

## SIXTEENTH DIVISION

[ CA-G.R. SP No. 130360, June 10, 2014 ]

**24/7 CUSTOMER PHILIPPINES, INC., AND/OR LIEZL P. LONGALONG, HAROLD JAY R. GUTIERREZ, LARIZZA YRISH V. RAMOS, CHERYL M. CORONEL, PETITIONERS, VS. NATIONAL LABOR RELATIONS COMMISSION (SIXTH DIVISION) AND BENJAMIN B. PADILLA, RESPONDENTS.**

### D E C I S I O N

**MACALINO, J:**

This is a petition for certiorari<sup>[1]</sup> under Rule 65 of the Rules of Court, assailing the January 22, 2013 Decision<sup>[2]</sup> and the March 27, 2013 Resolution<sup>[3]</sup> of the National Labor Relations Commission ("NLRC") in NLRC LAC No. 09-002736-12 [NLRC NCR Case No. 09-13688-11]. The NLRC Decision, which reversed and set aside the February 29, 2012 decision<sup>[4]</sup> of the labor arbiter, disposes as follows:

"**WHEREFORE**, premises considered, the Appeal is GRANTED and the February 2[9], 2012 Decision is hereby REVERSED and SET ASIDE and a new one entered declaring complainant's dismissal as illegal and ordering respondents to pay him separation pay computed at one month and full backwages from the time he was illegally dismissed on August 30, 2011. Both awards should be computed up to the finality of this Decision. Further, respondents are ordered to pay complainant proportionate 13<sup>th</sup> month pay and service incentive leave pay.

All other claims are dismissed for lack of basis.

**SO ORDERED.**"<sup>[5]</sup>

Culled from the records are the following facts:

Private respondent Benjamin B. Padilla was hired by petitioner corporation on April 26, 2010 as Technical Support Representative.<sup>[6]</sup> On July 27, 2011, petitioner corporation sent Benjamin a Show Cause Memo ("SCM")<sup>[7]</sup> calling his attention regarding his half-day no call no show ("NCNS") on July 15, 2011. Benjamin did not submit any written explanation regarding his first NCNS and he was thus given his first written warning on August 24, 2011.<sup>[8]</sup> On the same date, Benjamin was again issued a Show Cause Memo for his second NCNS on August 22, 2011.<sup>[9]</sup> This time, Benjamin explained in writing that his absence was due to a severe toothache<sup>[10]</sup> caused by "irreversible pulpitis" which needs surgical removal of the tooth affected, as shown in the dental certificate.<sup>[11]</sup> Despite his explanation, Benjamin was given a final warning also on August 24, 2011.<sup>[12]</sup> On August 25, 2011, Benjamin received his third SCM for his NCNS on August 23, 2011.<sup>[13]</sup> He explained that he was absent

on the said date because of heavy rains and floods in Parañaque where he lives. He further said that around 4:40 in the morning, he sent text messages to his supervisor informing her of his absence. He no longer called her as he did not want to disturb her rest because her shift starts at 10:00 A.M.<sup>[14]</sup> On August 30, 2011, Benjamin received a Termination Letter stating that, "As stipulated in The Code Section 1 Neglect of Duties Item B On Attendance Unauthorized Absence is a moderate violation and subject to Termination on the 3<sup>rd</sup> offense."<sup>[15]</sup>

Benjamin filed a complaint for illegal dismissal which was dismissed by the labor arbiter. On appeal, the NLRC reversed the ruling of the labor arbiter and issued the assailed decision. Petitioners' motion for reconsideration having been denied by Resolution of March 27, 2013, they filed the present petition based on the following grounds:

#### **I**

**The Honorable NLRC committed grave abuse of discretion when it disregarded substantial evidence on record, as well as the Labor Arbiter's findings in his Decision, that the Private Respondent was dismissed for just cause.**

#### **II**

**The Honorable NLRC committed grave abuse of discretion in disregarding 24/7's evidence about the reasonableness of its attendance policy, in violation of its management prerogative.**

#### **III**

**The Honorable NLRC committed grave abuse of discretion in awarding separation pay and backwages to the Private Respondent.**

#### **IV**

**The Honorable NLRC committed grave abuse of discretion in not awarding damages and attorney's fees to Petitioners."<sup>[16]</sup>**

Petitioners assert that Benjamin was validly dismissed because of his repeated violation of the reasonable company rules against unauthorized absences. They point out that Benjamin failed to call his supervisor and ask for permission before not reporting for work. They argue that his absences and tardiness connote habitual neglect of duty. They dismiss his reasons for being absent as absurd and flimsy. They argue that a toothache and massive flooding cannot prevent one from making a call. Petitioners fault the NLRC for basing its decision on text messages which they insist are unsubstantiated. They further question the NLRC in ruling that the Code of Conduct was not presented in evidence when its pertinent provision was stated in the affidavit of Darwin Baetiong, petitioner corporation's Employee Services Manager, and in the Employment Contract, paragraph 16 thereof. Petitioners also contend that the corporation merely exercised its management prerogative and that labor laws discourage interference with an employer's judgment in the conduct of his business.

***The petition lacks merit.***

The NLRC committed no grave abuse of discretion when it ruled that Benjamin was illegally dismissed from his employment. Benjamin is not guilty of gross and habitual neglect of duty. Under Article 282 of the Labor Code, neglect of duty as a ground for dismissal must be both gross and habitual. Gross negligence implies want of care in the performance of one's duties. Habitual neglect imparts repeated failure to perform one's duties for a period of time, depending on the circumstances.<sup>[17]</sup> Benjamin's accumulated two-day absence cannot be considered gross and habitual neglect of duty.

Thus, the penalty of dismissal is manifestly disproportionate to the infraction committed. While Benjamin admitted that he failed to call his superior, he explained why he opted to merely sent text messages. These text messages are now being contested by petitioners as contrary to company policy and unsubstantiated but they did not deny that they received them or that the same were shown to them as stated by Benjamin in his August 29, 2011 letter. Indeed, Benjamin admitted that he was aware of the petitioner corporation's proper call in procedure but there was no showing that he was aware of the consequences of not following the same. As correctly noted by the NLRC, the Code of Conduct, which was always mentioned in the SCM and even in the Termination Letter, as basis for disciplining employees, was not presented. The affidavit of Mr. Baetiong merely stated what the Code of Conduct provides regarding attendance but it does not state whether Benjamin was made aware of the same. The same is true regarding Paragraph 16 of the Employment Contract which simply states:

#### **"16. Termination of Employment**

Your employment, which may be terminated due to valid and just cause, is governed by the following conditions:

xxx

##### *During Employment*

xxx

B. Gross inefficiency, i.e., attendance, tardiness, among others.

xxx

E. Violation of the Company Code of Conduct which includes the Training Code of Conduct, among others. All Company training records, documents and properties in your custody or control shall be immediately surrendered to the Company during and at the termination of your employment."<sup>[18]</sup>

The document with caption, "TWC Absences & Tardiness Policy" attached in petitioners' position paper as Annex 2,<sup>[19]</sup> likewise does not prove that Benjamin knows that he will be meted immediately with termination for the third offense. Benjamin has not also been shown to be a gross liability to his employer. There is no evidence that Benjamin's absences "negatively affect the team's and program's overall productivity." The following findings of the NLRC deserve affirmance:

"[Benjamin's] employment was terminated for neglect of duties due to unauthorized absences. He incurred two (2) half-day absences and a