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THIRD DIVISION

[G.R. NO. 145901, December 15, 2005]

EASYCALL COMMUNICATIONS PHILS., INC., PETITIONER, VS. EDWARD KING, RESPONDENT.

D E C I S I O N

CORONA, J.:

This petition for review on certiorari under Rule 45 of the Rules of Court assails the February 10, 2000 decision[1] and November 8, 2000 resolution of the Court of Appeals (CA) in CA-G.R. SP No. 53510. The assailed decision nullified the November 27, 1998 decision and April 29, 1999 resolution of the National Labor Relations Commission (NLRC) and entered a new one declaring that the respondent Edward King was illegally dismissed and awarding him backwages, separation pay and attorney's fees.

Petitioner Easycall Communications Phils., Inc. was a domestic corporation primarily engaged in the business of message handling. On May 20, 1992, petitioner, through its general manager, Roberto B. Malonzo, hired the services of respondent as assistant to the general manager. He was given the responsibility of ensuring that the expansion plans outside Metro Manila and Metro Cebu were achieved at the soonest possible time.

In an August 14, 1992 memorandum, Mr. R.T. Casas, respondent's immediate superior, recommended his promotion to assistant vice president for nationwide expansion. On December 22, 1992, respondent was appointed to the even higher position of vice president for nationwide expansion. Respondent's promotion was based on his performance during the six months preceding his appointment. As vice president for nationwide expansion, he became responsible for the sales and rentals of pager units in petitioner's expansion areas. He was also in charge of coordinating with the dealers in these areas.

Sometime in March 1993, Malonzo reviewed the sales performance of respondent. He also scrutinized the status of petitioner's Nationwide Expansion Program (NEP) which was under respondent's responsibility. He found that respondent's actual sales for the period October 1992–March 1993 was 78% of his sales commitment and 70% of his sales target.

Malonzo also checked the frequency and duration of the provincial sales development visits made by respondent for the same period to expansion areas under his jurisdiction. He discovered that the latter spent around 40% of the total number of working days for that period in the field.

The management then confronted respondent regarding his sales performance and provincial sales development visits. A series of dialogues between petitioner's

management and respondent ensued.

On April 16, 1993, Rockwell Gohu, petitioner's deputy general manager, talked to respondent to discuss his sales performance. In the course of the conversation, Gohu informed respondent that Malonzo wanted his resignation. This prompted respondent to write a memorandum to Malonzo. In his memorandum, he inquired whether Malonzo really wanted him to resign. He emphasized that his work performance had yet to be evaluated. He also stated that, based on the approved budget for fiscal year ending in June 1993, he was within the budget and targets set forth by petitioner. He further declared that he had no intention of resigning from his position.

On April 19, 1993, respondent received a notice of termination signed by Malonzo. The notice informed him of the termination of his employment with petitioner effective April 30, 1993. In particular, the relevant portion of the notice read:

> This is to inform you that management is **no longer confident** that you are the right manager for the position you are occupying. Our series of discussions on the various aspects of your functions with you did not convince us that it is to the best interest of Easy Call to retain your services. xxx [2] (Emphasis supplied)

Aggrieved, the respondent filed a complaint for illegal dismissal with the NLRC. It was docketed as NLRC Case No. 00-04-02913-93.

In his June 24, 1997 decision, the labor arbiter found that the termination of respondent's employment on the ground of loss of confidence was valid. Consequently, the labor arbiter dismissed the complaint for lack of merit.

On appeal, the NLRC affirmed the decision of the labor arbiter in its November 27, 1998 decision, with the modification that petitioner was ordered to indemnify respondent in the amount of P10,000 for violating respondent's right to due process. Respondent filed a partial motion for reconsideration praying that the NLRC reverse its ruling insofar as it declared that he was validly dismissed for cause. The NLRC, however, denied the motion for lack of merit in a April 29, 1999 resolution. The NLRC also dismissed the complaint for lack of jurisdiction.

Respondent filed a petition for certiorari with the CA. The CA granted the petition and ruled that the NLRC erred in holding that it lacked jurisdiction over the case. The CA also ruled that the dismissal of respondent was illegal for having been done without cause and in violation of his right to due process.

Petitioner moved for a reconsideration of the CA decision but the motion was denied in the CA's November 8, 2000 resolution. Hence, this petition.

Petitioner now raises the following errors:

I.

> THE HONORABLE COURT OF APPEALS COMMITTED GRAVE ABUSE OF DISCRETION WHEN IT SUBSTITUTED ITS OWN FINDINGS TO THAT OF THE NLRC IN VIOLATION OF THE RULE THAT REGULAR COURTS SHOULD

ACCORD GREAT RESPECT TO FINDINGS OF ADMINISTRATIVE AGENCIES CONSIDERING THAT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE SIMILAR FINDINGS OF BOTH THE LABOR ARBITER AND THE COMMISSIONERS OF NLRC.

II.

FURTHERMORE, GLARING IS THE FACT THAT THE HONORABLE COURT OF APPEALS SIMPLY DISREGARDED THE SUBSTANTIAL EVIDENCE ON RECORD WHICH INDISPUTABLY SHOWED THAT RESPONDENT WAS TOTALLY REMISS IN HIS DUTIES AS VICE PRESIDENT FOR NATIONWIDE EXPANSION.

III.

THE HONORABLE COURT OF APPEALS GRAVELY ERRED WHEN IT FAILED TO CONSIDER THAT BEING A CORPORATE OFFICER, THE NLRC HAS NO JURISDICTION OVER THE SUBJECT UNDER PD 902-A.[3]

We shall rule first on the issue of jurisdiction as it is decisive. If the NLRC had no jurisdiction, then it would be unnecessary to consider the validity of respondent's dismissal.

Petitioner argues that since respondent was a "corporate officer," the NLRC had no jurisdiction over the subject matter under PD 902-A. In support of its contention, petitioner invokes *Paguio v. NLRC* [4] where we held that the removal of a corporate officer, whether elected or appointed, is an intra-corporate controversy over which the NLRC has no jurisdiction. The petitioner also cites our ruling in *de Rossi v. NLRC* [5] to the effect that the SEC, not the NLRC, has original and exclusive jurisdiction over cases involving the removal of corporate officers.

Under Section 5 of PD 902-A, the law applicable at the time this controversy arose, [6] the SEC, not the NLRC, had original and exclusive jurisdiction over cases involving the removal of corporate officers. Section 5(c) of PD 902-A applied to a corporate officer's dismissal for his dismissal was a corporate act and/or an intra-corporate controversy.[7]

However, it had to be first established that the person removed or dismissed was a corporate officer before the removal or dismissal could properly fall within the jurisdiction of the SEC and not the NLRC. Here, aside from its bare allegation, petitioner failed to show that respondent was in fact a corporate officer.

"Corporate officers" in the context of PD 902-A are those officers of a corporation who are given that character either by the Corporation Code or by the corporation's by-laws.[8] Under Section 25 of the Corporation Code, the "corporate officers" are the president, secretary, treasurer and such other officers as may be provided for in the by-laws.

A careful look at *de Rossi* (as well as the line of cases involving the removal of corporate officers where we held that it was the SEC and not the NLRC which had jurisdiction[9]) will show that the person whose removal was the subject of the

controversy was a corporate officer whose position was provided for in the by-laws. *That is not by any means the case here*.

The burden of proof is on the party who makes the allegation.[10] Here, petitioner merely alleged that respondent was a corporate officer. However, it failed to prove that its by-laws provided for the office of "vice president for nationwide expansion." Since petitioner failed to satisfy the burden of proof that was required of it, we cannot sanction its claim that respondent was a "corporate officer" whose removal was cognizable by the SEC under PD 902-A and not by the NLRC under the Labor Code.

An "office" is created by the charter of the corporation and the officer is elected by the directors or stockholders.[11] On the other hand, an employee occupies no office and generally is employed not by the action of the directors or stockholders but by the managing officer of the corporation who also determines the compensation to be paid to such employee.[12]

In this case, respondent was appointed vice president for nationwide expansion by Malonzo, petitioner's general manager, not by the board of directors of petitioner. It was also Malonzo who determined the compensation package of respondent. Thus, respondent was *an employee, not a "corporate officer."* The CA was therefore correct in ruling that jurisdiction over the case was properly with the NLRC, not the SEC.

We now proceed to the substantive issue of the validity of the dismissal of respondent.

While loss of confidence is a valid ground for dismissing an employee, it should not be simulated.[13] It must not be indiscriminately used as a shield by the employer against a claim that the dismissal of an employee was arbitrary.[14]

To be a valid ground for an employee's dismissal, loss of trust and confidence must be based on a **willful** breach and **founded** on clearly established facts.[15] A breach is willful if it is done intentionally, knowingly and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently.[16] Thus, a willful breach cannot be a breach resulting from mere carelessness.

In this case, the labor arbiter's finding, affirmed by the NLRC, was that the sales record of respondent and the time he spent in the field were "clear indications of complainant's inefficiency and/or negligence."[17] Inefficiency implies negligence, incompetence, ignorance and carelessness.[18] Negligence is the want or lack of care required by the circumstances.[19]

The grounds cited by petitioner, i.e., respondent's alleged poor sales performance and the allegedly excessive time he spent in the field, were not sufficient to support a claim of loss of confidence as a ground for dismissal.

Furthermore, the alleged loss of confidence was not founded on clearly established facts.[20] First, petitioner included the sales performance of respondent for the