

## THIRD DIVISION

[ G.R. No. 160940, July 21, 2008 ]

**MEGAFORCE SECURITY AND ALLIED SERVICES, INC., AND RAUL MANALO, PETITIONERS, HENRY LACTAO AND NATIONAL LABOR RELATIONS COMMISSION, RESPONDENTS. \*\***

### DECISION

#### AUSTRIA-MARTINEZ, J.:

Before the Court is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court assailing the Decision<sup>[1]</sup> dated May 29, 2003 of the Court of Appeals (CA) which dismissed petitioners' Petition for *Certiorari* in CA-G.R. SP No. 73156, and the CA Resolution<sup>[2]</sup> dated November 24, 2003 which denied petitioners' Motion for Reconsideration.

The factual background of the case is as follows:

On April 28, 1998, Megaforce Security and Allied Services, Inc. (Megaforce) hired Henry Lactao (Lactao) as a security guard. He was detailed at Merville Park Subdivision in Parañaque City.

On April 4, 2000, Lactao filed with the Arbitration Branch of the National Labor Relations Commission (NLRC), National Capital Region a complaint against Megaforce for underpayment of wages, non-payment of overtime pay, service incentive leave pay and 13<sup>th</sup> month pay.<sup>[3]</sup>

On May 3, 2000, Lactao was reassigned to ABB Industry, Inc. in Sucat, Parañaque City.

On May 30, 2000, Megaforce, thru its Operations Manager, Lt. Col. Nicomedes P. Olaso, issued a Recall Order,<sup>[4]</sup> recalling Lactao from his assignment at ABB Industry, Inc. effective May 31, 2000 and directing him to report to the Headquarters for proper disposition and new assignment.

From May 31 to June 6, 2000, Lactao reported to the Headquarters but he was not given a new assignment. Believing he was terminated, Lactao amended his complaint on June 7, 2000 to one for illegal dismissal with prayer for reinstatement with the same prayer for underpayment of wages, non-payment of overtime pay, service incentive leave pay and 13<sup>th</sup> month pay, plus moral and exemplary damages and attorney's fees.

In his Position Paper<sup>[5]</sup> dated August 14, 2000, Lactao claims that in retaliation to his filing of a complaint for underpayment of wages; and non-payment of overtime pay, service incentive leave pay and 13<sup>th</sup> month pay, Megaforce constructively

dismissed him by relieving him from his post and not giving him a new assignment.

In its Position Paper<sup>[6]</sup> dated August 30, 2000, Megaforce, thru its General Manager, co-petitioner Raul U. Manalo (Manalo), denied the illegal dismissal charge. It alleged that Lactao had committed various offenses such as abandoning his post and sleeping on duty during his detail at Merville Park Subdivision; when Lactao was reassigned to ABB Industry, Inc., the Management thereof requested that he be relieved of his post because of improper discipline and appearance, *i.e.*, for incomplete or worn-out paraphernalia and unshaved moustache; on May 30, 2000, it issued a Recall Order of Lactao's assignment at ABB Industry, Inc., effective May 31, 2000 with instruction that he should report to the Headquarters for proper disposition and new assignment; and Lactao never reported to the Headquarters after his relief.

On May 29, 2001, the Labor Arbiter (LA) rendered a Decision<sup>[7]</sup> dismissing the complaint for lack of merit.

Dissatisfied, Lactao filed an Appeal Memorandum with the NLRC. On April 15, 2002, the NLRC rendered a Decision<sup>[8]</sup> setting aside the Decision of the LA, ruling that the fact that Lactao was not given new assignment from May 31, 2000 up to the filing of the complaint leads to the conclusion that he was constructively dismissed without valid or authorized cause, thus making the same illegal. Hence, the NLRC ordered Megaforce to reinstate Lactao to his former or equivalent position and to pay his backwages from the time of his dismissal until he was actually reinstated. Lactao's other claims were denied for lack of merit.<sup>[9]</sup>

On May 20, 2002, Megaforce filed a Motion for Reconsideration<sup>[10]</sup> but it was denied by the NLRC in its Resolution<sup>[11]</sup> dated July 24, 2002.

On October 4, 2002, Megaforce filed a Petition for *Certiorari*<sup>[12]</sup> with the CA. Despite due notice, Lactao did not file his Comment and Memorandum.

On May 29, 2003, the CA rendered a Decision<sup>[13]</sup> dismissing the petition, ruling that the NLRC did not commit grave abuse of discretion in finding that Lactao was constructively dismissed. It held that Lactao was constructively dismissed when Megaforce did not give him a new assignment in spite of the recall order which specifically directed him to report to Megaforce's office for disposition and new assignment; Megaforce failed to give Lactao notice that he was being put on "floating status"; the inaction of Megaforce gave the impression that he was being eased out from his work by not being given a new assignment.

On July 1, 2003, Megaforce filed a Motion for Reconsideration<sup>[14]</sup> but it was denied by the CA in its Resolution<sup>[15]</sup> dated November 24, 2003.

Hence, the present petition.

Megaforce contends that it is not guilty of illegal dismissal because Lactao was merely recalled from his post and the failure to give him a new assignment within seven days from his recall is not constructive dismissal because a security guard may be placed on "floating status" for a period not exceeding six months under

prevailing jurisprudence; Lactao never reported back for reassignment and his refusal to report back to work should not be taken against it; and the CA erred in ruling in Lactao's favor when the latter failed to file his Comment and Memorandum.

Lactao insists that he was constructively dismissed when he was recalled from his post at ABB Industry, Inc. without being informed that he was being placed on "floating status" or given a new assignment.

The petition is bereft of merit.

In cases involving security guards, a relief and transfer order in itself does not sever employment relationship between a security guard and his agency.<sup>[16]</sup> An employee has the right to security of tenure, but this does not give him such a vested right in his position as would deprive the company of its prerogative to change his assignment or transfer him where his service, as security guard, will be most beneficial to the client.<sup>[17]</sup> Temporary "off-detail" or the period of time security guards are made to wait until they are transferred or assigned to a new post or client does not constitute constructive dismissal as their assignments primarily depend on the contracts entered into by the security agencies with third parties.<sup>[18]</sup> Indeed, the Court has repeatedly recognized that "off-detailing" is not equivalent to dismissal, so long as such status does not continue beyond a reasonable time; when such a "floating status" lasts for more than six months, the employee may be considered to have been constructively dismissed.<sup>[19]</sup>

However, in the present case, while the charge of illegal dismissal may have been premature because Lactao has not been given a new assignment or temporary "off-detail" for a period of seven days only when he amended his complaint, the continued failure of Megaforce to offer him a new assignment during the proceedings of the case before the LA and beyond the reasonable six-month period makes it liable for constructive dismissal.

There is constructive dismissal if an act of clear discrimination, insensibility, or disdain by an employer becomes so unbearable on the part of the employee that it would foreclose any choice by him except to forego his continued employment.<sup>[20]</sup> It exists where there is cessation of work because continued employment is rendered impossible, unreasonable or unlikely, as an offer involving a demotion in rank and a diminution in pay.<sup>[21]</sup>

As Lactao averred in his Memorandum before the Court, "[w]hile [Megaforce] alleged that [Lactao] was not dismissed, they failed to offer him reinstatement or give him work assignment during the mandatory conciliation of this case before the LA. Even when the writ of execution for his reinstatement was served upon them on July 20, 2004, [Megaforce] refused to reinstate him."<sup>[22]</sup> Clearly, the supposed temporary "off-detail" of Lactao was meant to be a permanent one.

The Court cannot accept the contention of Megaforce that Lactao did not report to work after his recall and had abandoned his job since it failed to present credible proof of any act on the part of Lactao to abandon his employment. Moreover, it is a settled doctrine that the filing of a complaint for illegal dismissal is inconsistent with abandonment of employment. An employee who takes steps to protest his dismissal