

MARCIAL APARECE, PETITIONER, VS. J. MARKETING CORPORATION AND/OR ROGER L. AGUILLON, RESPONDENTS.

G.R. No. 174224. October 17, 2008

Ponente: TINGA, J.

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TINGA, J.:

Petitioner, Marcial Aparece, assails the Decision[1] of the Court of Appeals dated April 18, 2006, which reversed and set aside the decisions of the Labor Arbiter[2] and the National Labor Relations Commission (NLRC), declared him not to have been illegally dismissed, but pronounced him entitled to 13[th] month pay.

It should be mentioned at the outset that in his complaint for illegal dismissal,[3] petitioner claims that his employment woes stem from a personal animosity borne towards him by J. Marketing Corporation's (JMC's) branch manager, respondent Roger Aguillon. He also refers to the incident at which the company motorcycle used by him was temporarily lost as the cause of his termination.

However, there are no material inconsistencies in the facts as found by the labor arbiter and the NLRC and the following facts which appear in the assailed Decision:

J. Marketing Corporation (JMC hereafter), is engaged in the wholesale and retail of home appliances and motorcycle units. On 8 August 1994, it employed Marcial Aparece (Aparece for brevity), as Credit Investigator/Collector with a salary of P4,200.00 per month. As Credit Investigator/Collector, JMC provided him with a motorcycle unit for his personal use in doing his tasks.

Sometime in August 1997, while Aparece was assigned in the Butuan City area, Aparece lost seven (7) pages of the turn-over sheets and 230 ledger cards, which was transmitted to him by Mr. Balingan, Credit Investigator and Collector in the Butuan City area, before the turn-over of area of collection. The loss was discovered by JMC when it conducted the regular inventory of collections. Thus, on 25 August 1997, JMC issued a Memorandum warning Aparece that a similar act of negligence will warrant his termination from service.

On 19 March 1998, Aparece lost Official Receipts bearing Nos. 519151D to 519200D during a field collection. Said incident was reported to Mr. Roger Soyao, Executive Vice President and General Manager of JMC. As a result, Aparece was subjected to six (6) days suspension without pay.

x x x

In February 2000, Aparece, for several occasions, reported late for work and would leave the office without permission, in violation of the company's rules and regulations. A Memorandum dated 28 February 2000 was issued to Aparece warning him that a similar act will merit a reprimand or suspension, if not termination.

x x x

Unmindful of all the memoranda and warnings issued, Aparece was again caught sleeping while on duty. JMC also observed that Aparece on repeated occasions does not report to the office before noonbreak, as required.

He was again issued a Memorandum by Vangie Tionko dated 6 July 2000, which reads:

x x x

As a last straw to the test of JMC's patience, Aparece's motorcycle unit was reported missing after he left said motorcycle in front of the JMC Office, sometime in August 2001. Although the motorcycle was recovered, it was only after earnest efforts to locate it were made. [sic] Branch Manager Roger Aguillon issued Aparece a Memorandum reprimanding him for such negligent behavior.

Due to these numerous infractions, and after several memoranda issued, Aparece was administratively investigated on 19 September 2001.

Thereafter, Aparece was notified of the investigation report and consequent termination of his services, viz:

x x x

On 28 May 2002, Aparece filed a Complaint for illegal dismissal before the National Labor Relations Commission, Regional Arbitration Branch No. XIII, Butuan City. He prayed for backwages, salary differential, separation pay and 13th month pay. On 30 May 2002, the Labor Arbiter issued Summons to the parties requiring them to appear for mandatory conference scheduled on 20 June 2002.

Meantime, the Department of Labor and Employment (DOLE) on 13 June 2002, conducted its regular visitation of JMC's premises. Engr. Oliver H. Baranda, Labor Employment Officer III, certified that JMC complied with the minimum wage requirements set by law.

On 9 July 2002, the preliminary conference was held. The parties failed to settle their differences, thus, the Labor Arbiter required them to submit their respective position papers. On 19 August 2002, JMC filed its position paper. However, on 23 August 2002, Aparece amended the complaint to include, among others, claims for service incentive leave pay, damages, double indemnity under R.A. [No.] 8188 and interest.

On 16 October 2002, Aparece filed his position paper. Thereafter, the Labor Arbiter rendered a Decision^[4] declaring Aparece illegally dismissed.

Dissatisfied with the Labor Arbiter's Decision, Aparece filed a Notice of Partial Appeal with Appeal Memorandum, dated 1 November 2002, praying that the Decision dated 17 October 2002 be reconsidered, by ordering the reinstatement of Aparece with full backwages, and for JMC to pay Aparece double indemnity under R.A. [No.] 8188, monetary equivalent of 15 days vacation leave per year of service and 15 days sick leave per year of service, and interest of 12% per annum.

On 28 August 2003, public respondent while affirming the Labor Arbiter's decision also ordered the reinstatement of Aparece.^[5]

Aggrieved, JMC seasonably filed a Motion for Reconsideration but was denied.^[6]

The Court of Appeals ruled that the NLRC committed grave abuse of discretion when it dismissed JMC's appeal and affirmed the decision of the Labor Arbiter. The appellate court declared that Aparece was validly dismissed and that JMC had complied with the twin notice rule.

In its Resolution^[7] dated June 21, 2006, the Court of Appeals denied reconsideration.^[8]

In his Petition for Review on Certiorari^[9] dated August 23, 2006, petitioner avers that the Court of Appeals should have dismissed JMC's petition due to lack of proper verification. Aparece also alleges that he was not accorded procedural due process before his termination because he was not served any notice of the charges against him. He further claims that since he had already been punished for his previous violations, to make these same offenses the basis for his termination would penalize him twice for the same offense. At any rate, petitioner

contends that the acts imputed against him cannot be considered serious misconduct.

In its Comment[10] dated December 13, 2006, JMC merely quotes at length the findings of fact and conclusions of the Court of Appeals. Petitioner's Reply,[11] dated October 22, 2007, is also a mere reiteration of his submissions.

While we do not fully subscribe to petitioner's contentions, we nonetheless partially grant his petition.

Petitioner contends that the Court of Appeals should have dismissed JMC's petition for lack of proper verification. The questioned verification states that, "Everything stated therein are (sic) true and correct of my own personal knowledge"[12] and lacks the phrase "or based on authentic records."

Sec. 4, Rule 7 of the 1997 Rules of Civil Procedure states that, "A pleading is verified by an affidavit that the affiant has read the pleading and that the allegations therein are true and correct of his personal knowledge or based on authentic records." As worded, the Rule dictates that a pleading may be verified under either of the two given modes or under both.

The veracity of the allegations in a pleading may be affirmed based on either one's own personal knowledge or on authentic records, or both, as warranted. The use of the preposition "or" connotes that either source qualifies as a sufficient basis for verification and that the concurrence of both sources is more than sufficient. Bearing both a disjunctive and conjunctive sense, this parallel legal signification avoids a construction that will exclude the combination of the alternatives or bar the efficacy of any one of the alternatives standing alone. Depending on the nature of the allegations in the petition, the verification may be based either purely on personal knowledge, or entirely on authentic records, or on both sources.[13]

In this case, the allegations in JMC's petition refer, for the main part, to the proceedings before the labor arbiter and the NLRC as well as the various memoranda and notices supposedly issued to herein petitioner calling his attention to the infractions he had committed. The verification based on the "personal knowledge" of the affiant, JMC's branch manager, Roger Aguillon, is arguably insufficient because none of the memoranda mentioned in the petition were issued by him. The deficiency, however, is not fatal considering the fact that petitioner herein admittedly received all of the memoranda and notices of proceedings cited in JMC's petition. Moreover, the defect is not jurisdictional and the appellate court had apparently chosen to relax the application of the rules in this case. We shall accordingly proceed to discuss the merits of its Decision.

The records disclose that prior to his termination on September 19, 2001, petitioner received the following memoranda from JMC:

- August 25, 1997--Gross Negligence for loss of seven (7) pages turn-over sheets and 230 ledger cards;
- May 19, 1998--Gross Negligence while performing duty for the loss of company O.R. bearing Nos. 519151D to 5192000D. As a result, complainant was meted with a six-(6) day suspension without pay. x x x
- February 28, 2000--Coming late and absence without permission. Complainant was given a last warning. x x x
- July 6, 2000--Failure to report to office before noon break and sleeping during office hours. Complainant was meted a suspension of three (3) days without pay. x x x
- September 19, 2001--[C]ontinued violation of company policies and gross negligence. [Complainant] negligently failed to keep his motorcycle unit inside the JMC office before leaving the office and below par performance as collector/credit investigator.[14]

The conduct of petitioner during his employment was short of the ideal. He was undoubtedly negligent and

careless with respect to his handling of company property which resulted in the loss of the latter's turn-over sheets, ledger cards, and official receipts. Moreover, petitioner also committed a series of violations of company policies. He had repeatedly failed to report for work before noon; left the office without notice; slept while on duty; and failed to report to the office after noon break. Petitioner's conduct exhibited his nonchalance and insolence; traits that have no place in a work setting.

The foregoing acts constitute gross negligence and serious misconduct warranting petitioner's dismissal. To justify the dismissal of an employee for negligence, the act must not only be gross but also habitual, although it is not necessary that the employer show that he has incurred actual loss, damage or prejudice by reason of the employee's conduct.[15] Serious misconduct, on the other hand, is the transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, willful in character, and implies wrongful intent and not mere error in judgment. For serious misconduct to warrant the dismissal of an employee, it (1) must be serious; (2) must relate to the performance of the employee's duty; and (3) must show that the employee has become unfit to continue working for the employer.[16]

Be that as it may, we find that JMC did not strictly comply with the well-entrenched procedural due process requirements in the manner by which it dismissed petitioner.

Book VI, Rule I, Section 2(d), of the Omnibus Rules Implementing the Labor Code provides the procedure for terminating an employee, viz:

(d) In all cases of termination of employment, the following standards of due process shall be substantially observed:

For termination of employment based on just causes as defined in Article 282 of the Labor Code:

(i) A written notice served on the employee specifying the ground or grounds for termination, and giving said employee reasonable opportunity within which to explain his side.

(ii) A hearing or conference during which the employee concerned, with the assistance of counsel if he so desires is given opportunity to respond to the charge, present his evidence, or rebut the evidence presented against him.

(iii) A written notice of termination served on the employee, indicating that upon due consideration of all the circumstances, grounds have been established to justify his termination.

In dismissing an employee, the employer has the burden of proving that the former has been served two notices: (1) one to apprise him of the particular acts or omissions for which his dismissal is sought, and (2) the other to inform him of his employer's decision to dismiss him.[17] The first notice must state that dismissal is sought for the act or omission charged against the employee. Otherwise, the notice cannot be considered sufficient compliance with the rules.[18]

Furthermore, the first notice must inform the employee outright that an investigation will be conducted on the charges particularized therein which, if proven, will result to his dismissal. Such notice must not only contain a plain statement of the charges of malfeasance or misfeasance but must categorically state the effect on his employment if the charges are proven to be true.[19] Obviously, the purpose of the first notice is to afford the employee the opportunity to defend himself against the charges hurled against him.

In this case, petitioner was warned in four memoranda that the commission of further violations will merit a stiffer penalty, possibly termination. However, these memoranda were issued by JMC on August 25, 1997, May 28, 1998, February 28, 2000 and July 6, 2000, all more than a year prior to petitioner's actual termination. Although petitioner admitted that an investigation was conducted,[20] the appellate court's pronouncement that the

memoranda issued by JMC satisfy the first notice requirement is still quite unsettling.

In *Agabon v. NLRC*,^[21] the Court ruled that where the dismissal is for a just cause, as in this case, the lack of statutory due process should not nullify the dismissal, or render it illegal or ineffectual. Neither should the employer be required to pay the employee back wages. However, the employer should indemnify the employee for the violation of his statutory right in the form of nominal damages the amount of which is addressed to the sound discretion of the court, taking into account the relevant circumstances.^[22]

Considering that an investigation was admittedly conducted although no formal first notice apprising petitioner of the charges for which his dismissal was sought was given, nominal damages in the amount of P30,000.00 should suffice. This amount should adequately serve to deter employers from future violations of the statutory due process rights of employees.

WHEREFORE, the petition is GRANTED IN PART. The Decision of the Court of Appeals in CA G.R. SP No. 84568, dated April 18, 2006, and its Resolution, dated June 21, 2006, are REVERSED and SET ASIDE. The Decision of the Labor Arbiter dated October 17, 2002 is REINSTATED with MODIFICATION, deleting the award of backwages and separation pay. Respondent J. Marketing Corporation is ordered to pay petitioner Marcial Aparece nominal damages in the amount of P30,000.00. No pronouncement as to costs.

SO ORDERED.

Quisumbing, (Chairperson), Carpio Morales, Velasco, Jr., and Brion, JJ., concur.

[1] Rollo, pp. 25-41; Penned by Associate Justice Teresita Dy-Liacco Flores and concurred in by Associate Justices Rodrigo F. Lim, Jr. and Ramon R. Garcia.

[2] Id. at 174-182.

[3] Id. at 156.

[4] The dispositive portion of the Labor Arbiter's Decision provides:

WHEREFORE, premises considered, judgment is hereby entered:

- Declaring complainant's dismissal illegal; and
- Ordering respondents to pay complainant the total amount of P103,980.73 as shown in the COMPUTATION marked as Annex "A" hereof.

Complainant's other claims are dismissed for lack of merit.

SO ORDERED.

Annex A referred to in the Labor Arbiter's Decision provides:

- Backwages (26 September 2001 - 18 October 2002)

a) 26 September 2001 February 28, 2002

P162.03 x 131 days

- 21,712.02

P 21,712.02/12

1,809.24

P 23,521.36

b) 01 March 2002 - 18 October 2002

P167.00 x 201 days

= 33,567.00

P 33,567.00/12

= 2,797.25

36,364.25

P 59,885.61

- COLA (28 May 1999 - 25 September 2001)

a) 28 May 1999 - 04 November 1999 - none

b) 05 November 1999 - 26 September 2001

P12.00 x 585 days

= P

7,020.00

P7,020.00

- 13[th] Month Pay (01 January 2001 - 25 September 2001)

a) 01 January 2001 - 30 April 2001

P154.00 x 105 days/12

= P

1,347.50

b) 01 May 2001 - 25 September 2001

P162.03 x 126 days / 12 =

1,701.31

1,347.50

3,048.82

- Separation Pay

P162.03 x 30 days x 7 years

= P

34,026.30

TOTAL AWARD

P 103,980.73

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[5] The dispositive portion of the NLRC's Decision states:

WHEREFORE, premises considered, the appealed decision is hereby modified. The respondents are hereby ordered to reinstate complainant to his former position without loss of seniority rights, plus payment of full backwages.

The rest of the decision not inconsistent with this resolution stands affirmed.

SO ORDERED.

[6]Id. at 26-34.

[7] Id. at 43.

[8] Id. at 44-46.

[9] Id. at 10-23.

[10]Id. at 230-242.

[11]Id. at 263-267.

[12] Id. at 92.

[13]Hun Hyung Park v. Eung Won Choi, G.R. No. 165496, February 12, 2007; 515 SCRA 502, 507.

[14]Rollo, p. 98; Resolution of the NLRC dated August 28, 2003.

[15] DEPARTMENT OF LABOR MANUAL, Sec. 4343.01(2).

[16] Roquero v. Philippine Airlines, G.R. No. 152329, April 22, 2003, 449 Phil. 437, 443 (2003).

[17]Electro System Industries Corporation v. National Labor Relations Commission, G.R. No. 165282, October 5, 2005, 472 SCRA 199, 203.

[18]Id. citing Tan v. National Labor Relations Commission, 359 Phil. 499 (1998).

[19] Id., citing Maquiling v. Philippine Tuberculosis Society, Inc., G.R. No. 143384, February 4, 2005, 450 SCRA 465, 477.

[20]Rollo, p. 176.

[21] G.R. No. 158693, November 17, 2004, 442 SCRA 573, 616-617.

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