

**A’PRIME SECURITY SERVICES, INC., PETITIONERS, VS.
NATIONAL LABOR RELATIONS COMMISSION (THIRD DIVISION),
HONORABLE LABOR ARBITER OSWALDO LORENZO AND
FLORENTINO LISING, RESPONDENTS.**

G.R. No. 93476. March 19, 1993

Ponente: CRUZ, J.

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CRUZ, J.:

Private respondent Florentino Lising was one of the security guard force employed by petitioner A' Prime Security Services, Inc. for assignment to its various clients. Shortly before this case arose, he was detailed to the Regional Relay Facilities (RRF), a U.S. Mission facility located at the Clark Air Base, Angeles City.

On September 8, 1988, Asst. Regional Security Officer Alan E. Gentile of the U.S. Embassy requested Lising's relief as guard supervisor. The reason given was that he had been found sleeping while on duty.[1]

Investigation conducted by the petitioner on September 12, 1988, affirmed that Lising was caught sleeping on duty at least four times.[2] In two sworn statements, however, he admitted having slept on duty only once, i.e., on July 16, 1988.[3]

The results of the investigation were reported by the petitioner to the RRF in a letter dated September 14, 1988,[4] with the following remarks:

1. Shift Supervisor Florentino M. Lising's services under the contract and other U.S. mission facilities in the Philippines were terminated effective September 7, 1988. x x x

When Lising learned about the request for his relief, he went on absence without official leave. On September 28, 1988, the petitioner sent him a letter reminding him that he had been on AWOL since September 15, 1988. He was warned that unless he reported back within three days from receipt of the letter, he would be considered to have abandoned his work.[5]

Lising returned but, when he was informed that he would be transferred to another client, again went on AWOL. This prompted another letter from the petitioner dated October 13, 1988, warning him once more of the termination of his services if he did not report back for work.[6]

Instead of complying, Lising filed on October 13, 1988, a complaint against the petitioner for illegal dismissal and non-payment of overtime pay. He demanded not reinstatement but separation pay and back wages.

On December 14, 1988, Labor Arbiter Oswald B. Lorenzo held that the petitioner was guilty of illegal dismissal and ordered Lising's reinstatement with full back wages. His claim for overtime pay was, however, dismissed for lack of basis.[7]

On February 5, 1990, the NLRC modified the Labor Arbiter's decision. Holding that Lising was dismissed for

cause although his dismissal was effected without due process, the NLRC disposed thus:

WHEREFORE, premises considered, the Decision dated December 14, 1988 is hereby MODIFIED. Respondents-appellants are directed to grant complainant separation pay equivalent to one month salary for every year of service. The dismissal of claim for overtime pay is, however, affirmed.[8]

Its motion for reconsideration having been denied on March 30, 1990, the petitioner has come to this Court on certiorari. The petitioner claims grave abuse of discretion on the part of the Labor Arbiter for finding that respondent Lising was illegally dismissed and on the part of the NLRC for awarding him separation pay.

The Solicitor General feels that Lising was not illegally dismissed but sustains the award of separation pay on the grounds of equity and social justice. For his part, Lising agrees completely with the decision under review.

The petitioner argues that it did not terminate Lising's employment but only withdrew his assignment at the Clark Air Base at the request of the U.S. Embassy. Lising himself terminated his services by abandonment and there was no need for a formal investigation to establish that fact.

To constitute abandonment of position, there must be concurrence of the intention to abandon and some overt acts from which it may be inferred that the employee concerned has no more interest in working.[9]

It is noted that in the letter dated October 13, 1988, the petitioner manifested its willingness to retain Lising in its employ provided that he reported for duty within three days. Instead of doing so, Lising filed a complaint for illegal dismissal which, significantly, did not seek reinstatement but merely separation pay. When asked by the Labor Arbiter why he did not report for work, Lising answered that he simply did not want to work anymore and just wanted his separation pay.[10]

The rule that abandonment of work is inconsistent with the filing of a complaint for illegal dismissal[11] is not applicable to the present case. This rule applies only where the complainant seeks reinstatement and not where he expressly rejects this relief and asks for separation pay instead.

The NLRC held that Lising's services were terminated on September 7, 1988, as shown by the letter of the petitioner to the Regional Security Officer quoted above. We do not read it that way. The said letter shows that what was actually terminated was not Lising's employment but only his detail or assignment to the US Facility at Clark Air Base. Such relief was without prejudice to his re-assignment to another client as determined by the petitioner conformably to its employment agreement with Lising.

The assignment of its personnel is the prerogative of the employer in the management of its business.[12] There is nothing in the record to indicate that Lising's re-assignment was utilized by the petitioner to ease him out of his employment. No less importantly, the private respondent has not given any satisfactory reason for his refusal to be transferred to another client.

The Court finds that it was private respondent Lising who severed his employment with the petitioner by his continued absence without official leave. Obviously, he could not be subjected to investigation on this ground - assuming it was necessary - because he simply took French leave, as it were, and refused to go back to work. Under these circumstances, the petitioner was justified in considering his services terminated as a result of his own abandonment.

In light of this finding, is Lising entitled to separation pay?

Separation pay is defined as the amount that an employee receives at the time of his severance from the service and is designed to provide the employee with the wherewithal during the period that he is looking for another employment.[13]

Under the Labor Code, it is payable to an employee whose services are validly terminated as a result of retrenchment, closure of business, or disease.[14] It is also settled that separation pay may be awarded as a measure of social justice in those instances where the employee is validly dismissed but for causes other than serious misconduct or those involving moral turpitude.[15]

It is true that in *PLDT v. NLRC*, [16] we observed that a security guard found sleeping on the job would doubtless be subject to dismissal but could be allowed separation pay since his conduct, while inept, was not depraved. However, the doctrine is not applicable to the case at bar because Lising was not dismissed at all but caused his own separation by his refusal to return to work.

We are satisfied that despite the finding that Lising had been sleeping while on duty, the petitioner still did not terminate his services for that offense. This is clear from the letter dated October 13, 1988, where the petitioner wrote:

Dear Mr. Lising,

Our records show that you have been on absence without official leave from work since October 10, 1988.

The act you have committed is prejudicial to the interest of the company.

In view of the foregoing, kindly settle with us personally within three (3) days from receipt hereof all matters affecting your employment. Should you fail to report within the grace period it shall be construed to mean that you have resigned from this Security Services and we will report your name to the Ministry of Labor and Employment for abandonment.

It is our hope that you have understood us very clearly in this regard.

Very truly yours,

CONSOLACION B. FLORES
Director

To sustain the private respondent's claim for separation pay under the circumstances here established would be to reward him for abandoning his work. The policy of social justice cannot protect an employee who despite his previous proven offenses, was still given an opportunity to return to his work but chose instead to reject that offer. Social justice is extended only to those who deserve its compassion.

WHEREFORE, the petition is GRANTED and the challenged decision is REVERSED for having been made with grave abuse of discretion. It is so ordered.

Griño-Aquino, Bellosillo, and Quiason, JJ., concur.

[1] Annex "O"; Rollo, p. 47.

[2] Annex "P"; Rollo, pp. 48-49.

[3] Annexes "Q" and "R"; Rollo, pp. 50-52.

[4] Annex "P", supra.

[5] Annex "S"; Rollo, p. 53.

[6] Annex "T"; Rollo, p. 54.

[7] Decided by Labor Arbiter Oswald B. Lorenzo; Rollo, p. 22.

[8] Decision penned by Presiding Commissioner Lourdes C. Javier, with Commissioners Ireneo B. Bernardo and Rogelio I. Rayala, concurring; Rollo, p. 31.

[9] Dagupan Bus Co. Inc., v. NLRC, 191 SCRA 328.

[10] Records, p. 117.

[11] Hua Bee Shirt Factory v. NLRC, 186 SCRA 586.

[12] "Annex D"; Rollo, pp. 35-36.

[13] Aquino v. NLRC, 206 SCRA 118.

[14] Arts. 283-284, Labor Code.

[15] PLDT v. NLRC, 164 SCRA 671; Del Castillo v. NLRC, 176 SCRA 229; Cosmopolitan Funeral Homes, Inc. v. Maalat, 187 SCRA 108.

[16] 164 SCRA 671.

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