377 Phil. 951

FIRST DIVISION

[G.R. No. 127421, December 08, 1999]

PHILIPPINE INDUSTRIAL SECURITY AGENCY CORPORATION, PETITIONER, VS. VIRGILIO DAPITON AND THE NATIONAL LABOR RELATIONS COMMISSION, RESPONDENTS.

D E C I S I O N

PUNO, J.:

This case arose from a complaint for **illegal dismissal**, underpayment of salaries and wages, overtime pay, holiday pay, 13th month pay and service incentive leave pay filed by respondent **Virgilio D. Dapiton** against petitioner **Philippine Industrial Security Agency Corporation** and its President, Isidro Lirag.

The evidence for petitioner shows that on November 2, 1990 petitioner hired respondent as a security guard. His initial assignment was at PCIBank in Kalookan City. During his tour of duty at PCIBank on January 25, 1994, respondent had a heated argument with his fellow security guard, Roderick Lumen. The incident almost led to a shootout. After investigation, petitioner's chief investigator recommended their dismissal. Lumen was compelled to resign while respondent was suspended from work for seven (7) days.

Petitioner alleged that respondent did not serve his suspension and instead went on a leave of absence. Nonetheless, he was assigned at the BPI Family Bank in Navotas when he reported back for duty. Allegedly, respondent refused to accept his assignment.

In March 1994, respondent was assigned at Sevilla Candle Factory in Malabon. Three (3) weeks later, he abandoned his post and went on absence without leave (AWOL).

Respondent was given another assignment at Security Bank and Trust Company. He was required to report for an interview and to undergo a neurological examination. Respondent refused and allegedly again went on AWOL.

On April 15, 1994, petitioner sent a telegram to respondent to report to its office for a conference. Respondent did not show up. Instead, on April 22, 1994, respondent filed the present illegal dismissal case.

Respondent denied petitioner's allegations. He claimed that after he served his suspension, he was assigned at BPI Family Bank in Navotas. He accepted the new post. However, after a short period, he was relieved and was transferred to the Mercury Drugstore in Grand Central, Kalookan City. Again, after a brief tour of duty, he was relieved.

In March 1994, he was posted at Sevilla Candle Factory. While on duty, he witnessed some *shabu* dealers doing their illegal trade. Fearful for his life, he left his post and requested petitioner to transfer him to another post.

He admitted that his assignment at Security Bank did not materialize for he failed to take the neurological test. He explained he could not pay the examination fee in the amount of P250.00. He asked petitioner to pay the said amount but it refused.

Respondent alleged that thereafter, he was reduced to a mere reliever of absent security guards and was frequently transferred from one post to another. His last assignment was at the Philippine Savings Bank (PSB) in Makati. It lasted for only one (1) day. Since **April 13, 1994**, he was not given any assignment. He reported to petitioner's office regularly for his posting but to no avail. Consequently, on April 22, 1994, he sued petitioner for illegal dismissal and asked for separation pay. The case was docketed as NLRC-NCR Case No. 00-04-03291-94.

On June 15, 1994, respondent filed an Amended Complaint and Position Paper.[1] He prayed for reinstatement and further charged petitioner with underpayment of salaries and wages, overtime pay, holiday pay, 13th month pay and service incentive leave pay. He alleged that he was only paid P4,800.00 monthly for 12 hours of work per day. He became a reliever of absent security guards and sometimes he worked for more than eight (8) hours. The daily rate before December 1993 was P118.00. The rate increased by P17.00 in December 1993 and by P10.00 in April 1994. Thus, using the rate of P118.00 alone, respondent claimed that petitioner should have paid him as much as P5,752.50 per month.

On August 25, 1994, after further exchange of pleadings, Labor Arbiter Felipe Pati issued an order declaring the case as submitted for decision.[2] Nonetheless, on October 24, 1994, petitioner filed a **Motion to Admit** to rebut respondent's money claims.[3] Attached to the motion was a summary of the computation of the salaries, overtime pay, 13th month pay and other monetary benefits allegedly received by respondent from 1992-1994. Petitioner did not submit the employment records and payrolls of respondent for the said period allegedly because they were voluminous. However, petitioner undertook to submit said documents should the labor arbiter require it. Additionally, its managing director executed an affidavit[4] attesting to the truthfulness of its computation per the existing records of the company. The motion was not acted upon.

On December 14, 1994, Labor Arbiter Felipe P. Pati rendered a decision[5] finding petitioner liable for constructive dismissal. Essentially, the labor arbiter found that from 1990 up to 1993, respondent was assigned at PCIBank in Kalookan City. After his suspension on January 26, 1994, respondent was transferred frequently to different posts and despite its accusation that respondent was always absent from work, it continued to give him new assignments and did not take any disciplinary action against him. Thus, the labor arbiter concluded that said transfers were a mere scheme of petitioner to ease out respondent from work. The labor arbiter ordered respondent's reinstatement with payment of backwages. Moreover, petitioner and its president, Isidro Lirag, were required to pay the sum of P74,844.24, representing respondent's wage differential, overtime pay, 13th month pay and night shift differential.

Petitioner and Lirag appealed to the NLRC.

The NLRC dismissed the appeal, albeit respondent Isidro Lirag was held not liable for the money claims of respondent. The *fallo* of the NLRC decision reads:[6]

> "WHEREFORE, the appealed Decision is hereby AFFIRMED, except the awards, conformably with this Resolution, shall be solely the liability of (petitioner) appellant agency."

Petitioner's motion for reconsideration was denied on July 31, 1996.[7] Hence, this petition. Petitioner contends that the NLRC gravely abused its discretion in:

> "I
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> "DENYING PETITIONER'S MOTION FOR RECONSIDERATION AND AFFIRMING THE LABOR ARBITER'S FINDING OF ILLEGAL DISMISSAL NOTWITHSTANDING THE FACT THAT THERE WERE OVERWHELMING EVIDENCE TO SHOW THAT IT WAS THE PRIVATE RESPONDENT HIMSELF WHO ABANDONED HIS POST AND REFUSED PETITIONER'S OFFER OF NEW ASSIGNMENT;
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> "II
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> "AFFIRMING THE DECISION OF THE LABOR ARBITER HOLDING PETITIONER LIABLE FOR UNDERPAYMENT SOLELY ON THE BASIS OF PRIVATE RESPONDENT'S UNSUBSTANTIATED ALLEGATIONS OR CLAIMS AND AT THE SAME TIME, TOTALLY DISREGARDING PETITIONER'S EVIDENCE."

The petition is partly meritorious.

The first issue is substantive—whether petitioner constructively dismissed the respondent. Petitioner contends that there was no dismissal, constructive or otherwise. Petitioner claims that respondent abandoned his post, refused to accept his new assignments and went on AWOL.

The records belie petitioner's posture.

Constructive dismissal is defined as a "quitting because continued employment is rendered impossible, unreasonable or unlikely; as an offer involving a demotion in rank and diminution in pay."[8] On the other hand, **abandonment of work** means a clear, deliberate and unjustified refusal of an employee to resume his employment and a clear intention to sever the employer-employee relationship.[9] **Abandonment is incompatible with constructive dismissal**.[10]

In the case at bar, we hold that there was no deliberate intent on the part of the respondent to abandon his employment with petitioner. The clear evidence that respondent did not wish to be separated from work is that, after his last assignment on April 12, 1994, he reported to petitioner's office regularly for a new posting but to no avail. He then lost no time in filing the illegal dismissal case. An employee who forthwith takes steps to protest his layoff cannot by any logic be said to have

abandoned his work.[11]

Moreover, respondent's failure to assume his posts in Sevilla Candle Factory and the Security Bank and Trust Company is not without reason. He explained that he requested for a transfer of assignment from Sevilla Candle Factory because he feared for his life after he witnessed *shabu* dealers doing their business in his workstation. As regards the Security Bank assignment, he failed to take the neurological test for lack of money to pay for the examination fee.

Petitioner cannot overinflate the significance of the fact that respondent often absented himself from work without an approved leave. It is a settled rule that mere absence or failure to report for work is not tantamount to abandonment of work.[12] Even the failure to report for work after a notice to return to work has been served does not necessarily constitute abandonment nor does it bar reinstatement.[13]

The burden of proving that respondent has abandoned his job rests with petitioner. However, petitioner failed miserably to discharge the burden. The records show no memoranda concerning respondent's alleged unauthorized absences and refusal to work. Even the telegram petitioner sent to respondent after he allegedly went on AWOL merely required respondent to report to its office for a conference but did not mention anything about his absences. We find it incredible that petitioner did not even write respondent on his alleged refusal to accept the posts assigned to him and the abandonment of his posts considering that such acts constitute willful disobedience and gross neglect of duty which are valid grounds for dismissal.[14]

Petitioner could have also submitted the daily time records of respondent to prove that he indeed went on AWOL. It did not. Instead, it only submitted the following documents, viz: a letter-petition of respondent's fellow security guards demanding respondent's removal from their unit for his alleged arrogance (Annex "A"); the result of petitioner's investigation on the January 25, 1994 incident at the PCIBank, where its chief investigator recommended the dismissal of respondent and Lumen from the service (Annex "B"); a memorandum dated January 26, 1994, addressed to respondent, informing the latter of his suspension for seven (7) days due to his involvement in the January 25, 1994 incident (Annex "C"); a letter of introduction dated April 15, 1994, addressed to Security Bank and Trust Company, issued by Mr. Isidro Lirag for the benefit of respondent for his possible detail at said bank (Annex "D"), and a telegram dated April 15, 1994 allegedly sent by petitioner to respondent, requiring him to report to petitioner's office for a conference.

By no stretch of the imagination can the foregoing documents prove that respondent has abandoned his job or that he unjustifiably refused the new posts assigned to him. They only show that respondent had bad relationship with his fellow security guards and that petitioner was justified in suspending and subsequently relieving him from his post at PCIBank.

Petitioner contends that respondent was only provisionally relieved from his last post and not dismissed from employment. Hence, the filing of the illegal dismissal case on April 22, 1994 was premature. If at all, it is argued that respondent should be considered on **temporary "off-detail" status**. Petitioner relies on the case of *Superstar Security Agency, Inc. vs. NLRC*,[15] where we held that placing an employee on temporary "off-detail" is not equivalent to dismissal provided that such