

BLUE SKY TRADING COMPANY, INC. AND/OR JOSE TANTIANSU AND LINDA TANTIANSU, PETITIONERS, VS. ARLENE P. BLAS AND JOSEPH D. SILVANO, RESPONDENTS.

G.R. No. 190559. March 07, 2012

Ponente: REYES, J.

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REYES, J.:

The Case

Before us is a Petition for Review on Certiorari[1] under Rule 45 of the Rules of Court assailing the October 26, 2009 Decision[2] and the December 14, 2009 Resolution[3] of the Court of Appeals (CA) in CA G.R. SP No. 108432. The dispositive portion of the assailed decision reads:

WHEREFORE, premises considered, the instant Petition is GRANTED. The challenged resolution of the NLRC dated 30 January 2009 is hereby REVERSED and SET ASIDE. Accordingly, the Decision of the NLRC dated 29 November 2007 is hereby REINSTATED.

SO ORDERED.[4]

The assailed resolution denied the petitioners' Motion for Reconsideration[5] to the foregoing.

Antecedent Facts

Petitioner Blue Sky Trading Company, Inc. (Blue Sky) is a duly registered domestic corporation engaged in the importation and sale of medical supplies and equipment. Petitioner Jose G. Tantiansu, Jr. (Jose) is Blue Sky's vice president for operations while petitioner Linda G. Tantiansu (Linda) is its assistant corporate secretary. The respondents Arlene P. Blas (Arlene) and Joseph D. Silvano (Joseph) were regular employees of Blue Sky and they respectively held the positions of stock clerk and warehouse helper before they were dismissed from service on February 5, 2005.

On January 29, 2005, Lorna N. Manalastas (Lorna), Blue Sky's warehouse supervisor, wrote Jose a memorandum[6] informing the latter that six pairs of intensifying screens were missing. Lorna likewise stated that when a certain "Boy" conducted an inventory on October 2004, the screens were still completely accounted for.

On January 31, 2005, Helario Adonis, Jr. (Helario), warehouse personnel, was summoned by Linda, Jose's wife Alice Tantiansu, and human resources department head Jean B. De La Paz (Jean). Helario was asked to admit his participation in the theft of the missing screens. While he was offered to be paid a separation pay if he would confess complicity with the alleged theft, he pleaded utter innocence.

On February 1, 2005, Jean notified Helario of his termination from service on the ground of his failure to properly account for and maintain a balance of the company's stock inventories, hence, resulting in Blue Sky's loss of trust and confidence in him.[7] The day after, Blue Sky promptly filed with the Department of Labor and Employment (DOLE) an establishment termination report[8] indicating therein Helario's dismissal from service for cause.

On February 3, 2005, Jean issued notices to explain/preventive suspension[9] to Arlene, Joseph, delivery personnel Jayde Tano-an (Jayde) and maintenance personnel/driver Wilfredo Fasonilao (Wilfredo). The notices informed them that they were being accused of gross dishonesty in connection with their alleged participation in and conspiracy with other employees in committing theft against company property, specifically relative to the loss of the six intensifying screens. They were placed under preventive suspension pending investigation and were thus required to file their written explanations within 48 hours from receipt of the notices.

On February 4, 2005, Arlene submitted to Jean a handwritten memorandum denying knowledge or complicity with the theft of the intensifying screens. In part, the memorandum reads:

I'm not the supervisor of that dep't. para tanungin sa lahat ng nangyayari. Second, hindi naman ako ang nag-inventory ng stocks na yan. Third, nag-ooat lang ako ng stocks kapag wala sila at kailangan na ang stocks. And lastly, ano ba talaga ang trabaho ko dito, kc all I know is pag-re-record ng stocks but parang lumalabas guard ako na kailangan kong malaman ang lahat ng kilos at galaw ng lahat ng employee dito. Dahil ako lagi ang tinatanong tungkol sa nangyayari sa mezz. Bakit ako lang ba ang tao doon? So it means that, dapat lahat kami ay may memo para mag-explain regarding that matter. Maging fair naman kayo sa akin.

Anyway, regarding sa nawawalang IS, ang alam ko inim-ventory ni Kuya Boy yan last Oct. According to him, complete daw lahat yun. Nang bumaba si Sir Jun mga last week ng Dec. para magpalinis ng stocks, na-found out nya na kulang ang stocks. So we did, we compare the bincard to the stockcard. But tally silang pareho. Kaya, we did we trace it is sa mga possible records like shipment sa Cebu or sales. But wala doon. Ang naiisip naming dahilan ay baka nagpakabit si Ate Lorna ng cassette with IS sa technical and she forgot to report it. Yun lang ang possible reason na alam ko. At wala na akong alam pang iba. x x x[10]

On the other hand, Joseph proffered the following explanation:

Tungkol po sa nawawalang intensifying screen, wala po akong alam. Kasi po sa messanin[,] pumapasok lang po ako pag may inutos o may pagagawa, tsaka hindi po ako naghahanda ng lumang stocks. Nagbababa po kami ng stock at nag-aakyat sa 2nd floor pag kami po ay inutusan ng nakakataas sa akin o may katungkulan. Yun lang po ang aking trabaho sa mesanin. Eto lang po ang aking masasabi.[11]

Jayde and Wilfredo also filed their written explanations denying any involvement in the theft which took place and professing their dedication and loyalty to Blue Sky.[12]

On February 5, 2005, Jean issued to Arlene, Joseph, Jayde and Wilfredo notices of dismissal for cause[13] stating therein that evidence that they had conspired with each other to commit theft against company property was too glaring to ignore. Blue Sky had lost its trust and confidence on them and as an act of self-preservation, their termination from service was in order.

On February 7, 2005, Blue Sky filed with the DOLE an establishment termination report stating therein the dismissal of Arlene, Joseph, Jayde and Wilfredo.[14]

On February 8, 2005, Arlene, Joseph, Helario, Jayde and Wilfredo filed with the National Labor Relations Commission (NLRC) a complaint for illegal dismissal and suspension, underpayment of overtime pay, and non-payment of emergency cost of living allowance (ECOLA), with prayers for reinstatement and payment of full backwages. The complaint was docketed as NLRC NCR Case No. 00-02-01351-05.

Meanwhile, an entrapment operation was conducted by the police during which Jayde and Helario were caught allegedly attempting to sell to an operative an ultrasound probe worth around P400,000.00 belonging to Blue Sky. On April 22, 2005, Quezon City Inquest Prosecutor Arleen Tagaban issued a resolution[15] recommending the filing in court of criminal charges against Jayde and Helario.

On May 2005, before the complaint which was filed with the NLRC can be resolved, Helario, Jayde and Wilfredo executed affidavits of desistance^[16] stating therein that their termination by Blue Sky was for cause and after observance of due process.

The Ruling of the Labor Arbiter

On November 17, 2005, Labor Arbiter Gaudencio P. Demaisip, Jr. (LA Demaisip) dismissed the complaint relative to Helario, Jayde and Wilfredo as a consequence of their filing of the affidavits of desistance. As to Arlene and Joseph, LA Demaisip denied their claims of illegal suspension and dismissal and for payment of ECOLA and overtime pay based on the following grounds:

[T]he duties of Ms. Blas [Arlene] was to take out stocks. Also, Mr. Silvano's [Joseph] work consisted of removing, storing, or furnishing of "stocks" or supplies.

Further, Ms. Blas [Arlene] was tasked to make written monitoring of "stocks" or supplies.

Complainants therefore, are charged with the care and custody of respondents' property. They may not be given such functions or allowed entrance and exit from respondents' bodega if they were untrustworthy.

Indeed, the functions consisting of removing, storing, furnishing, monitoring and gaining ingress to and egress from the "bodega", where the "stocks" or supplies are kept, involved trust and confidence.

Article 282 of the Labor Code allows the employer to terminate the services of the employees, among others, for breach of trust and confidence.

Loss of confidence however, apply (sic) to the following: x x x (2) to those situations where the employee is routinely charged with the care and custody of the employer's money or property such as auditors, cashier; property custodians, or those who regularly handle significant amount of money or property.

The dismissal must rest on actual breach of duty committed by the employee.

Further, proof beyond reasonable doubt is not necessary. It is sufficient if there is some basis for such loss of confidence.

x x x

The basis, for the dismissal of the complainants, is the fact that six (6) pairs of assorted sizes of Intensifying Screen of the company at the bodega were lost x x x.

An entrapment was conducted against Tano-an [Jayde] and Adonis [Helario] x x x:

x x x

Simply put, the contention, about the missing items or supplies, is credible and reliable.

It is not necessary that proof of taking or conspiracy must exist.

The existence of the fact, that items or supplies were missing at the bodega of the company, would suffice to prove loss of confidence.

Complainants failed in their duties to exercise utmost protection, care, or custody of respondent's property. Hence, their dismissal from the service is warranted.

x x x

Claims for ECOLA and overtime pay were not discussed by the complainants[,] hence, they should be denied.^[17]

Arlene and Joseph assailed before the NLRC the decision rendered by LA Demaisip.[18]

The Rulings of the NLRC

On November 29, 2007, the NLRC ordered the reinstatement of Arlene and Joseph and the payment to them of full backwages and ten percent attorney's fees. The decision, in part, reads:

[T]he respondents [Blue Sky, Jose and Linda] accused complainants [Arlene and Joseph] of theft of company property. It was, thus, incumbent upon the respondents to prove the alleged theft by the appellants [Arlene and Joseph] with clear and substantial evidence. A reading of the record will, however, show that respondents have not presented any evidence to show the involvement of the complaint [sic] Arlene Blas and Joseph Silvano x x x in the theft. To start with, appellants were not caught red handed. No specific acts or deeds were imputed upon appellants to prove the allegation that they committed theft against the respondents. While there may be articles which may have been lost, the respondents have not shown how these were lost and how appellants participated in the theft. The fact that appellants had access to the lost items is not sufficient to prove their guilt. As shown, there were several other persons who had unlimited access to the warehouse where the items stolen were stacked. No witnesses were also presented implicating appellants in the theft.

As it is, all respondents have are general allegations that appellants conspired with the other complainants in stealing the lost items. Allegations, no matter how convincing they may sound, while they remain to be so, cannot be considered as clear and substantial evidence sufficient to justify the dismissal of an employee. While proof beyond reasonable doubt is not required, still respondents should have presented substantial evidence to support the grounds they have relied upon. x x x

x x x

Finally, [w]e do not see appellants as holding positions of trust and confidence. Before an employee may be dismissed due to willful breach of trust, he must hold a position of trust and confidence (*Estiva [v]s. NLRC*, G.R. No. 95145, August 5, 1993). A position of trust and confidence is one where a person is entrusted with confidence on delicate matters, or with the custody, handling, or care and protection of the employer's property (*Panday vs. NLRC*, G.R. No. 67664, May 20, 1994) and/or funds (*Gonzales vs. NLRC*, 335 SCRA 197).

Appellant Arlene Blas is a Stock Clerk while Joseph Silvano is a warehouse helper. While they may have access to the lost items, they were not entrusted with confidence on delicate matters or custody of the employer's property. They do not have the authority to withdraw, transfer or release items in the warehouse. They are mere low keyed employees who deal with the handling of stocks only when ordered to by their superiors.[19]

Both parties filed their motions for reconsideration[20] to the foregoing.

Claiming that their relations with Blue Sky had been strained, Arlene and Joseph sought the payment of separation pay, in lieu of reinstatement. Further, they lamented that the NLRC failed to specifically address the issue relative to their monetary claims. Hence, they reiterated the said claims, in addition to service incentive leave and 13th month pay for the year 2005, arguing that the burden to prove payment of benefits pertained to Blue Sky which miserably failed in this regard.

On the other hand, Blue Sky averred that substantial evidence existed to support its claim that Arlene and Joseph participated in, or at the least knew about, the theft of the missing screens.

On January 30, 2009, the NLRC issued a resolution reversing its earlier decision and reinstating LA Demaisip's dismissal of the complaint filed by Arlene and Joseph on the basis of the following:

In our Decision promulgated on November 29, 2007, we advanced the view that complainants Blas [Arlene]

and Silvano [Joseph] were ordinary employees not occupying positions of trust, without however taking a profound appreciation of the fact that complainants' duties as "stock clerk" and "warehouse helper" routinely involved having unlimited access to company's properties and stocks. The fact that same properties which were subject of losses and thievery as established from the subsequent entrapment operations conducted by the respondents with the assistance of PNP operatives against the two (2) other complainants, namely Jayde [Tano-an] and Helario Adonis, who are presently facing charges for attempting to sell respondents' property, convinced this Commission to reconsider its previous finding and be in agreement with the respondents' position.

x x x

While we are not unmindful of the fact that complainants Blas and Silvano were not part of the group who were apprehended during the entrapment operations, however, had they not been remiss in their respective duties [as] "stock clerk" and "warehouse helper" or not aided their former co-workers Tano-an and Adonis, thievery or losses of company's property could not have been committed.

x x x

The loss of company's property having been substantially proven, complainants Blas [Arlene] and Silvano [Blas] cannot just make a general denial and wash their hands clean. Their termination not only due to loss of trust but also for gross neglect of duties is therefore found justified. x x x

x x x

Finally, as regards complainants' claim for alleged unpaid 13th month pay and service incentive leave pay for 2005, contrary evidence however showed that respondents [Blue Sky] had paid the said claims as shown by the payment of their final monetary benefits which the complainants had duly received.[21]

Aggrieved, Arlene and Joseph filed before the CA a Petition for Certiorari[22] under Rule 65 of the Rules of Court to challenge the above quoted NLRC resolution.

The Ruling of the CA

In the decision rendered on October 26, 2009, which is now the subject of the instant petition, the CA found merit in the claims advanced by Arlene and Joseph. In reversing the January 30, 2009 Resolution of the NLRC, the CA ratiocinated that:

Prefatorily, the basic requisite for dismissal on the ground of loss of trust and confidence is that the employee concerned must be one holding a position of trust and confidence. A position of trust and confidence is one where a person is entrusted with confidence on delicate matters, or with the custody, handling or care and protection of the employer's property. And, in order to constitute a just cause for dismissal, the act complained of must be work-related and shows that the employee concerned is unfit to continue to work for the employer.

In *General Bank and Trust Company vs. Court of Appeals*, the Supreme Court laid down the following guidelines for the application of the doctrine of loss of confidence as a justification in the termination of erring employees, viz:

- (a) loss of confidence which should not be simulated;
- (b) it should not be used as a subterfuge for causes which are improper, illegal or unjustified;
- (c) it should not be arbitrarily asserted in the face of overwhelming evidence to the contrary; and
- (d) it must be genuine, not a mere afterthought to justify earlier action taken in bad faith.

x x x

To [o]ur mind, the NLRC is correct insofar as it considered the nature of [p]etitioner BLAS and [p]etitioner SILVANO as stock clerk and warehouse helper, respectively, as positions of trust and confidence. On account of their positions in the company, the [p]etitioners were given access to the [r]espondents' warehouse w[h]ere the company products and goods are kept. Likewise, by the nature of the work the [p]etitioners performed for the [r]espondents, it is logical to conclude that the former were charged with the custody of [r]espondents' property, thus making their positions as one reposed with trust and confidence.

However, [w]e hold that the [r]espondents failed to sufficiently establish the charge against [p]etitioners which was the basis for its loss of trust and confidence that warranted their dismissal. Concededly, it is settled that proof beyond reasonable doubt is not required in dismissing an employee on the ground of loss of trust and confidence. It is sufficient that there is some basis for such loss of confidence or that there must be some reasonable grounds to believe, if not to entertain the moral conviction that the employee concerned is responsible for the misconduct and that the nature of his participation therein rendered him absolutely unworthy of trust and confidence demanded by his position. However, loss of confidence as a valid cause to terminate an employee must nonetheless rest on actual breach of duty committed by the employee and not on the employer's imagined whim or caprice.

Verily, [w]e are convinced that the [r]espondents failed to adduce any substantial proof showing that the [p]etitioners committed an actual breach of their duty which destroyed the trust and confidence reposed upon them by their employer. Clearly, there is no ample evidence to show that [p]etitioners conspired with the thieves in stealing six (6) pairs of intensifying screens from [r]espondents' warehouse. Nor is there any shred of evidence that tends to prove that the [p]etitioners had a direct hand in the larceny committed against the [r]espondents. In fact, the verity of the [p]etitioners' innocence on the thievery committed against the [r]espondents was recognized by the NLRC in the assailed Resolution, viz:

x x x

While we are not unmindful of the fact that complainants Blas [Arlene] and Silvano [Joseph] were not part of the group who were apprehended during the entrapment operations, however, had they not been remiss in their respective duties [as] "stock clerk" and "warehouse helper" or not aided their former co-workers Tano-an and Adonis, thievery or losses of company's property could not have been committed. x x x

x x x

The ratiocination of the NLRC in reversing its initial pronouncement is that the [p]etitioners were "remiss" in their duty is flawed. It bears noting that the NLRC offered no explanation to justify this finding nor is there any scintilla of evidence in the records to support the conclusion that the [p]etitioners had aided, expressly or impliedly, their former co-workers in committing theft against the company.[23] (Citations omitted)

The CA denied the petitioners' motion for reconsideration, hence, the instant petition.

The Issues

The petitioners submit the following for resolution:

I.

WHETHER OR NOT THE EVIDENCE ADDUCED BEFORE THE NLRC BY PETITIONERS ARE SUFFICIENT TO ESTABLISH THE CHARGES WHICH WAS (sic) BASIS FOR THE LOSS OF TRUST AND CONFIDENCE AGAINST RESPONDENTS[-]EMPLOYEES.

II.

WHETHER OR NOT THE CA WAS CORRECT IN GRANTING THE PETITION FOR CERTIORARI FILED BY RESPONDENTS AND LATER, DENYING PETITIONERS' MOTION FOR

RECONSIDERATION.[24]

The Petitioners' Arguments

In *Salvador v. Philippine Mining Service Corporation*,[25] it was ruled that proof beyond reasonable doubt of the employee's misconduct or dishonesty is not required to justify loss of confidence, it being sufficient that there is substantial basis for loss of trust. Thus, an employer should not be held liable for dismissing the services of an employee sincerely believed to have at least known or participated in the commission of theft against company property. The employer is not required to present proofs of the employee's actual taking or unlawful possession of company property. In fact, in *Dole Philippines, Inc. v. NLRC, et al.*,[26] the court held that where the dismissal for loss of confidence is based on suspected theft of company property on the part of the employee, it remains a valid cause for dismissal even if the employee is subsequently acquitted.

It is immaterial that Arlene and Joseph were not among those who were entrapped attempting to sell an ultrasound probe to a police operative. The nature of their tasks at Blue Sky and the fact of loss of the intensifying screens dictated Arlene and Joseph's liabilities. Arlene's daily work routine involved (a) receiving and releasing of stocks; and (b) preparing stock cards for purposes of checking and monitoring the items in the warehouse. On the other hand, Joseph carried and moved stocks in and out of the warehouse. The six intensifying screens were discovered missing while Arlene, Joseph, Helario, Jayde and Wilfredo were supposedly performing their tasks, hence, the logical inference that they conspired to commit the theft or at least, knowingly allowed it to happen. Had the employees exercised due or even ordinary diligence to protect company property, no loss would have been incurred. Further, the defense interposed by Arlene in her written explanation that she was not employed by Blue Sky as a security guard, showed her utter lack of concern for the company's welfare, which rendered her undeserving of an employer's trust and confidence.

Findings of fact of quasi-judicial agencies, like the NLRC, are accorded not only respect but even finality when they are supported by substantial evidence.[27] Thus, the CA erred when it ruled that the NLRC gravely abused its discretion in ordering the dismissal of the respondents' complaint.

The Respondents' Contentions

In their Comment,[28] the respondents cited Section 1, Rule 45 of the Rules of Court to argue that only questions of law can be raised in a petition for review on certiorari. In the case at bar, the petitioners raise a factual question, to wit, the alleged sufficiency of the evidence they presented to justify the dismissal of Arlene and Joseph on the basis of loss of trust and confidence. The petitioners thus call for an examination of the probative value of the evidence offered by the parties, which is beyond the province of a petition filed under Rule 45 of the Rules of Court.

This Court's Ruling

While a petition for review on certiorari under Rule 45 of the Rules of Court generally precludes us from resolving factual issues, the instant case falls among the exceptions as the LA, the NLRC and the CA were at odds as to their findings.

We deem it proper to first resolve the procedural challenge interposed by the respondents against the instant petition and we find it lacking in merit.

It bears stating that Rule 45 limits us merely to the review of questions of law raised against the assailed CA decision.[29] Further, the Court is generally bound by the CA's factual findings. The foregoing rules, however, admit of exceptions, among which is when the CA's findings are contrary to those of the trial court or administrative body exercising quasi-judicial functions from which the action originated.[30] The case before us

now falls under the aforementioned exception as the LA, NLRC and the CA were at odds as to their findings.

Substantial evidence of actual breach by an employee is required from an employer to be able to justify the former's dismissal from service on the basis of an alleged participation in theft of company property. However, in the case at bar, Blue Sky had failed to discharge the burden of proof imposed upon it.

We note that the petitioners essentially raise the sole question of whether they had proven by substantial evidence the charges of theft against Arlene and Joseph which led to the latter's termination from service on the ground of loss of trust and confidence.

We rule in the negative.

In *Functional, Inc. v. Samuel Granfil*,^[31] we declared:

The rule is long and well settled that, in illegal dismissal cases like the one at bench, the burden of proof is upon the employer to show that the employee's termination from service is for a just and valid cause. The employer's case succeeds or fails on the strength of its evidence and not on the weakness of that adduced by the employee, in keeping with the principle that the scales of justice should be tilted in favor of the latter in case of doubt in the evidence presented by them. Often described as more than a mere scintilla, the quantum of proof is substantial evidence which is understood as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if other equally reasonable minds might conceivably opine otherwise. Failure of the employer to discharge the foregoing onus would mean that the dismissal is not justified and therefore illegal.

Further, in *Baron v. NLRC*,^[32] we held that for there to be a valid dismissal based on loss of trust and confidence, the breach of trust must be willful, meaning it must be done intentionally, knowingly, and purposely, without justifiable excuse.

In the case at bar, we agree with the petitioners that mere substantial evidence and not proof beyond reasonable doubt is required to justify the dismissal from service of an employee charged with theft of company property. However, we find no error in the CA's findings that the petitioners had not adequately proven by substantial evidence that Arlene and Joseph indeed participated or cooperated in the commission of theft relative to the six missing intensifying screens so as to justify the latter's termination from employment on the ground of loss of trust and confidence.

Blue Sky alleged that Arlene, who was a stock clerk, and Joseph, a warehouse helper, had free access to the missing items. Arlene, who kept the stock cards, was supposed to be monitoring on a daily basis the incoming and outgoing stocks stored in or taken out of the warehouse. Joseph took the stocks from the warehouse to the vehicles for transport or delivery purposes. Arlene and Joseph averred otherwise. They insisted that they were mere lowly employees who did not have actual custody of company property, specifically, of the missing items. Arlene claimed that she was not responsible for conducting inventories and that she released stocks only when urgently necessary and only in the absence of those authorized to do so. Joseph alleged that he only went to the mezzanine, where the missing items were stored, when ordered to do so by his superiors.

We note that the parties disagree as to what tasks were actually and regularly performed by Arlene and Joseph. They are at odds as to the issue of whether or not Arlene and Joseph had custody of the missing screens. We observe though that neither of the parties presented any documentary evidence, such as employment contracts, to establish their claims relative to the actual nature of Arlene and Joseph's daily tasks. It bears emphasizing though that the photocopies of the identification cards issued by Blue Sky, which were annexed to the respondents' position paper filed with the LA, indicated that Arlene was assigned at the customer service department while Joseph was part of the warehouse department.^[33]

During the entrapment operation conducted by police operatives, Jayde and Helario were caught attempting to sell an ultrasound probe allegedly belonging to Blue Sky. Thereafter, Jayde, Helario and Wilfredo withdrew their complaints for illegal dismissal against the company. Arlene and Joseph, however, pursued their claims. Nonetheless, Blue Sky construed the result of the entrapment operation to mean that there was a conspiracy among the five employees to commit theft of company property. In the reply filed by the petitioners to the respondents' position paper filed before the LA, the former alleged that in a letter, Jayde, Helario and Wilfredo implicated Arlene and Joseph as participants and conspirators in the commission of theft.[34] However, we note that the petitioners' allegation was bare since the letter supposedly written by Jayde, Helario and Wilfredo was not offered as evidence. Further, Blue Sky alleged that the ultrasound probe was among the items found missing in the inventory conducted in December 2004. We observe though that the employees were dismissed for alleged theft of six intensifying screens. In the termination notices, no references were made at all to a missing ultrasound probe.

Further, we notice that both parties mentioned a certain "Boy" who conducted the inventory in October 2004. There is no dispute that at that time, the six intensifying screens were still completely accounted for. Further, Arlene and Joseph claimed that it was Lorna who had control and custody of the stocks as she was the warehouse supervisor. "Boy" and Lorna were not called upon by either of the parties to corroborate their claims. "Boy" and Lorna could have provided important information as to the time line and the manner the intensifying screens were lost. If "Boy" and Lorna remain under Blue Sky's employ, it is the company which is in a better position to require the two to execute affidavits relative to what they know about the missing screens.

The petitioners also argue that if Arlene and Joseph had not been grossly negligent in the performance of their duties, Blue Sky would not have incurred the loss. We observe though that in the notices sent to Arlene and Joseph, first charging them with theft, and later, informing them of their dismissal from service, gross negligence was not stated therein as a ground. Hence, Arlene and Joseph could not have defended themselves against the charge of gross negligence. They cannot be dismissed on that ground lest due process be violated.

Only the following had been established without dispute: (a) the fact of loss of the six intensifying screens; (b) an entrapment operation was successfully conducted by the police operatives who caught Jayde and Helario in the act of attempting to sell an ultrasound probe which allegedly belonged to Blue Sky; and (c) Jayde, Helario and Wilfredo filed their affidavits of desistance to withdraw their complaints for illegal dismissal against Blue Sky while Arlene and Joseph pursued their complaints.

In its November 29, 2007 Decision, the NLRC found that Arlene and Joseph, a stock clerk and a warehouse helper, respectively, did not have unlimited access to or custody over Blue Sky's property. The CA, in the decision and resolution assailed herein, while ordering the reinstatement of the November 29, 2007 NLRC Decision, found that Arlene and Joseph exercised custody over company property. Be that as it may, we observe that the nature of Arlene and Joseph's regular duties while under Blue Sky's employ and their specific participation in or knowledge of the theft of the intensifying screens remain uncertain. Thus, whether or not Arlene and Joseph had actual custody over company property, we agree with the CA that the petitioners had failed to establish by substantial evidence the charges which led to Arlene and Joseph's dismissal from service.

While we empathize with Blue Sky's loss and understand that its actions were merely motivated by its intent to protect the interests of the company, no blanket authority to terminate all employees whom it merely suspects as involved in the commission of theft resides in its favor. We thus reiterate the doctrine enunciated in *Functional, Inc.*[35] that the employer's case succeeds or fails on the strength of its evidence and not on the weakness of that adduced by the employee, in keeping with the principle that the scales of justice should be tilted in favor of the latter in case of doubt in the evidence presented by them.

Notwithstanding our affirmation of the CA's finding that the petitioners had failed to discharge the burden of proof imposed upon them to justify the dismissal of Arlene and Joseph, we deem it proper to modify the assailed decision and resolution in the manner to be discussed hereunder.

Blue Sky committed no impropriety in imposing preventive suspension against Arlene and Joseph pending investigation of the theft allegedly committed against the company.

We, however, find no merit in the challenge made by Arlene and Joseph against the legality of the preventive suspension imposed by Blue Sky upon them pending the investigation of the alleged theft.

In *Mandapat v. Add Force Personnel Services, Inc.*,^[36] we explained that preventive suspension may be legally imposed on an employee whose alleged violation is the subject of an investigation. The purpose of the suspension is to prevent an employee from causing harm or injury to his colleagues and to the employer. The maximum period of suspension is 30 days, beyond which the employee should either be reinstated or be paid wages and benefits due to him.

In Arlene and Joseph's case, Blue Sky issued to them notices to explain on February 3, 2005. They submitted their written explanation the day after and they were dismissed from service on February 5, 2005. While we do not agree with Blue Sky's subsequent decision to terminate them from service, we find no impropriety in its act of imposing preventive suspension upon the respondents since the period did not exceed the maximum imposed by law and there was a valid purpose for the same.

In lieu of reinstatement, Arlene and Joseph are entitled to an award of separation pay.

If reinstatement proves impracticable, and hardly in the best interest of the parties, perhaps due to the lapse of time since the employee's dismissal, or if the employee decides not to be reinstated, the latter should be awarded separation pay in lieu of reinstatement.^[37]

In the case at bar, Arlene and Joseph were dismissed from service on February 5, 2005. We find that the lapse of more than seven years already renders their reinstatement impracticable. Further, from the stubborn stances of the parties, to wit, the petitioners' insistence that dismissal was valid on one hand, and the respondents' express prayer for the payment of separation pay on the other, we find that reinstatement would no longer be in the best interest of the contending parties.

Arlene and Joseph are entitled to the payment of ECOLA, but not to 13th month, service incentive leave and overtime pay.

It is well-settled that in labor cases, the burden of proving payment of monetary claims rests on the employer.^[38]

We find nothing in the records to indicate that the petitioners had indeed paid ECOLA to Arlene and Joseph.

In the resolution issued on January 30, 2009, the NLRC found proof by way of the petitioners' annex to their position paper that Arlene and Joseph already received their 13th month and service incentive leave pay for the year 2005.^[39] The respondents had not specifically refuted the NLRC's findings, hence, we sustain the same.

Anent the respondents' claim for overtime pay, we find no ample basis to grant it as they had not offered any proof to show that they in fact rendered such service.

The decision rendered by the NLRC on November 29, 2007, which the CA affirmed, did not award in favor of Arlene and Joseph moral and exemplary damages. Consequently, we delete the award in the respondents' favor of ten percent attorney's fees.

If there is no evidence to show that the dismissal of an employee had been carried out arbitrarily, capriciously and

maliciously and with personal ill-will, moral damages cannot be awarded.[40] If moral damages cannot be awarded, the consequence is that there can also be no award of exemplary damages and attorney's fees.[41]

In the case at bar, albeit we find Arlene and Joseph's dismissal from service as illegal, we cannot attribute bad faith on the part of Blue Sky which merely acted with an intent to protect its interest. Hence, we find as lacking in basis the NLRC's award of ten percent attorney's fees in the respondents' favor.

Jose and Linda cannot be held solidarily liable for the dismissal of Arlene and Joseph in the absence of proof that they acted with malice and bad faith.

As a general rule, a corporate officer cannot be held liable for acts done in his official capacity because a corporation, by legal fiction, has a personality separate and distinct from its officers, stockholders, and members.[42] In illegal dismissal cases, corporate officers may only be held solidarily liable with the corporation if the termination was done with malice or bad faith.[43] We find that the aforementioned circumstance did not obtain in the case of Jose and Linda relative to Arlene and Joseph's dismissal from service.

IN VIEW OF THE FOREGOING, the October 26, 2009 Decision and December 14, 2009 Resolution issued by the Court of Appeals, finding that the dismissal from service of respondents Arlene and Joseph was illegal and awarding in their favor full backwages, are **AFFIRMED** but with the following **MODIFICATIONS**:

- (a) Blue Sky is directed to pay ECOLA and separation pay to the respondents;
- (b) The award in favor of the respondents of ten percent attorney's fees made by the National Labor Relations Commission in its November 29, 2007 Decision and which was affirmed by the Court of Appeals in the herein assailed decision and resolution is deleted; and
- (c) Pursuant to our ruling in *Eastern Shipping Lines, Inc. v. CA*,^[44] an interest of 12% per annum is imposed on the total sum of the monetary award to be computed from the date of finality of this Decision until full satisfaction thereof.

The case is remanded to the National Labor Relations Commission which is hereby **ORDERED** to **COMPUTE** the monetary benefits awarded in accordance with this Decision and to submit its compliance thereon within thirty (30) days from notice hereof.

SO ORDERED.

Carpio, Brion, Perez, and Sereno, JJ., concur.

[1] Rollo, pp. 28-48.

[2] Penned by Associate Justice Myrna Dimaranan Vidal, with Associate Justices Jose Catral Mendoza (now a member of this court) and Marlene Gonzales-Sison, concurring; *id.* at 10-23.

[3] *Id.* at 25.

[4] *Id.* at 23.

[5] *Id.* at 220-229.

[6] *Id.* at 86.

[7] *Id.* at 88.

- [8] Id. at 89.
- [9] Id. at 91-95.
- [10] Id. at 96.
- [11] Id. at 98.
- [12] Id. at 97, 99.
- [13] Id. at 100-103.
- [14] Id. at 104-105.
- [15] Id. at 141.
- [16] Id. at 139-140, 142-145.
- [17] Id. at 154-156.
- [18] Id. at 157-162.
- [19] Id. at 171-173.
- [20] Id. at 175-182, 183-186.
- [21] Id. at 192-193. (Citations omitted)
- [22] Id. at 195-210.
- [23] Supra note 2, at 18-22.
- [24] Supra note 1, at 35.
- [25] 443 Phil. 878 (2003).
- [26] 208 Phil. 591 (1983).
- [27] *Duldulao v. CA*, G.R. No. 164893, March 1, 2007, 517 SCRA 191, 198. (Citations omitted)
- [28] *Rollo*, pp. 236-246.
- [29] *Mercado v. AMA Computer College-Parañaque City, Inc.*, G.R. No. 183572, April 13, 2010, 618 SCRA 218, 233.
- [30] *AMA Computer College-East Rizal v. Ignacio*, G.R. No. 178520, June 23, 2009, 590 SCRA 633, 651.
- [31] G.R. No. 176377, November 16, 2011. (Citations omitted)
- [32] G.R. No. 182299, February 22, 2010, 613 SCRA 351.
- [33] *Rollo*, pp. 118 and 120.
- [34] Id. at 135.
- [35] Supra note 31.
- [36] G.R. No. 180285, July 6, 2010, 624 SCRA 155.
- [37] *St. Luke's Medical Center, Inc. and Robert Kuan v. Notario*, G.R. No. 152166, October 20, 2010, 634 SCRA

67, 80-81. (Citation omitted)

[38] Smart Communications, Inc. v. Astorga, G.R. No. 148132, January 28, 2008, 542 SCRA 434, 453. (Citation omitted)

[39] Supra note 21, at 193.

[40] Chaves v. NLRC, G.R. No. 166382, June 27, 2006, 493 SCRA 434.

[41] Pacquing v. Coca-Cola Philippines, Inc., G.R. No. 157966, January 31, 2008, 543 SCRA 344, 363. (Citation omitted)

[42] Culili v. Eastern Telecommunications Philippines, Inc., G.R. No. 165381, February 9, 2011, 642 SCRA 338, 365.

[43] Id.

[44] G.R. No. 97412, July 12, 1994, 234 SCRA 78.

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