, INC., AND RAUL MANALO, PETITIONERS, HENRY LACTAO AND NATIONAL LABOR RELATIONS COMMISSION, RESPONDENTS.

G.R. No. 160940. July 21, 2008

Ponente: AUSTRIA-MARTINEZ, J.

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AUSTRIA-MARTINEZ, J.:

Before the Court is a Petition for Review on Certiorari under Rule 45 of the Rules of Court assailing the Decision[1] dated May 29, 2003 of the Court of Appeals (CA) which dismissed petitioners' Petition for Certiorari in CA-G.R. SP No. 73156, and the CA Resolution[2] dated November 24, 2003 which denied petitioners' Motion for Reconsideration.

The factual background of the case is as follows:

On April 28, 1998, Megaforce Security and Allied Services, Inc. (Megaforce) hired Henry Lactao (Lactao) as a security guard. He was detailed at Merville Park Subdivision in Parañaque City.

On April 4, 2000, Lactao filed with the Arbitration Branch of the National Labor Relations Commission (NLRC), National Capital Region a complaint against Megaforce for underpayment of wages, non-payment of overtime pay, service incentive leave pay and 13[th] month pay.[3]

On May 3, 2000, Lactao was reassigned to ABB Industry, Inc. in Sucat, Parañaque City.

On May 30, 2000, Megaforce, thru its Operations Manager, Lt. Col. Nicomedes P. Olaso, issued a Recall Order,[4] recalling Lactao from his assignment at ABB Industry, Inc. effective May 31, 2000 and directing him to report to the Headquarters for proper disposition and new assignment.

From May 31 to June 6, 2000, Lactao reported to the Headquarters but he was not given a new assignment. Believing he was terminated, Lactao amended his complaint on June 7, 2000 to one for illegal dismissal with prayer for reinstatement with the same prayer for underpayment of wages, non-payment of overtime pay, service incentive leave pay and 13[th] month pay, plus moral and exemplary damages and attorney's fees.

In his Position Paper[5] dated August 14, 2000, Lactao claims that in retaliation to his filing of a complaint for underpayment of wages; and non-payment of overtime pay, service incentive leave pay and 13[th] month pay, Megaforce constructively dismissed him by relieving him from his post and not giving him a new assignment.

In its Position Paper[6] dated August 30, 2000, Megaforce, thru its General Manager, co-petitioner Raul U. Manalo (Manalo), denied the illegal dismissal charge. It alleged that Lactao had committed various offenses such as abandoning his post and sleeping on duty during his detail at Merville Park Subdivision; when Lactao was reassigned to ABB Industry, Inc., the Management thereof requested that he be relieved of his post because of improper discipline and appearance, i.e., for incomplete or worn-out paraphernalia and unshaved moustache; on May 30, 2000, it issued a Recall Order of Lactao's assignment at ABB Industry, Inc., effective May 31, 2000 with

instruction that he should report to the Headquarters for proper disposition and new assignment; and Lactao never reported to the Headquarters after his relief.

On May 29, 2001, the Labor Arbiter (LA) rendered a Decision[7] dismissing the complaint for lack of merit.

Dissatisfied, Lactao filed an Appeal Memorandum with the NLRC. On April 15, 2002, the NLRC rendered a Decision[8] setting aside the Decision of the LA, ruling that the fact that Lactao was not given new assignment from May 31, 2000 up to the filing of the complaint leads to the conclusion that he was constructively dismissed without valid or authorized cause, thus making the same illegal. Hence, the NLRC ordered Megaforce to reinstate Lactao to his former or equivalent position and to pay his backwages from the time of his dismissal until he was actually reinstated. Lactao's other claims were denied for lack of merit.[9]

On May 20, 2002, Megaforce filed a Motion for Reconsideration[10] but it was denied by the NLRC in its Resolution[11] dated July 24, 2002.

On October 4, 2002, Megaforce filed a Petition for Certiorari[12] with the CA. Despite due notice, Lactao did not file his Comment and Memorandum.

On May 29, 2003, the CA rendered a Decision[13] dismissing the petition, ruling that the NLRC did not commit grave abuse of discretion in finding that Lactao was constructively dismissed. It held that Lactao was constructively dismissed when Megaforce did not give him a new assignment in spite of the recall order which specifically directed him to report to Megaforce's office for disposition and new assignment; Megaforce failed to give Lactao notice that he was being put on "floating status"; the inaction of Megaforce gave the impression that he was being eased out from his work by not being given a new assignment.

On July 1, 2003, Megaforce filed a Motion for Reconsideration[14] but it was denied by the CA in its Resolution[15] dated November 24, 2003.

Hence, the present petition.

Megaforce contends that it is not guilty of illegal dismissal because Lactao was merely recalled from his post and the failure to give him a new assignment within seven days from his recall is not constructive dismissal because a security guard may be placed on "floating status" for a period not exceeding six months under prevailing jurisprudence; Lactao never reported back for reassignment and his refusal to report back to work should not be taken against it; and the CA erred in ruling in Lactao's favor when the latter failed to file his Comment and Memorandum.

Lactao insists that he was constructively dismissed when he was recalled from his post at ABB Industry, Inc. without being informed that he was being placed on "floating status" or given a new assignment.

The petition is bereft of merit.

In cases involving security guards, a relief and transfer order in itself does not sever employment relationship between a security guard and his agency.[16] An employee has the right to security of tenure, but this does not give him such a vested right in his position as would deprive the company of its prerogative to change his assignment or transfer him where his service, as security guard, will be most beneficial to the client.[17] Temporary "off-detail" or the period of time security guards are made to wait until they are transferred or assigned to a new post or client does not constitute constructive dismissal as their assignments primarily depend on the contracts entered into by the security agencies with third parties.[18] Indeed, the Court has repeatedly recognized that "off-detailing" is not equivalent to dismissal, so long as such status does not continue beyond a reasonable time; when such a "floating status" lasts for more than six months, the employee may be considered to have been

constructively dismissed.[19]

However, in the present case, while the charge of illegal dismissal may have been premature because Lactao has not been given a new assignment or temporary "off-detail" for a period of seven days only when he amended his complaint, the continued failure of Megaforce to offer him a new assignment during the proceedings of the case before the LA and beyond the reasonable six-month period makes it liable for constructive dismissal.

There is constructive dismissal if an act of clear discrimination, insensibility, or disdain by an employer becomes so unbearable on the part of the employee that it would foreclose any choice by him except to forego his continued employment.[20] It exists where there is cessation of work because continued employment is rendered impossible, unreasonable or unlikely, as an offer involving a demotion in rank and a diminution in pay.[21]

As Lactao averred in his Memorandum before the Court, "[w]hile [Megaforce] alleged that [Lactao] was not dismissed, they failed to offer him reinstatement or give him work assignment during the mandatory conciliation of this case before the LA. Even when the writ of execution for his reinstatement was served upon them on July 20, 2004, [Megaforce] refused to reinstate him." [22] Clearly, the supposed temporary "off-detail" of Lactao was meant to be a permanent one.

The Court cannot accept the contention of Megaforce that Lactao did not report to work after his recall and had abandoned his job since it failed to present credible proof of any act on the part of Lactao to abandon his employment. Moreover, it is a settled doctrine that the filing of a complaint for illegal dismissal is inconsistent with abandonment of employment. An employee who takes steps to protest his dismissal cannot logically be said to have abandoned his work.[23] The filing of such complaint is proof enough of his desire to return to work, thus negating any suggestion of abandonment.[24]

Under Article 279 of the Labor Code, as amended, an employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges; to his full backwages, inclusive of allowances; and to other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement. Thus, Lactao is entitled to reinstatement and backwages as a necessary consequence.

With respect to the question of whether the CA erred in ruling in Lactao's favor despite his failure to submit his comment and memorandum, suffice it to say that non-submission of Lactao's comment and memorandum does not mean that the appellate court shall ipso facto rule in favor of the petitioner and grant the petition. The applicable provision is Section 8, Rule 65 of the Rules of Court, which provides:

SEC. 8. Proceedings after comment is filed. -- After the comment or other pleadings required by the court are filed, or the time for the filing thereof has expired, the court may hear the case or require the parties to submit memoranda. If after such hearing or submission of memoranda or the expiration of the period for the filing thereof the court finds that the allegations of the petition are true, it shall render judgment for the relief prayed for or to which the petitioner is entitled.

The court, however, may dismiss the petition if it finds the same to be patently without merit, prosecuted for delay, or that the questions raised there are too unsubstantial to require consideration. (Emphasis supplied)

From the foregoing provision, it is clear that it is not the filing or non-filing of the comment and/or memorandum which determines whether the petition should be granted or dismissed, but whether the allegations of the petition are meritorious as to warrant the relief sought. Indeed, when a respondent fails to file his comment within the given period, the court may decide the case on the basis of the records before it, specifically the petition and its attachments.[25] Thus, the CA ruled in favor of Lactao and against Megaforce after finding that, based on the

allegations of the petition and parts of case records and documents attached thereto, the petition has no merit.

WHEREFORE, the petition is DENIED. The assailed Decision and Resolution of the Court of Appeals in CA-G.R. SP No. 73156 are AFFIRMED.

The present case is thus REMANDED to the Labor Arbiter for the computation, within thirty (30) days from receipt hereof, of the backwages, inclusive of allowances and other benefits due respondent Henry Lactao, computed from the time his compensation was withheld up to the time of his actual reinstatement.

Costs against petitioner.

SO ORDERED.

Quisumbing, (Chairperson), Ynares-Santiago, Nachura, and Reyes, JJ., concur.

[*] In lieu of Justice Minita V. Chico-Nazario, per Special Order No. 508 dated June 25, 2008.

[**]The Court of Appeals is deleted from the title per Section 4, Rule 45 of the Rules of Court.

[1] Penned by Associate Justice Sergio L. Pestaño and concurred in by Associate Justices Bernardo P. Abesamis and Noel G. Tijam, CA rollo, p. 108.

[2] Id. at 128.

[3] Id. at 54.

[4] Id. at 56.

[5] Id. at 49.

[6] Id. at 35.

[7] Id. at 58.

[8] Id. at 24.

[9] Id. at 30.

[10] Id. at 68.

[11] Id. at 33.

[12] Id. at 2.

[13] Supra note 1.

[14] CA rollo, p. 117.

[15] Supra note 2.

[16] OSS Security & Allied Services, Inc. v. National Labor Relations Commission, 382 Phil. 35, 44 (2000); Sentinel Security Agency, Inc. v. National Labor Relations Commission, 356 Phil. 434, 444 (1998).

[17] Tinio v. Court of Appeals, G.R. No.171764, June 8, 2007, 524 SCRA 533, 540; OSS Security & Allied Services, Inc. v. National Labor Relations Commission, supra note 16, at 45.

[18] See Mobile Protective & Detective Agency v. Ompad, G.R. No. 159195, May 9, 2005, 458 SCRA 308,

322-323; Philippine Industrial Security Agency Corporation v. Dapiton, 377 Phil. 951, 961-962 (1999).

[19] See Veterans Security Agency, Inc. v. Gonzalvo, Jr., G.R. No. 159293, December 16, 2005, 478 SCRA 298, 308; Mobile Protective & Detective Agency v. Ompad, *supra* note 18, at 323; Soliman Security Services, Inc. v. Court of Appeals, 433 Phil. 902, 910 (2002); Valdez v. National Labor Relations Commission, 349 Phil. 760, 766 (1998); Superstar Security Agency, Inc. v. National Labor Relations Commission, G.R. No. 81493, April 3, 1990, 184 SCRA 74, 77; Agro Commercial Security Services Agency, Inc., v. National Labor Relations Commission, G.R. Nos. 82823-24, July 31, 1989, 175 SCRA 790, 797.

[20] Fungo v. Lourdes School of Mandaluyong, G.R. No. 152531, July 27, 2007, 528 SCRA 248, 256-257; The Philippine American Life and General Insurance Co. v. Gramaje, G.R. No. 156963, November 11, 2004, 442 SCRA 274, 290.

[21] Duldulao v. Court of Appeals, G.R. No. 164893, March 1, 2007, 517 SCRA 191, 199; Phil. Employ Services and Resources, Inc. v. Paramio, G.R. No. 144786, April 15, 2004, 427 SCRA 732, 753-754.

[22] Rollo, p. 268.

[23] GSP Manufacturing Corporation v. Cabanban, G.R. 150454, July 14, 2006, 495 SCRA 123, 126; Samarca v. Arc-Men Industries, Inc., 459 Phil. 506, 515 (2003).

[24] Far East Agricultural Supply, Inc. v. Lebatique, G.R. No. 162813, February 12, 2007, 515 SCRA 491, 498; Anflo Management & Investment Corp. v. Bolanio, 439 Phil. 309, 318 (2002).

[25] Rules of Court, Rule 46, Sec. 7, provides:

SEC. 7. Effect of failure to file comment. - When no comment is filed by any of the respondents, the case may be decided on the basis of the record, without prejudice to any disciplinary action which the court may take against the disobedient party. (See DHL-URFA-FFW v. Buklod Ng Manggagawa ng DHL Phil. Corp., 478 Phil. 842, 852 [2004]; see also Ramoran v. Jardine CMG Life Insurance Co., Inc., 383 Phil. 83, 99 [2000])

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