

FIRST DIVISION

[G.R. NO. 171703, September 22, 2006]

**ACE PROMOTION AND MARKETING CORPORATION, PETITIONER,
VS. REYNALDO URSABIA, RESPONDENT.**

D E C I S I O N

YNARES-SANTIAGO, J.:

Assailed in this Petition for Review on Certiorari under Rule 45 of the Rules of Court is the August 25, 2005 Decision^[1] of the Court of Appeals in CA-G.R. SP No. 84575, reversing the November 27, 2003 Decision^[2] of the National Labor Relations Commission (NLRC) in NLRC Case No. V-000473-2002, and holding that respondent was illegally dismissed by petitioner. Likewise questioned is the appellate court's February 22, 2006 Resolution^[3] denying petitioner's motion for reconsideration.

The facts show that sometime in August, 1994, petitioner Ace Promotion and Marketing Corporation, a company engaged in the promotion of various consumer products, commodities, and goods, hired respondent Reynaldo Ursabia as a company driver assigned to pick up the products of Nestle Philippines, Inc., for promotion and marketing.

On July 6, 2001, respondent failed to report for work. Petitioner, through its area supervisor, Gerry Garcia, issued a Memorandum dated July 9, 2001, which reads as follows:

MEMORANDUM

To: Mr. Reynaldo S. Ursabia
Fr: Mr. Gerry P. Garcia
Date: July 09, 2001
Subj: Violation of Company Rule
Abandonment of Work last Jul. 06, 2001

Please explain thru writing why there should be no disciplinary measure be taken against (sic) on the above-mentioned violation.

We need your response 24 hrs upon receipt of this memorandum.

For your strict compliance.^[4]

When respondent reported back to work on July 9, 2001, he was personally served with the foregoing memorandum but refused to acknowledge the same, hence, petitioner sent it through registered mail to his (respondent) last known address.^[5]

The following day, July 10, 2001, Garcia noticed some damage on the vehicle assigned to respondent, hence, he issued another Memorandum which provides:

MEMORANDUM

To: Mr. Reynaldo S. Ursabia
Fr: Mr. Gerry P. Garcia
Date: July 10, 2001
Subj: Destruction of Company Property

After instructing your immediate supervisor to hold your services and told (sic) you to explain why you abandoned your work last July 6, 2001, instead of explaining reasons, you act (sic) negatively. Pointing somebody damage the vehicle assigned to you (sic). You didn't manage to wait for me and explain, you left the office by saying (sabihin mo kay boss gerry na awol na lang ako). Upon returning back to the office, we check (sic) the vehicle and found out that the right front wheel was deflated, we also found out that the sliding door was slightly damage (sic). It seems that a smooth object is (sic) used in hitting the vehicle and I think you disconnected some wirings so as not others may use (sic) the said vehicle. We also found a piece of paper inserted on the distribution cap.

In this regard, we again require you to explain why you cannot be Terminated base (sic) on the abovementioned. We need your response 24 hrs upon receipt of this memorandum.

Failure to comply, Matter will be relayed to our attorney for Legal Actions (sic).^[6]

Service of the said memorandum was done through registered mail to respondent's last known address.^[7]

Sometime in July 2001, an anonymous note^[8] was discovered among the stocks of petitioner containing the words "(Good news) be careful and save youre (sic) life because there's a time to come everybody x x x will die."^[9] The examination conducted by the PNP Crime Laboratory allegedly showed that the handwriting of respondent has significant similarities with the said handwritten note.^[10]

On August 6, 2001, respondent went to petitioner's office and was served with a termination letter, which reads:

It's been a long time now since we send (sic) you several letters instructing you to explain why you cannot be terminated for violating Company Rules. As of this time, we are confident enough that you had already received all the letters. You were also verbally advice (sic) that you have to explain why there should be no disciplinary measures be taken against you. August 6, 2001, you reported to the office, I personally served you the letters. After reading the contents, you were advised to acknowledge receipt of the original copies but you refuses (sic) to sign. Another violation is the Threat Letter inserted on stocks for return. We request (sic) PNP crime lab to examine said Letter. After a week they come up with the conclusion that said letter is similar with your handwriting.

In connection on all of the above (sic), your Services as Company Driver is hereby Terminated effective August 6, 2001.^[11]

Again, respondent refused to receive the same prompting petitioner serve it by registered mail to respondent's last known address.

Meanwhile, the petitioner filed two criminal cases for Malicious Mischief and Grave Threats against the respondent.^[12]

Displeased with his termination, respondent filed a complaint for illegal dismissal and non- payment of other monetary benefits.

On May 9, 2002, Labor Arbiter Jose G. Gutierrez rendered a decision in favor of respondent. The dispositive portion of which, reads:

WHEREFORE, in the light of the foregoing judgment is hereby rendered declaring the complainant illegally dismissed from his employment and directing the respondent x x x Ace Promotion and Marketing Corporation to pay complainant the following:

I - Backwages - P 63,000.00
II- Separation Pay - 50,400.00
III- 13th Month Pay - 3,150.00
IV - Service Incentive Leave - 1,211.50
P117,761.50

Plus P11,776.15, ten (10%) percent attorney's fees or a total aggregate amount of PESOS ONE HUNDRED TWENTY NINE THOUSAND FIVE HUNDRED THIRTY SEVEN & 65/100 (P129,537.65)

x x x x

SO ORDERED. ^[13]

On appeal, the NLRC rendered a decision dated November 27, 2003, reversing the decision of the Labor Arbiter and disposing as follows:

WHEREFORE, premises considered, the decision of Labor Arbiter Jose G. Gutierrez dated 9 May 2002 is VACATED and SET ASIDE and a new one is entered, to wit:

Ordering respondent Ace Promotion and Marketing Corporation to pay complainant his service incentive leave pay in the amount of One Thousand Two Hundred Eleven and 50/100 (P1,211.50).

SO ORDERED. ^[14]

In a decision dated August 25, 2005, the Court of Appeals set aside the decision of the NLRC and held that respondent was illegally dismissed. The dispositive portion thereof, reads:

WHEREFORE, the petition is GRANTED. The Decision of the National Labor Relations Commission dated 27 November 2003 is SET ASIDE and

the decision of the Labor Arbiter Jose G. Gutierrez dated 9 May 2002 is hereby REINSTATED with the modification that the award of 13th month pay is deleted.

SO ORDERED.^[15]

With the denial of its motion for reconsideration on February 22, 2006, petitioner filed the instant petition.

The issue for resolution is whether there exists a just cause to dismiss respondent and whether he was accorded procedural due process.

The Labor Arbiter held that respondent was dismissed by petitioner for the following misdemeanors: (1) abandonment, (2) destruction of company property, and (3) leaving a note which petitioner interpreted to be a threat. He ratiocinated that respondent's dismissal was illegal because no hearing was conducted to allow him (respondent) to confront petitioner's witnesses.^[16] The NLRC, on the other hand, ruled that the dismissal was valid because respondent is guilty of abandonment.^[17] This was reversed by the Court of Appeals which held that the termination of respondent is not valid because his failure to report for work for a single day did not constitute abandonment and that the criminal case for grave threats filed against respondent was dismissed by the prosecutor's office while the case for malicious mischief was dismissed by the court.^[18]

We agree with the Court of Appeals that respondent cannot be dismissed for abandonment. To constitute a just and valid ground for dismissal, abandonment requires the deliberate and unjustified refusal of the employee to resume his employment. Two elements must be present, namely: (1) the failure to report for work or absence without valid or justifiable reason, and (2) a clear intention to sever the employer- employee relationship. The second element is more determinative of the intent and must be evinced by overt acts. Mere absence, not being sufficient, the burden of proof rests upon the employer to show that the employee clearly and deliberately intended to discontinue his employment without any intention of returning.^[19]

In the instant case, the subsequent conduct of respondent after he failed to report for work on July 6, 2001, shows that he had no intention to sever his employment with petitioner. Record shows that he went to work on July 9, 2001, which enabled petitioner to personally serve him the memorandum of even date. While his act of loitering outside the company premises cannot be considered as reporting for work, it shows an intention to make his services available for petitioner. More importantly, he formally reported for work on August 6, 2001. All these show that respondent never really wanted to quit his job. He may be guilty of going on absence without leave, but not abandonment because the totality of his acts show a clear intention to return to work.

Likewise, the alleged damage on the company car assigned to respondent cannot justify his dismissal. Termination is simply disproportionate to such infraction not only because the extent of the damage was never proved by petitioner but more importantly, no substantial evidence was presented to establish the guilt of respondent. With regard to the "anonymous note" purportedly written by the latter,