

SECOND DIVISION

[G.R. NO. 169812, February 23, 2007]

**FEDERITO B. PIDO, PETITIONER, VS. NATIONAL LABOR
RELATIONS COMMISSION, CHERUBIM SECURITY AND GENERAL
SERVICES, INC., AND ROSARIO K. BALAIS, RESPONDENTS.**

D E C I S I O N

CARPIO MORALES, J.:

Federito B. Pido (petitioner) was hired on October 1, 1995 by Cherubim Security and General Services, Inc. (respondent) as a security guard. He was assigned at the Ayala Museum, but was later transferred on December 1, 1995 to the Tower and Exchange Plaza of Ayala Center where he worked as a computer operator at the Console Room, responsible for observing occurrences that transpire inside elevators and other areas in buildings which are recorded by surveillance cameras and relayed to monitors.^[1]

Like the other guards deployed by respondent at the Ayala Center, petitioner was under the operational control and supervision of the Ayala Security Force (ASF) of the Ayala Group of Companies.^[2]

On January 21, 2000, petitioner had an altercation with Richard Alcantara (Alcantara) of the ASF, arising from a statement of Alcantara that petitioner's security license for his .38 caliber revolver service firearm and duty detail order had already expired. On even date, Alcantara filed a complaint^[3] for Gross Misconduct, claiming that when he directed petitioner to present his security license, petitioner angrily and on top of his voice questioned his authority. And Alcantara recommended that petitioner be relieved from his post, and that immediate disciplinary action against him be taken.^[4]

On January 23, 2000, petitioner reported for work at the Ayala Center but he was not allowed to stay in the premises, a Recall Order^[5] having been issued by respondent through its Operations Manager. Petitioner thus filed an information report^[6] wherein he narrated that Alcantara confronted him on January 21, 2000 about his right to carry a firearm and afterwards tried to grab it from its holster, resulting in a heated argument between them.

Respondent thus conducted an investigation on January 25, 2000 during which petitioner echoed his tale in his January 21, 2000 information report.^[7]

Petitioner was later to claim that he was suspended by respondent following his argument with Alcantara.

As more than nine months had elapsed since the investigation was conducted by

respondent with no categorical findings thereon made, petitioner filed on October 23, 2000 a complaint^[8] for illegal constructive dismissal, illegal suspension, and non-payment and underpayment of salaries, holiday pay, rest day, service incentive leave, 13th month pay, meal and travel allowance and night shift differential against respondent, along with its employee Rosario K. Balais (Rosario) who was allegedly responsible for running the day to day affairs of respondent's business.^[9] Petitioner likewise prayed for reinstatement and payment of full backwages, attorney's fees and other money claims.

In its position paper, respondent denied that it dismissed petitioner from the service, it claiming that while it was still in the process of investigating the January 21, 2000 incident, it offered petitioner another assignment which he declined, saying "*pahinga muna ako* [I will in the meantime take a rest]."^[10]

By Decision^[11] of January 30, 2003, the Labor Arbiter ruled that petitioner's suspension for more than nine months had ripened into constructive termination, on account of which he ordered the payment of separation pay equivalent to one month salary of P8,000 for every year of service, or for the total amount of P32,000. The Arbiter, however, found that there was insufficient evidence to support petitioner's assertion that he was entitled to his money claims. Thus the Arbiter disposed:

WHEREFORE, premises considered, decision is hereby rendered declaring complainant to have been constructively terminated. Respondents Cherubim Security and General Services and/or Ms. Rosario K. Balais are hereby ordered to pay his separation in the computed amount of P32,000.00.

All other claims are dismissed.

SO ORDERED.^[12] (Underscoring supplied)

Both parties appealed to the National Labor Relations Commission (NLRC).

In its memorandum on partial appeal, respondent maintained that petitioner was not dismissed. It proffered that after refusing another assignment following his relief from his post at Ayala Center, petitioner "abandoned" his work; and that there was no reason to hold Rosario personally liable as she was merely an officer of respondent.^[13]

Petitioner, on the other hand, claimed in his appeal memorandum that the Labor Arbiter erred in awarding separation pay, instead of reinstatement and backwages.^[14]

By Decision of October 30, 2003, the NLRC modified the decision of the Labor Arbiter. While it found that petitioner was indeed constructively dismissed, it set aside the award of separation pay, given respondent's willingness to assign petitioner to another post which he declined. On the same ground, the NLRC denied petitioner's claim for backwages. It merely ordered his reinstatement:

WHEREFORE, the appeal filed by respondents is partially granted and the Decision of the Labor Arbiter dated 30 January 2003 is REVERSED and

SET ASIDE. In lieu thereof, a new order is hereby issued directing respondents to reinstate complainant and cause his immediate assignment or posting to work. Complainant's claim for backwages is DENIED for lack of merit.^[15] (Underscoring supplied)

Petitioner's motion for reconsideration having been denied by the NLRC by Resolution dated February 24, 2004, he filed a petition for certiorari^[16] with the Court of Appeals, maintaining that his suspension for more than nine months amounted to constructive dismissal to entitle him to separation pay and backwages.

By Decision^[17] dated March 10, 2005, the appellate court upheld the NLRC decision and accordingly dismissed petitioner's appeal. Petitioner's motion for reconsideration having been denied, he filed the present petition for review on certiorari, faulting the appellate court as follows:

. . . IN AFFIRMING THE ERRONEUS DECISION OF PUBLIC RESPONDENT NATIONAL LABOR RELATIONS COMMISSION HOLDING THAT THE PETITIONER WAS NOT CONSTRUCTIVELY DISMISSED FROM EMPLOYMENT . . . IN RULING THAT PETITIONER IS NOT ENTITLED TO THE PAYMENT OF HIS BACKWAGES AND IN ORDERING REINSTATEMENT INSTEAD OF PAYMENT OF SEPARATION PAY,^[18]

and submitting the following issues:

I

WHETHER THE PETITIONER'S NINE-MONTH SUSPENSION IS TANTAMOUNT TO CONSTRUCTIVE DISMISSAL.

II

WHETHER THE PETITIONER SHOULD BE PAID HIS BACKWAGES ASIDE FROM HIS SEPARATION PAY.

III

WHETHER THE PAYMENT OF SEPARATION PAY IS MORE VIABLE THAN THE ORDER OF REINSTATEMENT.^[19]

In dismissing petitioner's appeal, the appellate court sustained the findings of the Labor Arbiter and the NLRC that while a security guard, like petitioner, may be lawfully placed on a "floating status," the same should continue only for six months, otherwise the security agency could be liable for constructive dismissal under Article 286 of the Labor Code, viz:

ART. 286. *When employment not deemed terminated.* - The *bona fide* suspension of the operation of a business or undertaking for a period not exceeding six (6) months, or the fulfillment of the employee of a military or civic duty shall not terminate employment. In all such cases, the employer shall reinstate the employee to his former position without loss of seniority rights if he indicates his desire to resume his work not later

than one (1) month from the resumption of operations of his employer or from his relief from the military or civic duty.

This Court finds that, indeed, petitioner was constructively dismissed, but not on the grounds advanced by the appellate court, which echoed those of the NLRC and the Labor Arbiter.

In *Philippine Industrial Security Agency Corporation v. Dapiton*,^[20] this Court, explaining the application of Article 286 to security guards, held:

We stress that Article 286 applies only when there is a bona fide suspension of the employer's operation of a business or undertaking for a period not exceeding six (6) months. In such a case, there is no termination of employment but only a temporary displacement of employees, albeit the displacement should not exceed six (6) months. The paramount consideration should be the dire exigency of the business of the employer that compels it to put some of its employees temporarily out of work. **In security services, the temporary "off-detail" of guards** takes place when the security agency's clients decide not to renew their contracts with the security agency, resulting in a situation where the available posts under its existing contracts are less than the number of guards in its roster.^[21] (Italics in the original; emphasis and underscoring supplied)

Verily, a floating status requires the dire exigency of the employer's *bona fide* suspension of operation of a business or undertaking. In security services, this happens when the security agency's clients which do not renew their contracts are more than those that do and the new ones that the agency gets.^[22] Also, in instances when contracts for security services stipulate that the client may request the agency for the replacement of the guards assigned to it even for want of cause, the replaced security guard may be placed on temporary "off-detail" if there are no available posts under respondent's existing contracts.^[23]

When a security guard is placed on a "floating status," he does not receive any salary or financial benefit provided by law.^[24] Due to the grim economic consequences to the employee, the employer should bear the burden of proving that there are no posts available to which the employee temporarily out of work can be assigned. This, respondent failed to discharge.

From the January 23, 2000 Recall Order issued by respondent reading:

1. You are hereby instructed to report to Cherubim Office tomorrow, 24 January 2000 for investigation and effective to date, your duty at Tower One Console is [t]emporarily suspended.
2. The outright suspension is due to the argumentation (sic) [that] happened between you and ASF Alcantara last 21 January 2000, 0900 Hrs.
3. In this regard, report to Mr. Marcelino N. Tolod, the Operation[s] Manager, after your investigation for further instruction,^[25] (Underscoring supplied),