STATEMENT OF COVERAGE

This *Bar Review Guide* is presented in the form of an outline of basic principles which bar reviewees may use as a quick guide on the significant areas of labor law in the 2010 Bar Examination. This is presented in five (5) parts: *PART ONE* covers New Laws; *PART TWO* covers Books 1 to 4 of the Labor Code and some important social legislation; *PART THREE* covers Book 5; *PART FOUR* covers Books 6 and 7 of the Labor Code; and *PART FIVE* features the coverage of the 2010 Bar Examination in Labor Law and a survey of all questions given in the Bar Examination in Labor Law for the last twenty (20) years – from 1990 to 2009.

LABOR LAWS OF THE PHILIPPINES

PART FOUR

LAW ON TERMINATION OF EMPLOYMENT

SECURITY OF TENURE

• ***Constitutional basis.***

Security of tenure is a right of paramount value guaranteed by the 1987 Constitution in its Section 3 (Labor), Article XIII [Social Justice and Human Rights], and previously in Section 9, Article II, of the 1973 Constitution. This constitutional guarantee is an act of social justice.

• ***What is the extent of the application of security of tenure?***

Security of tenure does not exclusively apply to regular employment only. It also applies to probationary, seasonal, project and other forms of employment during the effectivity thereof.

Managerial employees also enjoy security of tenure. The principle of security of tenure applies not only to rank-and-file employees but also to managerial employees. (*PLDT vs. Tolentino, G. R. No. 143171, Sept. 21, 2004).*

The fact that one is a managerial employee does not by itself exclude him from the protection of the constitutional guarantee of security of tenure. *(Fujitsu Computer Products Corporation of the Philippines vs. CA, G. R. No. 158232, April 8, 2005; Maglutac vs. NLRC, 189 SCRA 767 [1990]).*

MANAGEMENT RIGHTS AND PREROGATIVES

• ***What is the extent of the rights and prerogatives of management?***

Our laws recognize and respect the exercise by management of certain rights and prerogatives. For this reason, courts often decline to interfere in legitimate business decisions of employers. In fact, labor laws discourage interference in employers' judgment concerning the conduct of their business. *(Philippine Industrial Security Agency Corporation vs. Aguinaldo, G. R. No. 149974, June 15, 2005; Mendoza vs. Rural Bank of Lucban, G.R. No. 155421, July 7, 2004).*

An employer can regulate, generally without restraint, according to its own discretion and judgment, every aspect of its business. (*Deles, Jr. vs. NLRC, G. R. No. 121348, March 9, 2000).*

This privilege is inherent in the right of employers to control and manage their enterprise effectively. *(Mendoza vs. Rural Bank of Lucban, G.R. No. 155421, 07 July 2004).*

• ***What are the limitations on the exercise of management prerogatives?***

Needless to state, the exercise of management prerogative is not absolute. The exercise of management prerogative is subject to the limitations imposed by law or by CBA, employment contract, employer policy or practice and general principles of fair play and justice. (*The Philippine American Life and General Insurance Co. vs. Gramaje, G. R. No. 156963, Nov. 11, 2004).*

• ***What is the extent of management's prerogative to prescribe working methods, time, place, manner and other aspects of work?***

Employers have the freedom and prerogative, according to their discretion and best judgment, to regulate and control all aspects of employment in their business organizations. Such aspects of employment include hiring, work assignments, working methods, time, place and manner of work, tools to be used, processes to be followed, supervision of workers, working regulations, transfer of employees, work supervision, lay-off of workers and the discipline, dismissal and recall of workers. (*Philippine Airlines, Inc. vs. NLRC, G. R. No. 115785, Aug. 4, 2000).*

Thus, as held in one case, management retains the prerogative, whenever exigencies of the service so require, to change the working hours of its employees. *(Sime Darby Pilipinas, Inc. vs. NLRC, G.R. No. 119205, 15 April 1998, 289 SCRA 86).*

PREROGATIVE TO TRANSFER

• ***What is the extent of management's prerogative to transfer or re-assign workers?***

a. Transfer; concept and meaning.

A transfer means a movement (1) from one position to another of equivalent rank, level or salary, without a break in the service; or (2) from one office to another within the same business establishment. (*Sentinel Security Agency, Inc. vs. NLRC, G. R. No. 122468, Sept. 3, 1998).*

b. Transfer of employees, inherent right of management.

The Supreme Court has recognized and upheld the prerogative of management to transfer an employee from one office to another within the business establishment, provided there is no demotion in rank or diminution of salary, benefits, and other privileges; and the action is not motivated by discrimination, made in bad faith, or effected as a form of punishment or demotion without sufficient cause. This is a privilege inherent in the employer's right to control and manage its enterprise effectively. (*Mendoza vs. Rural Bank of Lucban, G. R. No. 155421, July 7, 2004; Benguet Electric Cooperative vs. Fianza, G. R. No. 158606, March 9, 2004).*

c. Test to determine validity of transfer.

But like all other rights, there are limits. The managerial prerogative to transfer personnel must be exercised without grave abuse of discretion and putting to mind the basic elements of justice and fair play. Having the right should not be confused with the manner that right is

exercised. Thus, it cannot be used as a subterfuge by the employer to rid himself of an undesirable worker. In particular, the employer must be able to show that the transfer is not unreasonable, inconvenient or prejudicial to the employee. Should the employer fail to overcome this burden of proof, the employee's transfer is tantamount to constructive dismissal. (*The Philippine American Life and General Insurance Co. vs. Gramaje, G. R. No. 156963, Nov. 11, 2004; Globe Telecom, Inc. vs. Florendo-Flores, G. R. No. 150092, Sept. 27, 2002).*

In **Dusit Hotel Nikko vs. NUWHRAIN – Dusit Hotel Nikko Chapter**, **[G. R. No. 160391, August 9, 2005],** it was held that the several offers made by the employer to transfer an employee was indicative of bad faith. More so when the contemplated transfer was from a higher position to a much lower one. Further, the offers were made after said employee was dismissed due to redundancy under a Special Early Retirement Program (SERP). The employer tried to recall the termination when it was learned that she was going to file a complaint with the NLRC for illegal dismissal. As a ploy to stave off the filing of said case, the offers were made to the employee but she had not been transferred to another position at all. Six months from the time the employer made the offers to her, the latter never heard from the former again. Certainly, good faith cannot be attributed on the part of the hotel. More importantly, the offers made could not have the effect of validating an otherwise arbitrary dismissal.

d. No vested right to position.

In **OSS Security & Allied Services, Inc., vs. NLRC**, **[G. R. No. 112752, Feb. 9, 2000],** the High Court ruled that an employee has a right to security of tenure but this does not give her such a vested right in her position as would deprive the employer of its prerogative to change her assignment or transfer her where her service will be most beneficial to the employer's client. (*See also Tan vs. NLRC, 299 SCRA 169, 180 [1998]).*

In **Chu vs. NLRC**, **[G. R. No. 106107, June 2, 1994],** an employee complained that his right was violated by the transfer effected by management. He argued that management cannot transfer him because his "*Special Contract of Employment*" which was executed after his retirement at age 60 to extend his service, stipulated that his position is "Head" of the Warehousing, Sugar, Shipping and Marine Department. His transfer to the Sugar Sales Department, according to him, caused him inconvenience and was unreasonable. The Supreme Court overruled his argument. The mere specification in the employment contract of the position to be held by the employee is not such stipulation. An employee's right to security of tenure does not give him such a vested right in his position as would deprive the company of its prerogatives to change his assignment or transfer him where he will be most useful.

e. Refusal to transfer, when justified.

The refusal of an employee to be transferred may be held justified if there is a showing that the transfer was directed by the employer under questionable circumstances.

For instance, in **Yuco Chemical Industries, Inc. v. Ministry of Labor and Employment, [G.R. No. 75656, May 28, 1990],** the employees were being transferred during the height of the union's concerted activities in the company where they were active participants. Further, the transfer from the province to Manila was made after classes started, the employer knowing fully well that they were working students. Rendering the transfer more questionable is the fact that there was no showing that the company cannot hire employees in Manila who can perform the jobs assigned to the employees sought to be transferred, which jobs did not require any special dexterity which only said employees can perform.

In **Zafra v. Hon. CA, [G.R. No. 139013, September 17, 2002],** despite the petitioners' agreement in their applications for employment to be transferred or assigned to any branch, their refusal to be transferred from Cebu to Manila which was made a condition for their training abroad (Germany) was held valid. The fact that petitioners in their applications for employment agreed to be transferred or assigned to any branch should not be taken in isolation, but rather in conjunction with the established company practice in PLDT (the private respondent employer) of disseminating notices of transfer to the employees before sending them abroad for training. This should be deemed necessary and later to have ripened into a company practice or policy that could no longer be peremptorily withdrawn, discontinued, or eliminated by PLDT. Fairness at the workplace and settled expectations among the employees require that this practice be honored and this policy commended. Despite their knowledge that the lone operations and maintenance center of the 33 ALCATEL 1000 S12 Exchanges for which they trained abroad would be "homed" in Sampaloc, Manila, PLDT officials neglected to disclose this vital piece of information to petitioners before they acceded to be trained abroad. On arriving home, they did not give petitioners any other option but placed them in an *"either/or straightjacket"* that appeared too oppressive for them. Needless to say, had they known about their pre-planned reassignments, petitioners could have declined the foreign training intended for personnel assigned to the Manila office. The lure of a foreign trip is fleeting while a reassignment from Cebu to Manila entails major and permanent readjustments for petitioners and their families.

In **Damasco v. NLRC, [G.R. No. 115755, December 4, 2000],** the refusal of the employee to be transferred from Olongapo City to Metro Manila was not considered serious misconduct or willful disobedience of a lawful order in connection with her work. Even if the employer directed her to be assigned at his store in Metro Manila, her act of refusing to be detailed in Metro Manila could hardly be characterized as a willful or intentional disobedience of her employer's order. On the contrary, it was the employer's order that appears to be whimsical if not vindictive. Reassignment to Metro Manila is prejudicial to the employee, as she and her family are residing in Olongapo City. This would entail separation from her family and additional expenses on her part for transportation and food. Her reassignment order was unreasonable, considering the attendant circumstances.

In **Norkis Trading Co., Inc. v. NLRC, [G.R. No. 168159, August 19, 2005],** petitioners argue, in the main, that the decision to transfer or reassign private respondent from Naga City to the head office in Manila was a legitimate exercise of petitioner corporation's management prerogative. Thus, they contend that private respondent's refusal to report for work in Manila, coupled with her insistence that she be allowed to resume her work in Naga City, constitutes insubordination and willful disobedience justifying the termination of her employment. In disagreeing with this contention, the High Court, citing the ruling of the Court of Appeals, pronounced that while petitioners invoke management prerogative in the transfer of private respondent to Manila, there is no showing at all of any valid and legitimate reason (*i.e.*, business necessity) for the *verbal transfer order*, as in fact private respondent was not given work to do. Her meek and desperate plea to be allowed to return to her former post in Naga City Branch was met with total silence on management's end. Such insensitivity and disdain pervading her work environment became more intense when her travel allowances were withdrawn and management demanded for refund of the amounts received by her on the ground that she is not entitled thereto while posted in the main office. No other conclusion is discernible from the attendant circumstances except to confirm private respondent's sentiment gleaned from what she had been hearing all along, that top management indeed wanted to "ease her out of the company," as a consequence of her husband's filing of a similar illegal dismissal suit before the NLRC.

f. Refusal to transfer, when not justified.

An employee who refuses to be transferred, when such transfer is valid, is guilty of insubordination or willful disobedience of a lawful order of an employer under Article 282 of the Labor Code.

In **Abbott Laboratories, Inc. v. NLRC, [G.R. No. 76959, October 12, 1987],** the dismissal of a medical representative who acceded in his employment application to be assigned anywhere in the Philippines but later refused to be transferred from Manila to a provincial assignment, was held valid. The reason is that when he applied and was accepted for the job, he agreed to the policy of the company regarding assignment anywhere in the Philippines as demanded by his employer's business operation.

In **Genuino Ice Company, Inc. v. Magpantay, [G.R. No. 147790, June 27, 2006]**, respondent refused to be transferred from petitioner's Otis Plant to its Cavite Plant as said transfer, according to him, would entail additional expenditure and travel time on his part. Such refusal was declared as insubordination considering that the transfer was a lawful order of the petitioner and the latter was even willing to provide respondent with monetary allowance to defray whatever additional expenses he may incur consequent to the transfer.

In **Tinio v. CA, [G.R. No. 171764, June 8, 2007]**, petitioner's deliberate and unjustified refusal to be transferred from Cebu to Smart Communication's head office in Makati City, was held to be a form of neglect of duty constituting abandonment. Petitioner's failure to report for work, or his absence without valid or justifiable reason coupled with a clear intention to sever the employer-employee relationship, leads to no other conclusion than that he abandoned his work.

g. Refusal to transfer due to parental obligations, additional expenses and anguish.

Parental obligations, additional expenses that may be incurred and anguish that may be suffered if assigned away from the family are not valid grounds to refuse a transfer of assignment. An employee could not validly refuse lawful orders to transfer based on these grounds. (*Allied Banking Corporation v. CA, G.R. No. 144412, Nov. 18, 2003; Homeowners Savings and Loan Association, Inc. v. NLRC, G.R. No. 97067, Sept. 26, 1996, 262 SCRA 406).*

In **Phil. Telegraph and Telephone Corp. v. Laplana, [G.R. No. 76645, July 23, 1991, 199 SCRA 485],** the employee was a cashier at the Baguio City Branch of PT & T who was directed to transfer to the company's branch office in Laoag City. In refusing the transfer, the employee averred that she had established Baguio City as her permanent residence and that such transfer will involve additional expenses on her part, plus the fact that an assignment to a far place will be a big sacrifice for her as she will be kept away from her family which might adversely affect her efficiency. In ruling for the employer, the Supreme Court held that the transfer from one city to another within the country is valid as long as there is no bad faith on the part of the employer. The proposition that when an employee opposes his employer's decision to transfer him to another workplace, it is the employee's wishes that should be made to prevail is not acceptable, especially if there is no bad faith or underhanded motives on the part of either party.

h. Refusal to transfer consequent to promotion.

In **Dosch vs. NLRC**, **[208 Phil. 259; 123 SCRA 296 (1983)],** the refusal of the employee to be transferred was upheld because no law compels an employee to accept a promotion and because the position he was supposed to be promoted to did not even exist at that time.

i. Refusal to transfer to overseas assignment distinguished from refusal to transfer within the country.

In the case of **Allied Banking Corporation vs. CA**, **[G. R. No. 144412, November 18, 2003],** the Supreme Court distinguished transfer from the Philippines to overseas post and transfer from city to city within the Philippines. The High Court observed that the transfer of an employee to an overseas post, as in the *Dosch* case [supra], (where the refusal of the employee was upheld as valid) cannot be likened to a transfer from one city to another within the country, as in the 1991 case of *Phil. Telegraph and Telephone Corp.* [supra] as well as the instant case. Consequently, the refusal to be transferred within the Philippines based on personal grounds was considered willful disobedience of a lawful order.

j. Transfer due to standard operating procedure of management.

Where the rotation of employees from the day shift to the night shift was a standard operating procedure of management, an employee who had been on a day shift for sometime may be transferred to the night shift. (*Castillo vs. CIR, 39 SCRA 81).*

k. Transfer pursuant to company policy.

Transfers can be effected pursuant to a company policy to transfer employees from one place of work to another place of work owned by the employer to prevent connivance among them. (*Cinema, Stage and Radio Entertainment Free Workers vs. CIR, 18 SCRA 1071 [1996]).*

l. Transfer in accordance with pre-determined and established office policy and practice.

The employer has the right to transfer an employee to another office in the exercise of sound business judgment and in accordance with pre-determined and established office policy and practice. Particularly so when no illicit, improper or underhanded purpose can be ascribed to the employer and the objection to the transfer was solely on the personal inconvenience or hardship that will be caused to the employee by virtue of the transfer. (*Philippine Industrial Security Agency vs. Dapiton, G.R. No. 127421, Dec. 8, 1999, 320 SCRA 124, 138).*

m. Rotation among bank employees, legally required.

The Bangko Sentral ng Pilipinas, in its *Manual of Regulations for Banks and Other Financial Intermediaries* requires the rotation of bank personnel. The *Manual* directs that the "duties of personnel handling cash, securities and bookkeeping records should be rotated" and that such rotation "should be irregular, unannounced and long enough to permit disclosure of any irregularities or manipulations." Consequently, the standard practice of a bank in constantly transferring its officers and personnel with accounting responsibilities from one branch to another among its more than a hundred branches throughout the country primarily for internal control and to enable its employees to gain the necessary experience for eventual promotion, is legal. (*Allied Banking Corporation vs. CA, supra).*

n. Transfer to avoid conflict of interest.

Transfer of an employee to avoid conflict of interest is a valid exercise of management prerogative and does not constitute constructive dismissal. For example: in ***Duncan Association of Detailman-PTGWO vs. Glaxo Welcome Philippines, Inc.,*** **[G. R. No. 162994, Sept. 17, 2004],** the medical representative's transfer of assignment was held valid as the same was necessitated by a possible conflict of interest since his wife holds a sensitive supervisory position in a competitor firm who takes an active participation in the market war characterized as it is by stiff competition among pharmaceutical companies.

o. Transfer made in compliance with a government order does not amount to constructive dismissal.

In the 2008 case of ***Bisig Manggagawa sa Tryco v. NLRC,*** **[G.R. No. 151309, October 15, 2008],** respondent Tryco Pharma Corporation, a manufacturer of veterinary medicines with principal office in Caloocan City, received a letter dated March 26, 1997 from the Bureau of Animal Industry of the Department of Agriculture reminding it that its production should be conducted in San Rafael, Bulacan and not in Caloocan City. This led Tryco to order the transfer of petitioners from Caloocan City to San Rafael, Bulacan. Petitioners contend that the transfer orders amounted to their constructive dismissal. They maintain that the letter of the Bureau of Animal Industry is not credible because it was not authenticated; it was only a ploy, solicited by private respondents to give them an excuse to effect a massive transfer of employees. They point out that the Caloocan City office is still engaged in production activities until now and respondents even hired new employees to replace them. In not agreeing with this contention, the Supreme Court ruled:

> "We refuse to accept the petitioners' wild and reckless imputation that the Bureau of Animal Industry conspired with the respondents just to effect the transfer of the petitioners. There is not an iota of proof to support this outlandish claim. Absent any evidence, the allegation is not only highly irresponsible but is grossly unfair to the government agency concerned. Even as this Court has given litigants and counsel a relatively wide latitude to present arguments in support of their cause, we will not tolerate outright misrepresentation or baseless accusation. Let this be fair warning to counsel for the petitioners.
>
> "Furthermore, Tryco's decision to transfer its production activities to San Rafael, Bulacan, regardless of whether it was made pursuant to the letter of the Bureau of Animal Industry, was within the scope of its inherent right to control and manage its enterprise effectively. While the law is solicitous of the welfare of employees, it must also protect the right of an employer to exercise what are clearly management prerogatives. The free will of management to conduct its own business affairs to achieve its purpose cannot be denied."

p. Transfer occasioned by abolition of position.

A transfer from one position to another occasioned by the abolition of the position is valid. The abolition of a position deemed no longer necessary is a management prerogative and absent any findings of malice and arbitrariness on the part of management, will not efface such privilege if only to protect the person holding that office. The position may not be said to have been abolished because the employee was the occupant thereof; rather, the position was abolished

because the functions of the position had become redundant and unnecessary. (*Benguet Electric Cooperative vs. Fianza, G. R. No. 158606, March 9, 2004).*

q. Transfer may constitute constructive dismissal.

The transfer of an employee may constitute constructive dismissal when it amounts to "an involuntary resignation resorted to when continued employment is rendered impossible, unreasonable or unlikely; when there is a demotion in rank and/or a diminution in pay; or when a clear discrimination, insensibility or disdain by an employer becomes unbearable to the employee." *(Floren Hotel vs. NLRC, G. R. No. 155264, May 6, 2005; Mendoza vs. Rural Bank of Lucban, G.R. No. 155421, July 7, 2004).*

In *The* **Philippine American Life and General Insurance Co. vs. Gramaje**, **[G. R. No. 156963, November 11, 2004],** the Supreme Court declared the transfer of the respondent Assistant Vice-President from the Pensions Department to the Legal Department as not a legitimate exercise of management prerogative on the part of petitioner-employer. Before the order to transfer was made, discrimination, bad faith, and disdain towards respondent were already displayed by petitioner leading to the conclusion by the court that she was constructively dismissed.

As the High Court explained in **Globe Telecom, Inc. vs. Florendo-Flores**, **[G. R. No. 150092, September 27, 2002, 390 SCRA 201]** and in **Philippine Industrial Security Agency Corporation vs. Aguinaldo**, **[G. R. No. 149974, June 15, 2005]**:

> "In constructive dismissal, the employer has the burden of proving that the transfer and demotion of an employee are for just and valid grounds such as genuine business necessity. The employer must be able to show that the transfer is not unreasonable, inconvenient, or prejudicial to the employee. It must not involve a demotion in rank or a diminution of salary and other benefits. If the employer cannot overcome this burden of proof, the employee's demotion shall be tantamount to unlawful constructive dismissal."

In **Star Paper Corp. v. Espiritu, [G.R. No. 154006, November 2, 2006]**, the combined circumstances of the immediate transfer of respondents to far-off provinces after their refusal to sign the signature sheet of the document for the ratification of the Addendum to the 1995 CBA, and petitioner's emphasis on respondents' alleged previous infractions at work, point to the fact that the transfers are motivated by ill-will on the part of petitioner. Petitioner's order for respondents to report for work in petitioner's provincial branches on the very same day that they were served with the Memo of Transfer is extremely unreasonable as the relocation would unduly inconvenience not only respondents but their respective families. Petitioner, therefore, failed to sufficiently prove that respondents' transfer is for a just and valid cause and not unreasonable, inconvenient, or prejudicial to them, making it liable for constructive dismissal.

r. When transfer does not amount to demotion.

Mere title or position held by an employee in a company does not determine whether a transfer constitutes a demotion. Rather, it is the totality of the following circumstances, *to wit*: economic significance of the work, the duties and responsibilities conferred, as well as the rank and salary of the employee, among others, that establishes whether a transfer is a demotion. (*Tinio v. CA, G.R. No. 171764, June 8, 2007).*

In **Rural Bank of Cantilan, Inc. v. Julve, [G.R. No. 169750, February 27, 2007],** respondent contends that the abolition of his position as planning and marketing officer and his appointment as bookkeeper I and assistant branch head of the Madrid Branch is a demotion. However, it was established that the functions of his new position show the contrary. The bookkeeper and assistant branch head is not only charged with preparing financial reports and monthly bank reconciliations, he is also the head of the Accounting Department of a branch. Under any standard, these are supervisory and administrative tasks which entail great responsibility. Moreover, it was noted that his transfer did not decrease his pay. It was thus held that there was no demotion, much less, illegal dismissal in this case because he was never dismissed by petitioners despite his refusal to accept the new appointment. Rather, it was he who opted to terminate his employment when he purposely failed to report for work.

PREROGATIVE TO REORGANIZE

• ***What is the extent of management's prerogative to reorganize?***

The Supreme Court, in a number of cases, has recognized and affirmed the prerogative of management to implement a job evaluation program or a reorganization for as long as it is not contrary to law, morals or public policy. (*Hongkong and Shanghai Banking Corporation Employees Union vs. NLRC, G. R. No. 125038, Nov. 6, 1997).*

If the purpose of a reorganization is to be achieved, changes in the positions and rankings of the employees should be expected. To insist on one's old position and ranking after a reorganization would render such endeavor ineffectual. (*Arrieta vs. NLRC, G. R. No. 126230, Sept. 18, 1997, 279 SCRA 326).*

It is hard to accept the claim that an employer would go through all the expenditure and effort incidental and necessary to a reorganization just to dismiss a single employee whom they no longer deem desirable. (*Ibid.).*

PREROGATIVE TO PROMOTE

• ***What is the extent of management's prerogative to promote?***

a. Promotion, defined.

Promotion is the advancement from one position to another involving increase in duties and responsibilities as authorized by law, and increase in compensation and benefits. (*Millares vs. Subido, 20 SCRA 954).*

Apparently, the indispensable element for there to be a promotion is that there must be an *"advancement from one position to another"* or an upward vertical movement of the employee's rank or position. Any increase in salary should only be considered incidental but never determinative of whether or not a promotion is bestowed upon an employee. This can be likened to the upgrading of salaries of government employees without conferring upon them, the concomitant elevation to the higher positions. (*Philippine Telegraph & Telephone Corporation vs. CA, G. R. No. 152057, Sept. 29, 2003).*

b. Distinction between transfer and promotion.

Promotion denotes a scalar ascent of an officer or an employee to another position, higher either in rank or salary.

Transfer, on the other hand, involves lateral movement from one position to another of equivalent level, rank or salary. *(Millares vs. Subido, supra).*

c. Refusal to be promoted, legal effect.

An employee has the right to refuse promotion. There is no law which compels an employee to accept a promotion. Promotion is in the nature of a gift or reward. Any person may refuse to accept a gift or reward. Such refusal to be promoted is a valid exercise of such right and he cannot be punished therefor. *(Dosch vs. NLRC, G. R. No. 51182, July 5, 1983; See also Erasmo vs. Home Insurance & Guaranty Corporation, G.R. No. 139251, Aug. 29, 2002).*

An employee, therefore, cannot be promoted, even if merely as a result of a transfer, without his consent. A transfer that results in promotion or demotion, advancement or reduction or a transfer that aims to lure the employee away from his permanent position cannot be done without his consent. (*Philippine Telegraph & Telephone Corporation vs. CA, supra).*

Hence, the exercise by the employees of their right cannot be considered in law as insubordination, or willful disobedience of a lawful order of the employer. Consequently, employees cannot be dismissed on that basis. *(Ibid.).*

d. Employer's decision on issue of promotion should be respected.

The CBA between petitioner union and respondent company in the case of **Nagkahiusang Namumuo sa Dasudeco-National Federation of Labor [NAMADA-NFL] v. Davao Sugar Central Co., Inc., [G.R. No. 145848, August 9, 2006],** contains a stipulation that "(w)here a vacancy arises, resulting from the creation of new positions or any other causes, preference shall be given to employees who, in the judgment of the COMPANY, possess the necessary qualifications for the position." Petitioner-employee (Eborda) was recommended by his supervisor for the position of Shift Warehouseman but the Personnel Officer did not act thereon. Citing Article 212 [m] of the Labor Code which defines a "*supervisory employee*" as one "who, in the interest of the employer, effectively recommends such managerial actions xxx," petitioners contend that the phrase "effectively recommends such managerial actions" in the said provision of the Labor Code should not be construed as an ordinary recommendation, like the recommendation of a politician given to one for the purpose of employment or an ordinary business transaction. The phrase should be construed, they suggest, to mean that "the management has to really act based on the recommendation of its supervisors who after all knows [*sic*] more about the conduct, demeanor, and work attitude of the concerned worker." The Supreme Court, however, disagreed. It was held that since petitioner-employee does not even meet the educational qualification for the position of Shift Warehouseman as he merely finished high school, not to mention that, as noted by the appellate court, his medical records showed that he was suffering from acute anxiety disorder and brief reactive psychosis which are likely to affect his efficiency and ability to get along with his fellow workers, the decision of respondent-employer DASUCECO, which does not appear to have been actuated by bad faith, not to promote petitioner-employee, was a management prerogative which must be respected.

PREROGATIVE TO DEMOTE

• ***What is the extent of the employer's prerogative to demote?***

a. Concept.

There is demotion where there is reduction in position, rank or salary as a result of a transfer. (*Philippine Wireless, Inc. [Pocketbell] vs. NLRC, G. R. No. 112963, July 20, 1999).*

There is demotion when an employee occupying a highly technical position requiring the use of an employee's mental faculty, is transferred to another position where she performed mere mechanical work - virtually a transfer from a position of dignity to a servile or menial job. (*Blue Dairy Corporation vs. NLRC, G. R. No. 129843, Sept. 14, 1999).*

In addition to the comparison involving nature of work, another aspect of comparison to determine the existence of demotion is the workplaces themselves. Hence, there is also demotion if there is a change in the workplace such as in the case of transfer of an employee from the laboratory - the most expensive work area, on a per square-meter basis in the company's premises - to the vegetable processing section which involves processing of vegetables alone. Definitely, a transfer from a workplace where only highly trusted authorized personnel are allowed to access to a workplace that is not as critical is another reason enough for the employee to howl a protest. (*Blue Dairy Corporation vs. NLRC, supra).*

The employer has the right to demote and transfer an employee who has failed to observe proper diligence in his work and incurred habitual tardiness and absences and indolence in his assigned work. (*Petrophil Corporation vs. NLRC, G. R. No. L-64048, Aug. 29, 1986).*

For instance, in the consolidated cases of **Leonardo vs. NLRC**, **[G. R. No. 125303, June 16, 2000]** and **Fuerte vs. Aquino**, **[G. R. No. 126937, June 16, 2000],** the employer claims that the employee was demoted pursuant to a company policy intended to foster competition among its employees. Under this scheme, its employees are required to comply with a monthly sales quota. Should a supervisor such as the employee (Fuerte) fail to meet his quota for a certain number of consecutive months, he will be demoted, whereupon his supervisor's allowance will be withdrawn and be given to the individual who takes his place. When the employee concerned succeeds in meeting the quota again, he is re-appointed supervisor and his allowance is restored. The Supreme Court said that this arrangement appears to be an allowable exercise of company rights. An employer is entitled to impose productivity standards for its workers, and in fact, non-compliance may be visited with a penalty even more severe than demotion.

b. Due process principle in termination cases applies to demotions.

While due process required by law is applied in dismissals, the same is also applicable to demotions as the latter likewise affect the employment of a worker whose right to continued employment, under the same terms and conditions, is also protected by law. Moreover, considering that demotion is, like dismissal, also a punitive action, the employee being demoted should, as in cases of dismissals, be given a chance to contest the same. (*Leonardo vs. NLRC, supra; Blue Dairy Corporation vs. NLRC, supra).*

Simply put, even the employer's right to demote an employee requires the observance of the twin-notice requirement. (*Floren Hotel vs. NLRC, G. R. No. 155264, May 6, 2005).*

PREROGATIVE TO DISCIPLINE AND DISMISS EMPLOYEES

- ***What is the extent of the employer's prerogative to discipline and/or dismiss erring employees?***

a. Right to discipline.

The employer's right to conduct the affairs of his business, according to its own discretion and judgment, includes the prerogative to instill discipline in its employees and to impose penalties, including dismissal, upon erring employees. This is a management prerogative where the free will of management to conduct its own affairs to achieve its purpose takes form. The only criterion to guide the exercise of its management prerogative is that the policies, rules and regulations on work-related activities of the employees must always be fair and reasonable and the corresponding penalties, when prescribed, commensurate to the offense involved and to the degree of the infraction. (*St. Michael's Institute vs. Santos, G. R. No. 145280, Dec. 4, 2001; Consolidated Food Corporation vs. NRLC, 315 SCRA 129, 139 [1999]).*

Instilling discipline among its employees is a basic management right and prerogative. Management may lawfully impose reasonable penalties such as dismissal upon an employee who transgresses the company rules and regulations. (*Deles, Jr. vs. NLRC, G. R. No. 121348, March 9, 2000).*

The employer cannot be compelled to maintain in his employ the undeserving, if not undesirable, employees. (*Shoemart, Inc. vs. NLRC, G. R. No. 74229, Aug. 11, 1989).*

b. Right to dismiss.

The right of the employer to dismiss its erring employees is a measure of self-protection. (*Reyes vs. Minister of Labor, G. R. No. 48705, Feb. 9, 1989).*

The law, in protecting the rights of the laborer, authorizes neither oppression nor self-destruction of the employer. While the constitution is committed to the policy of social justice and the protection of the working class, it should not be supposed that every labor dispute will be automatically decided in favor of labor. Management also has its own rights which, as such, are entitled to respect and enforcement in the interest of simple fair play. Out of its concern for those with less privileges in life, the Supreme Court has inclined more often than not towards the worker and upheld his cause with his conflicts with the employer. Such favoritism, however, has not blinded the Court to rule that justice is, in every case, for the deserving, to be dispensed in the light of the established facts and applicable law and doctrine. (*Sime Darby Pilipinas, Inc. vs. NLRC, 119205, April 15, 1998).*

c. Right to discipline and/or dismiss, subject to police power.

The employer's inherent right to discipline is, however, subject to reasonable regulation by the State in the exercise of its police power. (*Associated Labor Unions-TUCP vs. NLRC, G. R. No. 120450, Feb. 10, 1999; PLDT vs. NLRC, 276 SCRA 1 [1997]).*

In the case of **Farrol vs. CA, [G. R. No. 133259, February 10, 2000],** RCPI, the employer, alleged that under its rules, petitioner's infraction is punishable by dismissal. However, the Supreme Court said that the employer's rules cannot preclude the State from inquiring whether the strict and rigid application or interpretation thereof would be harsh to the employee. Petitioner has no previous record in his twenty-four long years of service - this would have been his first offense. It was thus held that the dismissal imposed on petitioner is unduly harsh and grossly disproportionate to the infraction which led to the termination of his services. A lighter penalty would have been more just, if not humane.

d. Right to determine who to punish.

The employer has latitude to determine who among its erring officers or employees should be punished, to what extent and what proper penalty to impose. (*Soriano vs. NLRC, G. R. No. 75510, Oct. 27, 1987).*

e. Right to prescribe company rules and regulations.

The prerogative of an employer to prescribe reasonable rules and regulations necessary or proper for the conduct of its business and to provide certain disciplinary measures in order to implement said rules, and to assure that the same would be complied with has been recognized in this jurisdiction. (*Phimco Industries, Inc. vs. NLRC, G. R. No. 118041, June 11, 1997)*

f. Right to impose penalty; proportionality rule.

It is well recognized that company policies and regulations are, unless shown to be grossly oppressive or contrary to law, generally binding and valid on the parties and must be complied with until finally revised or amended unilaterally or preferably through negotiation or by competent authority. (*Alcantara, Jr. vs. CA, 386 SCRA 370 [2002]).*

Hence, management may lawfully impose appropriate penalties on erring workers pursuant to company rules and regulations. (*Philippine Airlines, Inc. vs. NLRC, 337 SCRA 286 [2000]).*

However, infractions committed by an employee should merit only the corresponding sanction demanded by the circumstances. The penalty must be commensurate with the act, conduct or omission imputed to the employee and imposed in connection with the employer's disciplinary authority. (*Farrol vs. CA, G. R. No. 133259, Feb. 10, 2000).*

Accordingly, in determining the validity of dismissal as a form of penalty, the charges for which an employee is being administratively cited must be of such nature that would merit the imposition of the said supreme penalty. Dismissal should not be imposed if it is unduly harsh and grossly disproportionate to the charges. This rule on proportionality - that the penalty imposed should be commensurate to the gravity of his offense - has been observed in a number of cases. (*Felix vs. NLRC, G. R. No. 148256, Nov. 17, 2004).*

In **Sagales v. Rustan's Commercial Corp., [G.R. No. 166554, November 27, 2008],** petitioner, a Chief Cook in Yum Yum Tree Coffee Shop of respondent company, was dismissed

because he was caught stealing 1.335 kilos of squid heads worth ₱50.00. The Supreme Court ruled that the penalty of dismissal imposed on him was too harsh under the circumstances. Petitioner deserves compassion more than condemnation. At the end of the day, said the Court, it is undisputed that: (1) petitioner has worked for respondent for almost thirty-one (31) years; (2) his tireless and faithful service is attested by the numerous awards he has received from respondent; (3) the incident on June 18, 2001 was his first offense in his long years of service; (4) the value of the squid heads worth ₱50.00 is negligible; (5) respondent practically did not lose anything as the squid heads were considered scrap goods and usually thrown away in the wastebasket; (6) the ignominy and shame undergone by petitioner in being imprisoned, however momentary, is punishment in itself; and (7) petitioner was preventively suspended for one month, which is already a commensurate punishment for the infraction committed. Truly, petitioner has more than paid his due.

In **Perez v. The Medical City General Hospital, [G.R. No. 150198, March 6, 2006],** where the petitioners (orderlies) were found to have pilfered some hospital-owned items, the Supreme Court ruled that their dismissal was disproportionate to the gravity of their offenses. Petitioner Perez had served the hospital for 19 consecutive years while Campos had served it for seven (7) years and their records were unblemished. Moreover, they were not managerial employees. Hence, it was held, without making any doctrinal pronouncement on the length of the suspension in cases similar to this, that considering petitioners' non-employment since January 2000, they may be deemed to have already served their period of suspension. Consequently, the Labor Arbiter's order of reinstatement was upheld but the award of backwages was deleted so as not to put a premium on acts of dishonesty.

The 2004 case of **Philippine Long Distance Telephone Company vs. Tolentino**, [G. R. No. 143171, September 21, 2004], reiterated the ruling in the 1998 case of **Hongkong and Shanghai Bank Corporation vs. NLRC**, [260 SCRA 49 (1996)], where it was declared that the penalty imposed must be commensurate to the depravity of the malfeasance, violation or crime being punished. A grave injustice is committed in the name of justice when the penalty imposed is grossly disproportionate to the wrong committed. Dismissal is the most severe penalty an employer can impose on an employee. It goes without saying that care must be taken and due regard given to an employee's circumstances, in the application of such punishment.

In **Permex, Inc. vs. NLRC**, [G. R. No. 125031, January 24, 2000], the dismissal of the employee accused of serious misconduct of falsification or deliberate misrepresentation, was considered too harsh a penalty in the light of the fact that it was not supported by the evidence on record and it was an unintentional infraction. Moreover, it was his first offense committed without malice and committed also by others who were not equally penalized.

In **VH Manufacturing, Inc. vs. NLRC**, [G. R. No. 130957, January 19, 2000], involving the dismissal of an employee for sleeping on the job, the Supreme Court said that while an employer enjoys a wide latitude of discretion in the promulgation of policies, rules and regulations on work-related activities of the employees, those directives, however, must always be fair and reasonable, and the corresponding penalties, when prescribed, must be commensurate to the offense involved and to the degree of the infraction. In the case at bar, the dismissal meted out on private respondent for allegedly sleeping on the job, under the attendant circumstances, appears to be too harsh a penalty, considering that he was being held liable for the first time, after nine (9) long years of unblemished service, for an alleged offense which caused no prejudice to the employer, aside from absence of substantiation of the alleged offense.

g. Right to choose which penalty to impose.

The matter of imposing the appropriate penalty depends on the employer. In **China Banking Corporation vs. Borromeo**, **[G. R. No. 156515, Oct. 19, 2004]**, where the managerial employee questioned the imposition of the accessory penalty of restitution on him without imposing the principal penalty of "Written Reprimand/Suspension," it was ruled that the employer's Code of Ethics expressly sanctions the imposition of restitution/forfeiture of benefits apart from or independent of the other penalties. It was certainly within the employer-bank's prerogative to impose on the respondent-employee what it considered the appropriate penalty under the circumstances pursuant to its company rules and regulations. Obviously, in view of his voluntary separation from the employer-bank, the imposition of the penalty of reprimand or suspension would be futile. The employer-bank was left with no other recourse but to impose the ancillary penalty of restitution. Like all other business enterprises, its prerogative to discipline its employees and to impose appropriate penalties on erring workers pursuant to company rules and regulations must be respected.

h. Right to impose heavier penalty than what the company rules prescribe.

The employer has the right to impose a heavier penalty than that prescribed in the company rules and regulations if circumstances warrant the imposition thereof.

In **Stanford Microsystems, Inc. vs. NLRC**, **[G. R. No. 74187, Jan. 28, 1988],** the fact that the offense was committed for the first time, or has not resulted in any prejudice to the company, was held not to be a valid excuse. No employer may rationally be expected to continue in employment a person whose lack of morals, respect and loyalty to his employer, regard for his employer's rules, and appreciation of the dignity and responsibility of his office, has so plainly and completely been bared. Company Rules and Regulations cannot operate to altogether negate the employer's prerogative and responsibility to determine and declare whether or not facts not explicitly set out in the rules may and do constitute such serious misconduct as to justify the dismissal of the employee or the imposition of sanctions heavier than those specifically and expressly prescribed. This is dictated by logic, otherwise, the rules, literally applied, would result in absurdity; grave offenses, *e.g.*, rape, would be penalized by mere suspension, this, despite the heavier penalty provided therefor by the Labor Code, or otherwise dictated by common sense.

In **Cruz vs. Coca-Cola Bottlers Phils., Inc.**, **[G. R. No. 165586, June 15, 2005],** admittedly, the company rules violated by petitioner are punishable, for the first offense, with the penalty of suspension. However, the Supreme Court affirmed the validity of the dismissal because respondent company has presented evidence showing that petitioner has a record of other violations from as far back as 1986. In 1991, petitioner was found to have deliberately misrepresented on two occasions the total number of empties and was consequently suspended for six (6) days. In 1990 and 1991, petitioner was also suspended for his involvement in vehicular accidents which caused damage to another car and an outlet store. On several occasions, petitioner has been investigated for shortages in remittances of collections from customers. These misdemeanors are aggravated by several AWOLS which petitioner had taken in the course of his employment.

i. Rule in case of first offense; effect when management tolerates violation of company policy.

As a general rule, the penalty imposable on first offenders necessarily depends on such factors as gravity of the offense, person aggrieved, or extent of injury or damage, among others.

In case there is a set of company rules and regulations describing certain offenses and the corresponding penalty for violation thereof, the penalty prescribed thereunder for first offenders should be followed.

In **Permex, Inc. vs. NLRC**, **[G. R. No. 125031, Jan. 24, 2000],** where the employee was dismissed on the charge of serious misconduct of falsification or deliberate misrepresentation involving alleged false entry in his daily time record which was not supported by the evidence on record and wherein he was not afforded an opportunity to be heard, the Supreme Court held the dismissal as too harsh a penalty for an unintentional infraction, not to mention that it was his first offense committed without malice, and committed also by others who were not actually penalized.

And where a violation of company policy or breach of company rules and regulations was found to have been tolerated by management, then the same could not serve as a basis for termination. (*Ibid.).*

DUE PROCESS

• ***What is due process?***

Contrary to the time-honored principle that the right to due process of law is a constitutionally-guaranteed right, it being a basic constitutional tenet that *"no person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws" (Section 1, Article III [Bill of Rights], 1987 Constitution),* however, the 2004 case of **Agabon vs. NLRC**, **[G. R. No. 158693 November 17, 2004],** distinguished ***constitutional due process*** and ***statutory due process***, to wit:

> "To be sure, the Due Process Clause in Article III, Section 1 of the Constitution embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our entire history. Due process is that which comports with the deepest notions of what is fair and right and just. It is a constitutional restraint on the legislative as well as on the executive and judicial powers of the government provided by the Bill of Rights.
>
> "Due process under the Labor Code, like *Constitutional due process*, has two aspects: substantive, *i.e.*, the valid and authorized causes of employment termination under the Labor Code; and procedural, *i.e.*, the manner of dismissal. Procedural due process requirements for dismissal are found in the Implementing Rules of P.D. 442, as amended, otherwise known as the Labor Code of the Philippines in Book VI, Rule I, Sec. 2, as amended by Department Order Nos. 9 and 10. (*Department Order No. 9 took effect on 21 June 1997. Department Order No. 10 took effect on 22 June 1997).* Breaches of these *due process*

requirements violate the Labor Code. Therefore, *statutory due process* should be differentiated from failure to comply with *constitutional due process*.

"*Constitutional due process* protects the individual from the government and assures him of his rights in criminal, civil or administrative proceedings; while *statutory due process* found in the Labor Code and Implementing Rules protects employees from being unjustly terminated without just cause after notice and hearing."

• ***Applicability of other constitutional rights to labor issues.***

Just like the concept of due process, the application to labor cases of other constitutional guarantees like the right against self-incrimination, right to counsel, right to equal protection of the laws and right against unreasonable searches and seizures has been raised as an issue in several cases. However, in *Yrasuegui v. Philippine Airlines, Inc.*, [G.R. No. 168081, October 17, 2008], it was categorically declared that in the absence of governmental interference, the liberties guaranteed by the Constitution cannot be invoked in labor cases. Put differently, the Bill of Rights is not meant to be invoked against acts of private individuals like employers. Private actions, no matter how egregious, cannot violate the constitutional guarantees.

a. Right against self-incrimination.

It is enshrined in the Constitution that "no person shall be compelled to be a witness against himself." *(Section 17, Article III [Bill of Rights], 1987 Constitution).*

This constitutionally-guaranteed right which is usually invoked in criminal cases, may be validly invoked in an administrative proceeding if it partakes of the character of a criminal proceeding because of the nature of the penalty that may be imposed for the offense. *(Pascual, Jr. v. Board of Medical Examiners, G.R. No. L-25018, May 26, 1969; Cabal v. Kapunan, Jr., G.R. No. L-19052, Dec. 29, 1962).*

b. Right to counsel.

The right to counsel under *Section 12* of *Article III [Bill of Rights]* of the *1987 Constitution* is meant to protect a suspect in a *criminal* case who is under custodial investigation. Custodial investigation is the stage where the police investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect who has been taken into custody by the police to carry out a process of interrogation that lends itself to elicit incriminating statements. It is that point when questions are initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. The right to counsel attaches only upon the start of such investigation. Therefore, the exclusionary rule under said provision of the Bill of Rights of the 1987 Constitution applies only to admissions made in a criminal investigation but not to those made in an administrative investigation.

Thus, if the investigation conducted by the employer is merely administrative and not criminal in character, the admissions made during such investigation may be used as evidence to justify dismissal. *(Manuel v. N. C. Construction Supply, G.R. No. 127553, Nov. 28, 1997, 282 SCRA 326).*

But would the failure of the employer to inform the employee who is undergoing administrative investigation of his right to counsel amount to deprivation of due process?

This was answered in the affirmative in ***Punzal v. ETSI Technologies, Inc.,*** **[G.R. Nos. 170384-85, March 9, 2007],** where petitioner's contention that she was denied due process was upheld because the records do not show that she was informed of her right to be represented by counsel during the conference with her employer. The protestations of respondent-employer that the right to be informed of the right to counsel does not apply to investigations before administrative bodies and that law and jurisprudence merely give the employee the option to secure the services of counsel in a hearing or conference, fall in the light of the clear provision of Article 277 (b) of the Labor Code that "*the employer* xxx *shall afford [the worker whose employment is sought to be terminated] ample opportunity to be heard and to defend himself with the assistance of his representatives if he so desires in accordance with company rules and regulations pursuant to guidelines set by the Department of Labor and Employment,"* and the Supreme Court's explicit pronouncement that *"[a]mple opportunity connotes every kind of assistance that management must accord the employee to enable him to prepare adequately for his defense including legal representation."* Consequently, the petitioner was awarded nominal damages in the amount of ₱30,000.00 for violation of her right to statutory due process.

c. Right to equal protection of the laws.

It is a settled principle that the commands of the equal protection clause are addressed only to the state or those acting under color of its authority. It has been held in a long array of U.S. Supreme Court decisions that the equal protection clause erects no shield against merely *private* conduct, however, discriminatory or wrongful it may have been.

The only exception occurs when the State, in any of its manifestations or actions, has been found to have become entwined or involved in a wrongful private conduct.

Such exception is not present in the case of **Duncan Association of Detailman-PTGWO v. Glaxo Welcome Philippines, Inc., [G.R. No. 162994, September 17, 2004],** where the employer's policy prohibiting its employees from any personal or marital relationships with employees of competitor companies was held not violative of the equal protection clause in the Constitution and not unreasonable under the circumstances because relationships of that nature might compromise the interests of the company. Significantly, the company actually enforced the policy after repeated requests to the employee to comply therewith. Indeed, the application of the said policy was made in an impartial and even-handed manner with due regard for the lot of the employee. In any event, from the wordings of the contractual provision and the policy in its employee handbook, it is clear that the company does not impose an absolute prohibition against relationships between its employees and those of competitor companies. Its employees are free to cultivate relationships with and marry persons of their own choosing. What the company merely seeks to avoid is a conflict of interest between the employees and the company that may arise out of such relationships.

The same pronouncement was made in **Yrasuegui v. Philippine Airlines, Inc., [G.R. No. 168081, October 17, 2008],** where petitioner was dismissed because of his failure to measure up to the weight standards set by respondent. His termination due to obesity was held legal and not violative of the equal protection clause in the Constitution. The High Court observed that the United States Supreme Court, in interpreting the Fourteenth Amendment which is the source of the equal protection guarantee in the 1987 Constitution, is consistent in saying that the equal protection clause erects no shield against private conduct, however discriminatory or wrongful it may be. Private actions, no matter how egregious, cannot violate the equal protection guarantee.

d. Right against unreasonable searches and seizures.

The constitutionally guaranteed right against unreasonable searches and seizures may not be invoked against the employer. As applied to labor cases, the Supreme Court declared that it finds no reason to revise the doctrine laid down in **People v. Marti, [G.R. No. 81561, January 18, 1991, 193 SCRA 57],** that the Bill of Rights does not protect citizens from unreasonable searches and seizures perpetrated by *private* individuals. It is not true that the citizens have no recourse against such assaults. On the contrary, such an invasion gives rise to both criminal and civil liabilities. *(Waterous Drug Corporation v. NLRC, G.R. No. 113271, Oct. 16, 1997, 280 SCRA 735).*

• ***What are "just causes" and "authorized causes" to terminate employment?***

Just causes and authorized causes. - As mentioned in Article 279, there are two (2) kinds of causes or grounds to terminate employment by employer, to wit:

1. *"Just causes"* which refer to those instances enumerated under *Article 282 [Termination by employer]* of the Labor Code.

2. *"Authorized causes"* which refer to those instances enumerated under *Articles 283 [Closure of establishment and reduction of personnel]* and *284 [Disease as ground for termination]* of the Labor Code.

• ***What is the two-fold due process requirement?***

Two-fold due process requirement.- The requirement of due process is two-fold, thus:

(1) *Substantive* aspect; and
(2) *Procedural* aspect.

• ***What are the twin requirements of notice and hearing?***

The twin requirements of notice and hearing constitute the essential elements of the procedural due process and neither of these elements can be eliminated without running afoul of the procedural mandate.

Two notices and a hearing required.

The Supreme Court, reiterating its earlier holding in **King of Kings Transport, Inc. vs. Mamac, [G.R. No. 166208, June 29, 2007],** explained the due process requirement in **Genuino vs. NLRC, [G.R. Nos. 142732-33, December 4, 2007]**, thus:

(1) **First written notice.** - The first written notice to be served on the employees should contain the specific causes or grounds for termination against them, and a directive that the employees are given the opportunity to submit their written explanation within a reasonable period. *"Reasonable opportunity"* under the Omnibus Rules means every kind of assistance that management must accord to the employees to enable them to prepare adequately for their defense. This should be construed as a period of at least *five (5) calendar days* from receipt of the notice to give the employees an opportunity to study the accusation against them, consult a union official or lawyer, gather data and evidence, and decide on the defenses they will raise against the complaint. Moreover, in order to enable the employees to intelligently prepare their explanation

and defenses, the notice should contain a detailed narration of the facts and circumstances that will serve as basis for the charge against the employees. A general description of the charge will not suffice. Lastly, the notice should specifically mention which company rules, if any, are violated and/or which among the grounds under Article 282 is being charged against the employees.

(2) **Hearing required,** - After serving the first notice, the employers should schedule and conduct a **hearing** or **conference** wherein the employees will be given the opportunity to: (1) explain and clarify their defenses to the charge against them; (2) present evidence in support of their defenses; and (3) rebut the evidence presented against them by the management. During the hearing or conference, the employees are given the chance to defend themselves personally, with the assistance of a representative or counsel of their choice. Moreover, this conference or hearing could be used by the parties as an opportunity to come to an amicable settlement.

(3) **Second written notice.** - After determining that termination of employment is justified, the employers shall serve the employees a **written notice of termination** indicating that: (1) all circumstances involving the charge against the employees have been considered; and (2) grounds have been established to justify the severance of their employment."

PROCEDURAL DUE PROCESS VARIES DEPENDING ON THE BASIS OF THE GROUND INVOKED.

Based on law and jurisprudence, the following pointers may be used as guide in determining the kind of procedural due process applicable to a given case:

a. For termination of the various forms of employment under Article 280.

Article 280 of the Labor Code enunciates several kinds of employment. The due process required in terminating the employment relationship contemplated therein varies as follows:

1. For termination of *regular* employment, the due process required would depend on the ground/s cited. If the termination is for just cause/s, due process applicable to Article 282 terminations applies. If due to authorized cause/s, due process applicable to Articles 283 and 284 terminations should be followed.

2. In case of *project employment*, if the termination is brought about by the completion of the project or any phase thereof, due process is complied with even if no prior notice of termination is served as this is not required according to *Section 2, Rule I, Book VI* of the *Rules to Implement the Labor Code, as amended by Article III, Department Order No. 10, Series of 1997.*

3. In case of *seasonal employment*, where the work or service to be performed by the employee is seasonal in nature and the employment is for the duration of the season, no prior notice of termination of the seasonal employment is also required in order to comply with the due process requirement.

4. In case of *casual employment*, where the job, work or service to be performed is merely incidental to the business of the employer, and such job, work or service is for a definite period made known to the employee at the time of engagement, no prior notice of termination is also required to subserve due process.

5. In case of *fixed-period employment*, the same rule as in project and seasonal employments applies, that is, no prior notice of termination is required.

b. For termination of probationary employment under Article 281.

If the termination of the probationary employment is due to *just* cause/s, the twin requirements of notice and hearing applicable to Article 282 terminations shall apply. If the termination is due to *authorized* cause/s, the notice requirement under Article 283 should be complied with. If the termination is brought about by the failure of a probationary employee to meet the reasonable standards to qualify him for regular employment which were made known to him by the employer at the time of his engagement as such, it is sufficient that a written notice of termination is served to the probationary employee within a reasonable time from the effective date thereof. *(Section 2, Rule I, Book VI, Rules to Implement the Labor Code, as amended by Article III, Department Order No. 10, Series of 1997).*

c. For termination based on just causes under Article 282.

Due process under Article 282 means compliance with the requirements of two (2) notices and a hearing. These requirements are mandatory, non-compliance therewith would render any judgment of dismissal reached by the employer void and inexistent. *(Skippers Pacific, Inc. v. Mira, G.R. No. 144314, Nov. 21, 2002; Concorde Hotel v. CA, G.R. No. 144089, Aug. 9, 2001).*

Excepted from this rule is termination due to **abandonment** which, under the law, is considered a form of neglect of duty, hence, a just cause to terminate employment under Article 282 [b]. For obvious reason, due process in abandonment cases does not involve the conduct of hearing. Compliance with the following two (2) notices suffices, *viz.*:

1. *First* notice asking the employee to explain why he should not be declared as having abandoned his job; and
2. *Second* notice to inform him of the employer's decision to dismiss him on the ground of abandonment.

d. For termination based on authorized causes under Article 283.

Due process is deemed complied with upon the separate and simultaneous service of a written notice of the intended termination to both: (1) the employee to be terminated; and (2) the appropriate DOLE Regional Office, at least one (1) month before the intended date of the termination specifying the ground/s therefor and the undertaking to pay the separation pay required under Article 283 of the Labor Code.

e. For termination due to disease under Article 284.

Article 284 does not specify the standards of due process to be followed in case an employee is dismissed due to disease. However, the silence of the law should not be construed that the sick employee may be terminated without complying with certain procedural requirements. In **Agabon v. NLRC, [G.R. No. 158693, November 17, 2004], t**he Supreme Court observed that the procedural requirements under Article 283 are likewise applicable to termination due to disease under Article 284.

f. For termination based on Article 285.

The termination of employment contemplated under Article 285 is done and effected by the employee and not by the employer. It is, therefore, the employee who is required to comply with certain procedural requisites in order to validly and legally effect the termination of his employment relationship with his employer.

Thus, an employee may terminate without just cause the employment relationship by simply serving a written notice on the employer at least one (1) month in advance. The employer upon whom no such notice is served may hold the employee liable for damages.

There are, however, certain just causes which an employee may validly invoke to effectively put an end to the employment relationship without serving any notice on the employer, to wit:

1. Serious insult by the employer or his representative on the honor and person of the employee;
2. Inhuman and unbearable treatment accorded the employee by the employer or his representative;
3. Commission of a crime or offense by the employer or his representative against the person of the employee or any of the immediate members of his family; and
4. Other causes analogous to any of the foregoing.

g. For termination based on Article 286.

Article 286 generally does not contemplate termination of employment when the employer implements a bona-fide suspension of operation of its business or undertaking for a period not exceeding six (6) months or when the employee fulfills a military or civic duty as required by law. In all such cases, the employer is required to 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 operation of his employer or from his relief from the military or civic duty. In other words, the law imposes the duty on the part of the employee to resume his work within the said period from the resumption of operation or from his relief from his compulsory military or civic duty.

However, in instances where it is the employer who does not resume its operation and instead permanently closes and ceases it, the due process requirement that should be complied with is that prescribed in Article 283 of the Labor Code according to **Sebuguero v. NLRC, GTI Sportswear Corporation, [G.R. No. 115394, September 27, 1995].** Hence, the employer should serve the notice of termination to both the affected employees and the DOLE at least one (1) month before the intended date thereof.

It must be noted that as held in **J.A.T. General Services v. NLRC, [G.R. No. 148340, January 26, 2004],** the procedural requirement for terminating an employee does not come into play yet during the period of *bona-fide* suspension of operation. The reason is that there is no termination of employment to speak of at that point. It is only when the employer permanently ceases its operation after the 6-month period that the due process requirement enunciated in *Sebuguero* should be observed.

h. For termination due to retirement under Article 287.

Article 287 does not impose any due process requirement to validly effect retirement. Normally, the retirement plan in the CBA or company policy prescribes the procedure that should be followed in the availment of the retirement benefits provided therein. Once the procedure is complied with, the release of the retirement benefits should be made as a matter of course and the receipt thereof by the retiring employee effectively marks the termination of employment based on this ground.

In the absence of a retirement plan or company retirement policy, mere notice by the employee of his option to retire at the age of 60 (for optional retirement) or 65 (for compulsory retirement) is sufficient. Observance of due process, in its strict sense, is not required to terminate employment based on retirement.

• ***Rundown of some relevant principles on notice requirement.***

- **Notices and hearing made before commission of offense, not valid.**

In **Janssen Pharmaceutica v. Silayro, [G.R. No. 172528, February 26, 2008],** the employer alleges that it has complied with the twin requirements of notice and hearing. However, the Supreme Court found that "(t)he superficial compliance with two notices and a hearing in this case cannot be considered valid where these notices were issued and the hearing made before an offense was even committed. The first notice, issued on 24 November 1998, was premature since respondent was obliged to return his accountabilities only on 25 November 1998. As respondent's preventive suspension began on 25 November 1998, he was still performing his duties as territory representative the day before, which required the use of the company car and other company equipment. During the administrative hearing on 3 December 1998, both parties clarified the confusion caused by the petitioner's premature notice and agreed that respondent would surrender his accountabilities as soon as the petitioner gave its instructions. Since petitioner's ostensible compliance with the procedural requirements of notice and hearing took place before an offense was even committed, respondent was robbed of his rights to explain his side, to present his evidence and rebut what was presented against him, rights ensured by the proper observance of procedural due process."

- **Service of notices is not a mere technicality but a requirement of due process.**
- **No prescribed form for notices.**
- **Verbal notice is not valid; notice must be in writing.**
- **Employee's written explanation does not cure lack of first notice**
- **Summary dismissal, even if agreed to by employee, not valid.**
- **First notice must inform outright the employee that an investigation will be conducted on the charges specified therein.**

> In **Coca-Cola Bottlers Philippines, Inc. v. Garcia, [G.R. No. 159625, January 31, 2008],** the rule enunciated in ***Maquiling v. Philippine Tuberculosis Society, Inc.*, [G.R. No. 143384, February 4, 2005, 450 SCRA 465],** was reiterated that the first notice must inform outright the employee that an investigation will be conducted on the charges specified in such notice which, if proven, will result in the employee's dismissal. This notice will afford the employee an opportunity to avail of all defenses and exhaust all remedies to refute the allegations hurled against him for what is at stake is his very life and limb his employment.

- **First notice must state that the dismissal of the employee is being sought.**

> Citing the rulings in **King of Kings Transport, Inc. v. Mamac, [G.R. No. 166208, June 29, 2007]** and **R. B. Michael Press v. Galit, [G.R. No. 153510, February 13, 2008],** the Supreme Court, in **Agullano v. Christian Publishing and Pizarro, [G.R. No. 164850, September 25, 2008],** ruled that there was violation of procedural due process because there was clearly no intimation in the first notice that the petitioner would be terminated from employment for his singular offense.

- **First notice should not only specify the section of the company rule violated but also the penalty of dismissal imposable thereon.**

> In **Cruz v. Coca-Cola Bottlers Phils., Inc., [G.R. No. 165586, June 15, 2005]**, the notices given to petitioner were declared legally deficient. The first notice dated July 27, 1998, did not contain the particulars of the charges nor the circumstances in which the violations happened. It was also couched in general terms since it only mentioned the specific sections and rule numbers of the Red

Book that were violated without defining what such violations were. A cursory reading of the said notice likewise shows that it did not state that petitioner was in fact facing a possible dismissal from the company. Consequently, petitioner was not sufficiently apprised of the gravity of the situation he was in.

- **The first notice treating the numerous separate violations in the past is defective.**

In **Aparece v. J. Marketing Corp., [G.R. No. 174224, October 17, 2008],** petitioner was warned in four (4) memoranda that the commission of further violations will merit a stiffer penalty, possibly termination. However, these memoranda were issued by respondent on August 25, 1997, May 28, 1998, February 28, 2000 and July 6, 2000 for infractions all committed more than a year prior to petitioner's actual termination. Although petitioner admitted that an investigation was conducted, the memoranda issued by respondent do not satisfy the first notice requirement. There was, therefore, no compliance with due process.

In **Aldeguer & Co., Inc./Loalde Boutique v. Tomboc, [G.R. No. 147633, July 28, 2008]**, the petitioner, in one, single notice, ordered respondent's dismissal. Petitioner argues, however, that "respondent was terminated not only for the offenses she committed in May 1997 but also for the other offenses particularly those committed in February 1997 for which she was already required to explain in writing." This argument fails since it does not satisfy the first notice requirement that the notice must inform outright the employee that an investigation will be conducted on the charges particularized therein which, if proven, will result to his dismissal. Such notice must not only contain a plain statement of the charges of malfeasance or misfeasance but must categorically state the effect on his employment if the charges are proven to be true. Such single notice does not comply with the requirements of the law.

- **Charges couched in general terms, not valid.**

In **Cabalen Management Co., Inc. v. Quiambao, [G.R. No. 169494, March 14, 2007],** it was pronounced that the rule that the written notice to the employees who stand to lose their employment must specify the particular acts or omissions constituting the grounds for their dismissal. ensures that the employees are able to answer the charges and to defend themselves from imputed wrongdoings before their dismissals are ordered. A review of the charges in the Notice to Explain and Suspension served on the employees in this case shows that most, if not all, were couched in general terms. Because of the vagueness of the charges, it follows that respondents could only issue a general denial.

- **Mere warning notices, not sufficient.**

In **Skippers United Pacific, Inc. v. Maguad, [G.R. No. 166363, August 15, 2006],** it was held that the warning notices given by the petitioners to the respondents cannot be deemed as substantial compliance with the two-notice requirement. The warning notices did not specify in details the particular acts or omissions committed by the respondents which showed their incompetence. Worse still, it did not apprise them that their dismissal was being sought. Such notices were stated in a general manner. It was never mentioned therein that the petitioners would dismiss the respondents. Although the petitioners claimed that

the notices were given to the respondents days before they were repatriated, the same leaves much to be desired.

- **Mere affidavit narrating the incident does not constitute first notice.**

  Petitioners in **Asian Terminals, Inc. v. Marbella, [G.R. No. 149074, August 10, 2006],** contend that the sworn statement of the supervisor of the group of stevedores to which respondents belong, sent to the latter stating the charges is a sufficient notice. It was held, however, that this sworn statement cannot be considered as the *first* notice required by the two-notice rule. If at all, it is a mere narration under oath, of what transpired during the incident and that respondents were among the stevedores who disobeyed said supervisor's order to work.

- **In case of two successive offenses, the notice in the second case is not the second notice contemplated by law.**

  In **Wah Yuen Restaurant v. Jayona, [G.R. No. 159448, December 16, 2005],** the respondent was cited in succession for two (2) offenses. Petitioner served a letter-memorandum dated January 5, 2000 for the first offense requiring respondent, who was an Assistant Manager, to explain his violation committed on January 3, 2000 for billing a customer in an amount considerably less than the cost of the actual stuff ordered. A second offense of the same nature was allegedly committed on April 3 and consequently, a letter of April 5, 2000 was sent to respondent terminating his services. Petitioner contends that it has complied with the two-notice rule when it served the letter-memorandum of January 5, 2000 which should be treated as the *first* notice and the letter of April 5 as the *second* notice, The Supreme Court disagreed. It held that for petitioner to consider the letter-memorandum of January 5, 2000 as the first notice, and the letter of April 5, 2000 as the second notice of termination of employment is erroneous. For albeit the two letters dealt with infractions of the same nature, they were separate and distinct. The April 5, 2000 termination letter itself clearly stated that respondent was being terminated for committing a second infraction. As such, he should have been given the chance to give his side thereon. But he was not.

- **The employee must be dismissed based on the same grounds mentioned in the first notice.**
- **Changing of ground for terminating employee indicates its lack of basis.**

  In **AMA Computer College, Inc. v. Garay, [G.R. No. 162468, January 23, 2007],** respondent Garay was initially investigated as one of the primary suspects for the loss of the ₱47,299.34 contained in an envelope left in the comfort room. When it became clear that she was not liable for it, the petitioners changed their charge and accused her of exhibiting a belligerent and hostile attitude during the investigation. The records, however, reveal that Garay cooperated in the investigation process. In fact, no less than the petitioners admitted that Garay voluntarily complied with the written notices requiring her to file her written explanation and to appear at the hearings. She may have shown her exasperation through her written explanation and her lawyer's demand letter but this is not sufficient for the petitioners to lose their trust and confidence in her. The sudden shift made by the petitioners on the ground for terminating Garay only reinforces the Court's conviction that there was no basis in the first place to hold Garay

suspect of any infraction. She could not in any credible way be connected with the loss of an envelope with cash left in the comfort room by the cashier.

• ***What are the instances when hearing is not required?***

In the situations mentioned below, hearing is not required to be conducted by the employer in order for the termination to be valid.

a. Admission of guilt by employee.
b. Termination due to authorized causes under Article 283.
c. Termination due to disease under Article 284.
d. Termination by the employee (resignation).
e. Termination after 6 months of bona-fide suspension of operation.
f. Termination due to expiration of fixed-period employment.
g. Termination of casual employment.
h. Termination due to completion of project in project employment.
i. Termination due to lapse of season in case of seasonal employment.
j. Termination due to expiration of period of probationary employment.
k. Termination due to expiration of tenure made coterminous with lease.
l. Termination due to expiration of contractual employment.
m. Termination due to abandonment.
n. Termination due to closure or stoppage of work by government authorities.

• ***Who has the burden of proof in illegal dismissal cases?***

Time and again, the rule is that in illegal dismissal cases, the *onus* of proving that the employee was not dismissed or if dismissed, that the dismissal was not illegal, rests on the employer and failure to discharge the same would mean that the dismissal is not justified and, therefore, illegal. *(Limketkai Sons Milling, Inc. vs. Llamera, G. R. No. 152514, July 12, 2005).*

• ***What is the quantum of evidence required in labor cases?***
”

All administrative determinations require only substantial proof and not clear and convincing evidence. (*Segismundo vs. NLRC, G. R. No. 112203, Dec. 13, 1994).*

SUSPENSION OF EFFECTS OF TERMINATION (ARTICLE 277 [B])

• ***When may the effects of termination be suspended?***

Grounds. - The Secretary may suspend the effects of termination *pending resolution of the case* in the event of a *prima facie* finding by the appropriate official of the Department of Labor and Employment before whom the dispute is pending that:

1. the termination may cause a serious labor dispute; **or**
2. the termination is in implementation of a mass lay-off. (*Article 277 [b])*

PREVENTIVE SUSPENSION

• ***What is preventive suspension?***

a. Legal basis.

The Labor Code does not contain any provision on preventive suspension. The legal basis for the valid imposition thereof is found in the *Rules to Implement the Labor Code*.

b. Justification for imposition of preventive suspension (not a penalty); period.

The employer may place the worker concerned under preventive suspension for a period of **30 days** if his continued employment poses a *serious and imminent threat to the life or property of the employer or of his co-workers.* During the said period, the employee is not entitled to his wages. But if the 30-day period is extended because the employer has not finished its investigation of the case, the employee should be paid his wages during the period of extension.

- Period of preventive suspension must be definite.
- Extension of period must be justified.
- Preventive suspension of workers in the construction industry, **only 15 days**.

SUSPENSION AS A PENALTY

• ***What is suspension as a penalty?***

When dismissal is too harsh a penalty due to certain mitigating factors such as, *inter alia*, the absence of malice or the fact that the employee is a first offender, suspension is deemed sufficient penalty.

In the 2005 case of **Coca-Cola Bottlers, Phils., Inc. vs. Kapisanan ng Malayang Manggagawa sa Coca-Cola-FFW**, **[G. R. No. 148205, February 28, 2005]**, the respondent-employee was dismissed for dishonesty, more specifically for violation of the company policy on fictitious sales transactions; falsification of company records/data/documents/reports; conspiring or conniving with, or directing others to commit fictitious transactions; and inefficiency in the performance of duties, negligence and blatant disregard of or deviation from established control and other policies and procedures. However, the petitioner-employer failed to adduce clear and convincing evidence that the respondent had committed said acts. Consequently, it was ruled that the extreme penalty of dismissal was too harsh and manifestly disproportionate to the infraction committed, which appears to have been fully explained, and, in fact, to be not inexcusable under the circumstances. There was no dishonesty, no demonstration of such moral perverseness as would have justified the claimed loss of confidence attendant to the job. The company must bear a share of the blame for entrusting a mere driver-helper with a highly fiduciary task knowing that he did not possess the required skills. At most, the employee failed to comply with, or even violated, certain company rules of internal control procedures, but to say that it was deliberate is gratuitous.

Perhaps, individual petitioner should first have been given a mere warning, then a reprimand or even a suspension, but certainly not outright dismissal from employment. One must keep in mind that a worker's employment is property in the constitutional sense, and he cannot be

deprived thereof without due process and unless it was commensurate to his acts and degree of moral depravity. Considering the factual backdrop in this case, it was ruled that for his infractions, the respondent-employee should be meted a suspension of two (2) months instead of dismissal.

STANDARDIZATION OF SITUATIONS IN TERMINATION DISPUTES

• ***What are the seven (7) standard situations in termination disputes?***

The rules on termination of employment in the Labor Code and pertinent jurisprudence are applicable to seven (7) different scenarios, namely:

1. The dismissal is for a just cause under Article 282, for an authorized cause under Article 283, or for health reasons under Article 284, and due process was observed – **THE DISMISSAL IS LEGAL**.

2. The dismissal is without just or authorized cause but due process was observed – **THE DISMISSAL IS ILLEGAL.**

3. The dismissal is without just or authorized cause and there was no due process – **THE DISMISSAL IS ILLEGAL.**

4. The dismissal is for just or authorized cause but due process was not observed – **THE DISMISSAL IS LEGAL BUT THE EMPLOYER IS LIABLE TO PAY INDEMNITY IN THE FORM OF NOMINAL DAMAGES.** ***THE AMOUNT OF NOMINAL DAMAGES VARIES FROM CASE TO CASE:***

   - ***If dismissal is for a <u>just</u> cause*** *– P30,000.00 (Per Agabon Case because employee has committed a wrongful act)*

   - ***If dismissal is for an <u>authorized</u> cause*** *– P50,000.00 (Penalty is stiffer per* **Jaka Food Processing Corporation vs. Pacot**, [G. R. 151378, March 28, 2005] because employee dismissed has not committed any wrongful act*)*

5. The dismissal is for a cause which later on is proven to be non-existent – **THE DISMISSAL IS NOT EFFECTIVE, HENCE, THE EMPLOYEE SHOULD BE REINSTATED. THE EMPLOYER IS NOT LIABLE TO PAY ANY BACKWAGES OR DAMAGES.**

6. The dismissal is not supported by evidence – **NO DISMISSAL TO SPEAK OF; SO EMPLOYEE SHOULD BE REINSTATED (BUT NOT AS A RELIEF). THE EMPLOYER IS NOT LIABLE TO PAY ANY BACKWAGES OR DAMAGES.**

7. The dismissal is made pursuant to law – **THE DISMISSAL IS LEGAL**

The first three (3) situations above are self-explanatory and need no further elaboration.

The Dismissal is For a Just or Authorized Cause But Due Process Was Not Observed.

• ***Synopsis on the developments in the law.***

In the last couple of decades, the Supreme Court has grappled with the legal effect and the corresponding sanction in cases where there exists a just and valid ground to justify the dismissal but the employer fails to comply with the due process requirement of the law. Prior to the promulgation in 1989 of ***Wenphil v. NLRC,* [170 SCRA 69, February 8, 1989],** the prevailing doctrine held that dismissing employees without giving them proper notices and an opportunity to be heard was illegal and that, as a consequence thereof, they were entitled to *reinstatement* plus *full backwages. Wenphil* abandoned this jurisprudence and ruled that if the dismissal was for a just or an authorized cause but done without due process, the termination was valid but the employer should be sanctioned with the payment of indemnity ranging from ₱1,000.00 to ₱10,000.00

In 2000, the Supreme Court promulgated ***Serrano v. NLRC*, [G.R. No. 117040, January 27, 2000],** which modified *Wenphil.* It considered such termination *"ineffectual"* (not illegal) and sanctioned the employer with payment of *full backwages* plus *nominal and moral damages*, if warranted by the evidence. In case the dismissal was for an authorized cause, *separation pay* in accordance with Article 283 of the Labor Code should be awarded.

In 2004, the Supreme Court in ***Agabon v. NLRC*, [G.R. No. 158693, November 17, 2004]**, abandoned *Serrano* and effectively reverted to *Wenphil* (known also as the ***"Belated Due Process Rule"***) and held that a dismissal due to abandonment - a just cause - was not illegal or ineffectual, even if done without due process; but the employer should indemnify the employee with "nominal damages for non-compliance with statutory due process." *(Glaxo Wellcome Phils., Inc. v. Nagkakaisang Empleyado ng Wellcome-DFA, G.R. No. 149349, March 11, 2005).*

• ***Dismissal is legal but employer is liable to pay indemnity in the form of nominal damages.***

Consequent to the ruling in *Agabon* [supra], it is now the prevailing doctrine that the dismissal will be held valid and legal but the employer should be sanctioned for failure to afford due process to the employee.

• ***Measure of penalty or indemnity - no longer full backwages but nominal damages.***

Previously, under the *Serrano* doctrine, the measure of penalty or indemnity was full backwages. Under the new rule enunciated in the *Agabon* case, the indemnity is in the form of nominal damages, the amount of which depends on the peculiar circumstances of each case.

• ***Penalty is stiffer if dismissal without due process is for an authorized cause.***

The 2005 case of ***Jaka Food Processing Corporation v. Pacot,* [G.R. 151378, March 28, 2005],** distinguished the legal effects of lack of due process in termination for a *just* cause (as in the *Agabon* case) and for *authorized* cause (as in this case).

In the instant case, the employees were terminated due to valid retrenchment but it was effected without the employer complying with the due process requirement under Article 283 of the Labor Code regarding the service of a written notice upon the employees and the Department of Labor and Employment at least one (1) month before the intended date of termination.

In awarding a "*stiffer*" sanction of ₱50,000.00 to distinguish it from the *Agabon* case where the penalty was ₱30,000.00, the High Court declared:

> "The difference between *Agabon* and the instant case is that in the former, the dismissal was based on a just cause under Article 282 of the Labor Code while in the present case, respondents were dismissed due to retrenchment, which is one of the authorized causes under Article 283 of the same Code.
>
> "At this point, we note that there are divergent implications of a dismissal for just cause under Article 282, on one hand, and a dismissal for authorized cause under Article 283, on the other.
>
> "A dismissal for just cause under Article 282 implies that the employee concerned has committed, or is guilty of, some violation against the employer, *i.e.* the employee has committed some serious misconduct, is guilty of some fraud against the employer, or, as in *Agabon*, he has neglected his duties. Thus, it can be said that the employee himself initiated the dismissal process.
>
> "On another breath, a dismissal for an authorized cause under Article 283 does not necessarily imply delinquency or culpability on the part of the employee. Instead, the dismissal process is initiated by the employer's exercise of his management prerogative, *i.e.* when the employer opts to install labor saving devices, when he decides to cease business operations or when, as in this case, he undertakes to implement a retrenchment program.
>
> "The clear-cut distinction between a dismissal for just cause under Article 282 and a dismissal for authorized cause under Article 283 is further reinforced by the fact that in the first, payment of separation pay, as a rule, is not required, while in the second, the law requires payment of separation pay.
>
> "For these reasons, there ought to be a difference in treatment when the ground for dismissal is one of the just causes under Article 282, and when based on one of the authorized causes under Article 283.
>
> "Accordingly, it is wise to hold that: (1) if the dismissal is based on a just cause under Article 282 but the employer failed to comply with the notice requirement, the sanction to be imposed upon him should be *tempered* because the dismissal process was, in effect, initiated by an act imputable to the employee; and (2) if the dismissal is based on an authorized cause under Article 283 but the employer failed to comply with the notice requirement, the sanction should be *stiffer* because the dismissal process was initiated by the employer's exercise of his management prerogative.
>
> "xxx
>
> "It is, therefore, established that there was ground for respondents' dismissal, *i.e.*, retrenchment, which is one of the authorized causes enumerated under Article 283 of the Labor Code. Likewise, it is established that JAKA failed to comply with the notice requirement under the same Article. Considering the factual circumstances in the instant case and the above ratiocination, we, therefore, deem it proper to fix the indemnity at ₱50,000.00."

Reiterating the ruling in *Jaka* [supra], the Supreme Court, in ***Smart Communications, Inc. v. Astorga,* [G.R. No. 148132, January 28, 2008],** and ***DAP Corporation v. CA,* [G.R. No. 165811, December 14, 2005],** awarded the same amount of ₱50,000.00 as indemnity in the form

of nominal damages because of the employer's non-compliance with the one-month mandatory notice requirement. The same holding was made in the earlier case of ***San Miguel Corp. v. Aballa,*** **[G.R. No. 149011, June 28, 2005]** where the private respondents were merely verbally informed on September 10, 1995 by the SMC Prawn Manager that effective the following day or on September 11, 1995, they were no longer to report for work as SMC would be closing its operations.

• ***Amount of nominal damages may be reduced.***

The amount of nominal damages of P30,000.00 for termination due to just causes prescribed in the *Agabon* case has been reduced in many cases but not increased beyond this amount.

Likewise, the amount of nominal damages of P50,000.00 for termination due to authorized causes was reduced in a number of cases due to certain justifying circumstances. As an example, for reason that the closure of business was found to have been effected in good faith although without due process, the amount of indemnity awarded to each of the employees was reduced to P40,000.00 in the case of ***Business Services of the Future Today, Inc. v. CA,*** **[G.R. No. 157133, January 30, 2006].**

In another case, on motion for partial reconsideration filed by petitioners in the case of ***Industrial Timber Corp. v. Ababon,*** **[G.R. No. 164518, March 30, 2006],** the Supreme Court also reduced the award of nominal damages to each of the 97 respondents who were found to have been validly retrenched but the employer failed to comply with the notice requirement, from P50,000.00, which was awarded earlier in the main decision (promulgated on January 25, 2006) to P10,000.00 because the execution of the decision became impossible, unjust, or too burdensome. In other words, the modification of the decision was made in order to harmonize the disposition with the prevailing circumstances.

Dismissal for Non-Existent Cause:

In "*termination for non-existent cause,*" contemplated under situation ***No. 5*** above, the employer does not intend to dismiss the employee but the dismissal was effected nonetheless for a specific cause which turns out to be non-existent. Example is when the employee is terminated due to his detention by the military for alleged subversive act which later was not proven and the case dismissed for lack of evidence. *(Magtoto vs. NLRC, G. R. No. 63370, Nov. 18, 1985).*

Hence, absent the reason which gave rise to his separation from employment, there is no intention on the part of the employer to dismiss the employee concerned. Accordingly, reinstatement is in order. (*Pepito vs. Secretary of Labor, 96 SCRA 454).*

In the case of **Standard Electric Manufacturing Corporation v. Standard Electric Employees Union-NAFLU-KMU [G.R. No. 166111, August 25, 2005]**, respondent Javier was dismissed by the petitioner effective February 5, 1996 for (a) being AWOL from July 31, 1995 up to January 30, 1996; and (b) committing rape. However, on demurrer to evidence, respondent Javier was acquitted of the charge. With respondent Javier's acquittal, the cause of his dismissal from his employment turned out to be non-existent. His absence from August 9, 1995 cannot be deemed as an abandonment of his work. Abandonment is a matter of intention and cannot lightly be inferred or legally presumed from certain equivocal acts. Mere absence or failure to report for work, even after notice to return, is not tantamount to abandonment. Moreover, his acquittal for rape makes it more compelling to view the illegality of his dismissal. The trial court dismissed

the case for "insufficiency of evidence," and such ruling is tantamount to an acquittal of the crime charged and proof that his arrest and detention were without factual and legal bases in the first place. The petitioner-employer acted with precipitate haste in terminating his employment on January 30, 1996, on the ground that he had raped the complainant therein. Respondent Javier had yet to be tried for the said charge. In fine, the petitioner prejudged him and preempted the ruling of the RTC. The petitioner had, in effect, adjudged him guilty without due process of law. While it may be true that after the preliminary investigation of the complaint, probable cause for rape was found and respondent Javier had to be detained, this cannot be made as legal basis for the immediate termination of his employment.

In **Asian Terminals, Inc. v. NLRC, [G.R. No. 158458, December 19, 2007]**, the Supreme Court was again confronted with the same issue of termination of an employee who was arrested and detained for reasons not related to his work. Following the ruling in *Magtoto* [supra], *Pedroso* [supra], and *Standard Electric* [supra], the High Court ruled that absences incurred by an employee who is prevented from reporting for work due to his detention to answer some criminal charge is excusable if his detention is baseless, in that the criminal charge against him is not at all supported by sufficient evidence. Similarly, respondent herein was prevented from reporting for work by reason of his detention. That his detention turned out to be without basis as the criminal charge upon which said detention was ordered was later dismissed for lack of evidence, made the absences he incurred as a consequence thereof not only involuntary but also excusable. It was certainly not the intention of respondent to absent himself, or his fault that he was detained on an erroneous charge. In no way may the absences he incurred under such circumstances be likened to abandonment. The CA, therefore, correctly held that the dismissal of respondent was illegal, for the absences he incurred by reason of his unwarranted detention did not amount to abandonment

Dismissal Not Supported by Evidence:

Under situation ***No. 6*** above, the employee was not actually dismissed but nonetheless has filed an illegal dismissal case. The case of **Asia Fancy Plywood Corporation vs. NLRC**, [G. R. No. 113099, Jan. 20, 1999, 301 SCRA 189] is an example of a case where the employees' conclusion that they were dismissed was unsubstantiated as there was no evidence that they were dismissed from employment by their employer nor were they prevented from returning to work. Here, their employer has, in fact, expressed its willingness to accept them back to their former positions. In such a case, no backwages should be awarded since the same is proper only if an employee is unjustly or illegally dismissed. The employees should simply be ordered to report for work and for the employer to accept them to their former or substantially equivalent position without backwages.

Reinstatement without backwages was also ordered in the 2001 case of **Security and Credit Investigation, Inc. vs. NLRC**, **[G. R. No. 114316, January 26, 2001],** where the Supreme Court found that petitioner did not dismiss respondent security guards, and that the latter did not abandon their employment. (*See also Indophil Acrylic Manufacturing Corporation vs. NLRC, 226 SCRA 723 [1993]).*

In the case of **Ledesma, Jr. v. NLRC, [G.R. No. 174585, October 19, 2007]**, the High Court had the opportunity to declare the rule that while in cases of illegal dismissal, the employer bears the burden to prove that the termination was for a just or authorized cause, however, it is necessary that the facts and the evidence presented therein should be able to establish a *prima*

facie case that the employee was really dismissed from employment. Before the employer must bear the burden of proving that the dismissal was legal, the employee must first establish by substantial evidence the fact of his dismissal from service. Logically, if there is no dismissal to speak of, then there can be no question as to the legality or illegality thereof.

Abad v. Roselle Cinema, [G.R. No. 141371, March 24, 2006], instructs that there is no dismissal to speak of if the antecedent circumstances and the employees' contemporaneous acts amply provide substantial proof of their voluntary termination of employment.

Citing *Abad*, it was held in **Leopard Integrated Services, Inc. v. Macalinao, [G.R. No. 159808, September 30, 2008],** that the fact that respondent filed a complaint for illegal dismissal is not by itself sufficient indicator that respondent had no intention of deserting his employment since the totality of respondent's antecedent acts palpably display the contrary.

In the consolidated cases of **Leonardo vs. NLRC**, **[G. R. No. 125303, June 16, 2000]** and **Fuerte vs. Aquino, [G. R. No. 126937, June 16, 2000],** the Supreme Court also ordered the reinstatement but without backwages of the employee (Fuerte) who was not deemed to have abandoned his job nor was he constructively dismissed. As pointed out by the Court, in a case where the employee's failure to work was occasioned neither by his abandonment nor by a termination, the burden of economic loss is not rightfully shifted to the employer; each party must bear his own loss.

- ***Case where the employee filed illegal dismissal case to pre-empt lawful dismissal.***

In **Jo Cinema Corporation vs. Abellana, [G. R. No. 132837, June 28, 2001],** the employee was placed under preventive suspension for 20 days for unauthorized encashment of check. Before the lapse of said period and while the investigation was on-going, she filed a case for illegal dismissal. The Supreme Court ruled that she was not dismissed. She could not have been dismissed on the day she was preventively suspended because a formal investigation was still being conducted. In fact, she even attended said investigation where she admitted having encashed the checks. If she was indeed dismissed on said date, as she claims, petitioners would not have continued with the investigation. Undoubtedly, the employee pre-empted the outcome of the investigation by filing a complaint for illegal dismissal. Thus, it was she who signified her intention not to report for work when she filed the instant case.

Having thus determined that the employee was not dismissed from the service, the payment of separation pay and backwages are not in order. It must be emphasized that the right of an employee to demand for separation pay and backwages is always premised on the fact that the employee was terminated either legally or illegally. The award of backwages belongs to an illegally dismissed employee by direct provision of law and it is awarded on grounds of equity for earnings which a worker or employee has lost due to illegal dismissal. Separation pay, on the other hand, is awarded as an alternative to illegally dismissed employees where reinstatement is no longer possible.

- ***Case where employee refused to be investigated.***

In **Leonardo vs. NLRC, [G. R. No. 125303, June 16, 2000],** the petitioner-employee protests that he was never accorded due process. According to the Supreme Court, however, this begs the question, for he was never terminated; he only became the subject of an investigation in which he was apparently loath to participate. As testified to by the personnel manager, he was

given a memorandum asking him to explain the incident in question, but he refused to receive it. In an analogous instance in the case of **Pizza Hut/Progressive Development Corporation vs. NLRC**, [252 SCRA 531, 536 (1996)], it was held that an employee's refusal to sign the minutes of an investigation cannot negate the fact that he was accorded due process. So should it be here.

Dismissal Brought About by Implementation of a Law

The case of **St. Luke's Medical Center Employees Association-AFW and Santos v. NLRC, [G.R. No. 162053, March 7, 2007],** presents a unique situation where the termination of the employee was occasioned by the enactment of a law, Republic Act No. 7431, otherwise known as the *"Radiologic Technology Act of 1992."* The basic issue here is whether petitioner Santos was illegally dismissed by private respondent St. Luke's Medical Center (SLMC) on the basis of her inability to secure a certificate of registration from the Board of Radiologic Technology as required by Section 15 of said law which provides:

> "Sec. 15. *Requirement for the Practice of Radiologic Technology and X-ray Technology*. - Unless exempt from the examinations under Sections 16 and 17 hereof, no person shall practice or offer to practice as a radiologic and/or x-ray technologist in the Philippines without having obtained the proper certificate of registration from the Board."

Petitioner Santos worked as X-Ray Technician in the Radiology Department of private respondent SLMC. However, she has not passed the board examination even after the passage of said law. She was offered early retirement but she refused to avail of it. She asked to be transferred to another department but her qualifications did not fit with any of the vacant positions therein. Having been terminated for failure to comply with the requirement of said law, she filed a case for illegal dismissal contending that her failure to comply with the Board certification requirement did not constitute just cause for termination as it violated her constitutional right to security of tenure. Finding this contention untenable, the Supreme Court ratiocinated that no malice or ill-will can be imputed upon private respondent as the separation of petitioner Santos was undertaken by it conformably to an existing statute. It is undeniable that her continued employment without the required Board certification exposed the hospital to possible sanctions and even to a revocation of its license to operate. Certainly, private respondent could not be expected to retain petitioner Santos despite the inimical threat posed by the latter to its business. This notwithstanding, the records bear out the fact that petitioner Santos was given ample opportunity to qualify for the position and was sufficiently warned that her failure to do so would result in her separation from work in the event there were no other vacant positions to which she could be transferred. Despite these warnings, petitioner Santos was still unable to comply and pass the required exam. To reiterate, the requirement for Board certification was set by statute. Justice, fairness and due process demand that an employer should not be penalized for situations where it had no participation or control.

RELIEFS AVAILABLE TO AN ILLEGALLY DISMISSED EMPLOYEE

- ***What are the reliefs available to an illegally dismissed employee under the Labor Code and the Civil Code?***

The following reliefs may be awarded:

1. Reinstatement without loss of seniority rights and other privileges. In case reinstatement is not possible, payment of separation pay in lieu thereof may be awarded, computed at one month or one month pay per year of service, whichever is higher.
2. Full backwages, inclusive of allowances;
3. Other benefits or their monetary equivalent;
4. Damages (moral and exemplary, if the dismissal is with malice or effected in bad faith);
5. Attorney's fees (10% of all monetary awards).
6. Legal interest on separation pay and backwages

[**NOTE:** Nos. 2 and 3 above are computed from the time the compensation was withheld from the employee (date of dismissal) up to the time of his actual reinstatement. If reinstatement is not possible, the computation is up to the time of finality of decision].

The reliefs mentioned above are not available to a legally dismissed employee. Any order of reinstatement and award of backwages have, under such situation, no factual and legal bases. (*Philippine Airlines, Inc. vs. NLRC, G. R. No. 115785, August 4, 2000).*

REINSTATEMENT

• ***What are the various forms of reinstatement under the Labor Code.***

a. Provisions of the Labor Code enunciating the remedy of reinstatement.

The Labor Code grants the remedy of reinstatement in various forms and situations. Its provisions recognizing reinstatement as a remedy are as follows:

1. **Article 223** which provides for reinstatement of an employee whose dismissal is declared illegal by the Labor Arbiter. This form of reinstatement is self-executory and must be implemented even during the pendency of the appeal that may be instituted by the employer.

2. **Article 263 [g]** which provides for automatic return to work of all striking or locked-out employees, if a strike or lockout has already taken place, upon the issuance by the Secretary of Labor and Employment of an assumption or certification order. The employer is required to immediately resume operations and readmit all workers under the same terms and conditions prevailing before the strike or lockout.

3. **Article 277 [b]** which empowers the Secretary of Labor and Employment to suspend the effects of termination pending the resolution of the termination dispute in the event of a *prima facie* finding by the appropriate official of the Department of Labor and Employment before whom such dispute is pending that the termination may cause a serious labor dispute or is in implementation of a mass lay-off.

4. **Article 279** which grants reinstatement as a relief to an employee whose dismissal is declared as illegal in a final and executory judgment.

b. Reinstatement under Article 279 distinguished from the other forms of reinstatement.

The following distinctions between Article 279 and the other forms of reinstatement under the Labor Code may be cited:

1. On the nature of the order of reinstatement.

The reinstatement under Article 279 may only be granted in cases of final and executory judgments, and not while the cases for illegal dismissal are still pending as in the reinstatement provided under Articles 223, 263 [g] or 277 [b].

In other words, Article 279 presupposes that the judgment ordering reinstatement has already become final and executory, hence, there is nothing left to be done except to execute and enforce it. On the other hand, reinstatement under Articles 223, 263 [g] and 277 [b] presupposes that the issue of the legality or illegality of the termination is still pending resolution.

2. On the need for the issuance of a writ of execution.

The reinstatement under Article 279 may only be executed and enforced through the issuance of a writ of execution under Article 224 of the Labor Code.

The reinstatement under Article 223 is self-executory and, therefore, does not need any writ of execution for its enforcement.

As far as the reinstatement contemplated in Article 263 [g] is concerned, it is immediately executory upon the issuance of an assumption or certification order by the Secretary of Labor and Employment which, by law, automatically carries with it a return-to-work order.

The reinstatement under Article 277 [b] is likewise immediately executory upon the issuance by the Secretary of Labor and Employment of an order suspending the effects of termination.

3. On the remedies available to employer.

Under Article 279, the employer cannot effectively prevent the execution and enforcement of the reinstatement order, it being final and executory in character.

Under Article 223, the employer is not granted any right to controvert, forestall or stay the execution of the reinstatement order issued by the Labor Arbiter. In no way can he stay its execution by posting a supersedeas bond. The law grants him two (2) options, both of which, however, call for reinstatement either actually to the employee's former position or in the payroll.

Under Article 263 [g], the employer is under legal compulsion to immediately reinstate the striking or locked-out employees upon resumption of his operations, under the same terms and conditions prevailing before the strike or lockout. The return-to-work order may be implemented by reinstating the striking or locked-out employees to their former positions or in the payroll, where circumstances exist that do not justify actual reinstatement. (*See University of Immaculate Concepcion, Inc. v. The Hon. Secretary of Labor, G.R. No. 151379, Jan. 14, 2005 where payroll reinstatement was ordered in implementing the return-to-work order instead of actual reinstatement).*

Under Article 277 [b], the employer does not have any contra-remedy against the immediate reinstatement which automatically results upon the issuance of the order by the Secretary of Labor and Employment suspending the effects of termination.

• ***Reinstatement when not prayed for, effect.***

The failure to allege reinstatement as one of the reliefs in the complaint for illegal dismissal is not fatal. In the interest of justice, according to **Manipon vs. NLRC**, **[G. R. No. 105338, Dec. 27, 1994],** although the issue of the grant of separation pay was never contested even at the level of the Labor Arbiter nor assigned as error at the NLRC level, the Labor Arbiter's ruling where he granted petitioner separation pay instead of ordering his reinstatement should be

corrected. Reinstatement should be granted although he failed to specifically pray for the same in his complaint.

In **Pheschem Industrial Corporation vs. Moldez**, **[G. R. No. 161158, May 9, 2005],** respondent's omission to pray for reinstatement in his position paper before the Labor Arbiter was not considered as an implied waiver to be reinstated. It was considered a mere procedural lapse which should not affect his substantive right to reinstatement. It is a settled principle that technicalities have no place in labor cases as rules of procedure are designed primarily to give substance and meaning to the objectives of the Labor Code to accord protection to labor.

• ***Reinstatement when what is prayed for is separation pay.***

In the 2003 case of **Solidbank Corporation vs. CA**, **[G. R. No. 151026, Aug. 25, 2003],** where the employee explicitly prayed for an award of separation pay in lieu of reinstatement, the Supreme Court said that by so doing, he forecloses reinstatement as a relief by implication. Consequently, he is entitled to separation pay equivalent to one month pay for every year of service, from the time of his illegal dismissal up to the finality of this judgment, as an alternative to reinstatement.

• ***Employee ordered reinstated may, at the end of the proceeding, opt for separation pay instead.***

The employee who files an illegal dismissal case may choose between reinstatement and payment of separation pay in lieu of reinstatement. He is bound by the relief he prayed for in his complaint. If ordered reinstated later on after the end of the proceedings, he has no other option but to abide thereby.

However, the Supreme Court recognizes an exception. In the 2004 case of **Procter and Gamble Philippines vs. Bondesto**, **[G. R. No. 139847, March 5, 2004],** after more than a year after the respondent was placed on payroll reinstatement, the company's Tondo Plant, where the respondent was assigned, was shut down. Since the respondent's employment could not be maintained at the Tondo Plant, so the petitioner maintains, it was constrained to discontinue the respondent's payroll reinstatement. Clearly, the respondent is entitled to reinstatement, without loss of seniority rights to another position of similar nature in the company. It should be stressed that while the petitioner manifested the closure of the Tondo Plant, it failed to indicate the absence of an unfilled position more or less of a similar nature as the one previously occupied by the respondent at its other plant/s. However, if the respondent no longer desires to be reinstated, he should be awarded separation pay at the rate of one (1) month for every year of service as an alternative, following settled jurisprudence.

• ***Reinstatement not possible due to old age.***

In **Jaculbe v. Silliman University, [G.R. No. 156934, March 16, 2007],** it was held that reinstatement was already out of the question because petitioner was 71 years old at the time the decision was rendered by the Supreme Court and, therefore, well over the statutory compulsory retirement age. For this reason, separation pay was granted in lieu of reinstatement.

In **Asian Terminals, Inc. v. Marbella, [G.R. No. 149074, August 10, 2006],** while respondents (stevedores) are entitled to reinstatement, however, it may no longer be a feasible option in the light of the fact that they are more than fifty (50) years old and they want to go

home to their respective provinces to retire. Moreover, their relationship with petitioners has already been strained because of this case. Thus, the award of separation pay in lieu of reinstatement was declared proper.

• ***Reinstatement no longer possible because of the death of the employee.***

The death of the employee renders moot the issue of reinstatement. (*Intercontinental Broadcasting Corp. v. Benedicto, G.R. No. 152843, July 20, 2006).*

This is so because the relief of reinstatement has the effect of restoring the employee to the position from which he was removed, *i.e.*, to his *status quo ante* dismissal. This is no longer possible due to the death of the illegally dismissed employee. (*Maxi Security and Detective Agency v. NLRC, G.R. No. 162850, Dec. 16, 2005).*

• ***When position no longer exists, reinstatement to a substantially equivalent position is proper.***

An illegally dismissed employee is entitled to be reinstated to his former position, unless such position no longer exists at the time of his reinstatement, in which case, he should be given a substantially equivalent position in the same establishment without loss of seniority rights. *(Section 4, Rule I, Book VI, Rules to Implement the Labor Code; Pedroso v. Castro, G.R. No. 70361, Jan. 30, 1986).*

However, as held in **Tanduay Distillery Labor Union v. NLRC, [G.R. No. 73352, December 06, 1994],** in the event that the previous positions of petitioners may no longer be open or available considering that more than ten (10) years have since elapsed from the date of their dismissal, the employer has to pay, in lieu of reinstatement and in addition to the backwages, separation pay equivalent to at least one (1) month pay for every year of service.

• ***Reinstatement rendered impossible due to the injury suffered by the employee.***

In **Victory Liner, Inc. v. Race, [G.R. No. 164820, March 28, 2007],** the reinstatement of respondent bus driver was deemed not feasible and unwarranted because of the injury he suffered in an accident resulting in a fractured left leg. There is a serious doubt as to whether the respondent is physically capable of driving a bus. Moreover, petitioner is a common carrier and, as such, is obliged to exercise extra-ordinary diligence in transporting its passengers safely. To allow the respondent to drive the petitioner's bus under such uncertain condition would, undoubtedly, expose to danger the lives of its passengers and its property. This would place the petitioner in jeopardy of violating its extra-ordinary diligence obligation and thus may be subjected to numerous complaints and court suits. Resultantly, in lieu of reinstatement, payment to respondent of separation pay equivalent to one month pay for every year of service is in order. (*See also the resolution in the motion for reconsideration in the same case [Victory Liner, Inc. v. Race, G.R. No. 164820, Dec. 8, 2008]).*

• ***Reinstatement rendered moot and academic by supervening events.***

Reinstatement should no longer be ordered when it is rendered moot and academic by reason of supervening events such as:

1. Declaration of insolvency of the employer by the court. *(Electruck Asia, Inc. v. Meris, G.R. No. 147031, July 27, 2004).*
2. Fire which gutted the employer's establishment and resulted in its total destruction. (*Bagong Bayan Corporation v. Ople, G.R. No. 73334, Dec. 8, 1986).*
3. Closure of the business of the employer. *(Section 4[b], Rule I, Book VI, Rules to Implement the Labor Code; Price v. Innodata Phils., Inc./Innodata Corp., G.R. No.*

178505, Sept. 30, 2008; Philtread Tire & Rubber Corporation v. Vicente, G.R. No. 142759, Nov. 10, 2004).

4. Non-existence of the employee's former position at the time of reinstatement for reasons not attributable to the fault of the employer. *(Section 4[b], Rule I, Book VI, Rules to Implement the Labor Code; Pizza Inn v. NLRC, G.R. No. 74531, June 28, 1988).*
5. Take over of the business of the employer by another company and there is no agreement regarding assumption of liability by the acquiring company. *(Callanta v. Carnation Philippines, G.R. No. 70615, Oct. 28, 1986).*

• ***A managerial employee should not be reinstated if strained relations exist.***

A person holding a managerial position may not be ordered reinstated if strained relations exist. This was the holding in **Golden Donuts, Inc. et al. v. NLRC, [G.R. Nos. 105758-59, February 21, 1994].** The position of manager is an important consideration in determining the validity of reinstatement. If the employee is a laborer, clerk or other rank-and-file employee, there would be no problem in ordering reinstatement with facility. But the employee involved in the instant case was a Vice President for Marketing of the company. An officer in such a key position can work effectively only if she enjoys the full trust and confidence of top management.

But if the alleged strained relations between a managerial employee and his employer was not adequately proven, reinstatement should be ordered. Hence, in **PLDT v. Tolentino, [G.R. No. 143171, September 21, 2004],** the Supreme Court ordered the reinstatement of the managerial employee despite allegation of existence of strained relations inasmuch as the same were not adequately proven by the employer which had the burden of doing so. Strained relations must be proven as a fact.

• ***Reinstatement is irreconcilable with retirement.***

In **PLDT v. Bolso, [G.R. No. 159701, August 17, 2007],** the dismissed employee prayed for reinstatement but later applied for early retirement benefits under the employer's early retirement/redundancy program, the High Court ruled that the employee's plea for reinstatement conflicts with his application for early retirement which the employer denied due to the then pending complaint against him. Reinstatement is plainly irreconcilable with retirement. At any rate, since the employee was dismissed for a just cause, neither he nor his heirs can avail of the retirement benefits.

• ***Reinstatement rendered impossible because employee has reached retirement age under a Retirement Plan.***

In **Torres, Jr. v. NLRC, [G.R. No. 172584, November 28, 2008],** the two petitioners who were ordered reinstated have already reached the retirement age under the Retirement Plan of their employer, San Miguel Corporation (SMC). Thus, it was ruled that the retirement age of 60 years already attained by petitioners as early as 1989 for Edmundo Torres, Jr. and 1990 for Manuel Castellano had set in motion the provisions of SMC's Retirement Plan which is a valid management prerogative. Ultimately, therefore, the Court of Appeals was correct in ruling that the reinstatement of petitioners is no longer feasible. SMC should accordingly take formal steps, in accordance with its Retirement Plan, to effect petitioners' retirement.

DOCTRINE OF STRAINED RELATIONS

• Strained relations or antagonism may effectively bar reinstatement.

In a plethora of cases, the Supreme Court has been consistent in its holding that the existence of strained relations between the employer and the illegally dismissed employee may effectively bar reinstatement of the latter.

• Litigation, by itself, does not give rise to strained relations that may justify non-reinstatement.

No strained relations should arise from a valid and legal act of asserting one's right; otherwise, an employee who asserts his right could be easily separated from the service by merely paying his separation pay on the pretext that his relationship with his employer had already become strained. *(Globe-Mackay Cable and Radio Corporation v. NLRC, G.R. No. 82511, March 3, 1992, 206 SCRA 701, 709).*

Indeed, if the strained relations engendered as a result of litigation are sufficient to rule out reinstatement, then reinstatement would become the exception rather than the rule in cases of illegal dismissal. *(Procter and Gamble Philippines v. Bondesto, G.R. No. 139847, March 5, 2004).*

This doctrine should, therefore, not be used so indiscriminately as to bar the reinstatement of illegally dismissed workers, especially when they themselves have not indicated any aversion to returning to work. It is only normal to expect a certain degree of antipathy and hostility to arise from a litigation between parties, but not in every instance does such an atmosphere of antagonism exist as to adversely affect the efficiency and productivity of the employee concerned. *(Coca-Cola Bottlers Phils., Inc. v. Daniel, G.R. No. 156893, June 21, 2005; Pheschem Industrial Corporation v. Moldez, G.R. No. 161158, May 9, 2005).*

• Nature of position, material in determining validity of "strained relations."

It appears from the rulings of the Supreme Court in cases where the doctrine of "*strained relations*" is invoked that the common denominator which bars reinstatement is the nature of the position of the employee. If the nature of the position requires that trust and confidence be reposed by the employer upon the employee occupying it as would make reinstatement adversely affect the efficiency, productivity and performance of the latter, strained relations may be invoked in order to justify non-reinstatement. Where the employee, however, has no say in the operation of his employer's business, invocation of this doctrine is not proper.

In applying this doctrine in ***Acesite Corporation v. NLRC,* [G. R. No. 152308, January 26, 2005]** and ***Gonzales v. Acesite [Philippines] Hotel Corporation,* [G. R. No. 152321, January 26, 2005]**, the fact that the employee was the Chief of Security of the hotel whose duty was to "manage the operation of the security areas of the hotel to provide and ensure the safety and security of the hotel guests, visitors, management, staff and their properties according to company policies and local laws," was considered as basis thereof since such position is one of trust and confidence, he being in charge of the over-all security of the hotel. Reinstatement, therefore, was held no longer possible and in lieu thereof, separation pay of one (1) month salary for every year of service was ordered paid to the employee.

In not applying this doctrine in the case of ***Abalos v. Philex Mining Corporation,* [G.R. No. 140374, November 27, 2002],** the fact that the complainants are mere rank-and-file workers consisting of cooks, miners, helpers and mechanics of the respondent company was cited as reason therefor. The nature of their positions does not require that trust and confidence be reposed

on them by the employer. Whatever antagonism occasioned by the litigation should not be taken as a bar to their reinstatement.

• ***Criminal prosecution indicates strained relations.***

Criminal prosecution confirms the existence of *"strained relations"* which would render the employee's reinstatement highly undesirable. *(RDS Trucking, v. NLRC, G.R. No. 123941, Aug. 27, 1998).*

As held in **Cabatulan v. Buat, [G.R. No. 147142, February 14, 2005],** the fact that the employee was charged by his employer with qualified theft and was even coerced into withdrawing the labor case filed by the former against the latter, gives rise to no other conclusion except that antagonism already caused a severe strain in their relationship.

SEPARATION PAY

• ***What is separation pay?***

The only instances under the Labor Code and pertinent jurisprudence where the employer is liable to pay separation pay are the following:

1. When ordered as substitute for reinstatement in illegal dismissal cases;
2. When termination is due to closure of establishment or reduction of personnel under Article 283;
3. When termination is due to disease under Article 284;
4. When resignation pay or separation pay (or sometimes called *"financial assistance"*) is required under a unilaterally promulgated voluntary policy or practice of the employer or under an agreement such as a Collective Bargaining Agreement;
5. When employment is deemed terminated after the lapse of six (6) months in cases involving *bona-fide* suspension of the operation of business or undertaking under Article 286;
6. When the employer terminates without just cause, the services of a househelper prior to the expiration of the fixed-term employment under Article 149.

• ***May separation pay be awarded despite lawful dismissal for cause?***

An employee who is dismissed for just cause is generally not entitled to separation pay. In some cases, however, the Supreme Court awards separation pay to a legally dismissed employee on the grounds of equity and social justice. This is not allowed, though, when the employee has been dismissed for serious misconduct or some other causes reflecting on his moral character or personal integrity. (*Etcuban, Jr. vs. Sulpicio Lines, Inc., G. R. No. 148410, Jan. 17, 2005).*

This equitable principle was emphasized again lately in the 2002 case of **San Miguel Corporation vs. Lao**, **[433 Phil. 890, 897, July 11, 2002]** and was further expounded the 2005 decision in **Philippine Commercial International Bank vs. Abad**, **[G. R. No. 158045, February 28, 2005].** As stated in *San Miguel*, where the cause for the termination of employment cannot be considered as one of mere inefficiency or incompetence but an act that constitutes an

utter disregard for the interest of the employer or a palpable breach of trust reposed in him, the grant of separation benefits is hardly justifiable.

In **PLDT vs. NLRC and Abucay**, **[164 SCRA 671],** it was declared that while it would be compassionate to give separation pay to a salesman if he were dismissed for his inability to fill his quota, surely, however, he does not deserve such generosity if his offense is the misappropriation of the receipts of his sales.

In **Gustilo vs. Wyeth Phils., Inc.**, **[G. R. No. 149629, October 4, 2004],** the Court of Appeals, despite its finding that the dismissal was legal, still awarded the complainant separation pay of ₱106,890.00 allegedly by reason of several mitigating factors mentioned in its assailed Decision. The Supreme Court, however, reversed said award based on the afore-mentioned case of *PLDT*. It ruled that an employee who was legally dismissed from employment is not entitled to an award of separation pay. Despite this holding, however, the Supreme Court was constrained not to disturb the award of separation pay in this case because respondent company did not interpose an appeal from said award. Hence, no affirmative relief can be extended to it. A party in a case who did not appeal is not entitled to any affirmative relief.

• ***The San Miguel test.***

In line with the 2002 case of *San Miguel* [supra], it is now a matter of established rule that the question of whether separation pay should be awarded depends on the cause of the dismissal and the circumstances of each case.

Under the *San Miguel* test, separation pay may "exceptionally" be awarded as a "measure of social justice," provided that the dismissal does not fall under either of two circumstances:

(1) There was serious misconduct; or
(2) The dismissal reflected on the employee's moral character.

Simply stated, notwithstanding a valid dismissal, an employee's lack of moral depravity could evoke compassion and thereby compel an award of separation pay. (*PCIB vs. Abad, G. R. No. 158045, Feb. 28, 2005).*

• ***The Toyota doctrine.***

in the 2007 case of **Toyota Motor Phils. Corp. Workers Association [TMPCWA] v. NLRC, [G.R. Nos. 158786 and 158789, October 19, 2007],** it was ruled that in addition to serious misconduct, in dismissals based on the other grounds under Article 282 like willful disobedience, gross and habitual neglect of duty, fraud or willful breach of trust, and commission of a crime against the employer or his family, separation pay should not be conceded to the dismissed employee. In effect, the ruling in this case has expanded the *PLDT* and *San Miguel* doctrines.

This ruling in *Toyota* was affirmed and reiterated in the 2008 case of **Central Philippines Bandag Retreaders, Inc. v. Diasnes, [G.R. No. 163607, July 14, 2008],** involving gross and habitual neglect of duties due to respondent's repeated and continuous absences without prior leave and frequent tardiness. In this case, the Supreme Court in no uncertain terms decreed that labor adjudicatory officials and the Court of Appeals must demur the award of separation pay based on social justice when an employee's dismissal is based on serious

misconduct or willful disobedience; gross and habitual neglect of duty; fraud or willful breach of trust; or commission of a crime against the person of the employer or his immediate family - grounds under Article 282 that sanction dismissal of employees. They must be most judicious and circumspect in awarding separation pay or financial assistance as the constitutional policy to provide full protection to labor is not meant to be an instrument to oppress the employers. The commitment of the Supreme Court to the cause of labor should not embarrass it from sustaining the employers when they are right. In fine, courts should be more cautious in awarding financial assistance to the undeserving and those who are unworthy of the liberality of the law. (*See also Aromin v. NLRC, G.R. No. 164824, April 30, 2008).*

In all cases, the Supreme Court declined to grant termination pay because the causes for dismissal recognized under Article 282 of the Labor Code were serious or grave in nature and attended by willful or wrongful intent or they reflected adversely on the moral character of the employees.

But despite the 2007 *Toyota* ruling, in the December 17, 2008 case of **Bristol Myers Squibb [Phils.], Inc. v. Baban, [G.R. No. 167449],** the Supreme Court, notwithstanding its ruling that respondent's dismissal based on loss of trust and confidence was valid, it still heeded respondent's plea for mercy and awarded separation pay at the rate of one month salary for every year of service as an equitable relief in consideration of his past services rendered and because the cause of his dismissal does not constitute serious misconduct or those that negatively reflected on his moral character. Respondent here was a district manager of petitioner Bristol Myers who had stapled a thank you note from his father who lost in his vice-mayoralty bid in Zamboanga City on the "Mamacare" milk product samples for distribution to petitioner's clients.

• ***Exception to the Toyota doctrine – when termination is based on analogous causes.***

Toyota, however, makes a distinction when the grounds cited are the analogous causes for termination under Article 282 [e], like inefficiency, drug use and others. It declared that in these cases, the NLRC or the courts may opt to grant separation pay anchored on social justice in consideration of the length of service of the employee, the amount involved, whether the act is the first offense, the performance of the employee and the like, using the guideposts enunciated in *PLDT* on the propriety of the award of separation pay.

The best example of this liberality is the case of **Yrasuegui v. Philippine Airlines, Inc., [G.R. No. 168081, October 17, 2008],** where the dismissal of petitioner (an international flight attendant) due to his obesity was held valid as an analogous cause under Article 282 [e] of the Labor Code. The Supreme Court, however, as an act of social justice and for reason of equity, awarded him separation pay equivalent to one-half month's pay for every year of service, including his regular allowances. The Court observed that his dismissal occasioned by his failure to meet the weight standards of his employer was not for serious misconduct and does not reflect on his moral character.

• ***Cases where separation pay was awarded as financial assistance.***

In many cases, the Supreme Court has granted financial assistance to a legally dismissed employee.

In the case of **Piñero v. NLRC, [G.R. No. 149610, August 20, 2004, 437 SCRA 112, 120],** petitioner who was dismissed as a result of an illegal strike, was granted one-half (½) month's pay for the 29 years of his service. His infraction was deemed not so reprehensible or unscrupulous as to warrant complete disregard of his long years of service with no derogatory record.

In **Malabago v. NLRC, [G.R. No. 165465, September 13, 2006],** the High Court affirmed the award of separation pay as financial assistance granted by the Court of Appeals to petitioner despite the fact that the validity of his dismissal on the ground of violation of a company policy which is punishable by dismissal under the employees' manual, was upheld.

In **Aparente, Sr. v. NLRC, [G.R. No. 117652, April 27, 2000, 331 SCRA 82, 93]**, despite the blatant disobedience of company rules, one-half (½) month pay for every year of service was granted to the employee based on equity.

• ***Case where financial assistance instead of retirement benefits was awarded.***

In **Eastern Shipping Lines, Inc. v. Sedan, [G.R. No. 159354, April 7, 2006],** after ruling that respondent employee was not entitled to retirement benefits, the Supreme Court affirmed the award to him of financial assistance in the amount of P200,000.00 for the sake of "social and compassionate justice," in the light of the following special circumstances: that private respondent joined the company when he was a young man of 25 years and stayed on until he was 48 years old; that he had given to the company the best years of his youth, working on board ship for almost 24 years; that in those years, there was not a single report of any transgression by him of any of the company rules and regulations; that he applied for optional retirement under the company's non-contributory plan when his daughter died and for his own health reasons; and that it would appear that he had served the company well, since even the company said that the reason it refused his application for optional retirement was that it still needed his services; that he denies receiving the telegram asking him to report back to work; but that considering his age and health, he preferred to stay home rather than risk further working in a ship at sea.

BACKWAGES

• ***What are backwages?***

Full Backwages have to be paid by an employer as part of the price or penalty he has to pay for illegally dismissing his employee. Other benefits must be paid in addition to backwages. The computation should be based on the wage rate level at the time of the illegal dismissal and not in accordance with the latest, current wage level of the employee's position.

• ***Other benefits must be paid in addition to backwages.***

Following several decisions of the Supreme Court, the following benefits, in addition to the basic salary, should be taken into account in the computation of backwages, if applicable:

1. Fringe benefits or their monetary equivalent. (*Acesite Corporation vs. NLRC, G. R. No. 152308, Jan. 26, 2005).*
2. Increases in compensation and other benefits, including 13th month pay. (*Food Traders House, Inc. vs. NLRC, G. R. No. 120677, Dec. 21, 1998, 300 SCRA 360).*
3. Transportation and emergency allowances. (*Santos vs. NLRC, G. R. No. 76721, Sept. 21, 1987; Soriano vs. NLRC, G. R. No. L-75510, Oct. 27, 1987).*
4. Holiday pay, vacation and sick leaves and service incentive leaves. (*St. Louise College of Tuguegarao vs. NLRC, G. R. No. 74214, Aug. 31, 1989;* On service incentive leave, *see Fernandez vs. NLRC, G. R. No. 105892, Jan. 28, 1998, 285 SCRA 149).*

5. Just share in the service charges. (*Maranaw Hotels & Resort Corporation vs. NLRC, G. R. No. 123880, Feb. 23, 1999).*
6. Gasoline, car and representation allowances. (*Consolidated Rural Bank [Cagayan Valley], Inc. vs. NLRC, G. R. No. 123810, Jan. 20, 1999, 301 SCRA 223).*
7. Any other allowances and benefits or their monetary equivalent. (*Blue Dairy Corporation vs. NLRC, G. R. No. 129843, Sept. 14, 1999).*

The computation of said benefits should be up to the date of reinstatement as provided under Article 279 of the Labor Code. (*Fernandez vs. NLRC, supra).*

• ***Dismissed employee's ability to earn, irrelevant in the award of backwages.***

The award of backwages is not conditioned on the employee's ability or inability to, in the interim, earn any income.

A classic case to illustrate this legal principle is the 2004 case of **Tomas Claudio Memorial College, Inc. vs. CA, [G. R. No. 152568, Feb. 16, 2004].** The petitioner-employer took the position that it cannot be lawfully compelled to pay backwages for the period of time that the private respondent-employee was twice incarcerated in jail on account of his violation of the Dangerous Drugs Act, from June 10, 1996 up to July 5, 1996, and from November 21, 1996 up to February 17, 1997. The Supreme Court, however, ruled that the illegally dismissed employee is entitled to backwages even during the period of his incarceration noting that the first criminal case was dismissed for lack of probable cause and the second has yet to be finally decided, hence, the employee has, in his favor, the presumption of innocence until his guilt is proved beyond reasonable doubt.

• ***Salary increase during period of demotion, not covered by backwages.***

Raised as an issue in **Paguio vs. Philippine Long Distance Telephone Co., Inc.**, **[G. R. No. 154072, December 3, 2002],** is whether petitioner is entitled to an amount equal to 16% of his monthly salary representing his salary increase during the period of his demotion. Petitioner based his right to the award of ₱384,000.00 equivalent to 16% of his monthly salary increase starting from January 1997 on the fact that, throughout his employment until his illegal transfer in 1997, he had been consistently given by the company annual salary increases on account of his above-average or outstanding performance. He claims that his contemporaries now occupy higher positions as they had been promoted several times during the course of this case. Thus, even if he ranked higher and performed better than they during the past years, petitioner has now been left behind career-wise. Petitioner averred that this would not have taken place had he not been illegally transferred. He argued that justice and equity requires that he be given the monetary award deleted by the Court of Appeals from the decision of the NLRC. Undeniably, this particular award which petitioner is seeking is not based on any wage order or decree but on an employee's performance during a certain period, as evaluated according to a specified criteria. Petitioner claims that there is a high probability that he would have been granted the increase had he not been transferred from the Garnet Exchange of respondent PLDT. Petitioner likens his claim to that for backwages in illegal dismissal cases.

The Supreme Court was unconvinced. It ruled:

> "Petitioner's claim, however, is based simply on expectancy or his assumption that, because in the past he had been consistently rated for his outstanding performance and his salary correspondingly increased, it is probable that he would similarly have been given high ratings and salary increases but for his transfer to another position in the company.
>
> "In contrast to a grant of backwages or an award of *lucrum cessans* in the civil law, this contention is based merely on speculation. Furthermore, it assumes that in the other position to which he had been transferred petitioner had not been given any performance evaluation. As held by the Court of Appeals, however, the mere fact that petitioner had been previously granted salary increases by reason of his excellent performance does not necessarily guarantee that he would have performed in the same manner and, therefore, qualify for the said increase later. What is more, his claim is tantamount to saying that he had a vested right to remain as Head of the Garnet Exchange and given salary increases simply because he had performed well in such position, and thus he should not be moved to any other position where management would require his services."

• ***Full backwages, how computed when dismissed employee has reached 60 years of age.***

If the dismissed employee has already reached sixty (60) years of age, the backwages should only cover the time when he was illegally dismissed up to the time when he reached 60 years. Under Article 287, 60 years is the optional retirement age. (*Espejo vs. NLRC, G. R. No. 112678, March 29, 1996, 255 SCRA 430, 435).*

• ***Full backwages, how computed when dismissed employee has reached 65 years of age.***

But in the 2001 case of **St. Michael's Institute vs. Santos, [G. R. No. 145280, Dec. 4, 2001],** where the dismissed employee has already reached the compulsory retirement age of 65, it was ruled that the award of backwages should be computed up to said age. The view of the employer that payment of backwages to the illegally dismissed teacher should be computed only up to December 11, 1993 when she reached 60 years of age cannot be subscribed.

• ***Full backwages, how computed when company has already ceased operations.***

In **Chronicle Securities Corporation vs. NLRC**, **[G. R. No. 157907, Nov. 25, 2004],** where the employer - the Manila Chronicle - had already permanently ceased its operations, full backwages should be computed only up to the date of the closure. To allow the computation of the backwages to be based on a period beyond that would be an injustice to the employer.

• ***Full backwages, how computed when valid retrenchment supervened.***

In **Mitsubishi Motors Philippines Corporation vs. Chrysler Philippines Labor Union**, **[G. R. No. 148738, June 29, 2004],** the illegally dismissed employee was no longer ordered reinstated because of the occurrence of a supervening event – that of retrenchment which covered him because he was a newly regularized employee at the time of his termination. However, such non-reinstatement was not considered a sufficient ground to deny him his backwages, his termination being illegal. In computing the backwages, the Supreme Court considered the date of effectivity of the retrenchment as the date when backwages should be

reckoned. Thus: "Considering that notices of retrenchment were mailed on February 25, 1998 and made effective one month therefrom, respondent Paras should be paid full backwages from the date of his illegal dismissal up to March 25, 1998. Pursuant to Article 283 of the Labor Code, he should be paid separation pay equivalent to one (1) month salary, or to at least one-half month pay for every year of service, whichever is higher, a fraction of at least six months to be considered as one (1) year."

• ***Employer's offer to reinstate does not forestall payment of full backwages.***

In **Condo Suite Club Travel, Inc. vs. NLRC**, **[G. R. No. 125671, January 28, 2000],** backwages were limited by the NLRC from the date of the employee's dismissal up to the time when the employer allegedly offered to reinstate him. It explained that the failure of the employee to work, after the supposed offer was made, can no longer be attributed to the fault of the employer. In reversing the NLRC, the Supreme Court ruled that this does not suffice to provide complete relief to the painful socio-economic dislocation of the employee and his family. As previously stated, an employee who is unjustly dismissed is entitled to his full backwages computed from the time his compensation was withheld from him up to the time of his reinstatement. Mere offer to reinstate a dismissed employee, given the circumstances in this case, is not enough. If the petitioner (employer) were sincere in its intention to reinstate the private respondent (dismissed employee), petitioner should have at the very least reinstated him in its payroll right away. The petitioner should thus be held liable for the entire amount of backwages due the private respondent from the day he was illegally dismissed up to the date of his reinstatement. Only then could observance of labor laws be promoted and social justice upheld.

• ***Distinctions between reinstatement and backwages.***

Reinstatement is distinct from backwages. The award of one does not preclude or bar the other. Both reliefs are rights granted by substantive law which cannot be defeated by mere procedural lapses.

Reinstatement restores the employee who was unjustly dismissed to the position from which he was removed, *i.e.*, to his *status quo ante* dismissal; while the grant of backwages allows the same employee to recover from the employer that which he had lost by way of wages as a result of his dismissal. These twin remedies of reinstatement and payment of backwages make whole the dismissed employee who can then look forward to continued employment. These two remedies give meaning and substance to the constitutional right of labor to security of tenure.

• ***What are the distinctions between separation pay in lieu of reinstatement and backwages?***

1. Separation pay is paid when reinstatement is not possible; while backwages are paid for the compensation which otherwise the employee should have earned had he not been illegally dismissed.

2. The former is computed on the basis of the employee's length of service; while the latter are based on the actual period when he was unlawfully prevented from working.

3. The former is paid as a wherewithal during the period that an employee is looking for another employment; while the latter are paid for the loss of earnings during the period between illegal dismissal and reinstatement.

4. The former is oriented towards the immediate future; while the latter involve the restoration of the past income lost.

5. Separation pay cannot be paid in lieu of backwages.

Needlessly, payment of backwages is not inconsistent with either reinstatement or separation pay in lieu thereof.

DAMAGES AND ATTORNEY'S FEES

• ***What are damages and attorney's fees?***

No proof of pecuniary loss is necessary in order that moral, nominal or exemplary damages may be adjudicated. The assessment of such damages is left to the discretion of the court, according to the circumstances of each case. Normally, if dismissal is attended with bad faith, whimsicality and oppression, the said damages are awarded, including attorney's fees.

Award of attorney's fees when employee is forced to sue. - It is settled that in actions for recovery of wages or where an employee was forced to litigate and has incurred expenses to protect his rights and interests, *even if not so claimed*, an award of attorney's fees equivalent to ten percent (10%) of the total award is legally and morally justifiable.

LEGAL INTEREST ON SEPARATION PAY AND BACKWAGES

• ***Is legal interest on monetary benefits allowed?***

Yes.

• ***Cases where imposition of legal interest was ordered.***

In the 2008 case of **The Hon. Secretary of Labor and Employment v. Panay Veteran's Security and Investigation Agency, Inc., [G.R. No. 167708, August 22, 2008],** the High Court categorically declared that monetary award is subject to legal interest in accordance with the guidelines enunciated in the above-cited case of *Eastern Shipping Lines, Inc. v. Court of Appeals*. The obligation of respondents to pay the lawful claims of petitioners Agapay and Alonso, Jr. was established with reasonable certainty on October 30, 2000 when respondents received the notice of inspection from the labor employment officer. Since such obligation did not constitute a loan or forbearance of money, it was subject to legal interest at the rate of six percent (6%) per annum from that date until the May 10, 2001 order of the DOLE-NCR Regional Director attained finality. From the time the May 10, 2001 order of the DOLE-NCR Regional Director became final and executory, petitioners Agapay and Alonso, Jr. were entitled to twelve percent (12%) legal interest per annum until the full satisfaction of their respective claims.

In **Equitable Banking Corp. v. Sadac, [G.R. No. 164772, June 8, 2006],** twelve percent (12%) interest per annum was imposed on the unpaid backwages awarded to an illegally dismissed employee computed from the time the judgment became final and executory until full satisfaction thereof.

In **Sy v. CA, [G.R. No. 142293, February 27, 2003]**, interest of six per centum (6%) per annum was imposed on the separation pay awarded under Article 284 (disease) to an illegally dismissed employee computed from the finality of the decision until fully paid. According to the Court, the rationale behind the imposition of said interest was to avoid further delay in the payment due the separated worker whose claim was filed way back in 1994. The decision was declared to be "immediately executory." Further, an additional six percent (6%) interest per annum should be charged thereon for any delay, pursuant to the provisions of the Civil Code.

TERMINATION OF EMPLOYMENT OF OVERSEAS FILIPINO WORKERS (OFWs); MONETARY AWARDS

• OFWs are not entitled to the reliefs under Article 279.

The proper basis for the monetary awards of the overseas Filipino workers (OFWs) is Section 10 of R. A. No. 8042 and not Article 279 of the Labor Code. Consequently, the remedies provided for under Article 279 such as reinstatement, or separation pay in lieu of reinstatement or full backwages, are not available to OFWs. This is so because the OFWs are contractual employees whose rights and obligations are governed primarily by the Rules and Regulations of the POEA and, more importantly, by R. A. No. 8042. (*Gu-Miro vs. Adorable, G. R. No. 160952, Aug. 20, 2004).*

• Monetary awards to illegally dismissed OFWs, how reckoned.

Section 10 of Republic Act No. 8042 *(Migrant Workers and Overseas Filipinos Act of 1995), prior to its amendment by R.A. No. 10022 on March 8, 2010,* provides:

> "In case of termination of overseas employment without just, valid or authorized cause as defined by law or contract, the worker shall be entitled to the full reimbursement of his placement fee with interest at twelve percent (12%) per annum, **plus his salaries for the unexpired portion of his employment contract or for three (3) months for every year of the unexpired term, whichever is less**." (Underscoring supplied)

• Rule in Section 10 of R.A. No. 8042 on reckoning of monetary awards to OFWs declared unconstitutional in 2009.

However, the above highlighted rule ceased to have any legal efficacy because in an *en banc* decision in the 2009 case of **Antonio M. Serrano v. Gallant Maritime Services, Inc., [G.R. No. 167614, March 24, 2009],** the Supreme Court declared as unconstitutional the subject clause "*or for three months for every year of the unexpired term, whichever is less*" in the afore-quoted 5th paragraph of Section 10 of R.A. No. 8042 for being discriminatory, among other significant reasons cited therein. Consequent to this ruling, illegally dismissed OFWs are now entitled to all the salaries for the entire unexpired portion of their employment contracts, irrespective of the stipulated term or duration thereof. In other words, the Supreme Court reverted to the old rule prior to the effectivity of R.A. No. 8042 on August 25, 1995 as discussed in the *Edi-Staffbuilders* case [supra].

Noting the disparity between overseas employment and local employment whose employment contract both provide for fixed term, the Supreme Court in this case of *Serrano* said that in sum, prior to R.A. No. 8042, OFWs and local workers with fixed-term employment who were illegally discharged were treated alike in terms of the computation of their money claims: they were uniformly entitled to their salaries for the entire unexpired portions of their contracts. But with the enactment of R.A. No. 8042, specifically the adoption of the subject clause, illegally dismissed OFWs with an unexpired portion of one year or more in their employment contracts have since been differently treated in that their money claims are subject to a 3-month cap, whereas no such limitation is imposed on local workers with fixed-term employment.

The Supreme Court concluded that the subject clause contains a suspect classification in that, in the computation of the monetary benefits of fixed-term employees who are illegally discharged, it imposes a 3-month cap on the claim of OFWs with an unexpired portion of one year or more in their contracts, but none on the claims of other OFWs or local workers with fixed-term employment. The subject clause singles out one classification of OFWs and burdens it with a peculiar disadvantage.

- ***Rule in Section 10 of R.A. No. 8042 which was previously declared unconstitutional in 2009 has been replicated in the amendatory provision of R.A. No. 10022 which was enacted on March 8, 2010.***

Surprisingly, the same rule embodied in the original provision of Section 10 of R.A. No. 8042 has been revived and replicated in the amendatory provision of R.A. No. 10022, to wit:

> "In case of termination of overseas employment without just, valid or authorized cause as defined by law or contract, or any unauthorized deductions from the migrant worker's salary, the worker shall be entitled to the full reimbursement of his placement fee and the deductions made with interest at twelve percent (12%) per annum, **plus his salaries for the unexpired portion of his employment contract or for three (3) months for every year of the unexpired term, whichever is less.**

This leads one to ask whether the ruling in *Serrano v. Gallant Maritime Services, Inc.* declaring the above highlighted portion of Section 10 unconstitutional should still be considered as such under the new law.

The insistence by Congress on this provision despite its earlier adjudication of unconstitutionality and nullity certainly creates a constitutional issue. Did such replication in the newly minted Section 10 of R.A. No. 10022 (approved on March 8, 2010), result in curing its patent nullity and unconstitutionality?

In the light of the rationale behind such declaration of unconstitutionality and nullity which was well ventilated and articulated by the Supreme Court in its March 24, 2009 *en banc* decision in the *Serrano v. Gallant Maritime Services, Inc.* case, it may be opined that the replication thereof in a subsequent law, R.A. No. 10022, does not operate to cure the nullity and unconstitutionality of the provision. It remains to be null and void as its *raison d etre* remains the same.

- ***Prevailing rule is that an OFW who is illegally dismissed is entitled to all the unpaid salaries for the unexpired portion of his contract.***

By reason of this latest *Serrano* doctrine, all past decisions subjecting the monetary award to the afore-mentioned qualifying clause no longer apply. The rule now is that OFWs who are dismissed without just cause are entitled to the payment of their salaries corresponding to the unexpired portion of their fixed-term contract, irrespective of the term of the contract.

- ***All past decisions to the contrary are no longer applicable by reason of the Serrano doctrine.***

Consequently, the duration of the OFW employment contract is no longer material in determining the monetary award as the following rule has already been rendered null and unconstitutional under the *Serrano* doctrine:

1. If the duration of the employment contract is less than one (1) year, an illegally dismissed OFW shall be entitled to all his salaries for the unexpired portion thereof;

2. If the duration of the employment contract is at least one (1) year or more, an illegally dismissed OFW shall be entitled to *"whichever is less"* between his *"salaries for the unexpired portion of his employment contract"* or his salaries *"for three (3) months for every year of the unexpired term."*

• ***A validly dismissed OFW is not entitled to his salary for the unexpired portion of his employment contract.***

An OFW who is dismissed from employment for a valid cause is not entitled to any salary for the unexpired portion of his employment contract. However, if he is dismissed without observance of procedural due process, he is entitled to an indemnity in the form of nominal damages. (*Sadagnot v. Reiner Pacific International Shipping, Inc., G.R. No. 152636, Aug. 8, 2007).*

• ***Monetary award to OFW is not in the nature of separation pay or backwages but a form of indemnity.***

The award of salaries for the unexpired portion of an OFW's employment contract is not an award of backwages or separation pay but a form of indemnity for the OFW who was illegally dismissed. (*Skippers United Pacific, Inc. v. NLRC, G.R. No. 148893, July 12, 2006).*

• ***Only salaries are to be included in the computation of the amount due for the unexpired portion of the contract.***

Only salaries are to be included in the computation of the amount due to an OFW. Allowances are excluded. As held in ***PCL Shipping Philippines, Inc. v. NLRC,*** **[G.R. No. 153031, December 14, 2006],** there is no basis in including the OFW's living allowance as part of the three months salary to which he is entitled under Section 10 of R.A. No. 8042.

And as held in ***Antonio M. Serrano v. Gallant Maritime Services, Inc.,*** [supra], there is likewise no basis to include overtime, holiday and leave pay in the said computation. The word *"salaries"* in the 5th paragraph of Section 10 of R.A. No. 8042 does not include overtime and leave pay. For seafarers like petitioner, DOLE Department Order No. 33, Series 1996, provides a Standard Employment Contract of Seafarers, in which salary is understood as the basic wage, exclusive of overtime, leave pay and other bonuses; whereas overtime pay is compensation for all work *"performed"* in excess of the regular eight hours, and holiday pay is compensation for any work *"performed"* on designated rest days and holidays. (*See also Philippine Transmarine Carriers, Inc. v. Carilla, G.R. No. 157975, June 26, 2007).*

• ***Entitlement to overtime pay of OFWs.***

As far as entitlement to overtime pay is concerned, the correct criterion in determining whether or not sailors are entitled to overtime pay is not whether they were on board and cannot leave ship beyond the regular eight (8) working hours a day, but whether they actually rendered service in excess of said number of hours. *(Stolt-Nielsen Marine Services (Phils.), Inc. v. NLRC, 332 Phil. 340, 352 [1996]).*

In the 2006 case of **PCL Shipping Philippines, Inc. v. NLRC, [G.R. No. 153031, Dec. 14, 2006]**, the High Tribunal found that private respondent OFW was not entitled to overtime pay because he failed to present any evidence to prove that he rendered service in excess of the regular eight working hours a day. (*See also Centennial Transmarine, Inc. v. Dela Cruz, G.R. No. 180719, Aug. 22, 2008).*

This holds true even in cases of *guaranteed* overtime pay as held in **Bahia Shipping Services, Inc. v. Chua, [G.R. No. 162195, April 8, 2008]; Santiago v. CF Sharp Crew**

Management, Inc., [G.R. No. 162419, July 10, 2007]; and the earlier case of Stolt-Nielsen Marine Services (Phils.), Inc. v. NLRC, [328 Phil. 161 (1996)].

• ***Reimbursement of placement fee included in the monetary award to an OFW.***

In addition to the monetary award discussed above, an illegally dismissed OFW is entitled to the full reimbursement of his placement fee with twelve percent (12%) interest per annum. *(Phil. Employ Services and Resources, Inc. v. Paramio, G.R. No. 144786, April 15, 2004).*

In the 2005 case of **Athenna International Manpower Services, Inc. v. Villanos, [G.R. No. 151303, April 15, 2005],** the same award of full reimbursement of the OFW's placement fee with interest at twelve percent (12%) *per annum* was ordered by the Supreme Court, with the qualification, however, that while respondent was assessed ₱94,000 in placement fee, he paid only ₱30,000 on the agreement that the balance of ₱64,000 would be paid on a monthly salary deduction upon his deployment. Hence, respondent cannot be granted reimbursement of the entire assessed amount of ₱94,000. He is only entitled to the reimbursement of the amount of placement fee he actually paid, which is the ₱30,000 he gave as downpayment plus interest at twelve percent (12%) *per annum*.

• ***Costs of repatriation and transport of personal belongings should be included in the monetary award to an illegally dismissed OFW.***

Under Section 15 of R.A. No. 8042, the repatriation of the OFW and the transport of his personal belongings are the primary responsibilities of the agency which recruited or deployed him. All the costs attendant thereto should be borne by the agency concerned and/or its principal.

• ***Right to recover cost of repatriation from OFW's wages.***

The right of the employer to recover the cost of repatriation from the wages and earnings of the OFW hinges on whether the latter was legally or illegally dismissed. As held in the case of **PCL Shipping Philippines, Inc. v. NLRC, [G.R. No. 153031, December 14, 2006],** the employer has the right to recover the cost of repatriation from the seaman's wages and other earnings only if the concerned seaman is validly discharged for disciplinary measures. In the present case, however, since petitioners failed to prove that private respondent OFW was validly terminated from employment on the ground of desertion, it only follows that they do not have the right to deduct the costs of private respondent's repatriation from his wages and other earnings.

• ***Effect of unauthorized substitution or alteration of POEA-approved employment contract.***

R.A. No. 8042 explicitly prohibits the substitution or alteration to the prejudice of the worker, of employment contracts already approved and verified by the POEA from the time of actual signing thereof by the parties up to and including the period of their expiration without the approval of the POEA. *(See Sec. 6[i], R.A. No. 8042).*

The unauthorized alteration in the employment contract of the OFW in the case of **Placewell International Services Corp. v. Camote, [G.R. No. 169973, June 26, 2006],** particularly the diminution in his salary from US$370.00 to SR800.00 per month, was declared void for violating the POEA-approved contract which set the minimum standards, terms, and conditions of his employment. Thus, the original POEA-approved employment contract of the OFW subsists despite the so-called new agreement with the foreign employer at the Kingdom of Saudi Arabia, to which he was deployed by petitioner. Consequently, the solidary liability of petitioner with the foreign employer for the OFW's money claims continues in accordance with Section 10 of R.A. No. 8042.

• ***Monetary awards in foreign currency; how paid.***

In case the salary of an illegally dismissed employee is in foreign currency (say, US Dollars) as in the case of OFWs, the monetary award equivalent to the salary for the unexpired portion should be paid at its prevailing peso equivalent at the time of payment in accordance with Republic Act No. 8183 which provides in its Section 1 that "[a]ll monetary obligations shall be settled in the Philippine currency which is legal tender in the Philippines. However, the parties may agree that the obligation or transaction shall be settled in any other currency at the time of payment." *(Republic Act No. 8183 entitled "An Act Repealing Republic Act Numbered Five Hundred Twenty-Nine Entitled 'An Act to Assure the Uniform Value of Philippine Coin and Currency'"; Asia World Recruitment, Inc. vs. NLRC, G. R. No. 113363, Aug. 24, 1999).*

• ***Joint and solidary obligation of local agency and foreign principal.***

Private employment or recruitment agencies are jointly and severally liable with its principal, the foreign-based employer, for all claims filed by recruited workers which may arise in connection with the recruitment agreements or employment contracts. (*Sevillana vs. I.T. [International] Corp., supra; Empire Insurance Company vs. NLRC, 294 SCRA 263).*

PERSONAL LIABILITY OF STOCKHOLDERS OR CORPORATE OFFICERS FOR CLAIMS OF EMPLOYEES.

• ***Concept and legal basis.***

As a general rule, only the employer-corporation, partnership, association or any other entity, and not its officers, which may be held liable for illegal dismissal of employees or for other wrongful acts. (*Brent Hospital, Inc. vs. NLRC, G. R. No. 117593, July 10, 1998).*

Hence, responsibility for the payment of separation pay in lieu of reinstatement, backwages, moral and exemplary damages, attorney's fees and other monetary awards in an illegal dismissal case devolves upon the employer-corporation. (*Seaborne Carriers Corporation vs. NLRC, G. R. No. 88795, Oct. 04, 1994).*

To justify solidary liability, there must be an allegation or showing that the officers of the corporation deliberately or maliciously designed to evade the financial obligation of the corporation to its employees or a showing that the officers indiscriminately stopped its business to perpetrate an illegal act as a vehicle for the evasion of existing obligations, in circumvention of statutes, and to confuse legitimate issues. (*Reahs vs. NLRC, G. R. No. 117473, April 15, 1997).*

In **Acesite Corporation vs. NLRC**, **[G. R. No. 152308, January 26, 2005],** the NLRC declared the corporate officers of a hotel solidarily liable in order "to deter other foreign employer[s] from repeating the inhuman treatment of their Filipino employees who should be treated with equal respect especially in their own land and prevent further violation of their human rights as employees." The Supreme Court disagreed and reversed the said finding of the NLRC considering that the "records of the case do not show any inhuman treatment of the (illegally dismissed employee) and the allegation of bad faith or malice was not proven. That the superiors just happened to be foreigners is of no moment.

• ***When officers are solidarily liable.***

In **A. C. Ransom Labor Union-CCLU vs. NLRC**, [L-69494, June 10, 1986, 142 SCRA 269], it was ruled that a corporation is the employer only in its technical sense. Being an artificial person, there must be a natural person who should be acting for its interest. The term "*employer*," according to Article 212 [e] of the Labor Code, "*includes any person acting in the interest of an employer, directly or indirectly.*" If not so included, the employees will have no recourse if corporate employers will evade the payment of their lawful claims.

In **NYK International Knitwear Corporation Philippines vs. NLRC**, [G. R. No. 146267, February 17, 2003], the Supreme Court, conformably with its ruling in *A. C. Ransom* [supra], held the manager as falling within the meaning of an "employer" as contemplated under Article 212 [e] of the Labor Code, who may be held jointly and severally liable for the obligations of the corporation to its dismissed employees. Pursuant to prevailing jurisprudence, the manager cannot be exonerated from her joint and several liability in the payment of monetary award to the illegally dismissed employee in her capacity as manager and responsible officer of the company.

• ***Rule when company ceased operations.***

When the company ceased to operate, the officers, particularly the president, may be held liable for the payment of the employee's claims. (*Gudez vs. NLRC, G. R. No. 183023, March 22, 1990).*

• ***The corporate officer must be identified as such to hold him liable.***

The rule is clear. A person cannot be held jointly and severally liable for the obligations of the company arising from illegal dismissal if the dismissed employee failed to establish that such person is a stockholder or an officer thereof. (*Concorde Hotel vs. CA, G. R. No. 144089, Aug. 9, 2001).*

• ***Absence of clear identification of officer directly responsible, the President or highest officer should be held liable.***

In the absence of a clear identification of the officer directly responsible for failure to pay backwages or other monetary claims, it was held in *Equitable Banking Corporation vs. NLRC,* [G. R. No. 102467, June 13, 1997, 273 SCRA 352], that the President of the corporation should be considered as the *"officer"* who should be held liable.

The reason is simple: as held in **Kay Products, Inc. vs. CA**, [G. R. No. 162472, July 28, 2005], citing **Naguiat vs. NLRC**, [G. R. No. 116123, March 13, 1997, 269 SCRA 564], the president of the company who actively manages the business, falls within the meaning of an "*employer*" as contemplated by the Labor Code, who may be held jointly and severally liable for the obligations of the corporation to its dismissed employees.

The rule, of course, is different if it was the President who was dismissed and who filed the claim for unpaid wages. In this situation, *Equitable* [supra] pronounced that it is the Vice-President of the company who should be held liable being the highest and most ranking official of the corporation next to the complaining President.

• ***Corporate officers cannot be held liable absent any finding in the decision to that effect.***

Tan vs. Timbal, Jr., [G. R. No. 141926, July 14, 2004], says that if the Labor Arbiter neither made any finding in his decision that the corporate officer acted with malice or bad faith in ordering the suspension or dismissal of the employee nor did he hold the said corporate officer liable, either jointly or severally with the corporation, for the monetary award in favor of the employee, the corporate officer cannot be held liable for the said monetary awards. More so in a case where the decision of the Labor Arbiter, for failure of the parties to appeal therefrom, had already become final and executory.

Coca-Cola Bottlers Phils., Inc. vs. Daniel, [G. R. No. 156893, June 21, 2005], declares that the mere fact that the president and chief executive officer, assistant vice-president and general manager, and plant security officer were impleaded in the case does not make them solidarily liable - absent any showing - as in this case - that the dismissal was attended with malice or bad faith. It appears that the only reason they were impleaded was the fact that they were officers and/or agents of petitioner company.

• ***Decision must state in its fallo that the obligation is solidary.***

There is a solidary liability only when the obligation expressly so states, when the law so provides or when the nature of the obligation so requires. (*Inciong, Jr. vs. CA, 257 SCRA 578 [1996]).*

When it is not provided in a judgment that the defendants are liable to pay jointly and severally a certain sum of money, none of them may be compelled to satisfy in full said judgment.

In the dispositive portion of the Labor Arbiter's decision in the 2000 case of **Industrial Management International Development Corp. vs. NLRC**, [G. R. No. 101723, May 11, 2000], the word *"solidary"* does not appear. The *fallo* expressly states the parties liable without mentioning therein that their liability is solidary. In this case, their liability should merely be joint. Moreover, even granting that the Labor Arbiter has committed a mistake in failing to indicate in the dispositive portion that the liability of respondents therein is solidary, the correction - which is substantial - can no longer be allowed because the judgment has already become final and executory. Once a decision or order becomes final and executory, it is removed from the power or jurisdiction of the court which rendered it to further alter or amend it

STATUS OF EMPLOYMENT

• ***What are the kinds of employment?***

1. *"Regular employment"* which is attained in either of three (3) ways, to wit:

   a. **By nature of work.** The employee has been engaged to perform activities which *are usually necessary or desirable in the usual business or trade of the employer.*

b. **By period of service.** The employee has rendered *at least one year of service*, whether such service is continuous or broken, with respect to the activity in which he is employed and his employment shall continue while such activity exists.

c. **By probationary employment.** The employee is allowed to work *after a probationary period*.

2. *"Project employment"* where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee.

3. *"Seasonal employment"* where the work or service to be performed by the employee is seasonal in nature and the employment is for the duration of the season.

4. *"Casual employment"* where an employee is engaged to perform a job, work or service which is merely incidental to the business of the employer, and such job, work or service is for a definite period made known to the employee at the time of engagement; provided, that any employee who has rendered at least one (1) year of service, whether such service is continuous or not, shall be considered a regular employee with respect to the activity in which he is employed and his employment shall continue while such activity exists.

5. *"Probationary employment"* where the employee is on trial by an employer during which the employer determines the qualification of the employee for regular employment.

6. *"Fixed-period employment"* contracts are not limited to those by nature, seasonal or for specific projects with pre-determined dates of completion provided under the Labor Code. They also include contracts to which the parties by free choice, have assigned a specific date of termination.

7. *"Part-time employment"* is a single, regular or voluntary form of employment with hours of work substantially shorter than those considered as normal in the establishment.

REGULAR EMPLOYMENT

• ***Summary of principles on regular employment:***

➢ ***Significance of the 1st and 2nd paragraphs of Article 280.***

Article 280 is composed of two (2) paragraphs. Once it is established that the employees are regular under the *first* paragraph of Article 280, there is no more need to dwell further on the question of whether or not they have rendered one (1) year of service under the *second* paragraph thereof. *(San Miguel Corporation v. NLRC, G.R. No. 125606, Oct. 7, 1998).*

➢ ***Written or oral agreement, immaterial to regularity of employment.***

➢ ***Evidence to prove regularity of employment.***

There are certain kinds of evidence which have been declared as admissible to prove regularity of employment. In the case of ***Cocomangas Hotel Beach Resort v. Visca,*** **[G.R. No. 167045, August 29, 2008],** that respondents were regular employees was further bolstered by the following substantial

evidence: (a) the SSS Quarterly Summary of Contribution Payments listing respondents as employees of petitioners; (b) the Service Record Certificates stating that respondents were employees of petitioners for periods ranging from three to twelve years and all have given "very satisfactory performance"; and (c) petty cash vouchers showing payment of respondents' salaries and holiday and overtime pays.

- ***Commission or per piece basis of compensation is only a mode of paying the compensation of the employee but has no effect on regularity of employment.***
- ***TV and radio talents are, as a general rule, not employees but independent contractors.***

Sonza v. ABS-CBN Broadcasting Corp., [G.R. No. 138051, June 10, 2004].

- ***When talents are deemed regular employees.***

Respondents in **Consolidated Broadcasting System, Inc. v. Oberio, [G.R. No. 168424, June 8, 2007],** who were employed as drama talents by DYWB-Bombo Radyo, a radio station owned and operated by petitioner, were also declared as regular employees. They reported for work daily for six days in a week and were required to record their drama production in advance. Some of them were employed by petitioner since 1974, while the latest one was hired in 1997. Their drama programs were aired not only in Bacolod City but also in the sister stations of DYWB in the Visayas and Mindanao areas. Note that under *Policy Instruction No. 40* [supra], petitioner is obliged to execute the necessary contract specifying the nature of the work to be performed, rates of pay, and the programs in which they will work. Moreover, project or contractual employees are required to be appraised of the project they will undertake under a written contract. This was not complied with by the petitioner, justifying the reasonable conclusion that no such contracts exist and that respondents were in fact regular employees. Further, respondents' employment with petitioner passed the *"four-fold test"* on the existence of employer-employee relationship.

In **Dumpit-Murillo v. CA, [G.R. No. 164652, June 8, 2007],** the Supreme Court also departed from the *Sonza* ruling [supra]. On October 2, 1995, under Talent Contract No. NT95-1805, private respondent Associated Broadcasting Company (ABC) hired petitioner Thelma Dumpit-Murillo as a newscaster and co-anchor for *Balitang-Balita*, an early evening news program. The contract was for a period of three (3) months. It was renewed under Talent Contracts Nos. NT95-1915, NT96-3002, NT98-4984 and NT99-5649. In addition, petitioner's services were engaged for the program "*Live on Five*." On September 30, 1999, after four (4) years of repeated renewals, petitioner's talent contract expired. Two weeks after the expiration of the last contract, petitioner sent a letter to Mr. Jose Javier, Vice President for News and Public Affairs of ABC, informing the latter that she was still interested in renewing her contract subject to a salary increase. Thereafter, petitioner stopped reporting for work. On November 5, 1999, she wrote Mr. Javier another letter following up on her employment. A month later, petitioner sent a demand letter to ABC, demanding: (a) reinstatement to her former position; (b) payment of unpaid wages for services rendered from September 1 to October 20, 1999 and full backwages; and (c) payment of

13th month pay, vacation, sick, or service incentive leaves and other monetary benefits due to a regular employee starting March 31, 1996. ABC replied that a check covering petitioner's talent fees for September 16 to October 20, 1999 has been processed and prepared but that the other claims of petitioner have no basis in fact or in law. Subsequently, petitioner filed a complaint for illegal dismissal. The Supreme Court ruled:

> "In our view, the requisites for regularity of employment have been met in the instant case. Gleaned from the description of the scope of services aforementioned, petitioner's work was necessary or desirable in the usual business or trade of the employer which includes, as a pre-condition for its enfranchisement, its participation in the government's news and public information dissemination. In addition, her work was continuous for a period of four years. This repeated engagement under contract of hire is indicative of the necessity and desirability of the petitioner's work in private respondent ABC's business."

- ***Production Assistants are not talents.***

It was held in **ABS-CBN Broadcasting Corp. v. Nazareno, [G.R. No. 164156, September 26, 2006],** that it is of no moment that petitioner hired respondents as *"talents."* The fact that respondents received pre-agreed *"talent fees"* instead of salaries, that they did not observe the required office hours, and that they were permitted to join other productions during their free time are not conclusive of the nature of their employment. Respondents, who are Production Assistants, cannot be considered *"talents"* because they are not actors or actresses or radio specialists or mere clerks or utility employees. They are regular employees who perform several different duties under the control and direction of ABS-CBN executives and supervisors.

- ***A newspaper columnist is not an employee of the newspaper publishing the column.***

The case of **Orozco v. The Fifth Division of the Honorable Court of Appeals, [G.R. No. 155207, August 13, 2008]** raises a novel question never before decided in our jurisdiction – whether a newspaper columnist is an employee of the newspaper which publishes the column. In holding that petitioner Orozco, who is a newspaper columnist of the Philippine Daily Inquirer (PDI), is not an employee of PDI, the Supreme Court applied the control test and cited, *inter alia*, its parallel to the case of *Sonza v. ABS-CBN Broadcasting Corp.*, [G.R. No. 138051, June 10, 2004]. It thus held that petitioner was engaged as a columnist for her talent, skill, experience, and her unique viewpoint as a feminist advocate. How she utilized all these in writing her column was not subject to dictation by respondent. As in *Sonza*, respondent PDI was not involved in the actual performance that produced the finished product. It only reserved the right to shorten petitioner's articles based on the newspaper's capacity to accommodate the same. This fact was not unique to petitioner's column. It is a reality in the newspaper business that space constraints often dictate the length of articles and columns, even those that regularly appear therein. Furthermore, respondent PDI did not

supply petitioner with the tools and instrumentalities she needed to perform her work. Petitioner only needed her talent and skill to come up with a column every week. As such, she had all the tools she needed to perform her work. Considering that respondent PDI was not petitioner's employer, it cannot be held guilty of illegal dismissal.

PROJECT EMPLOYMENT

a. Concept.

As defined by law, project employees are those hired:

1. for a specific project or undertaking; and
2. the completion or termination of such project has been determined at the time of their engagement.

b. Principal test of project employment.

The principal test of project employment, as distinguished from regular employment, is whether or not the project employees were assigned to carry out a specific project or undertaking, the duration and scope of which were specified at the time the employees were engaged for that project. (*Equipment Technical Services v. CA, G.R. No. 157680, Oct. 8, 2008).*

c. Indicators of project employment.

Either one or more of the following circumstances, among others, may be considered as indicator/s that an employee is a project employee:

1. The duration of the specific/identified undertaking for which the worker is engaged is reasonably determinable.
2. Such duration, as well as the specific work/service to be performed, is defined in an employment agreement and is made clear to the employee at the time of hiring.
3. The work/service performed by the employee is in connection with the particular project or undertaking for which he is engaged.
4. The employee, while not employed and awaiting engagement, is free to offer his services to any other employer.
5. The termination of his employment in the particular project/undertaking is reported to the Regional Office of the Department of Labor and Employment having jurisdiction over the workplace, within thirty (30) days following the date of his separation from work, using the prescribed form on employees' terminations or dismissals or suspensions.
6. An undertaking in the employment contract by the employer to pay completion bonus to the project employee as practiced by most construction companies. *(Section 2.2., Department Order No. 19, Series of 1993).*

d. Project employees should be informed of their status as such at inception of the employment relationship.

The duration of the project employment as well as the particular work or service to be performed should be defined in an employment agreement and must be made clear to the employees at the time of hiring. Failure to do so would make them regular employees. (*Abesco Construction and Development Corp. v. Ramirez, G.R. No. 141168, April 10, 2006).*

e. Failure to present contract of project employment means that employees are regular.

While the absence of a written contract does not automatically confer regular status, it has been construed by the Supreme Court as a red flag in cases involving the question of whether the workers concerned are regular or project employees.

In ***Belle Corp. v. Macasusi,* [G.R. No. 168116, April 22, 2008],** ***Grandspan Development Corporation v. Bernardo,* [G.R. No. 141464, September 21, 2005, 470 SCRA 461, 470], and *Audion Electric Co., Inc. v. NLRC,* [G.R. No. 106648, June 17, 1999, 308 SCRA 341, 350],** the High Court took note of the fact that the employer was unable to present employment contracts signed by the workers, which stated the duration of the project.

f. When may a project employee become regular employee?

A project employee, according to ***Maraguinot, Jr. v. NLRC,* [G.R. No. 120969, January 22, 1998, 284 SCRA 539]**, may acquire the status of a regular employee when the following factors concur:

1. There is a continuous (as opposed to intermittent) rehiring of project employees even after cessation of a project for the same tasks or nature of tasks; and
2. The tasks performed by the alleged "*project employee*" are vital, necessary and indispensable to the usual business or trade of the employer.

g. Regular employment is inconsistent with project employment.

Regular employees cannot certainly be at the same time project employees. Article 280 states that regular employees are those whose work is necessary or desirable to the usual business of the employer. The two (2) exceptions mentioned therein following the general description of regular employees refer to either *project* or *seasonal* employees.

h. Intervals in employment contracts indicate project employment.

Intervals in the employees' employment contracts would bolster the company's position that, indeed, they are project employees. Since their work depends on availability of such contracts or projects, necessarily the employment of its workforce is not permanent but coterminous with the projects to which they are assigned and from whose payrolls they are paid. It would be extremely burdensome for their employer to retain them as permanent employees and pay them wages even if there are no projects to work on.

i. Continuous, as opposed to intermittent, rehiring shows that employee is regular.

Even in instances where the employee is hired as a project employee from the onset, "once such an employee has been: (1) continuously, as opposed to intermittently, rehired by the same employer for the same tasks or nature of tasks; and (2) these tasks are vital, necessary and indispensable to the usual business or trade of the employer, then the employee must be deemed a *regular employee*." *(PLDT v. Ylagan, G.R. No. 155645, Nov. 24, 2006).*

j. "Project-to-project" basis of employment.

The Supreme Court has upheld the validity of a contract of employment on a "*project-to-project*" basis provided that "the period was agreed upon knowingly and voluntarily by the parties, without any force, duress or improper pressure brought to bear upon the employee and absent any other circumstances vitiating his consent, or where it satisfactorily appears that the employer and employee dealt with each other on more or less equal terms with no moral dominance whatever being exercised by the former xxx." *(Salinas v. NLRC, G.R. No. 114671,*

Nov. 24, 1999; Caramol v. NLRC, G.R. No. 102973, Aug. 24, 1993, 225 SCRA 582, quoting Brent School v. Zamora, G.R. No. 48494, Feb. 5, 1990, 181 SCRA 702).

k. Length of service not controlling determinant of employment tenure.

The simple fact that the employment as project employees has gone beyond one (1) year does not detract from, or legally dissolve, their status as project employees. The *second* paragraph of Article 280 of the Labor Code providing that an employee who has served for at least one (1) year shall be considered a regular employee relates to *casual* employees, *not* to *project* employees.

In **Caseres v. Universal Robina Sugar Milling Corp. [URSUMCO], [G.R. No. 159343, September 28, 2007],** the rule was reiterated that the fact that petitioners were constantly rehired does not *ipso facto* establish that they became regular employees. Their respective contracts with respondent show that there were intervals in their employment. In petitioner Caseres' case, while his employment lasted from August 1989 to May 1999, the duration of his employment ranged from one day to several months at a time, and such successive employments were not continuous. With regard to petitioner Pael, his employment never lasted for more than a month at a time. These facts support the conclusion that they were indeed project employees, and since their work depended on the availability of such contracts or projects, necessarily the employment of respondent's work force was not permanent but coterminous with the projects to which they were assigned and from whose payrolls they were paid. As ruled in *Palomares v. NLRC,* [G.R. No. 120064, August 15, 1997, 343 Phil. 213], it would be extremely burdensome for their employer to retain them as permanent employees and pay them wages even if there were no projects to work on.

l. When length of service of project employees indicates regularity of employment.

Indeed, according to the Supreme Court in **PNOC-Energy Development Corp. v. NLRC, [G.R. No. 169353, April 13, 2007],** while length of time may not be the controlling test for project employment, it is vital in determining if the employee was hired for a specific undertaking or tasked to perform functions vital, necessary and indispensable to the usual business or trade of the employer. In the instant case, respondents had been project employees several times over. Their employment ceased to be coterminous with specific projects when they were repeatedly rehired by petitioner.

Thus, as declared in **Equipment Technical Services v. CA, [G.R. No. 157680, October 8, 2008]** and **Phesco, Inc. v. NLRC [G.R. Nos. 104444-49, December 27, 1994, 239 SCRA 446, 449],** where the employment of project employees is extended long after the supposed project had been finished, the employees are removed from the scope of project employment and they should be considered regular employees. Repeated extensions of the employment contracts long after the completion of the project for which they were allegedly hired will make them regular employees.

By then, the employees had already gone through the status of project employees and their employments became non-coterminous with specific projects when they started to be continuously rehired due to the demands of the employer's business and were re-engaged for many more projects without interruption. *(Tomas Lao Construction, v. NLRC, G.R. No. 116781, Sept. 5, 1997; See also Chua v. CA, G.R. No. 125837, Oct. 6, 2004).*

m. Termination of employment of project and regular employees, distinguished.

The services of project employees are coterminous with the project or any phase thereof and may be terminated upon the end or completion of the project or phase thereof for which they were hired.

Regular employees, in contrast, enjoy security of tenure and are legally entitled to remain in the service of their employer and to hold on to their work or position until their services are terminated by any of the modes of termination of service recognized under the Labor Code.

SEASONAL EMPLOYMENT

a. Concept.

A "*seasonal employee*" is one whose work or service to be performed is seasonal in nature and the employment is for the duration of the season. *(Article 280, Labor Code; Section 5, Rule I, Book VI of the Rules to Implement the Labor Code).*

b, Regular seasonal employment.

Seasonal employees may attain regularity in their employment as such. Once they attained such regularity, they are properly to be called *"regular seasonal employees."*

Regular seasonal workers are called to work from time to time, mostly during certain season. The nature of their relationship with the employer is such that during off-season, they are temporarily laid off but they are re-employed during the season or when their services may be needed. They are not, strictly speaking, separated from the service but are merely considered as on leave of absence without pay until they are re-employed. Their employment relationship is never severed but only suspended. As such, they can be considered as being in the regular employment of the employer.

c. Requisites for regularity of employment of seasonal employees.

The case of ***Hacienda Fatima v. National Federation of Sugarcane Workers - Food and General Trade,* [G.R. No. 149440, January 28, 2003]**, enunciates the requisites in order that a seasonal employee may be deemed to have attained regularity of employment as such, thus:

1. The seasonal employee should perform work or services that are seasonal in nature; and
2. They must have also been employed for more than one (1) season.

Both requisites should concur in order that the employee may be classified as regular seasonal employee. If the seasonal worker is engaged only for the duration of one (1) season, then, he does not attain regularity of employment as a seasonal worker.

d. Regular seasonal workers, if not rehired for the next season, are deemed illegally dismissed.

According to the 2003 case of *Hacienda Fatima* [supra], the refusal of the employer to use the services of the regular seasonal workers - even if they were ready, able and willing to perform their usual duties whenever these were available - and hiring of other workers to perform the tasks originally assigned to them amounts to their illegal dismissal. Where there is no showing of clear, valid and legal cause for the termination of employment, the law considers the matter a case of illegal dismissal and the burden is on the employer to prove that the termination was for a valid and authorized cause.

CASUAL EMPLOYMENT

a. Meaning of casual employment.

There is casual employment where an employee is engaged to perform a job, work or service which is merely incidental to the business of the employer, and such job, work or service is for a definite period made known to the employee at the time of engagement.

b. Proviso in the second paragraph of Article 280 refers only to casual employees.

The proviso in the *second* paragraph of Article 280 which provides that an employee who has served for at least one (1) year shall be considered a regular employee, refers and relates *only* to casual employees, and is not applicable to those who fall within the definition of said Article's *first* paragraph, *i.e.*, project employees, etc.

c. Casual employee becomes regular after one year of service by operation of law.

Generally, a casual employee who has not rendered at least one (1) year of service, is not a regular employee or does not become one. Consequently, he may be legally dismissed before the lapse of the one-year period. *(Capule, v. NLRC, G.R. No. 90653, Nov. 12, 1990).*

d. Reckoning of the one (1) year period.

The one (1) year period mentioned in the *second* paragraph of Article 280 after which the casual employee becomes a regular employee should be reckoned from the hiring date. (*Kimberly-Clark [Phils.], Inc. v. Secretary of Labor, G.R. No. 156668, November 23, 2007*).

e. Repeated rehiring of a casual employee makes him a regular employee.

If the casual employee has been performing the job for at least one (1) year, even if the performance is not continuous or merely intermittent, the law deems the repeated and continuing need for its performance as sufficient evidence of the necessity, if not indispensability, of that activity to the employer's business. Consequently, the employment is considered regular but only with respect to such activity and while such activity exists. *(Tan v. Lagrama, G.R. No. 151228, Aug. 15, 2002; Romares v. NLRC, G.R. No. 122327, Aug. 19, 1998).*

FIXED-TERM EMPLOYMENT

a. No Labor Code provision on fixed-term employment.

Article 280 does not expressly provide for fixed-period employment. While the Supreme Court has recognized the validity of fixed-term employment contracts, it has consistently held that this is the exception rather than the general rule. More importantly, a fixed-term employment is valid only under certain circumstances as enunciated in the leading case of *Brent*

b. Criteria for the validity of fixed-term contracts of employment.

In the case of ***Philippine National Oil Company-Energy Development Corporation v. NLRC,* [G.R. No. 97747, March 31, 1993],** the Supreme Court laid down two (2) criteria under which fixed contracts of employment cannot be said to be in circumvention of security of tenure, to wit:

1. The fixed period of employment was knowingly and voluntarily agreed upon by the parties, without any force, duress or improper pressure being brought to bear upon the employee and absent any other circumstances vitiating his consent; or

2. It satisfactorily appears that the employer and employee dealt with each other on more or less equal terms with no moral dominance whatever being exercised by the former on the latter. *(See also Philips Semiconductors [Phils.], Inc. v. Fadriquela, G.R. No. 141717, April 14, 2004; Labayog v. M.Y. San Biscuits, Inc., G.R. No. 148102, July 11, 2006; Medenilla v. Philippine Veterans Bank, G.R. No. 127673, March 13, 2000).*

If the foregoing criteria are not present, the fixed-term contract of employment should be struck down for being illegal.

c. Fixed-term employment is valid even if duties are usually necessary or desirable in the employer's usual business or trade.

Even if an employee is engaged to perform activities that are usually necessary or desirable in the usual trade or business of the employer, it does not preclude the fixing of employment for a definite period. (*Caparoso v. CA, G.R. No. 155505, February 15, 2007*).

d. Employee is deemed regular if contract failed to state the specific fixed period of employment.

In case the contract of employment failed to specify the date of its effectivity and the date of its expiration, the employment is deemed regular and not fixed-term.

Comparing ***Poseidon Fishing v. NLRC,* [G.R. No. 168052, February 20, 2006],** with the *Brent School* case [supra], the High Court ruled that unlike in the *Brent* case where the period of the contract was fixed and clearly stated, in the case at bar, the term of employment of private respondent as provided in the *Kasunduan* was not only vague, it also failed to provide an actual or specific date or period for the contract. Furthermore, as petitioners themselves admitted in their petition before the Supreme Court, private respondent was repeatedly hired as part of the boat's crew and he acted in various capacities on-board the vessel. In fact, in a span of 12 years, private respondent worked for petitioner company first as a Chief Mate, then Boat Captain, and later, as Radio Operator. His job was directly related to the deep-sea fishing business of petitioner. His work was, therefore, necessary and important to the business of his employer. Such being the scenario involved, private respondent is considered a regular employee of petitioner under Article 280 of the Labor Code.

e. Charges for misconduct or other wrongful acts or omissions, relevant only in termination prior to expiration of the term.

Since a fixed-term employment terminates on its own force at the end of the fixed period, the charges for misconduct or any other wrongful acts or omissions against a fixed-term employee assume relevance only if his dismissal from the service is effected by his employer before the expiration of the fixed-period of employment.

In **AMA Computer College, Paranaque, v. Austria, [G.R. No. 164078, November 23, 2007],** it was held that the employer erred in dismissing the employee – it having acted on the mistaken belief that the employee was liable for the charges leveled against him. Despite this, however, the employee cannot claim entitlement to any benefits flowing from such employment after the expiration of the fixed-term thereof on September 17, 2000 because such employment which is the source of the benefits had by then already ceased to exist.

f. Employees allowed to work beyond fixed term become regular employees.

In **Viernes v. NLRC, [G.R. No. 108405, April 4, 2003],** the employees were initially employed on a fixed-term basis as their employment contracts were only from October 8 to 31, 1990. After October 31, 1990, however, they were allowed to continue working in the same

capacity as meter readers without the benefit of a new contract or agreement or without the term of their employment being fixed anew. The Supreme Court ruled that after October 31, 1990, their employment should no longer be treated as being on a fixed-term basis. The complexion of the employment relationship of the employees and the employer is thereby totally changed. The employees have attained the status of regular employment. Hence, since they are already regular employees at the time of their illegal dismissal from employment, they are entitled to be reinstated to their former position as regular employees, not merely as probationary employees (since they never were engaged on probationary basis). Reinstatement means restoration to a state or condition from which one had been removed or separated.

g. Rendering work beyond one (1) year would result to regular employment.

Respondents in **Agusan del Norte Electric Cooperative, Inc. v. Cagampang and Garzon, [G.R. No. 167627, October 10, 2008],** started working as linemen for petitioner on October 1, 1990, under an employment contract which was for a period not exceeding three (3) months. They were both allegedly required to work eight (8) hours a day and sometimes on Sundays, getting a daily salary of ₱122.00. When the contract expired, the two were laid-off for one to five days and then ordered to report back to work but on the basis of job orders. After several renewals of their job contracts in the form of job orders for similar employment periods of about three months each, the said contracts eventually expired on April 31, 1998 and July 30, 1999. Respondents' contracts were no longer renewed, resulting in their loss of employment. Finding that they have become regular employees at the time of their termination, the Supreme Court held that there can be no dispute that the respondents' work as linemen was necessary or desirable in the usual business of petitioner. Additionally, the respondents have been performing the job for at least one (1) year. The law deems the repeated and continuing need for its performance as sufficient evidence of the necessity, if not indispensability, of that activity to petitioner's business.

k. Successive renewals of fixed-period contracts will result to regular employment.

In **Philips Semiconductors [Phils.], Inc. v. Fadriquela, [G.R. No. 141717, April 14, 2004], i**t was ruled that an employee who has been engaged to perform work which is necessary or desirable in the business or trade of the company and whose original contract of employment had been extended or renewed for four (4) times ranging from two (2) to three (3) months over a period of one (1) year and twenty-eight (28) days to the same position, with the same chores and who remained in the employ of the company without any interruption, is definitely a regular employee. Such re-employment was but a catch-all excuse to prevent her regularization. The continuing need for her services is sufficient evidence of the necessity and indispensability of her services to the company's business. By operation of law then, she has attained regular status in her employment and is thus entitled to security of tenure as provided in Article 279 of the Labor Code.

In ***Glory Philippines, Inc. v. Vergara,* [G.R. No. 176627, August 24, 2007],** petitioner, relying on the ruling in ***Philippine Village Hotel v. NLRC,* [G.R. No. 105033, February 28, 1994, 230 SCRA 423],** claims that respondents were fixed-term employees. The High Court, however, ruled that such reliance is misplaced because the facts in the said case are not on all fours with the case at bar. In said case, the employees were hired only for a one-month period and their employment contracts were never renewed. In the instant case, respondents' original employment contracts were renewed four (4) times. In the last instance, their contracts were extended despite the cessation of petitioner's alleged transaction with Glory Japan. Thus, respondents were continuously under the employ of petitioner, performing the same duties and responsibilities, from July 6, 1998 to May 25, 1999.

l. Hiring of employees on a 5-month basis circumvents the right to security of tenure.

In **Pure Foods Corporation v. NLRC, [G.R. No. 122653, December 12, 1997, 283 SCRA 133],** it was pronounced that the scheme of the employer in hiring workers on a uniformly fixed contract basis of five (5) months and replacing them upon the expiration of their contracts with other workers with the same employment status was designed to prevent the "*casual*" employees from attaining the status of regular employment. It was a clear circumvention of the employee's right to security of tenure and to other benefits like minimum wage, cost-of-living allowance, sick leave, holiday pay, and 13th month pay.

The Supreme Court has also made the same ruling in **Universal Robina Corp. v. Catapang, [G.R. No. 164736, October 14, 2005]**, where respondents were also hired under 5-month employment contracts. After their expiration, the petitioner company would renew them and re-employ the respondents. In holding that the respondents have already become regular employees, the Supreme Court quoted with approval the following excerpt from the decision of the Court of Appeals:

m. Employment on a "day-to-day basis for a temporary period" will result to regular employment.

A contract which states that the employment of the worker "*shall be on a day-to-day basis for a temporary period*" and that the same may be terminated at any time without liability to the employer other than for salary actually earned up to and including the date of last service, is a contract which has the purpose of circumventing the employee's security of tenure. The court rigorously disapproves such contracts which demonstrate a clear attempt to exploit the employee and deprive him of the protection sanctioned by the Labor Code. Owing to a worker's length of service with the company and considering the nature of his work which is usually necessary or desirable in the usual trade or business of the company, he becomes a regular employee, by operation of law, one year after he was employed.

The issue of regularization of route helpers (*cargadores-pahinantes*) was raised in the 2008 case of **Pacquing v. Coca-Cola Philippines, Inc., [G.R. No. 157966, January 31, 2008]**, where the Supreme Court, following the ruling in *Magsalin* [supra], ruled that they are regular employees under the principle of *stare decisis et non quieta movere* (follow past precedents and do not disturb what has been settled). Indeed, it is the Court's duty to apply the previous ruling in *Magsalin* to the instant case. Once a case has been decided one way, any other case involving exactly the same point at issue, as in the case at bar, should be decided in the same manner. Else, the ideal of a stable jurisprudential system can never be achieved.

n. Employment on "as the need arises" basis will result to regular employment.

In **Philips Semiconductors [Phils.], Inc. v. Fadriquela, [G.R. No. 141717, April 14, 2004],** the employer's general and catch-all submission that its policy for a specific and limited period on an "*as the need arises*" basis is not prohibited by law or abhorred by the Constitution; and that there is nothing essentially contradictory between a definite period of employment and the nature of the employee's duties, was rejected and struck down by the Supreme Court for being contrary to law.

o. Termination prior to lapse of fixed-term contract should be for a just or authorized cause.

Though Article 279 of the Labor Code provides that the employer, in cases of regular employment, shall not terminate the services of an employee except for a just or authorized cause, the same rule is also made applicable in cases of non-regular employment such as fixed-term

employment wherein the employer cannot lawfully terminate it before the end of the agreed period unless there is a just or authorized cause to do so. (*Medenilla v. Philippine Veterans Bank, infra; George Anderson v. NLRC, G.R. No. 111212, Jan. 22, 1996, 252 SCRA 116; 322 Phil. 122, 137).*

p. Validity of pre-termination stipulation in contracts of employment.

The employment contracts of petitioners with respondent in the case of **Price v. Innodata Phils., Inc./Innodata Corp., [G.R. No. 178505, September 30, 2008],** contain the following stipulation:

> "6.1 xxx Further should the Company have no more need for the EMPLOYEE's services on account of completion of the project, lack of work (sic) business losses, introduction of new production processes and techniques, which will negate the need for personnel, and/or overstaffing, this contract may be pre-terminated by the EMPLOYER upon giving of three (3) days notice to the employee.
>
> xxx
>
> "6.4 The EMPLOYEE or the EMPLOYER may pre-terminate this CONTRACT, with or without cause, by giving at least Fifteen – (15) [day] notice to that effect. Provided, that such pre-termination shall be effective only upon issuance of the appropriate clearance in favor of the said EMPLOYEE." (Emphasis ours)

The afore-quoted stipulation in petitioners' employment contracts displays utter disregard for their security of tenure. Despite fixing a period or term of employment, *i.e.*, one year, respondent employer reserved the right to pre-terminate petitioners' employment under the said stipulation. Pursuant thereto, petitioners have no right at all to expect security of tenure, even for the supposedly one-year period of employment provided in their contracts, because they can still be pre-terminated (1) upon the completion of an unspecified project; or (2) with or without cause, for as long as they are given a three-day notice. Such contract provisions are repugnant to the basic tenet in labor law that no employee may be terminated except for just or authorized cause.

FIXED-TERM EMPLOYMENT OF OVERSEAS FILIPINO WORKERS (OFWs)

a. OFWs can never acquire regular employment.

The 2002 decision rendered on Motion for Reconsideration in the case of **Millares v. NLRC, [G.R. No. 110524, July 29, 2002, 385 SCRA 306]**, which reversed its first ruling in the same case promulgated on March 14, 2000, [328 SCRA 79 (2000)], clearly cited as reason for its holding that OFWs cannot acquire regular employment, the fact that employment of seafarers is governed by the contracts they sign everytime they are re-hired and their employment is terminated when the contract expires. Their employment is contractually fixed for a certain period of time. They fall under the exception of Article 280 whose employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of engagement of the employee or where the work or service to be performed is seasonal in nature and the employment is for the duration of the season.

b. Employment contracts of OFWs for indefinite period, not valid.

Pentagon International Shipping, Inc. v. Adelantar, [G.R. No. 157373, July 27, 2004], pronounces that even if the employment contract of an OFW provides for an unlimited

period, it is not valid as it contravenes the explicit provision of the POEA Rules and Regulations on fixed-period employment.

c. OFWs do not become regular employees by reason of nature of work.

Clearly, an OFW cannot be considered a regular employee notwithstanding the fact that the work he performs is necessary and desirable in the business of the company. The exigencies of their work necessitate that they be employed on a contractual basis. *(Gu-Miro v. Adorable, G. R. No. 160952, Aug. 20, 2004).*

d. Series of rehiring of OFWs cannot ripen into regular employment.

Gu-Miro v. Adorable, [G.R. No. 160952, August 20, 2004], enunciates that even the continued re-hiring by the company of the OFW to serve as Radio Officer on board the employer's different vessels, should be interpreted not as a basis for regularization but rather as a series of contract renewals sanctioned under the doctrine set down by the *second* Millares decision [supra] rendered on July 29, 2002. If at all, petitioner was preferred because of practical considerations - namely, his experience and qualifications. However, this does not alter the status of his employment from being contractual.

e. The employment of OFWs for a fixed period, not discriminatory.

The employment of seafarers for a fixed period is not discriminatory against them and in favor of foreign employers, according to **Ravago v. Esso Eastern Marine, Ltd., [G.R. No. 158324, March 14, 2005].**

f. The contracts of OFWs cease upon expiration thereof.

Not being considered regular or permanent employees under Article 280, OFWs' employment automatically ceases upon the expiration of their contracts. *(Ravago v. Esso Eastern Marine, Ltd., supra; Millares v. NLRC, supra).*

g. Hiring of seaman for overseas employment but assigning him to local vessel does not affect his status as an OFW.

In **OSM Shipping Philippines, Inc. v. NLRC, [G.R. No. 138193, March 5, 2003],** the petitioner does not deny hiring private respondent Guerrero as master mariner. However, it argues that since he was not deployed overseas, his employment contract became ineffective because its object was allegedly absent. Petitioner contends that using the vessel in coastwise trade and subsequently chartering it to another principal had the effect of novating the employment contract. The Supreme Court was not persuaded by this argument. Contrary to petitioner's contention, the contract had an object which was the rendition of service by private respondent on board the vessel. The non-deployment of the ship overseas did not affect the validity of the perfected employment contract. After all, the decision to use the vessel for coastwise shipping was made by petitioner only and did not bear the written conformity of private respondent. A contract cannot be novated by the will of only one party. The claim of petitioner that it processed the contract of private respondent with the POEA only after he had started working is also without merit. Petitioner cannot use its own misfeasance to defeat his claim.

h. Seaman hired for overseas deployment but later assigned to domestic operations after the expiration of his overseas contract ceases to be an OFW.

The 2005 case of **Delos Santos v. Jebsen Maritime, Inc., [G.R. No. 154185, November 22, 2005],** presents a scenario different from the 2003 case of *OSM Shipping* [supra]. The husband of petitioner, Gil Delos Santos, was hired by respondent Jebsen Maritime, Inc., for and

in behalf of Aboitiz Shipping Co., as third engineer of *MV Wild Iris*. The POEA-approved contract of employment was for a fixed period of one (1) month and for a specific undertaking of conducting said vessel to and from Japan. On the vessel's return to the Philippines a month after, Delos Santos remained on board, respondent having opted to retain his services while the vessel underwent repairs in Cebu. After its repair, *MV Wild Iris*, this time renamed/registered as *MV Super RoRo 100*, sailed within domestic waters, having been meanwhile issued by the Maritime Industry Authority a Certificate of Vessel Registry and a permit to engage in coastwise trade on the Manila-Cebu-Manila-Zamboanga-General Santos-Manila route. During this period of employment, Delos Santos was paid by and received from respondent his salary in Philippine peso. Later, Delos Santos got sick and filed a complaint with the Labor Arbiter for recovery of disability benefits, and sick wage allowance and reimbursement of hospital and medical expenses.

The principal issue to be resolved boils down to which between the POEA-Standard Employment Contract (POEA-SEC) and the Labor Code, governs the employer-employee relationship between Delos Santos and respondent after *MV Wild Iris*, as later renamed *Super RoRo 100*, returned to the country from its one-month conduction voyage to and from Japan.

The Supreme Court ruled that the POEA-SEC should no longer apply after the expiration of the one-month contract which was doubtless fixed to coincide with the pre-determined one-month long Philippines-Japan-Philippines conduction-voyage run. After the lapse of the said period, his employment under the POEA-approved contract may be deemed as *functus oficio* and Delos Santos' employment pursuant thereto considered automatically terminated, there being no mutually-agreed renewal or extension of the expired contract. After said period, Delos Santos ceased to be an OFW as his employment on board an inter-island vessel should already be considered as domestic employment.

EMPLOYMENT STATUS OF PART-TIME EMPLOYEES

The Labor Code and its implementing rules have no specific provisions regarding part-time employment. Technological progress, improved methods of production and division of labor are among the reasons which led to new developments in the distribution of working hours in a day, in a week or in a year. The new trends in the pattern of working time have been reflected in the staggering of working time. Experience shows, however, that various approaches to the scheduling of working time are inter-related and complementary. In the Philippines, the most common type of these schemes is part-time work.

a. Part-time employment, defined.

"*Part-time work*" is defined by the International Labor Organization (ILO) as "a single, regular or voluntary form of employment with hours of work substantially shorter than those considered as normal in the establishment." A *"part-time worker"* is an employed person whose normal hours of work are less than those of comparable full-time workers.

Part-time work may take different forms depending on the agreed hours of work in a day, the days of work in a week or other reference periods. In the Philippines, however, the two most common and acceptable forms are four (4) hours work per day and weekend work or two (2) full days per week.

b. Security of tenure of part-time employees.

The same protection afforded to full-time workers with respect to security of tenure should also be extended to part-time workers. Thus, protection provided under Articles 279 to

286, Book VI of the Labor Code and its implementing rules and regulations should likewise be applied to said type of workers. If for example, a part-time employee becomes regular, he cannot be dismissed summarily without just or authorized cause and without complying with the twin requirements of notice and hearing. Otherwise, he shall be considered illegally dismissed.

c. Indicators of regular employment of part-time employees.

A part-time worker is a regular employee under any of the following conditions:

1. The terms of his employment show that he is engaged as regular or permanent employee;
2. The terms of his employment indicate that he is employed for an indefinite period;
3. He has been engaged for a probationary period and has continued in his employment even after the expiration of the probationary period; or
4. The employee performs activities which are usually necessary or desirable in the usual business or trade of the employer.

On the other hand, where the employment contract is fixed or for a definite period only as contemplated by law, part-time employees are likewise entitled to tenurial rights during the entire period of their fixed employment. In other words, they cannot be separated from work without just or authorized cause.

In ***Philippine Airlines, Inc. v. Pascua,*** **[G.R. No. 143258, August 15, 2003]**, which involves the issue of regularization of part-time workers to full-time workers, the Supreme Court ruled that although the employees were initially hired as part-time employees for one (1) year, thereafter the over-all circumstances with respect to the duties assigned to them, number of hours they were permitted to work including overtime, and the extension of their employment beyond two (2) years can only lead to the conclusion that they should be declared full-time employees.

EMPLOYMENT STATUS OF AN APPOINTEE IN AN ACTING CAPACITY.

a. Principle of acting capacity appointment in the government service applies to private entities.

The Supreme Court has held that an acting appointment is merely temporary, or one which is good until another appointment is made to take its place. *(Castro v. Solidum, 97 Phil. 278, 280 [1955]).*

In the case of **Aklan College, Inc. v. Guarino, [G.R. No. 152949, August 14, 2007],** the High Court declared that insofar as the principles governing permanent and temporary appointments are concerned, the ruling in the case of *Achacoso v. Macaraig,* [G.R. No. 93023, March 13, 1991, 195 SCRA 235], applies to permanent and temporary appointments in private entities, although *Achacoso* serves as the jurisprudential basis in cases involving the issue of security of tenure in career executive service positions in the government.

Aklan College involves the appointment of an instructor to the position of Acting Personnel Director. In holding that the instructor could not have attained security of tenure with respect to his position as Personnel Director and, therefore, his termination as such is valid, the Supreme Court cited *Achacoso* where it was held that a permanent appointment can be issued only to a person who meets all the requirements for the position to which he is being appointed; a person who does not have the requisite qualifications for the position cannot be appointed to it in the first place or, only as an exception to the rule, may be appointed to it merely in an acting

capacity in the absence of persons who are qualified; the purpose of an acting or temporary appointment is to prevent a hiatus in the discharge of official functions by authorizing a person to discharge the same pending the selection of a permanent or another appointee; the person named in an acting capacity accepts the position under the condition that he shall surrender the office once he is called upon to do so by the appointing authority.

b. Due process need not be observed in terminating an acting appointee.

The procedural due process prescribed by the Labor Code need not be observed in terminating an employee from a position which he holds in an acting capacity. As held in *Aklan College* [supra], there is no need for a notice to be served to the acting appointee or any form of hearing. Such procedural requirements apply where the officer is removable only for cause. A *bona fide* appointment in an acting capacity is essentially temporary and revocable in character and the holder of such appointment may be removed anytime even without hearing or cause.

EMPLOYMENT STATUS OF PROFESSORS, INSTRUCTORS AND TEACHERS.

In *Aklan College, Inc. v. Guarino,* [G.R. No. 152949, August 14, 2007], the High Court held that the provisions of Article 280 of the Labor Code are not applicable to a teacher's acquisition of security of tenure. It is settled that questions respecting a private school teacher's entitlement to security of tenure are governed by the *Manual of Regulations for Private Schools* and not the Labor Code. *Paragraph 75* of the *1970 Manual* (now *Section 93* of the *1992 Manual*) lays down the requisites before a teacher can be considered as having attained a permanent status and, therefore, entitled to security of tenure.

Both the *1970* and *1992 Manuals* were promulgated by the Department of Education, Culture and Sports (now known as Department of Education) in the exercise of its rule-making power as provided for under Section 70 of *Batas Pambansa Blg*. 232, otherwise known as the *"Education Act of 1982."* As such, these *Manuals* have the force and effect of law. *(Id.).*

• ***Probationary period under Article 281 does not apply.***

Section 92 of the *Manual of Regulations for Private Schools* enunciates the following probationary periods, subject in all instances to compliance with Department of Education and school requirements:

1. *For those in the elementary and secondary levels* - Three (3) consecutive years of satisfactory service;
2. *For those in the tertiary level* - Six (6) consecutive regular semesters of satisfactory service;
3. *For those in the tertiary level where collegiate courses are offered on the trimester basis* - Nine (9) consecutive trimesters of satisfactory service. *(Saint Mary's University v. CA, G.R. No. 157788, March 8, 2005).*

EMPLOYMENT STATUS OF WORKING SCHOLARS.

There is no employer-employee relationship between students, on the one hand, and schools, colleges or universities, on the other, where students work for the latter in exchange for the privilege to study free of charge, provided that the students are given real opportunity, including such facilities as may be reasonable and necessary, to finish their chosen courses under such arrangement. *(Section 14, Rule X, Book III, Rules to Implement the Labor Code).*

Conversely, if the working scholar is not given any real opportunity or afforded the reasonable and necessary facilities to finish his schooling under the arrangement, there is going to be an employer-employee relations with the school and he may be considered a regular employee, the nature of his work being usually necessary and desirable in the usual business or trade of the school.

EMPLOYMENT STATUS OF RESIDENT PHYSICIANS IN-TRAINING.

There is employer-employee relationship between resident physicians and the training hospital unless:

1. There is a training agreement between them; and
2. The training program is duly accredited or approved by the appropriate government agency.

If any of the foregoing requisites is not present, the resident physicians should be considered regular employees, the nature of their work being usually necessary or desirable in the usual business or trade of the hospital.

EMPLOYMENT STATUS OF WORKING CHILDREN.

• ***May working minors/children become regular employees?***

As a general rule, working children may become regular employees in the light of the following:

1. Article 280 of the Labor Code does not distinguish regularity of employment on the basis of age. It is the nature of work or the length of service which determines such regularity. Consequently, if the minor is engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, or he is allowed to work beyond one (1) year, his employment is deemed regular.

2. No employer is permitted to discriminate against any person in respect to terms and conditions of employment on account of his age. *(Article 140, Labor Code; Section 3, Rule XII, Book III, Rules to Implement the Labor Code).*

3. Working children, according to the *Child and Youth Welfare Code*, shall have the same freedom as adults to join the collective bargaining union of their own choosing in accordance with existing law. Neither management nor any collective bargaining union shall threaten or coerce working children to join, continue or withdraw as members of such union. *(Article 111, Chapter 3, Title VI, Presidential Decree No. 603, The Child and Youth Welfare Code, as amended by Presidential Decree No. 1179, Aug. 15, 1977).*

The only exception when working children may not become regular employees or treated as employees is when they work under the direct responsibility of their parents or guardians in any non-hazardous undertaking where the work will not in any way interfere with their schooling. *(Section 2, Rule XII, Book III, Rules to Implement the Labor Code).*

EMPLOYMENT STATUS OF HOUSEHELPERS.

• ***Employment of househelpers is fixed-term in nature.***

The employment of househelpers is the only kind in the Labor Code which is required to be on a fixed-term basis.

EMPLOYMENT STATUS OF HOMEWORKERS.

• ***Regularity of employment.***

May homeworkers become regular employees? The answer is yes for the following reasons:

1. Article 280 of the Labor Code does not distinguish regularity of employment on the basis of the place of work - in the field or within the plant or office of the employer or in the home of the worker. It is the nature of work or length of service, as the case may be, which determines such regularity. If the work is usually necessary or desirable in the usual business or trade of the employer, then the employment is regular.

2. Homeworkers have the right to form, join or assist organizations of their own choosing, in accordance with law. *(Section 3, Department Order No. 5, Feb. 4, 1992).*

3. Employers are required to report the homeworkers' employment for purposes of the SSS, Medicare and ECC requirements. *(Ibid.).*

EMPLOYMENT STATUS OF PIECE-RATE WORKERS.

The piece-rate basis of compensating workers has no bearing on the issue of regularity of their employment. The mere fact that they are paid on a piece-rate basis does not necessarily negate their status as regular workers.

The following factors, if present, would show that piece-rate employees are regular employees:

(1) Their work is "usually necessary or desirable in the usual business or trade of the employer" as this phrase is understood within the context of Article 280 of the Labor Code;

(2) They worked for the employer throughout the year, their employment not being dependent on a specific project or season; and

(3) They worked for the employer for more than one (1) year. *(Lambo v. NLRC, supra; Labor Congress of the Philippines v. NLRC, G. R. No. 123938, May 21, 1998, 290 SCRA 509).*

EMPLOYMENT STATUS OF FIELD PERSONNEL.

There is no doubt that they may be so considered, notwithstanding their exclusion from the coverage of certain labor standards benefits, if the nature of their work is usually necessary or desirable in the usual business or trade of the employer or after the lapse of probationary period or the one-year period provided in Article 280 of the Labor Code, as the case may be.

EMPLOYMENT STATUS OF WOMEN WORKING IN NIGHTCLUBS AND SIMILAR ESTABLISHMENTS.

a. Status of women working in nightclubs and similar workplaces.

Any woman who is permitted or suffered to work with or without compensation, in any nightclub, cocktail lounge, beerhouse, massage clinic, bar or similar establishments, under the effective control or supervision of the employer for a substantial period of time as determined by the Secretary of Labor and Employment shall be considered as an employee of such establishment for purposes of labor and social legislation. No employer shall discriminate against such employees or in any manner reduce whatever benefits they are enjoying. *(Article 138, Labor Code; Section 4, Rule XII, Book III, Rules to Implement the Labor Code).*

b. Regularity of employment.

In accordance with the provision of Article 138 of the Labor Code and its implementing rules, women working in nightclubs and similar establishments are considered regular employees thereof considering that they are made to perform activities that are usually necessary or desirable in the usual business or trade of their employer.

It should be noted that it is unlawful for any employer to discriminate against any woman employee with respect to terms and conditions of employment solely on account of her sex. *(Article 135, Labor Code).*

DOCTRINE OF *"CONTRACT OF ADHESION" AS* APPLIED TO EMPLOYMENT CONTRACTS.

Article 1377 of the Civil Code provides:

> "The interpretation of obscure words or stipulations in a contract shall not favor the party who caused the obscurity." *(See Servidad v. NLRC, G.R. No. 128682, March 18, 1999).*

Said rule of interpretation is applicable to contracts of adhesion where there is already a prepared form containing the stipulations of the employment contract and the employees merely "*take it or leave it.*" The presumption is that there was an imposition by one party (the employer) upon the other (the employee) and that the latter signed the contract out of necessity that reduced his bargaining power.

In **EDI-Staffbuilders International, Inc. v. NLRC, [G.R. No. 14558, October 26, 2007],** it was declared that a contract of adhesion is contrary to public policy. This case involves a compromise agreement entered into by an OFW with a foreign-based employer. The Supreme Court, in affirming the ruling of the Court of Appeals, declared that the latter's finding is correct that the Declaration (compromise agreement) is a contract of adhesion which should be construed against the employer. An adhesion contract is contrary to public policy as it leaves the weaker party - the employee - in a *"take-it-or-leave-it"* situation. Certainly, the employer is being unjust to the employee as there is no meaningful choice on his part while the terms are unreasonably favorable to the employer.

In **Rowell Industrial Corp. v. Hon. CA, [G.R. No. 167714, March 7, 2007],** the Supreme Court declared the employment contract signed by the respondent as one of adhesion. Petitioner failed to controvert the claim of respondent employee that he was made to sign the contract of employment prepared by petitioner as a condition for his hiring. Such contract in which the terms are prepared by only one party and the other party merely affixes his signature signifying his adhesion thereto is called contract of adhesion. It is an agreement in which the parties bargaining are not on equal footing, the weaker party's participation being reduced to the

alternative *"to take it or leave it."* In the present case, respondent employee, in need of a job, was compelled to agree to the contract, including the five-month period of employment, just so he could be hired. Hence, it cannot be argued that respondent employee signed the employment contract with a fixed term of five (5) months willingly and with full knowledge of the impact thereof. (*See also Fabrigas v. San Francisco del Monte, Inc., G.R. No. 152346, Nov. 25, 2005, 476 SCRA 247, 263; Qua Chee Gan v. Law Union and Rock Insurance Co., Ltd., G.R. No. L-4611, Dec. 17, 1955, 98 Phil. 85, 95).*

PROBATIONARY EMPLOYMENT

a. Nature of probationary employment.

A probationary employee is one who, for a given period of time, is on observation, evaluation and trial by an employer during which the employer determines whether or not he is qualified for permanent employment. During the probationary period, the employer is given the opportunity to observe the skill, competence, attitude and fitness of the probationary employee while the latter seeks to prove to the employer that he has the qualifications to meet the reasonable standards for permanent employment.

b. Purpose and not length of the probationary period is material.

The word "*probationary*" is appropriately used to underscore the objective or purpose of the period, and not its length which is immaterial. *(International Catholic Migration Commission v. NLRC, G.R. No. 72222, Jan. 30, 1989).*

c. Distinction between probationary employment and fixed-term employment.

The intention of the parties – the employer and the employee – in entering into the employment contract underscores the distinction between probationary employment and fixed-term employment. In probationary employment, both the employer and the employee mutually intend to make the employment status of the latter regular and permanent after he shall have successfully hurdled and passed the trial period. No such intention exists between the parties in a fixed-term employment contract. Hence, at the expiration of the mutually agreed fixed term, the employment relationship is ended and the employee cannot claim regularity of employment.

d. Probationary period cannot be stipulated within a fixed-term employment contract.

A probationary period cannot be stipulated within the fixed period of employment. The cases in point are **Villanueva v. NLRC, [G. R. No. 127448, September 10, 1998, 356 Phil. 638],** and **Servidad v. NLRC, [G.R. No. 128682, March 18, 1999, 305 SCRA 49, 55; 364 Phil. 518].** In these cases, the Supreme Court struck down the afore-quoted employment contracts for being "devious, but crude, attempts to circumvent [the employee's] right to security of tenure xxx."

In a 2006 case involving the same employer, **Innodata Philippines, Inc. v. Quejada-Lopez, [G.R. No. 162839, October 12, 2006],** petitioner averred that the present employment contracts it entered into with respondents no longer contain the afore-said so-called *"double-bladed"* provisions previously found objectionable in *Villanueva* and *Servidad.* The Supreme Court, however, observed that in a feeble attempt to conform to the earlier rulings in *Villanueva* and *Servidad*, petitioner has reworded its present employment contracts but a close scrutiny thereof shows that the double-bladed scheme to block the acquisition of tenurial security still exists. As presently worded, the employment contracts state:

"TERM/DURATION

1. The EMPLOYER hereby employs, engages and hires the EMPLOYEE, and the EMPLOYEE hereby accepts such appointment as FORMATTER effective March 04, 1997 to March 03, 1998, a period of one (1) year.

xxx

"TERMINATION

7.1 This Contract shall automatically terminate on March 03, 1998 without need of notice or demand.

xxx

7.4 The EMPLOYEE acknowledges that the EMPLOYER entered into this Contract upon his express representation that he/she is qualified and possesses the skills necessary and desirable for the position indicated herein. Thus, the EMPLOYER is hereby granted the right to pre-terminate this Contract within the first three (3) months of its duration upon failure of the EMPLOYEE to meet and pass the qualifications and standards set by the EMPLOYER and made known to the EMPLOYEE prior to execution hereof. Failure of the EMPLOYER to exercise its right hereunder shall be without prejudice to the automatic termination of the EMPLOYEE's employment upon the expiration of this Contract or cancellation thereof for other causes provided herein and by law." (Emphasis supplied)

The Supreme Court thus ruled:

"Like those in *Villanueva* and *Servidad*, the present contracts also provide for two periods. Aside from the fixed one-year term set in paragraph 1, paragraph 7.4 provides for a three-month period during which petitioner has the right to pre-terminate the employment for the "failure of the employees to meet and pass the qualifications and standards set by the employer and made known to the employee prior to" their employment. Thus, although couched in ambiguous language, paragraph 7.4 refers in reality to a probationary period.

"Clearly, to avoid regularization, petitioner has again sought to resort alternatively to probationary employment and employment for a fixed term. Noteworthy is the following pronouncement of this Court in *Servidad*:

> "If the contract was really for a fixed term, the [employer] should not have been given the discretion to dismiss the [employee] during the one year period of employment *for reasons other than the just and authorized causes under the Labor Code.* Settled is the rule that an employer can terminate the services of an employee only for valid and just causes which must be shown by clear and convincing evidence.
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> "The language of the contract in dispute is truly a double-bladed scheme to block the acquisition of the employee of tenurial security. Thereunder, [the employer] has two options. It can terminate the employee by reason of expiration of contract, or it may use 'failure to meet work standards' as the ground for the employee's dismissal. In either case, the tenor of the contract

> jeopardizes the right of the worker to security of tenure guaranteed by the Constitution."
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> xxx
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> "Finally, it is worth noting that after its past employment contracts had been declared void by this Court, petitioner was expected to ensure that the subsequent contracts would already comply with the standards set by law and by this Court. Regrettably, petitioner failed to do so." *(Id.).*

REGULAR EMPLOYMENT AFTER PROBATIONARY PERIOD.

An employee who is allowed to work after a probationary period is considered a regular employee. *(Article 281, Labor Code; Philippine National Bank v. Cabansag, G.R. No. 157010, June 21, 2005; Servidad v. NLRC, G.R. No. 128682, March 18, 1999).*

PROBATIONARY PERIOD.

a. General rule.

Probationary period, as a general rule, should not exceed six (6) months from the date the employee started working. *(Article 281, Labor Code).*

One becomes a regular employee upon completion of his six-month period of probation. *(Voyeur Visage Studio, Inc. v. CA, G.R. No. 144939, March 18, 2005; A' Prime Security Services, Inc. v. NLRC, G.R. No. 107320, Jan. 19, 2000).*

b. Exceptions.

The six-month period provided in Article 281 admits of certain exceptions such as:

1. When the employer and the employee agree on a shorter or longer period;
2. When the nature of work to be performed by the employee requires a longer period;
3. When a longer period is required and established by company policy.

If not one of the exceptional circumstances above is proven, the employee whose employment exceeds six (6) months is undoubtedly a regular employee. (*San Miguel Corp. v. Del Rosario, G.R. Nos. 168194 & 168603, Dec. 13, 2005).*

The best example of a probationary period exceeding six (6) months is the leading case of ***Buiser v. Hon. Leogardo,*** **[G.R. No. L-63316, July 31, 1984],** where the Supreme Court considered the probationary period of eighteen (18) months as valid since it was shown that the company needs at least eighteen (18) months to determine the character and selling capabilities of the employees as sales representatives. The company here is engaged in the publication of advertisements in PLDT's Yellow Pages Telephone Directories. Solicited ads are published a year after the sale has been made and only then can the company be able to evaluate the efficiency, conduct and selling ability of the sales representatives, the evaluation being based on the published ads.

c. Probationary period, how reckoned and computed.

As pronounced in the case of ***Cebu Royal Plant [SMC] v. Deputy Minister of Labor,*** **[G.R. No. L-58639, August 12, 1987, 153 SCRA 38],** the 6-month probationary period should

be reckoned ***"from the date of appointment up to the same calendar date of the 6th month following."***

d. Validity of extension of probationary period.

Article 281 does not provide for the extension of the probationary period. It may, however, be extended but only upon the mutual agreement by the employer and the probationary employee.

In **Dusit Hotel Nikko v. Gatbonton, [G.R. No. 161654, May 5, 2006],** respondent was hired as Chief Steward of the Food and Beverage Department of petitioner for a 3-month probationary employment. At the expiration of the said period, his probationary employment was extended for another two (2) months to give him opportunity to improve his performance. Respondent, however, did not sign the Memorandum of Extension. Prior to the expiration of the period of extension, he was terminated on the same grounds cited earlier upon the expiration of his 3-month probationary employment, that is, poor ratings on staff supervision, productivity, quantity of work, and overall efficiency and that he did not qualify as Chief Steward. In holding that respondent had become a regular employee at the expiration of the first three (3) months of his probationary employment, the Supreme Court pronounced that in the absence of any evaluation or valid extension, since the respondent did not sign the Memorandum of Extension, it cannot be concluded that respondent failed to meet the standards of performance set by the hotel for a Chief Steward. It is an elementary rule in the law on labor relations that a probationary employee engaged to work beyond the probationary period of six (6) months, as provided under Article 281 of the Labor Code, or for any length of time set forth by the employer (in this case, three [3] months), shall be considered a regular employee. This is clear in the last sentence of Article 281. Any circumvention of this provision would put to naught the State's avowed protection for labor.

e. Employment is deemed regular if the employment contract has no stipulation on probationary period.

In the absence of a stipulation in employment contracts providing for a probationary period, or that the employees were apprised of the fact that they were to be placed on probationary status as well as the requirements that they should comply with in order to qualify as regular employees, no other conclusion can be drawn but that they were not probationary but regular employees who are entitled to security of tenure. They cannot be dismissed without any just or authorized cause warranting the same. (*ATCI Overseas Corporation v. CA, G.R. No. 143949, Aug. 9, 2001; A. M. Oreta & Co., Inc. v. NLRC, G.R. No. 74004, August 10, 1989).*

f. Employee is deemed regular absent any contract to prove probationary employment.

The best proof of probationary employment is the contract itself. Thus, as held in **San Miguel Corp. v. Del Rosario, [G.R. Nos. 168194 and 168603, Dec. 13, 2005],** since no such contract was presented by the employer, the continuous employment of the employee as an account specialist for almost eleven (11) months, from April 17, 2000 to March 12, 2001, means that she was a regular employee and not a temporary reliever or a probationary employee.

g. Repetitive rehiring of a probationary employee means he has become a regular employee.

The act of an employer in repetitively rehiring a probationary employee negates the former's claim that the latter failed to qualify as a regular employee. As held in ***Octaviano, v. NLRC,* [G.R. No. 88636, October 3, 1991],** these successive hirings and firings are a ploy to avoid the obligations imposed by law on employers for the protection and benefit of probationary

employees who, more often than not, are kept in the bondage, so to speak, of unending probationary employment without any complaint due to the serious unemployment problem besetting the country.

TERMINATION OF PROBATIONARY EMPLOYMENT.

a. Security of tenure of probationary employees.

Within the limited legal six-month probationary period, probationary employees are entitled to security of tenure notwithstanding their limited tenure and non-permanent status. (*Philippine Daily Inquirer, Inc. v. Magtibay, Jr., G.R. No. 164532, July 24, 2007).*

According to **Woodridge School [now known as Woodridge College, Inc.] v. Benito, [G.R. No. 160240, October 29, 2008],** upon expiration of their contract of employment, probationary employees cannot claim security of tenure and compel their employers to renew their employment contracts. In fact, the services of an employee hired on probationary basis may be terminated when he fails to qualify as a regular employee in accordance with reasonable standards made known by the employer to the employee at the time of his engagement. There is nothing that would hinder the employer from extending a regular or permanent appointment to an employee once the employer finds that the employee is qualified for regular employment even before the expiration of the probationary period. Conversely, if the purpose sought by the employer is neither attained nor attainable within the said period, the law does not preclude the employer from terminating the probationary employment on justifiable ground.

b. Conditions for termination of probationary employment.

The power of the employer to terminate an employee on probation is subject to the following conditions:

1. It must be exercised in accordance with the specific requirements of the contract;
2. The dissatisfaction on the part of the employer must be real and in good faith; and
3. There must be no unlawful discrimination in the dismissal.

c. Grounds to terminate probationary employment.

Under Article 281, a probationary employee may be terminated only on two (2) grounds, to wit:

1. For a just cause or authorized cause; or
2. When the probationary employee fails to qualify as a regular employee in accordance with reasonable standards made known by the employer to the employee at the start of the employment.

d. Procedural due process required only in the case of the first ground.

Procedural due process applies only in case the termination of the probationary employment is due to the *first* ground above. Thus, the twin requirements of notice and hearing should be complied with in case the termination of the probationary employment is due to a *just cause*. In case the termination is based on *authorized cause*, no such hearing and notice are required. Due process in this case means the service of written notice of termination to the affected employee and to the Department of Labor and Employment at least one (1) month before the intended effectivity of the termination.

e. Application of due process principle in case of the second ground.

The *second* ground does not require notice and hearing. Due process of law for the *second* ground consists of making the reasonable standards expected of the employee during his probationary period known to him at the time of his probationary employment. By the very nature of a probationary employment, the employee knows from the very start that he will be under close observation and his performance of his assigned duties and functions would be under continuous scrutiny by his superiors. It is in apprising him of the standards against which his performance shall be continuously assessed where due process regarding the *second* ground lies, and not in notice and hearing as in the case of the *first* ground. (*Philippine Daily Inquirer, Inc. v. Magtibay, Jr., G.R. No. 164532, July 24, 2007; Sameer Overseas Placement Agency, Inc. v. NLRC, G.R. No. 132564, Oct. 20, 1999).*

In the 2008 case of **Woodridge School [now known as Woodridge College, Inc.] v. Benito, [G.R. No. 160240, October 29, 2008],** the notices of termination sent by petitioner to respondent-teachers stated that the latter failed to qualify as regular employees. However, nowhere in the notices did petitioner explain the details of said "failure to qualify" and the standards not met by respondents. It can only be speculated that this conclusion was based on the alleged acts of respondents in uttering defamatory remarks against the school and the school principal; failure to report for work for two or three times; going to class without wearing proper uniform; delay in the submission of class records; and non-submission of class syllabi. Yet, other than bare allegations, petitioner failed to substantiate the same by documentary evidence. Considering that respondents were on probation for three (3) years, and they were subjected to yearly evaluation by the students and by the school administrators (principal and vice-principal), it is safe to assume that the results thereof were definitely documented. As such, petitioner should have presented the evaluation reports and other related documents to support its claim, instead of relying solely on the affidavits of their witnesses. The unavoidable inference, therefore, remains that the respondents' dismissal is invalid.

f. Termination to be valid must be done prior to lapse of probationary period.

The provision in Article 281 which states that *"the probationary period shall not exceed six months"* means that the probationary employee may be dismissed for cause at any time before the expiration of six months after hiring. If, after working for less than six (6) months, he is found unfit for the job, he can be dismissed. On the other hand, if such worker continues to be employed longer than six (6) months, he is considered as a regular employee and ceases to be a probationary employee. (*Pasamba v. NLRC, G.R. No. 168421, June 8, 2007; See also Manila Electric Company v. NLRC, G.R. No. 83751, Sept. 29, 1989, 178 SCRA 198, 203).*

The length of time is immaterial in determining the correlative rights of both the employer and the employee in dealing with each other during the probationary period. As held in **Espina v. Hon. CA, [G.R. No. 164582, March 28, 2007]** and **Pasamba v. NLRC, [G.R. No. 168421, June 8, 2007],** as long as the termination was made before the expiration of the six-month probationary period, the employer was well within his right to sever the employer-employee relationship. A contrary interpretation would defeat the clear meaning of the term *'probationary.'"*

g. Termination one (1) day prior to expiration of probationary period.

But according to the case of **Manila Hotel Corporation v. NLRC, [G.R. No. L-53453, January 22, 1986],** termination of probationary employment one (1) day before the employee becomes a regular employee is highly suspicious, especially when the employee was promoted as lead gardener in so short a span of less than six (6) months thereby giving rise to the presumption in his favor that his performance was satisfactory.

h. Termination a few days after lapse of probationary period.

After the expiration of the probationary period, the employee becomes a regular employee. Consequently, he can only be dismissed after full observance of both substantive and procedural due process.

In **Cebu Royal Plant [San Miguel Corporation] v. Hon. Deputy Minister of Labor, [G.R. No. L-58639, August 12, 1986],** an employee whose probationary employment was terminated four (4) days after expiration of probationary period has already become a regular employee.

In **San Miguel Corp. v. Del Rosario, [G.R. Nos. 168194 and 168603, December 13, 2005],** the termination of the probationary employee was declared illegal because by the time she was dismissed, her alleged probationary employment already exceeded six (6) months, *i.e.*, six (6) months and eight (8) days to be precise.

i. Agabon doctrine applies if dismissal of probationary employee for a just cause is without due process.

If a probationary employee was dismissed for a just cause but without affording him the required notice and hearing, the doctrinal ruling in the leading case of *Agabon v. NLRC,* [G.R. No. 158693, November 17, 2004], shall apply. Consequently, the employer is liable for nominal damages in the amount of ₱30,000. (*Aberdeen Court, Inc. v. Agustin, Jr., G.R. No. 149371, April 13, 2005).*

j. Jaka doctrine applies if dismissal of probationary employee for an authorized cause is without due process.

If a probationary employee was dismissed for an authorized cause and the employer failed to comply with the notice requirement, the ruling in *Jaka Food Processing Corporation v. Pacot,* [G.R. 151378, March 28, 2005], where the stiffer penalty in the form of nominal damages was set at ₱50,000 should apply.

JUST CAUSES FOR TERMINATION OF EMPLOYMENT BY THE EMPLOYER

An employer may terminate an employment for any of the following causes:

(a) Serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work;
(b) Gross and habitual neglect by the employee of his duties;
(c) Fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative;
(d) Commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representatives; and
(e) Other causes analogous to the foregoing.

2. SERIOUS MISCONDUCT.

a. Concept.

"*Misconduct*" has been defined as improper or wrongful conduct. It is the transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, willful in character, and implies wrongful intent and not mere error in judgment.

Under Article 282, the misconduct, to be a just cause for termination, must be serious. This implies that it must be of such grave and aggravated character and not merely trivial or unimportant. *(Philippine National Bank v. Velasco, G.R. No. 166096, Sept. 11, 2008).*

b. Requisites.

For misconduct or improper behavior to be a just cause for dismissal, the following requisites must concur:

1. It must be serious;
2. It must relate to the performance of the employee's duties; and
3. It must show that the employee has become unfit to continue working for the employer.

c. Misconduct must relate to employee's duties.

For misconduct or improper behavior to be a just cause for dismissal, the same must, however serious, nevertheless be in connection with or be related to the performance of the employee's duties and must show that he has become unfit to continue working for the employer. *(Coca-Cola Bottlers, Phils., Inc. v. Kapisanan ng Malayang Manggagawa sa Coca-Cola-FFW, G.R. No. 148205, Feb. 28, 2005).*

In **Fujitsu Computer Products Corporation of the Philippines v. CA, [G.R. No. 158232, March 31, 2005, 454 SCRA 737],** the respondent's act of sending an e-mail message as an expression of sympathy for the plight of a superior can hardly be characterized as serious misconduct as to merit the penalty of dismissal. There is no showing that the sending of such e-mail message had any bearing on or relation to respondent's competence and proficiency in his job. To reiterate, in order to consider it a serious misconduct that would justify dismissal under the law, the act must have been done in relation to the performance of his duties as would show him to be unfit to continue working for his employer. (*See also Marival Trading, Inc. v. NLRC, G.R. No. 169600, June 26, 2007).*

The act of the employee in **Philippine Aeolus Automotive United Corporation v. NLRC, [G.R. No. 124617, April 28, 2000],** in throwing a stapler and uttering abusive language upon the person of the plant manager may be considered from a layman's perspective as a serious misconduct. However, in order to consider it a serious misconduct that would justify dismissal under the law, it must have been done in relation to the performance of her duties as would show her to be unfit to continue working for her employer. The acts complained of, under the circumstances they were done, did not in any way pertain to her duties as a nurse. Her employment identification card discloses the nature of her employment as a nurse and no other. Also, the memorandum informing her that she was being preventively suspended pending investigation of her case was addressed to her as a nurse. Hence, she cannot be held in violation therefor.

The 2008 case of **Lagrosas v. Bristol-Myers Squibb [Phil.], Inc./Mead Johnson Phil., [G.R. Nos. 168637 and 170684, September 12, 2008],** presents a situation where the act of the employee was not considered serious misconduct because it, *inter alia*, did not relate to his duties. Lagrosas is a Territory Manager of respondent. On February 4, 2000, Ma. Dulcinea S. Lim, also a Territory Manager and Lagrosas' former girlfriend, attended a district meeting of territory

managers at McDonald's Alabang Town Center. After the meeting, she dined out with her friends. She left her car at McDonald's and rode with Cesar R. Menquito, Jr. When they returned to McDonald's, Lim saw Lagrosas' car parked beside her car. Lim told Menquito not to stop his car but Lagrosas followed them and slammed Menquito's car thrice. Menquito and Lim alighted from the car. Lagrosas approached them and hit Menquito with a metal steering wheel lock. When Lim tried to intervene, Lagrosas accidentally hit her head.

The Supreme Court, in holding that Lagrosas' act does not constitute serious misconduct, cited the following reasons: *First*, the incident occurred outside of company premises and after office hours since the district meeting of territory managers which Lim attended at McDonald's had long been finished. McDonald's may be considered an extension of Bristol-Myers' office and any business conducted therein as within office hours, but the moment the district meeting was concluded, that ceased, too. When Lim dined with her friends, it was no longer part of the district meeting and considered official time. Thus, when Lagrosas assaulted Lim and Menquito upon their return, it was no longer within company premises and during office hours. *Second*, Bristol-Myers itself admitted that Lagrosas intended to hit Menquito only. In the Memorandum dated March 23, 2000, it was stated that "You got out from your car holding an umbrella steering wheel lock and proceeded to hit Mr. Menquito. Dulce tried to intervene, but you accidentally hit her on the head, knocking her unconscious." Indeed, the misconduct was not directed against a co-employee who unfortunately got hit in the process. *Third*, Lagrosas was not performing official work at the time of the incident. He was not even a participant in the district meeting. Hence, his action could not have reflected his unfitness to continue working for Bristol-Myers.

d. Circulation of e-mail message, when considered serious misconduct.

The act of petitioner in **Punzal v. ETSI Technologies, Inc., [G.R. Nos. 170384-85, March 9, 2007],** of circulating a second e-mail message showed that her remarks were not merely an expression of her opinion about the decision of the Senior Vice President (SVP); they were directed against the SVP himself, *viz*: *"He was so unfair ... para bang palagi siyang iniisahan sa trabaho .. Anyway, solohin na lang niya bukas ang office"* referring to the SVP's disapproval of the holding of the Halloween party in the office during office hours. It was held that the message resounds of subversion and undermines the authority and credibility of management and petitioner displayed a tendency to act without management's approval, and even against management's will. Consequently, the termination of petitioner based on her said e-mail message was declared valid.

e. Statement made in a union meeting, when not a ground to dismiss.

The case of **Kephilco Malaya Employees Union v. Kepco Philippines Corp., [G.R. No. 171927, June 29, 2007],** is different from *Lopez v. Chronicle Publications Employees Association* [supra]. At the union's general membership meeting on February 7, 2003, Burgos made the following remarks in response to a question raised on the floor concerning the status of the US$1,000 gift: *"What is the problem if the US$1,000 is with me. It is intact. Don't worry. Just wait because we will buy gifts for everybody. The amount of US$1,000 is a small amount compared to a KIA plus ₱700,000, which was possibly offered in exchange for the CBA during the negotiation but which I did not show any interest in."* Finding his dismissal illegal, the Supreme Court ruled that respondent's reliance on *Lopez* is misplaced. The erring employee therein deliberately and unnecessarily utilized a different medium – the union's newspaper, one of a permanent nature - without any justification. The attendant factual antecedents in the present case do not sufficiently reflect a scornful attitude and depravity of conduct on the part of Burgos for his questioned remarks to be considered as serious misconduct.

Also, in **St. Michael's Institute v. Santos, [G. R. No. 145280, December 4, 2001, 422 Phil. 723],** the Supreme Court reinstated the employees who were dismissed for uttering offensive remarks in their speeches denouncing the corrupt practices of the school administration in an assembly.

f. Committing libel against an immediate superior constitutes serious misconduct.

In **Torreda v. Toshiba Information Equipment [Phils.], Inc., [G.R. No. 165960, February 8, 2007],** the false attribution by the petitioner of robbery (theft) against Sepulveda was made in writing; patently then, petitioner committed *libel*, not grave slander against Sepulveda. The malicious and public imputation in writing by one of a crime on another is libel under Article 353, in relation to Article 355, of the Revised Penal Code. There is abundant evidence on record showing that petitioner committed libel against his immediate superior, Sepulveda, an act constituting serious misconduct which warrants his dismissal from employment. Petitioner maliciously and publicly imputed on Sepulveda the crime of robbery of ₱200.00. As gleaned from his Complaint dated September 7, 1999 which he filed with the General Administration, he knew that it was Delos Santos who opened his drawer and not Sepulveda. Thus, by his own admission, petitioner was well aware that the robbery charge against Sepulveda was a concoction, a mere fabrication with the sole purpose of retaliating against Sepulveda's previous acts.

g. Possession or use of shabu or other drugs, a valid ground to terminate employment.

There is no question that the possession and use by an employee of *methampethamine hydrochloride* or shabu is a just cause to terminate employment as it constitutes serious misconduct under Article 282 of the Labor Code.

In **Roquero v. Philippine Air Lines, Inc., [G.R. No. 152329, April 22, 2003],** the Supreme Court affirmed the validity of the dismissal of petitioner who was caught red-handed possessing and using *methampethamine hydrochloride* or shabu in a raid conducted inside the company premises by PAL security officers and NARCOM personnel. Said the Supreme Court: "It is of public knowledge that drugs can damage the mental faculties of the user. Roquero was tasked with the repair and maintenance of PAL's airplanes. He cannot discharge that duty if he is a drug user. His failure to do his job can mean great loss of lives and properties. Hence, even if he was instigated to take drugs, he has no right to be reinstated to his position. He took the drugs fully knowing that he was on duty and more so that it is prohibited by company rules. Instigation is only a defense against criminal liability. It cannot be used as a shield against dismissal from employment especially when the position involves the safety of human lives."

k. Immorality.

On the outset, it must be stressed that to constitute immorality, the circumstances of each particular case must be holistically considered and evaluated in light of the prevailing norms of conduct and applicable laws. *(Santos, Jr. v. NLRC, G.R. No. 115795, March 6, 1998, 287 SCRA 117; Chua-Qua v. Clave, G.R. No. L-49549, Aug. 30, 1990, 189 SCRA 117).*

As a general rule, immorality is not a just ground to terminate employment. The exception is when such immoral conduct is prejudicial or detrimental to the interest of the employer.

The standard to be used to determine whether the immoral conduct adversely affects the interest of the employer is whether the immoral act is of such nature which is calculated to undermine or injure such interest or which would make the worker incapable of performing his work.

For instance, in the case of ***Santos, Jr. v. NLRC,*** **[G.R. No. 115795, March 6, 1998, 287 SCRA 117],** involving a teacher, immorality was defined as a course of conduct which offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate. Thus, the gravity and seriousness of the charges against the teacher stem from his being a married man and at the same time a teacher. Therefore, when a teacher engages in extra-marital relationship, especially when the parties are both married, such behavior amounts to immorality, justifying his termination from employment.

In another case, ***Sanchez v. Ang Tibay,*** **[54 O.G. 4515],** the dismissal of the supervisor who maintained a concubine and practically drove his family away because of his illicit relationship was held legal. As supervisor, he failed to set a good example to the several personnel under him.

l. Immoral act committed beyond office hours is a valid ground to terminate employment.

The act of the employee in **Navarro III v. Damasco, [G.R. No. 101875, July 14, 1995],** of sexually harassing a co-employee within the company premises (ladies' dormitory) even after office hours was held to be a work-related matter considering that the peace of the company is thereby affected. The Code of Employee Discipline is very clear that immoral conduct "within the company premises regardless of whether or not [it is] committed during working time" is punishable.

m. Sexual intercourse inside company premises constitutes serious misconduct.

A security coordinator in **Stanford Microsystems, Inc. v. NLRC, [G.R. No. L-74187, January 28, 1988],** committed serious breaches of company rules when he caused the introduction of intoxicating liquor into the premises which he drank with another guard on duty, and allowed two female security guards to come inside the Security Office and had sexual intercourse with one of them on top of the desk of the Security Head, while the other guard pretended to be asleep during all the time that the lustful act was commenced until consummated.

n. The act of a lady teacher in falling in love with a student, not immoral.

In **Chua-Qua v. Clave, [G.R. No. L-49549, Aug. 30, 1990, 189 SCRA 117],** the act of a 30-year old lady teacher of falling in love with her student whose age is 16, was held not an immoral act which would justify the termination of her employment. The school utterly failed to show that the teacher took advantage of her position to court her student. If the two eventually fell in love despite the disparity of their ages and academic levels, this only lends substance to the truism that the heart has reasons of its own which reason does not know. But definitely yielding to this gentle and universal emotion is not to be so casually equated with immorality. The deviation of the circumstances of their marriage from the usual societal pattern cannot be considered as a defiance of contemporary social mores.

o. Fighting as a ground for termination.

Fighting within the work premises is a valid ground for the dismissal of an employee. Such act adversely affects the employer's interests for it distracts employees, disrupts operations and creates a hostile work atmosphere. *(Solvic Industrial Corp. v. NLRC, G.R. No. 125548, Sept. 25, 1998; Malaya Shipping Services, Inc. v. NLRC, G.R. No. 121698, March 26, 1998).*

However, not every fight within company premises in which an employee is involved would automatically warrant dismissal from service. This is especially true when the employee

concerned did not instigate the fight and was in fact the victim who was constrained to defend himself. *(Garcia v. NLRC, G. R. No. 116568, Sept. 3, 1999).*

In **Supreme Steel Pipe Corp. v. Bardaje, [G.R. No. 170811, April 24, 2007],** respondent employee figured in a heated exchange of word with a security guard who ordered him in a loud voice and arrogant manner to remove and turn-over to him his long-sleeved shirt which he wore over his uniform. Feeling singled-out from the other warehousemen who were also wearing long-sleeved shirts over their uniforms, he replied: *"Ano ba ang gusto mo, hubarin ko o magsuntukan na lang tayo sa labas?"* The brewing scuffle between the two was averted by a co-employee and another security guard who were able to keep the parties apart. In declaring his dismissal as illegal, the High Court ruled that the verbal tussle between him and the security guard did not start due to the alleged *"violent temper and tendency to violate company rules and regulations"* of respondent; but it was primarily due to the guard's provoking attitude. The respondent's misconduct does not warrant the imposition of the ultimate sanction of dismissal. Undeniably, the altercation between respondent and the security guard was nipped in the bud by the timely intervention of other employees. The momentary work stoppage did not pose a threat to the safety or peace of mind of the workers. Neither did such disorderly behavior cause substantial prejudice to the business of petitioner.

p. Utterance of obscene, insulting or offensive words constitutes serious misconduct.

It is well-settled that the utterance of obscene, insulting or offensive words against a superior constitutes gross misconduct, one of the grounds to terminate the services of an employee. (*Echeverria v. Venutek Medika, Inc., G.R. No. 169231, Feb. 15, 2007).*

In **De la Cruz v. NLRC, [G.R. No. 82703, September 15, 1989, 177 SCRA 626],** the act of the employee in hurling invectives at a company physician such as "*sayang ang pagka-professional mo*" and "*putang ina mo,*" was held to constitute insubordination and conduct unbecoming of an employee which validly warranted his dismissal.

In **Bondoc v. NLRC, [G.R. No. 103209, July 28, 1997, 276 SCRA 288],** utterances on different occasions towards a co-employee such as - "*Di bale bilang na naman ang araw mo;*" - "*Sige lang, patawa tawa ka pa, eh bilang na bilang na ang araw mo*'" - "*Matakot ka sa Diyos, bilang na ang araw mo; Mag-ingat ka sa paglabas mo sa Silahis Hotel;*" – "*Unggoy* xxx *ulol*" were held unquestionably as partaking the form of grave threat or coercion which justified the dismissal of the offender.

In **Autobus Workers' Union v. NLRC, [G.R. No. 117453, June 26, 1998, 291 SCRA 219, 228],** the act of the employee in uttering towards his supervisor "*gago ka*" and taunting the latter by saying "*bakit anong gusto mo, 'tang ina mo,*" was held sufficient ground to dismiss him.

In **Solid Development Corporation Workers Association (SDCWA-UWP) v. Solid Development Corporation, [G.R. No. 165995, August 14, 2007],** the owner and president of the company caught the employee loafing during office hours. When he called the employee's attention, the latter retorted, "Bakit mo ako sinisita porke mahirap lang kaming mga trabahador ninyo eh. Kayo talagang mga intsek." The employee's supervisor overheard this remark and reminded him to respect the owner and president of the company. However, the employee replied, "Ikaw, masyado kang sipsip sa baboy na intsik." Later, in a meeting, the employee again approached the owner and president of the company and told him, "Bakit ako pa ang nasilip mo! Nagtatrabaho naman ako ah! Kayo talagang mga intsik! Letseng buhay ito!" In declaring the employee's dismissal as valid, the Supreme Court said that the employee's act of insulting the company's owner and president constitutes serious misconduct. Moreover, it was done in

relation to the performance of his duties which showed him to be unfit to continue working for the company.

In **Pasamba v. NLRC, [G.R. No. 168421, June 8, 2007],** petitioner made the following remarks against Dr. Pacita J. M. Lopez, Assistant Chairman of the Department of Pediatrics of St. Luke's Medical Center (SLMC):

> *"Bakit si Dra. Lopez pa ang napili mong 'pedia' eh ang tanda-tanda na n'un? xxx Alam mo ba, kahit wala namang diperensya yung baby, ipinapa-isolate nya? Minsan nga, meron bagong baby siyang pasyente na ipinasok dito, sabi ko, bah, himala! Walang ikinabit sa kanya. Tapos, kinabukasan . . . kinabitan din pala!"*

Holding that the dismissal of petitioner was valid, the Supreme Court said that petitioner's allegation that uttering slanderous remarks is not related to her tasks as a staff nurse deserves scant consideration. SLMC is engaged in a business whose survival is dependent on the reputation of its medical practitioners. To impute unethical behavior and lack of professionalism to a medical professional, to one who is also a hospital official, would be inimical to the interests of SLMC. This would also show tremendous disloyalty on the part of the employee who makes such derogatory statements. Moreover, the petitioner's bad faith became evident when, instead of addressing these disparaging remarks to the proper hospital officers, she addressed them to a former patient, whose child was at that time a patient in SLMC and entrusted to the care of the medical professional in question. An employer cannot be compelled to retain an employee who is guilty of acts inimical to the interests of the employer.

But in **Samson v. NLRC, [G.R. No. 121035, April 12, 2000],** the following utterances: "Si EDT (referring to Epitacio D. Titong, General Manager and President of the company), bullshit yan," "sabihin mo kay EDT yan," and "sabihin mo kay EDT, bullshit yan" while making the "dirty finger" gesture, were held to be not sufficient to merit the dismissal of the employee. The Supreme Court justified said finding by distinguishing this case from the De la Cruz, Autobus, Asian Design and Reynolds cases [supra], in that the said offensive utterances were not made in the presence of the employee's superior; that the company's rules and regulations merely provide for "verbal reminder" for first offenders; and that the penalty of dismissal was unduly harsh considering his eleven (11) years of service to the company.

Citing *Samson* [supra], petitioner in the 2007 case of **Punzal v. ETSI Technologies, Inc., [G.R. Nos. 170384-85, March 9, 2007],** sought to justify her act of circulating an e-mail message containing the following words against respondent's Senior Vice President, *viz*: *"He was so unfair ... para bang palagi siyang iniisahan sa trabaho ... Anyway, solohin na lang niya bukas ang office."* The Supreme Court held, however, that petitioner's reliance on *Samson* is misplaced. First, in that case, the misconduct committed was not related with the employee's work as the offensive remarks were verbally made during an informal Christmas gathering of the employees, an occasion "where tongues are more often than not loosened by liquor or other alcoholic beverages" and "it is to be expected xxx that employees freely express their grievances and gripes against their employers." In petitioner's case, her assailed conduct was related to her work. It reflects an unwillingness to comply with reasonable management directives. Further, while in *Samson*, Samson was held to be merely expressing his dissatisfaction over a management decision, in this case, as earlier shown, petitioner's offensive remarks were directed against respondent's Senior Vice President himself. Finally, in *Samson*, it was found that the "lack of urgency on the part of the respondent company in taking any disciplinary action against [the employee] negates its charge that the latter's misbehavior constituted serious misconduct."

In the case at bar, the management acted fourteen (14) days after petitioner circulated the quoted e-mail message.

In **Marival Trading, Inc. v. NLRC, [G.R. No. 169600, June 26, 2007],** it was alleged that the employee threw her bag and other things noisily and uttered *"Sana naman next time na uurungin yung gamit naming (sic), eh sasabihin muna sa amin."* The Supreme Court found these remarks as not unpleasant. Quite the contrary, the words *"sana naman"* which she supposedly uttered, suggest that she was merely making a request or entreaty to her superior for a little more consideration. The utter lack of respect for her superior was not patent. False and malicious statements were not made by her. Her act was not intended to malign or to cast aspersion on Marival's Vice-President and General Manager. The affidavits were not sufficient to prove her gross misconduct. Viewed in its context, the act is not of such serious and grave character to warrant dismissal. Given the factual circumstances of this case, the employee's act clearly does not constitute serious misconduct to justify her dismissal.

q. The act of a teacher in pressuring a colleague to change the failing grade of a student is serious misconduct.

The pressure and influence exerted by a teacher on his colleague to change the failing grade of a student to a passing one, as well as his misrepresentation that the student is his nephew, constitute serious misconduct which is a valid ground for dismissing an employee. *(Padilla v. NLRC, G.R. No. 114764, June 13, 1997, 273 SCRA 457).*

But in **NLRC v. Salgarino, [G.R. No. 164376, July 31, 2006],** the series of acts of the teacher of not having sought permission from petitioners before conducting the make-up tests in her house, contrary to the policy of the petitioners that permission should first be granted before conducting make-up tests that must be conducted in the school premises; of making the increases in the grades of the students during her maternity leave which is not allowed since the substitute teachers were the ones authorized to compute and give the grades for the concerned students; and of invoking humanitarian consideration in doing so which is not a basis in the Manual of Regulations for Private Schools for grading a student, constitute transgression of school rules, regulations and policies which may be characterized as a misconduct. However, such misconduct is not serious enough to warrant her dismissal from employment under paragraph [a] of Article 282 of the Labor Code. Hence, her dismissal was deemed illegal.

r. Sleeping while on duty as a ground for termination.

In **First Dominion Resources Corp. v. Peñaranda and Vidal, [G.R. No. 166616, January 27, 2006],** the employees (respondents *Peñaranda* and *Vidal*) who were caught sleeping while on duty were found to have violated twice Company Rule 8 which strictly prohibits sleeping while on duty. For their first offense, both were given stern warning that another violation would cost them their jobs. Refusing to heed the warning, Vidal cleverly tried to avoid being caught sleeping a second time by sneaking inside the container van to doze off. On the other hand, Peñaranda, after being awakened and warned by his supervisor, ignored the same and continued sleeping until caught by the roving guard. These circumstances clearly show that the employees' behavior was perverse and willful. The second requisite that the rule or order violated is reasonable and lawful is also present in this case. As a manufacturer of finished textile, petitioner utilizes machines which are operated continuously. The machines' functions are interlocked in a way that a disruption in one interrupts the entire operation. Thus, petitioner found it necessary to be very explicit in prohibiting sleeping on the job in Company Rule 8. Consequently, their dismissal based on this ground was held valid and legal.

s. Obtaining copies of payslips, not a serious misconduct.

Petitioner in **The Peninsula Manila v. Alipio, [G.R. No. 167310, June 17, 2008],** dismissed respondent on the charge that she committed serious misconduct because she obtained copies of her payslip vouchers when she is not entitled to any copy thereof. The Supreme Court ruled that respondent's act of obtaining copies of her payslips cannot be characterized as a misconduct, much less a grave misconduct. On the contrary, it is absurd that she had to resort to her own resourcefulness to get hold of these documents since it was incumbent upon petitioner, as her employer, to give her copies of her payslips as a matter of course. Respondent's dismissal was thus not based on a just cause.

SEXUAL HARASSMENT.

a. Acts penalized.

R. A. No. 7877 punishes sexual harassment if the same is:

1. Work-related; or
2. Education-related; or
3. Training-related. *(Section 3, Ibid.).*

b. Who may be liable for sexual harassment?

Sexual harassment may be committed by the following persons:

1. In *work-related* environment - by any employer, employee, manager, supervisor or agent of the employer;
2. In *education-related* environment - by any teacher, instructor or professor;
3. In *training-related* environment - by any coach or trainor;
4. By any other person who, having authority, influence or moral ascendancy over another in a *work* or *training* or *education* environment, demands, requests or otherwise requires any sexual favor from another, regardless of whether the demand, request or requirement for submission is accepted by the object of said act;
5. By any person who directs or induces another to commit any act of sexual harassment as defined in the law, or who cooperates in the commission thereof by another without which it would not have been committed, shall also be held liable under the law. *(Section 3, Ibid.).*

c. Sexual harassment in a work-related or employment environment.

In a work-related or employment environment, sexual harassment is committed when:

1. The sexual favor is made a condition in the hiring or in the employment, re-employment or continued employment of said individual or in granting said individual favorable compensation, terms, conditions, promotions, or privileges; or the refusal to grant the sexual favor results in limiting, segregating or classifying the employee which in any way would discriminate, deprive or diminish employment opportunities or otherwise adversely affect said employee;
2. The above acts would impair the employee's rights or privileges under existing labor laws; or
3. The above acts would result in an intimidating, hostile, or offensive environment for the employee. *(Section 3[a], Republic Act No. 7877).*

In a sexual harassment case involving a manager, **Villarama v. NLRC and Golden Donuts, Inc., [G.R. No. 106341, September 2, 1994, 236 SCRA 280],** the Supreme Court said that as a managerial employee, petitioner is bound by a more exacting work ethics. He failed to live up to this higher standard of responsibility when he succumbed to his moral perversity. And when such moral perversity is perpetrated against his subordinate, he provides a justifiable ground for his dismissal for lack of trust and confidence. It is the right, nay, the duty of every employer to protect its employees from over-sexed superiors.

In **Domingo v. Rayala, [G.R. No. 155831, February 18, 2008],** which involved a sexual harassment suit filed against Rogelio I. Rayala, the former Chairman of the National Labor Relations Commission (NLRC) by a subordinate, Ma. Lourdes T. Domingo, then Stenographic Reporter III, the issues presented before the Supreme Court were (1) did he commit sexual harassment? and (2) if he did, what is the applicable penalty? In holding him liable for sexual harassment, the Supreme Court explained:

> "Yet, even if we were to test Rayala's acts strictly by the standards set in Section 3, RA 7877, he would still be administratively liable. It is true that this provision calls for a 'demand, request or requirement of a sexual favor.' But it is not necessary that the demand, request or requirement of a sexual favor be articulated in a categorical oral or written statement. It may be discerned, with equal certitude, from the acts of the offender. Holding and squeezing Domingo's shoulders, running his fingers across her neck and tickling her ear, having inappropriate conversations with her, giving her money allegedly for school expenses with a promise of future privileges, and making statements with unmistakable sexual overtones - all these acts of Rayala resound with deafening clarity the unspoken request for a sexual favor.
>
> "Likewise, contrary to Rayala's claim, it is not essential that the demand, request or requirement be made as a condition for continued employment or for promotion to a higher position. It is enough that the respondent's acts result in creating an intimidating, hostile or offensive environment for the employee. That the acts of Rayala generated an intimidating and hostile environment for Domingo is clearly shown by the common factual finding of the Investigating Committee, the OP and the CA that Domingo reported the matter to an officemate and, after the last incident, filed for a leave of absence and requested transfer to another unit."

d. Sexual harassment in an education or training environment.

In an education or training environment, sexual harassment is committed:

1. Against one who is under the care, custody or supervision of the offender;
2. Against one whose education, training, apprenticeship or tutorship is entrusted to the offender;
3. When the sexual favor is made a condition to the giving of a passing grade, or the granting of honors and scholarships, or the payment of a stipend, allowance or other benefits, privileges, or considerations; or
4. When the sexual advances result in an intimidating, hostile or offensive environment for the student, trainee or apprentice. *(Section 3[b], Ibid.).*

e. The charge for sexual harassment should be substantiated by the complainant-employee.

Any employee, male or female, may charge an employer or superior with sexual harassment but the claim must be well substantiated.

In the case of ***Digitel Telecommunications Philippines, Inc. v. Soriano,*** **[G.R. No. 166039, June 26, 2006]**, it was held that the claim of respondent-employee of having been sexually harassed by petitioner firm's Senior Vice President for Business Division and Senior Executive Vice President, who were her immediate superior and next higher superior, respectively, did not pass the test of credibility. She failed to discharge the *onus* of proving her claim.

f. Duty of the employer or head of office.

It is the duty of the employer or the head of the work-related, educational or training environment or institution, to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution or prosecution of acts of sexual harassment.

Towards this end, the employer or head of office shall:

1. Promulgate appropriate rules and regulations in consultation with and jointly approved by the employees or students or trainees, through their duly designated representatives, prescribing the procedure for the investigation of sexual harassment cases and the administrative sanctions therefor. The said rules and regulations issued shall include, among others, guidelines on proper decorum in the workplace and educational or training institutions.

2. Create a committee on decorum and investigation of cases on sexual harassment. The committee shall conduct meetings, as the case may be, with officers and employees, teachers, instructors, professors, coaches, trainors and students or trainees to increase understanding and prevent incidents of sexual harassment. It shall also conduct the investigation of alleged cases constituting sexual harassment.

In the case of *work-related* environment, the committee shall be composed of at least one (1) representative each from the management, the union, if any, the employees from the supervisory rank, and from the rank-and-file employees.

In the case of *educational* or *training* institution, the committee shall be composed of at least one (1) representative from the administration, the trainors, teachers, instructors, professors, or coaches and students or trainees, as the case may be. *(Section 4, Ibid.).*

g. Solidary liability for damages of employer or head of office.

The employer or head of office, educational or training institution shall be solidarily liable for damages arising from the acts of sexual harassment committed in the employment, education or training environment, if the employer or head of office, educational or training institution is informed of such acts by the offended party and no immediate action is taken thereon. *(Section 5, Ibid.).*

h. Victim's right to institute separate action for damages.

The victim of sexual harassment is not precluded from instituting a separate and independent action for damages and other affirmative reliefs. *(Section 6, Ibid.).*

i. Penalties; imprisonment and fine.

Any person who violates the provisions of R. A. No. 7877 shall, upon conviction, be penalized by imprisonment of not less than one (1) month nor more than six (6) months, or a fine

of not less than ten thousand pesos (₱10,000.00) nor more than twenty thousand pesos (₱20,000.00) or both such fine and imprisonment at the discretion of the court. *(Section 7, Ibid.).*

An illustrative criminal case involving sexual harassment is **Dr. Rico S. Jacutin v. People of the Philippines, [G.R. No. 140604, March 6, 2002]** where the Supreme Court affirmed the Sandiganbayan's decision finding Dr. Rico Jacutin *y* Salcedo guilty of the crime of sexual harassment defined and punished under R. A. No. 7877, particularly Sections 3 and 7 thereof, and penalizing him with imprisonment of six (6) months and to pay a fine of Twenty Thousand (₱20,000.00) Pesos, with subsidiary imprisonment in case of insolvency. Additionally, he was ordered to indemnify the offended party, Juliet Yee, in the amount of ₱30,000.00 and ₱20,000.00 by way of, respectively, moral damages and exemplary damages.

j. Prescription of action.

Any action arising from sexual harassment shall prescribe in three (3) years. *(Section 7, R. A. No. 7877).*

k. Delay in filing the case for sexual harassment.

According to ***Libres v. NLRC,* [G.R. No. 123737, May 28, 1999],** a delay of one (1) year in instituting the complaint for sexual harassment is not an *indicium* of afterthought. The delay could be expected since the respondent was the subordinate's immediate superior. Fear of retaliation and backlash, not to forget the social humiliation and embarrassment that victims of this human frailty usually suffer, are all realities that the subordinate had to contend with. Moreover, the delay did not detract from the truth derived from the facts. In fact, the narration of the respondent even corroborated the subordinate's assertion in several material points. He only raised issue on the complaint's protracted filing.

Respondent Mariquit Soriano, who filed a sexual harassment suit against two top officers of petitioner firm in the case of **Digitel Telecommunications Philippines, Inc. v. Soriano, [G.R. No. 166039, June 26, 2006],** argues that "there is no prescription that would bar the filing of cases involving sexual harassment [as] the period varies depending on the needs, circumstances, and emotional threshold of the employee." The Supreme Court, however, disagreed. It ruled that while it was stated in *Philippine Aelous* that there is, strictly speaking, no fixed period within which an alleged victim of sexual harassment may file a complaint, it does not mean that she or he is at liberty to file one anytime she or he wants to. Surely, any delay in filing a complaint must be justifiable or reasonable so as not to cast doubt on its merits. In *Philippine Aelous*, the therein complainant employee Rosalinda raised the issue of sexual harassment as soon as she had the opportunity to do so. Thus, after the company issued a memorandum terminating her employment in November 1994, she filed a complaint before the Labor Arbiter on December 6, 1994, raising the issue of sexual harassment committed four years earlier by her superior who had charged her of committing gross acts of disrespect. The earliest opportunity for her to cry foul thus came only after she was terminated in November 1994. If Rosalinda kept her silence, she must have done so out of fear of losing her job. When, however, she was fired, she immediately broke her silence.

The case of Mariquit Soriano is different. She voluntarily submitted on June 27, 2000 a letter of resignation dated June 28, 2000, to become effective on June 30, 2000. She subsequently executed a Deed of Quitclaim and Release on August 22, 2000. There was no reason for her to be afraid of losing her job or not getting anything from Digitel. Still, she waited for about 11 months, counted from the date of filing of her letter of resignation or about nine months counted from the day she executed the Deed of Quitclaim and Release before she, for the first time, charged individual petitioners with sexual harassment. (*Id.).*

ACTS OF DISHONESTY.

a. Theft of funds or property not owned by employer.

If the violation consists in the theft of funds or property not belonging to the employer, the same may not be cited as basis to terminate the employment of the violator.

In **Villamor Golf Club v. Pehid, [G.R. No. 166152, October 4, 2005],** the funds alleged to have been embezzled by respondent Pehid belonged to the locker personnel of petitioner Villamor Golf Club (VGC) and not to petitioner VGC. In fact, the latter had not sanctioned the purpose upon which the said funds were established. In the case at bench, the voluntary contribution by the locker personnel amongst themselves to a mutual fund for their own personal benefit in times of need is not in any way connected with the work of the locker boys and respondent Pehid. If ever there was misappropriation or loss of the said mutual fund, the petitioner VGC will not in any way "tend or cause to prejudice the club." Such mutual fund is a separate transaction among the employees and is not in any way connected with the employee's work. Thus, if a co-employee "A" owes employee "B" ₱100,000.00 and the former absconds with the money, the employer cannot terminate the employment of employee "A" for dishonesty and/or serious misconduct since the same was not committed in connection with the employee's work. The dishonesty of an employee to be a valid cause for dismissal *must relate to or involve the misappropriation or malversation of the club funds, or cause or tend to cause prejudice to VGC*. Hence, the claim that the petitioners' interest was prejudiced has no factual basis.

b. Act of falsification, a valid ground to terminate employment.

Falsification is a wrongful act the commission of which would merit the dismissal of the culprit.

In **Ramoran v. Jardine CMG Life Insurance Co., Inc., [G.R. No. 131943, February 22, 2000],** the dismissal of the employee was held valid when she was found to have falsified her overtime authorization slips in violation of the Company Rules and Regulations.

INSUBORDINATION OR WILLFUL DISOBEDIENCE OF LAWFUL ORDERS.

It is the duty of the employee to obey all reasonable rules, orders, and instructions of the employer, and willful or intentional disobedience thereto, as a general rule, justifies rescission of the contract of service and the peremptory dismissal of the employee. (*Malabago v. NLRC, G.R. No. 165465, Sept. 13, 2006*).

a. Company rules and regulations; requisites for validity.

In order that insubordination or willful disobedience by an employee of the orders, regulations or instructions of the employer may constitute a just cause for terminating his employment, said orders, regulations, or instructions must be:

1. lawful and reasonable;
2. sufficiently known to the employee; and
3. in connection with the duties for which the employee has been engaged to discharge.

Absent any of the foregoing elements would make the refusal of the employee to comply with the rules justified and not constitutive of "*willful disobedience*" as would warrant the imposition of the penalty for such refusal.

b. Willful disobedience; requisites.

In order for the ground of "*willful disobedience*" to be considered a just cause to terminate employment, the following requisites must concur:

1. The employee's assailed conduct must have been willful or intentional, the willfulness being characterized by a wrongful and perverse attitude; and
2. The order violated must have been reasonable and lawful and made known to the employee and must pertain to the duties for which he has been engaged to discharge.

Accordingly, if the willful disobedience by an employee is committed against an *unreasonable* order or one not connected with his duties, such act cannot be a valid ground for dismissal.

The same holds true where the employer did not even point out which order or rule that the employee disobeyed as in the case of **Tongko v. The Manufacturers Life Insurance Co. [Phils.], Inc., [G.R. No. 167622, November 7, 2008],** where the employer did not point out the specific acts that the employee was guilty of that would constitute gross and habitual neglect of duty or disobedience. The employer merely cited the employee's alleged *"laggard performance,"* without substantiating such claim, and equated the same to disobedience and neglect of duty.

c. Making false allegations in complaint does not constitute insubordination.

In **Petron Corp. v. NLRC, [G.R. No. 154532, October 27, 2006],** it was held that making false accusations against his superior in a complaint filed with the Labor Arbiter cannot constitute insubordination. In filing the complaint, he believed himself to have been constructively dismissed as of August 5, 1996. By no stretch of the imagination can the filing of such complaint constitute insubordination. If, as asserted by the private respondent, he had been constructively dismissed as of August 5, 1996, such assertion could not have risen to the level of false accusation against his superior.

d. Failure to answer memo to explain constitutes willful disobedience.

In **Ace Promotion and Marketing Corp. v. Ursabia, [G.R. No. 171703, September 22, 2006],** it was noted that the failure of the employee to answer the July 9 and 10, 2001 memoranda of the employer was clearly intentional. He reported to and loitered outside the employer's premises but never made any oral or written reply to the said memoranda. This shows his wrongful and perverse attitude to defy the reasonable orders which undoubtedly pertain to his duties as an employee.

e. Another notice is required in case of termination on the ground of failure to answer memo to explain.

In case termination will be made based on the ground of failure or refusal to answer the memo to explain, it is required that another notice should be served on the employee to inform him that his services will be terminated specifically based thereon.

As held in the same 2006 case of **Ace Promotion and Marketing Corp. v. Ursabia, [G.R. No. 171703, September 22, 2006],** the just cause to terminate the employee was his willful disobedience to the July 9 and July 10, 2001 memoranda of his employer. However, he was not given sufficient notice that his services will be terminated on such grounds. He defied two (2) memoranda of his employer. Hence, it is necessary that he be furnished with a *third* memorandum informing him that his disobedience to the previous two memoranda may cause his dismissal. While the July 10, 2001 memorandum stated that he failed to answer the July 9, 2001

directive requiring an explanation for his absence on even date, the employer never sent a notice to the employee ordering him to explain his disobedience to the July 10, 2001 memorandum. Moreover, the final notice of termination of the employee failed to specify the ground for his dismissal. It vaguely stated that he is being terminated for violation of company rules which were not specified by his employer. It even added a third ground (*i.e.*, writing a threat), for which he was not given a chance to controvert. Under the circumstances, the employer did not sufficiently comply with the required two-notice rule.

f. Willfulness of conduct may be deduced from the manner the reply is written.

In the case of **ePacific Global Contact Center, Inc. v. Cabansay, [G.R. No. 167345, November 23, 2007],** the Senior Training Manager was directed by the company's Senior Vice President (SVP) to postpone the presentation of the new training process/module to the team leaders. In reply thereto, the Senior Training Manager wrote in an e-mail message: *"This is a very simple presentation and I WILL NOT POSTPONE it today, it's very easy to comprehend and as per YOUR INSTRUCTION we will be implementing it next week, so when should we present this to the TLs? Let's not make SIMPLE THINGS COMPLICATED. I will go on with the presentation this afternoon."* The Supreme Court, in upholding the validity of her dismissal based on the ground of insubordination leading to the company's loss of trust and confidence, found the said e-mail reply as indicative of her willfulness of conduct, which, as it is written, is characterized by abject aggressiveness and antagonism. The afore-quoted e-mail message has a begrudging tone and is replete with capitalized words eliciting her resolve to indeed contravene the SVP's directive.

g. Rule against marriage, when valid.

In **Duncan Association of Detailman-PTGWO v. Glaxo Welcome Philippines, Inc., [G.R. No. 162994, September 17, 2004],** the contract of employment expressly prohibited an employee from having a relationship with an employee of a competitor company. It provides:

> **"10. You agree to disclose to management any existing or future relationship you may have, either by consanguinity or affinity with co-employees or employees of competing drug companies. Should it pose a possible conflict of interest in management discretion, you agree to resign voluntarily from the Company as a matter of Company policy."**

The Supreme Court ruled that this stipulation is a valid exercise of management prerogative. The prohibition against personal or marital relationships with employees of competitor-companies upon its employees is reasonable under the circumstances because relationships of that nature might compromise the interests of the company. In laying down the assailed company policy, the employer only aims to protect its interests against the possibility that a competitor company will gain access to its trade secrets, manufacturing formulas, marketing strategies and other confidential programs and information.

h. Rule against marriage, when not valid.

In *PT & T v. NLRC,* [G.R. No. 118978, May 23, 1997, 272 SCRA 596, 605], it was held that a company policy of not accepting or considering as disqualified from work any woman worker who contracts marriage runs afoul of the test of, and the right against, discrimination afforded all women workers by our labor laws and by no less than the Constitution.

i. "Reasonable business necessity rule" as applied to the prohibition against marriage policy.

The employees in the 2006 case of **Star Paper Corp. v. Simbol, Comia and Estrella, [G.R. No. 164774, April 12, 2006],** were terminated on various occasions, on the basis of the following company policy promulgated in 1995, *viz.*:

> **"1. New applicants will not be allowed to be hired if in case he/she has [a] relative, up to [the] 3rd degree of relationship, already employed by the company.**
>
> **"2. In case two of our employees (both singles [*sic*], one male and another female) developed a friendly relationship during the course of their employment and then decided to get married, one of them should resign to preserve the policy stated above."**

According to the employer, said rule is only intended to carry out its *no-employment-for-relatives-within-the-third-degree-policy* which is within the ambit of the prerogatives of management. The Supreme Court, however, disagreed. It ruled that said policy failed to comply with the standard of *reasonableness* which is being followed in our jurisdiction. The cases of *Duncan* [supra] and *PT&T* [supra] instruct that the requirement of reasonableness must be clearly established to uphold the questioned employment policy. The employer has the burden to prove the existence of a *reasonable business necessity*. The burden was successfully discharged in *Duncan* but not in *PT&T*. The High Court similarly did not find a reasonable business necessity in the case at bar. Thus, it pronounced:

> "Petitioners' sole contention that 'the company did not just want to have two (2) or more of its employees related between the third degree by affinity and/or consanguinity' is lame. That the second paragraph was meant to give teeth to the first paragraph of the questioned rule is evidently not the valid reasonable business necessity required by the law.
>
> "It is significant to note that in the case at bar, respondents were hired after they were found fit for the job, but were asked to resign when they married a co-employee. Petitioners failed to show how the marriage of Simbol, then a Sheeting Machine Operator, to Alma Dayrit, then an employee of the Repacking Section, could be detrimental to its business operations. Neither did petitioners explain how this detriment will happen in the case of Wilfreda Comia, then a Production Helper in the Selecting Department, who married Howard Comia, then a helper in the cutter-machine. The policy is premised on the mere fear that employees married to each other will be less efficient. If we uphold the questioned rule without valid justification, the employer can create policies based on an unproven presumption of a perceived danger at the expense of an employee's right to security of tenure.
>
> "Petitioners contend that their policy will apply only when one employee marries a co-employee, but they are free to marry persons other than co-employees. The questioned policy may not facially violate Article 136 of the Labor Code but it creates a disproportionate effect and under the disparate impact theory, the only way it could pass judicial scrutiny is a showing that it is reasonable despite the discriminatory, albeit disproportionate, effect. The failure of petitioners to prove a legitimate business concern in imposing the questioned policy cannot prejudice the employee's right to be free from arbitrary discrimination based upon stereotypes of married persons working together in one company."

j. Rule on mandatory drug-testing of employees, held constitutional.

The kindred petitions in the consolidated cases of **Social Justice Society [SJS] v. Dangerous Drugs Board, [G.R. No. 157870, November 3, 2008],** raise the issue of the constitutionality of Section 36 of Republic Act No. 9165, otherwise known as the *"Comprehensive Dangerous Drugs Act of 2002,"* insofar as it requires mandatory drug-testing of, *inter alia*, officers and employees in the public and private offices. As far as pertinent, the challenged section reads as follows:

> "SEC. 36. *Authorized Drug Testing*.—Authorized drug testing shall be done by any government forensic laboratories or by any of the drug testing laboratories accredited and monitored by the DOH to safeguard the quality of the test results. xxx The drug testing shall employ, among others, two (2) testing methods, the screening test which will determine the positive result as well as the type of drug used and the confirmatory test which will confirm a positive screening test. xxx. The following shall be subjected to undergo drug testing:
>
> xxx
>
> '(d) Officers and employees of public and private offices.— Officers and employees of public and private offices, whether domestic or overseas, shall be subjected to undergo a random drug test as contained in the company's work rules and regulations, xxx for purposes of reducing the risk in the workplace. Any officer or employee found positive for use of dangerous drugs shall be dealt with administratively which shall be a ground for suspension or termination, subject to the provisions of Article 282 of the Labor Code and pertinent provisions of the Civil Service Law;
>
> xxx
>
> 'In addition to the above stated penalties in this Section, those found to be positive for dangerous drugs use shall be subject to the provisions of Section 15 of this Act.'"

In upholding the validity and constitutionality of the afore-quoted provision, the Supreme Court *en banc* pronounced, thus:

> "Just as in the case of secondary and tertiary level students, the mandatory but random drug test prescribed by Sec. 36 of RA 9165 for officers and employees of public and private offices is justifiable, albeit not exactly for the same reason. xxx.
>
> "The first factor to consider in the matter of reasonableness is the nature of the privacy interest upon which the drug testing, which effects a search within the meaning of Sec. 2, Art. III of the Constitution, intrudes. In this case, the office or workplace serves as the backdrop for the analysis of the privacy expectation of the employees and the reasonableness of drug testing requirement. The employees' privacy interest in an office is to a large extent circumscribed by the company's work policies, the collective bargaining agreement, if any, entered into by management and the bargaining unit, and the inherent right of the employer to maintain discipline and efficiency in the workplace. Their privacy

expectation in a regulated office environment is, in fine, reduced; and a degree of impingement upon such privacy has been upheld.

"Just as defining as the first factor is the character of the intrusion authorized by the challenged law. Reduced to a question form, is the scope of the search or intrusion clearly set forth, or, as formulated in *Ople v. Torres*, [G.R. No. 127685, July 23, 1998, 293 SCRA 141, 169; citing *Morfe v. Mutuc*, No. L-20387, January 31, 1968, 22 SCRA 424, 444-445], is the enabling law authorizing a search 'narrowly drawn' or 'narrowly focused'?

"The poser should be answered in the affirmative. For one, Sec. 36 of RA 9165 and its implementing rules and regulations (IRR), as couched, contain provisions specifically directed towards preventing a situation that would unduly embarrass the employees or place them under a humiliating experience. While every officer and employee in a private establishment is under the law deemed forewarned that he or she may be a possible subject of a drug test, nobody is really singled out in advance for drug testing. The goal is to discourage drug use by not telling in advance anyone when and who is to be tested. And as may be observed, Sec. 36(d) of RA 9165 itself prescribes what, in *Ople*, is a narrowing ingredient by providing that the employees concerned shall be subjected to "random drug test as contained in the company's work rules and regulations xxx for purposes of reducing the risk in the work place."

"For another, the random drug testing shall be undertaken under conditions calculated to protect as much as possible the employee's privacy and dignity. As to the mechanics of the test, the law specifies that the procedure shall employ two testing methods, i.e., the screening test and the confirmatory test, doubtless to ensure as much as possible the trustworthiness of the results. But the more important consideration lies in the fact that the test shall be conducted by trained professionals in access-controlled laboratories monitored by the Department of Health (DOH) to safeguard against results tampering and to ensure an accurate chain of custody. In addition, the IRR issued by the DOH provides that access to the drug results shall be on the 'need to know' basis; that the 'drug test result and the records shall be [kept] confidential subject to the usual accepted practices to protect the confidentiality of the test results.' Notably, RA 9165 does not oblige the employer concerned to report to the prosecuting agencies any information or evidence relating to the violation of the *Comprehensive Dangerous Drugs Act* received as a result of the operation of the drug testing. All told, therefore, the intrusion into the employees' privacy, under RA 9165, is accompanied by proper safeguards, particularly against embarrassing leakages of test results, and is relatively minimal.

"To reiterate, RA 9165 was enacted as a measure to stamp out illegal drug in the country and thus protect the well-being of the citizens, especially the youth, from the deleterious effects of dangerous drugs. The law intends to achieve this through the medium, among others, of promoting and resolutely pursuing a national drug abuse policy in the workplace via a mandatory random drug test. To the Court, the need for drug testing to at least minimize illegal drug use is substantial enough to override the individual's privacy interest under the premises. The Court can consider that the illegal drug menace cuts across gender, age group, and social- economic lines. And it may not be amiss to state

> that the sale, manufacture, or trafficking of illegal drugs, with their ready market, would be an investor's dream were it not for the illegal and immoral components of any of such activities. The drug problem has hardly abated since the martial law public execution of a notorious drug trafficker. The state can no longer assume a laid back stance with respect to this modern-day scourge. Drug enforcement agencies perceive a mandatory random drug test to be an effective way of preventing and deterring drug use among employees in private offices, the threat of detection by random testing being higher than other modes. The Court holds that the chosen method is a reasonable and enough means to lick the problem.
>
> "Taking into account the foregoing factors, i.e., the reduced expectation of privacy on the part of the employees, the compelling state concern likely to be met by the search, and the well-defined limits set forth in the law to properly guide authorities in the conduct of the random testing, we hold that the challenged drug test requirement is, under the limited context of the case, reasonable and, *ergo*, constitutional."

k. Effect of refusal to undergo random drug testing.

Refusal to undergo drug testing is tantamount to refusal to follow company rules and regulations. The worker may be held guilty of insubordination and should be dealt with in accordance with the pertinent policies of the company.

l. Lending money with high interest rates to subordinates.

In declaring petitioner's dismissal as valid in the case of ***Picar v. Shangri-la Hotel,*** **[G.R. No. 146367, December 14, 2005]**, on the ground of willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work and breach of the employer's trust, the Supreme Court pronounced that petitioner, who was the repair and maintenance supervisor of respondent's Engineering Department, disobeyed respondent's code of discipline and abused his authority by requiring respondent's employees to work in remodeling his house and by lending money with high interest rates to his subordinates.

m. When laxity in the enforcement of rules and procedures is not an excuse for commission of wrongful acts.

There are cases where the laxity or leniency in the enforcement of rules and procedures does not excuse the commission of wrongful acts.

For instance, it was held in ***San Miguel Corporation v. NLRC,*** **[G.R. No. 50321, March 13, 1984],** that the laxity in the implementation of accounting procedures in a company does not excuse the commission of dishonest acts by employees. It should not be used to hamper the right of the employer to dismiss erring employees on the ground of loss of confidence or breach of trust.

In another case involving the same company, **San Miguel Corporation v. NLRC, [G.R. Nos. 146121-22, April 16, 2008],** private respondent Ernesto Ibias was not punished for his absences without permission (AWOPs). However, even if he was not punished, the same remained on record. He was aware of the number of AWOPs he incurred and should have known that these were punishable under company rules. The fact that he was spared from suspension cannot be used as a reason to incur further AWOPs and be absolved from the penalty therefor. The Court of Appeals, NLRC, and the Labor Arbiter found that respondent incurred unauthorized absences but concluded that the penalty of discharge or termination was

disproportionate to respondent's absences in view of SMC's inconsistent and lax implementation of its policy on employees' attendance. The Supreme Court, however, disagreed and ruled that "what the lower tribunals perceived as laxity, we consider as leniency." SMC's tendency to excuse justified absences actually redounded to the benefit of respondent since the imposition of the corresponding penalty would have been deleterious to him. In a world where "no work-no pay" is the rule of thumb, several days of suspension would be difficult for an ordinary working man like respondent. He should be thankful that SMC did not exact from him almost 70 days suspension before he was finally dismissed from work. It is axiomatic that appropriate disciplinary sanction is within the purview of management imposition. Thus, in the implementation of its rules and policies, the employer has the choice to do so strictly or not, since this is inherent in its right to control and manage its business effectively. Consequently, management has the prerogative to impose sanctions lighter than those specifically prescribed by its rules, or to condone completely the violations of its erring employees. Of course, this prerogative must be exercised free of grave abuse of discretion, bearing in mind the requirements of justice and fair play.

In **Cadiz v. CA and PCIB, [G.R. No. 153784, October 25, 2005],** the High Court found more disturbing the Labor Arbiter's willingness to acquit petitioners of culpability for the fraud they had committed on account of the purported negligence of the bank. It is similar to concluding that the bank guards, and not the burglars, bear primary culpability for a bank robbery. Whatever liability or responsibility was expected of the bank stands as an issue separate from the liability of the recreant bank employees. Even assuming that the bank observed less-than-ideal controls over the security of its operations, such laxity does not serve as the *carte blanche* signal for the bank employees to take advantage of safeguard control lapses and perpetrate chicanery on their employer.

n. Refusal to render overtime constitutes insubordination.

In **R.B. Michael Press v. Galit, [G.R. No. 153510, February 13, 2008],** the Supreme Court considered the refusal of the employee to render overtime work as insubordination. There is no question that the employer's order for the employee to render overtime service to meet a production deadline complies with the second requisite, *i.e.*, that the order violated is reasonable, lawful, made known to the employee, and pertains to the duties which he had been engaged to discharge. Article 89 of the Labor Code empowers the employer to legally compel his employees to perform overtime work against their will to prevent serious loss or damage. In the present case, the employer's business is a printing press whose production schedule is sometimes flexible and varying. It is only reasonable that workers are sometimes asked to render overtime work in order to meet production deadlines. The fact that the employee refused to provide overtime work despite his knowledge that there is a production deadline that needs to be met, and that without him, being the offset machine operator, no further printing can be had, shows his wrongful and perverse mental attitude. His excuse that he was not feeling well that day is unbelievable and obviously an afterthought. He failed to present any evidence other than his own assertion that he was sick. Also, if it were true that he was then not feeling well, he would have taken the day off, or had gone home earlier. On the contrary, he stayed and continued to work all day, and even tried to go to work the next day, thus belying his excuse which is, at most, a self-serving statement.

GROSS AND HABITUAL NEGLECT OF DUTIES.

a. Negligence must be both gross and habitual to be a valid ground to dismiss.

As a ground to terminate employment, Article 282 [b] explicitly provides that negligence must not only be gross but must be both "*gross and habitual*" in character to justify depriving an employee of his means of livelihood. *(Chavez v. NLRC, G.R. No. 146530, Jan. 17, 2005; Union Motor Corporation v. NLRC, G.R. No. 159738, Dec. 9, 2004).*

Thus, a single or an isolated act of negligence which is not "*gross and habitual*" in nature will not justify termination of services. Under the Labor Code, simple negligence is not a ground for dismissal of an employee. (*Talidano v. Falcon Maritime & Allied Services, Inc., G.R. No. 172031, July 14, 2008).*

"Gross negligence" means an absence of that diligence that an ordinarily prudent man would use in his own affairs.

b. Element of habituality may be disregarded where damage or loss is substantial.

The element of habituality may be dispensed with in certain cases. But the element of grossness of the negligent act must always be present. Thus, in cases where the actual loss suffered by the employer as a consequence of the employee's negligence is substantial in amount, the requisite element of "*habituality*" may be disregarded in determining the validity of the termination of employment.

Respondent's negligence in the case of **School of the Holy Spirit of Quezon City v. Taguiam, [G.R. No. 165565, July 14, 2008],** which resulted in the death of a pupil during a swimming class, although gross, was not habitual. In view of the considerable resultant damage, however, the High Court ruled that the cause is sufficient to dismiss respondent. As a result of her gross negligence, petitioners lost its trust and confidence in respondent. As a teacher who stands *in loco parentis* to her pupils, respondent should have made sure that the children were protected from all harm while in her company. Respondent should have known that leaving the pupils in the swimming pool area all by themselves may result in an accident. A simple reminder "not to go to the deepest part of the pool" was insufficient to cast away all the serious dangers that the situation presented to the children, especially when respondent knew that the victim cannot swim. Dismally, respondent created an unsafe situation which exposed the lives of all the pupils concerned to real danger. This is a clear violation not only of the trust and confidence reposed on her by the parents of the pupils but of the school itself.

c. Actual damage, loss or injury, not an essential requisite.

To justify the dismissal of an employee for neglect of duties, it is not necessary that the employer should show that he has incurred actual loss, damage, or prejudice by reason of the employee's conduct. It is sufficient that the gross and habitual neglect by the employee of his duties tends to prejudice the employer's interest since it would be unreasonable to require the employer to wait until he is materially injured before removing the cause of the impending evil. (*Sec. 4343.01[2], Department of Labor Manual).*

d. Absences, if authorized, cannot be cited as a ground to terminate employment.

Generally, absences once authorized or with prior approval of the employer, irrespective of length thereof, may not be invoked as a ground for termination of employment. Accordingly, dismissal of an employee due to his prolonged absence with leave by reason of illness duly established by the presentation of a medical certificate is not justified. *(Oriental Mindoro Electric Cooperative, Inc. v. NLRC, G.R. No. 111905, July 31, 1995; Atlas Consolidated Mining and Development Corporation v. NLRC, G.R. No. 75751, Oct. 17, 1990, 190 SCRA 505).*

However, unauthorized absences or those incurred without official leave, constitute gross and habitual neglect in the performance of work. *(Cando v. NLRC, G.R. No. 91344, Sept. 14, 1990).*

e. Tardiness or absenteeism, if not habitual, cannot be cited as a ground to terminate employment.

If not habitual, tardiness or absenteeism cannot be invoked as sufficient ground to terminate employment.

Thus, in **Genuino Ice Company, Inc. v. Magpantay, [G.R. No. 147790, June 27, 2006]**, respondent's four-day absence was declared not tantamount to gross and habitual neglect of duty. Respondent has never been proved to be habitually absent in a span of seven (7) years.

In **Philips Semiconductors [Phils.], Inc. v. Fadriquela, [G.R. No. 141717, April 14, 2004],** given the factual milieu therein, the employee's dismissal from employment for incurring five (5) absences in April 1993, three (3) absences in May 1993 and four (4) absences in June 1993, even if true, was considered too harsh a penalty.

f. Tardiness or absenteeism, if habitual, may be cited as a ground to terminate employment.

Once habitually incurred without leave, tardiness or absenteeism constitutes gross negligence and may thus be a sufficient ground to terminate an employment.

In the case of **Valiao v. Hon. CA, [GR. No. 146621, July 30, 2004, 435 SCRA 543],** it was held that where the records clearly show that the employee has not only been charged with the offense of high-grading but also has been warned twenty-one (21) times for absences without official leave, these repeated acts of misconduct and willful breach of trust by an employee justify his dismissal and forfeiture of his right to security of tenure.

In **PLDT Co., Inc. v. Balbastro, [G.R. No. 157202, March 28, 2007],** the dismissal of the employee was held valid because it was shown by evidence that she committed patent abuse of her sick leave privileges which is one of the grounds listed in the company rules for disciplinary action. The three (3) unauthorized absences all committed in 1989 are sufficient bases for her employer's finding that she patently abused her sick leave privileges. The fact that she had been suspended for her first two (2) unauthorized absences does not prevent her employer from imposing the penalty of dismissal. Previous infractions may be used as justification for an employee's dismissal from work in connection with a subsequent similar offense.

g. Absences or tardiness due to emergency, ailment or fortuitous event are justified.

Absences incurred by reason of certain emergency cases or ailment or unforeseeable events cannot be used as basis to terminate employment.

In **Navarro v. Coca-Cola Bottlers Phils., Inc., [G.R. No. 162583, June 8, 2007],** the Employees Code of Disciplinary Rules and Regulations provided for the penalty of discharge for a tenth AWOP/AWOL, whether consecutive or not, following other AWOP/AWOLs within one (1) calendar year. On August 11, 1997, petitioner did not report for work because of heavy rains which flooded the entire barangay where he resided. It was his tenth absence. Despite his explanation, he was terminated from employment. In holding that his dismissal was illegal, the Supreme Court ruled that petitioner's application for leave should have been approved by the company. His absence was due to a fortuitous event outside of petitioner's control. Petitioner had no wrongful, perverse or even negligent attitude, intended to defy the order of his employer when he absented himself. He did so because heavy rains flooded their residential area which was

along the railroad. In his favor, the Barangay Captain certified that indeed there was flooding in their place of residence. A worker cannot be reasonably expected to anticipate times of sickness nor emergency. Hence, to require prior notice of such times would be absurd. He can only give proper notice after the occurrence of the event - which is what petitioner did in this case.

In **Del Monte Philippines, Inc. v. Velasco, [G.R. No. 153477, March 6, 2007],** the series of absences of the respondent due to pregnancy and its related ailments, was held not a valid ground to dismiss her from employment. The Supreme Court agreed with the CA in concluding that her sickness was pregnancy-related and, therefore, the petitioner cannot terminate her services because in doing so, petitioner will, in effect, be violating the Labor Code which, under Article 137 thereof, prohibits an employer to discharge an employee on account of the latter's pregnancy.

h. Condonation of absenteeism or tardiness.

Condonation of absenteeism or tardiness cannot be inferred from the fact alone that no sanction has been seasonably imposed by the employer therefor. Neither can it be considered as a waiver to enforce its rules.

During his employment, the employee in **R.B. Michael Press v. Galit, [G.R. No. 153510, February 13, 2008],** was tardy for a total of 190 times, totaling to 6,117 minutes, and was absent without leave for a total of nine and a half days. In resolving the issue on tardiness and absences, the Labor Arbiter ruled that petitioners cannot use respondent's habitual tardiness and unauthorized absences to justify his dismissal since they had already deducted the corresponding amounts from his salary. Furthermore, the Labor Arbiter explained that since respondent was not subjected to any admonition or penalty for tardiness, petitioners then had condoned the offense or that the infraction is not serious enough to merit any penalty. The Court of Appeals then supported the Labor Arbiter's ruling by ratiocinating that petitioners cannot draw on respondent's habitual tardiness in order to dismiss him since there is no evidence which shows that he had been warned or reprimanded for his excessive and habitual tardiness. The Supreme Court, however, found the said ruling incorrect. It ruled that the mere fact that the numerous infractions of respondent have not been immediately subjected to sanctions cannot be interpreted as condonation of the offenses or waiver of the company to enforce company rules. A waiver is a voluntary and intentional relinquishment or abandonment of a known legal right or privilege. It has been ruled that "a waiver to be valid and effective must be couched in clear and unequivocal terms which leave no doubt as to the intention of a party to give up a right or benefit which legally pertains to him." Hence, the management prerogative to discipline employees and impose punishment is a legal right which cannot, as a general rule, be impliedly waived.

i. When past infractions are no longer relevant to the current violation.

Infractions in the past for which the employee had already been meted appropriate penalty for each violation can no longer be used as basis for his dismissal from the service. To do so would put him to penalty twice for the same offense. This principle is best exemplified in the case of **Dr. Ting v. Hon. CA, [G.R. No. 146174, July 12, 2006],** where the employee had already been penalized for his two (2) prior infractions, hence, it was held that the same can no longer be considered in the determination of the habitual nature of his neglect of duty under Article 282 of the Labor Code because to do so would be to unduly penalize him twice for his infraction.

The same ruling was made in **Tower Industrial Sales v. Hon. CA, [G.R. No. 165727, April 19, 2006],** where the absences without official leave incurred on February 19, 2002 and March 4, 2002 by the employee for which he was already penalized, although they were

clear violations of company rules, were considered not grave enough as to amount to gross misconduct. In his fifteen (15) years of service with his employer, a day or two of absences without prior leave is trivial; hardly of habitual character.

ABANDONMENT OF WORK.

a. Abandonment of work, requisites.

Abandonment is a form of neglect of duty; hence, a just cause for termination of employment under Article 282 of the Labor Code.

To constitute abandonment, two (2) elements must concur, namely:

1. The employee must have failed to report for work or must have been absent without valid or justifiable reason; and
2. There must have been a clear intention on the part of the employee to sever the employer-employee relationship manifested by some overt act.

b. Mere absence is not enough to constitute abandonment.

Although absence without a valid or justifiable reason is an element of abandonment, settled is the rule, however, that mere absence or failure to report for work is not tantamount to abandonment of work.

c. Clear intention to sever employment relationship, necessary.

Abandonment is a matter of intention and cannot lightly be presumed from certain equivocal acts.

The *second* element above is the more determinative factor being manifested by some overt acts from which it may be deduced that the employee has no more intention to work. The intent to discontinue the employment must be shown by clear proof that it was deliberate and unjustified.

Absenteeism *per se* is not an overt act which would prove an unequivocal intent on the part of the employee to discontinue employment. (*City Trucking, Inc. v. Balajadia, G.R. No. 160769, Aug. 9, 2006).*

For instance, in the case of **Mame v. CA, [G.R. No. 167953, April 3, 2007],** the petitioner employee, as foreman carpenter, was accused of wrong installation of expensive narra planks on the stairs of a client's residence. Consequently, he was told by his employers who are engaged in construction: "*Umalis ka na, ayaw na kitang makita dito. Tanggal ka na sa trabaho,*" followed by scathing insults. Thus, he had no choice but to leave his employment. Debunking the claim of respondent-employers that petitioner had walked out and abandoned his job, the Supreme Court noted that petitioner's *"walk-out"* and his failure to report for work afterwards is not sufficient to anchor a finding of abandonment. It must be noted that petitioner must have been so humiliated when respondent Norilyn Cuerpo blamed him for the erroneous installation of *narra* planks on the stairs of the Bayot residence. He sulked and remained in the crew barracks. He did not immediately leave the site. Thus, it cannot be concluded solely by such circumstances that petitioner thereby abandoned his job. Notwithstanding, respondents themselves did not consider petitioner as having abandoned his job by his mere absence from September 18, 2001 to September 28, 2001 when he left Baguio City and arrived in Manila to file his complaint in the NLRC. The ten-day interval from the time of the incident between petitioner and respondent

Norilyn Cuerpo up to the time he filed the complaint for illegal dismissal is so short that it is quite absurd to expect respondents to consider that petitioner had abandoned his job. In fact, respondents were not actually aware that petitioner quit his job.

d. An employee who stopped working because of her mistaken belief that she has been dismissed is not guilty of abandonment.

In **Uniwide Sales Warehouse Club v. NLRC, [G.R. No. 154503, February 29, 2008],** the private respondent-employee stopped working because of her mistaken belief that the successive memoranda sent to her from March 1998 to June 1998 constituted discrimination, insensibility or disdain which was tantamount to constructive dismissal. Thus, private respondent filed a case for constructive dismissal against petitioners and consequently stopped reporting for work. In declaring that the private respondent did not abandon her job, the Supreme Court, citing the case of *Lemery Savings & Loan Bank v. NLRC*, [G.R. No. 96439, January 27, 1992, 205 SCRA 492], ruled that the mistaken belief on the part of the employee that she was already dismissed should not lead to a drastic conclusion that she has chosen to abandon her work. The petitioners were not able to establish that private respondent deliberately refused to continue her employment without justifiable reason.

e. Requirement of notice before declaring abandonment.

Abandonment of work does not *per se* sever the employer-employee relationship. The operative act that will ultimately put an end to the relationship is the dismissal of the employee after complying with the procedure prescribed by law. If the employer does not follow the procedure, there is illegal dismissal. *(De Paul/King Philip Customs Tailor v. NLRC, G.R. No. 129824, March 10, 1999).*

Due process in the case of abandonment means the service of two (2) notices to the employee, *viz.*:

1. *First* notice directing the employee to explain why he should not be declared as having abandoned his job; and
2. *Second* notice to inform him of the employer's decision to dismiss him on the ground of abandonment.

For obvious reason, no hearing is required in order to validly dismiss an employee for abandonment.

f. Notices in abandonment cases must be sent to employee's last known address.

In case of abandonment of work, the notices should be served at the worker's last known address. *(Kams International, Inc. v. NLRC, G.R. No. 128806, Sept. 28, 1999; Icawat v. NLRC, G.R. No. 133573, June 20, 2000; Carlos A. Gothong Lines, Inc. v. NLRC, G.R. No. 96685, Feb. 15, 1999).*

g. Notices sent to employee's last known address, when not valid.

In the case of **Coca-Cola Bottlers Philippines, Inc. v. Garcia, [G.R. No. 159625, January 31, 2008],** involving abandonment, the Supreme Court was not persuaded by the argument of petitioner that the purpose of the notice requirement was achieved when it sent several notices to respondent at her last known address. While petitioner presented the envelopes of the alleged notices sent to respondent's last known address, the contents thereof were not offered in evidence. Thus, the records are wanting of any proof that respondent was properly apprised of the charges against her and given an opportunity to explain her side, as petitioner

maintains. Evidently, it is clear that respondent's dismissal was effected without the notice required by law. Thus, petitioner failed to satisfy the two-notice requirement.

h. Immediate filing of complaint for illegal dismissal praying for reinstatement negates abandonment.

The immediate filing of complaint for illegal dismissal by the employees who were dismissed on the ground of abandonment praying for their reinstatement, negates the finding of abandonment. They cannot, by any reasoning, be said to have abandoned their work for as the Supreme Court had consistently ruled, the filing by an employee of a complaint for illegal dismissal where reinstatement is prayed for is proof enough of his desire to return to work, thus negating the employer's charge of abandonment.

i. Lapse of time between dismissal and filing of a case, not material indication of abandonment.

The lapse of time between the dismissal of an employee for abandonment and the filing of a complaint for illegal dismissal is not a material *indicium* of abandonment. For instance, the filing of a complaint for illegal dismissal the very next day after the employee was removed *(Anflo Management & Investment Corp. v. Bolanio, G.R. No. 141608, Oct. 4, 2002)*, or two (2) days after receiving the termination letter *(EgyptAir, v. NLRC, G.R. No. 63185, Feb. 27, 1989)*, or four (4) days *(Artemio Labor v. NLRC, G.R. No. 110388, Sept. 14, 1995)*, or six (6) days *(Masagana Concrete Products v. NLRC, G.R. No. 106916, Sept. 3, 1999)*, or eighty-four (84) days *(GSP Manufacturing Corp. v. Cabanban, G.R. No. 150454, July 14, 2006)*, from the supposed date of abandonment, does not indicate abandonment of work. Such dispatch in protesting the termination belies the claimed abandonment. (*See Macahilig v. NLRC, G.R. No. 158095, Nov. 23, 2007).*

In more extreme cases, the Supreme Court did not consider the lapse of two (2) years and five (5) months *(Reno Foods, Inc. v. NLRC, G.R. No. 116462, Oct. 18, 1995, 249 SCRA 379, 387)* or twenty (20) months *(Angeles v. Fernandez, G.R. No. 160213, Jan. 30, 2007)* or nine (9) months *(NS Transport Services, Inc. v. Zeta, G.R. No. 158499, April 4, 2007; Kingsize Manufacturing Corp. v. NLRC, G.R. Nos. 110452-54, Nov. 24, 1994)* or eight (8) months *(Padilla Machine Shop v. Javilgas, G.R. No. 175960, Feb. 19, 2008; Nazal v. NLRC, G.R. No. 122368, June 19, 1997, 274 SCRA 350, 356-357)* or six (6) months before filing the complaint for illegal dismissal, as an indication of abandonment. Under the law, the employee has four (4) years within which to institute his action for illegal dismissal. *(See Pare v. NLRC, G.R. No. 128957, Nov. 16, 1999).*

j. When what is prayed for is separation pay and not reinstatement, the filing of complaint does not negate abandonment.

The rule that abandonment of work is inconsistent with the filing of a complaint for illegal dismissal is not applicable to a case where the complainant does not pray for reinstatement but merely asks for separation pay instead. It goes without saying that the prayer for separation pay, being the alternative remedy to reinstatement, contradicts an employee's stance that he was illegally dismissed for abandonment. That he was illegally dismissed is belied by praying for such relief. *(Jo v. NLRC, G.R. No. 121605, Feb. 2, 2000).*

k. When merely praying for separation pay and not reinstatement does not indicate abandonment.

The Supreme Court ruled in **Macahilig v. NLRC, [G.R. No. 158095, November 23, 2007],** that petitioner's prayer for separation pay is not a manifestation of his lack of intention to

work. Notably, in his position paper filed with the Labor Arbiter, petitioner stated that it was not in the best interest of the parties that reinstatement be granted and thus prayed for separation pay. The prayer for separation pay cannot be legally regarded as an abandonment since, given the smallness of respondent's staff (numbering only 3), petitioner would have found it uncomfortable to continue working under the hostile eyes of the employer who had been forced to reinstate him. The hostility of private respondent was made manifest when she considered the filing of the case as petitioner's act of exacting money from her. In fact, she branded petitioner as one who was very good at acting, and who had mastered the art of gaining other people's sympathy. The realities of the situation preclude a harmonious relationship, should reinstatement be ordered.

l. Employment in another firm coinciding with the filing of complaint does not indicate abandonment.

The fact that the start of the new employment with another employer coincides with the date of the original complaint for illegal dismissal strongly indicates that such employment was only meant to help the employee and his family survive during the pendency of his case. It has been said that abandonment of position cannot be lightly inferred, much less legally presumed from certain equivocal acts such as an interim employment. *(Hda. Dapdap I v. NLRC, G.R. No. 120556, Jan. 26, 1998; Jardine Davies, Inc. v. NLRC, G.R. No. 106915, Aug. 31, 1993).*

The fact that the employee sought an alternative employment after he was barred from resuming his work with the company does not indicate abandonment for he must continue to feed, shelter and clothe himself and his family. (*NS Transport Services, Inc. v. Zeta, G.R. No. 158499, April 4, 2007*).

m. Effect of offer of reinstatement by employer during proceedings before Labor Arbiter and refusal by employee.

The private respondent in **Hantex Trading Co., Inc. v. CA, [G.R. No. 148241, September 27, 2002],** accused of abandoning his work, filed a complaint and prayed therein, among others, for reinstatement. However, during the initial hearing before the Labor Arbiter, the petitioners made an offer to reinstate him to his former position but he *"defiantly"* refused the offer despite the fact that in his complaint, he was asking for reinstatement. Again, the petitioners extended the offer in its position paper filed with the Labor Arbiter but was likewise rejected by the private respondent. The petitioners consequently asserted that these circumstances are clear indications of respondent's lack of further interest to work and effectively negate his claim of illegal dismissal.

The Supreme Court, however, ruled otherwise. It considered the refusal to be reinstated as more of a symptom of strained relations between the parties, rather than an *indicium* of abandonment of work as obstinately insisted by petitioners. While the private respondent desires to have his job back, it must have later dawned on him that the filing of the complaint for illegal dismissal and the bitter incidents that followed have sundered the erstwhile harmonious relationship between the parties. He must have surely realized that even if reinstated, he will find it uncomfortable to continue working under the hostile eyes of the petitioners who had been forced to reinstate him. He had every reason to fear that if he accepted petitioners' offer, their watchful eyes would thereafter be focused on him, to detect every small shortcoming of his as a ground for vindictive disciplinary action. In such instance, reinstatement would no longer be beneficial to him.

Neither does the fact that petitioners made *offers to reinstate* respondent legally disproves illegal dismissal. As observed by the Court of Appeals, to which the Supreme Court was in full agreement, the offer may very well be "a tacit admission of petitioners that they erred in

dismissing him verbally and without observance of both substantive and procedural due process." Curiously, petitioners' offer of reinstatement was made only after more than one (1) month from the date of the filing of the illegal dismissal case. Their belated gesture of goodwill is highly suspect. If petitioners were indeed sincere in inviting respondent back to work in the company, they could have made the offer much sooner. In any case, their intentions in making the offer are immaterial, for the offer to re-employ respondent could not have the effect of validating an otherwise arbitrary dismissal.

But in **Leopard Integrated Services, Inc. v. Macalinao, [G.R. No. 159808, September 30, 2008],** where evidence that the petitioners had dismissed the respondent was lacking, the Supreme Court considered as an indication of petitioners' lack of intention in dismissing respondent (security guard) from employment, and respondent's lack of interest in resuming work, the fact that during the preliminary conference of the case before the Labor Arbiter, petitioners offered to allow respondent to report for work but the latter refused. This was not denied by respondent. And even during the pendency of the case before the CA, respondent was subsequently admitted into employment by petitioners and was given a posting at the United Overseas Bank, Binondo Branch. Given these circumstances, it is clear that there was no dismissal to begin with; instead, it was respondent who, by his own acts, displayed his lack of interest in resuming his employment with petitioners.

n. Employer's insistence on commission of wrongful acts by the employees negates the charge of abandonment.

In **Romy's Freight Service v. Castro, [G.R. No. 141637, June 8, 2006],** it was held that petitioner's obstinate insistence on the alleged serious misconduct (*i.e.*, the commission of estafa and/or qualified theft) of private respondents belies his claim of abandonment as the ground for their dismissal. Rather, it strengthens the finding of petitioner's discrimination, insensibility and antagonism towards private respondents which gave no choice to the latter except to forego their employment.

o. Absence to evade arrest, not a valid justification.

In **Camua, Jr. v. NLRC, [G.R. No. 158731, January 25, 2007],** petitioner failed to report for work and thus was dismissed for abandonment. Petitioner sought to justify his absence by citing the fact that he was in hiding since a warrant of arrest was issued against him. In holding that his reason for not reporting for work cannot be considered valid nor justifiable, the Supreme Court declared: "He said he had gone hiding in Batangas to evade arrest and ward off the long arm of the law. We have held that through flight, one derogates the course of justice by avoiding arrest, detention, or the institution or continuance of criminal proceedings. We cannot countenance the petitioner's excuse and make him benefit from a grossly unlawful act which he himself created. To do so would be to place an *imprimatur* on his attempt to derail the normal course of the administration of justice."

p. Requesting for a Certificate of Employment, not evidence of abandonment.

According to the Supreme Court in **City Trucking, Inc. v. Balajadia, [G.R. No. 160769, August 9, 2006],** the act of an employee in requesting for a Certificate of Employment does not show that he has abandoned his work. Here, respondent requested for the issuance of the Certificate of Employment after he has been told that his services have already been terminated. Getting a Certificate of Employment is normal. To contend that it is evidence of abandonment is *non sequitur*.

FRAUD.

a. Concept.

"*Fraud*" or "*dolo*" consists in the conscious and intentional proposition to evade the normal fulfillment of an obligation. (*8 Manresa, 5th Ed., Bk. 1, p. 168).*

The circumstances evidencing fraud and misrepresentation are as varied as the people who perpetrate it, each assuming different shapes and forms and may be committed in as many different ways. Fraud and misrepresentation are, therefore, never presumed; it must be proved by clear and convincing evidence and not mere preponderance of evidence. *(Solidbank Corporation v. Mindanao Ferroalloy Corporation, G.R. No. 153535, July 28, 2005).*

b. Lack of damage or losses not necessary in fraud cases.

The fact that the employer did not suffer losses from the dishonesty of the dismissed employee because of its timely discovery does not excuse the latter from any culpability. *(Villanueva v. NLRC, G. R. No. 129413, July 27, 1998).*

In **Diamond Motors Corporation v. CA, [G.R. No. 151981, December 1, 2003]** and in the earlier case of **Philippine Airlines, Inc. v. NLRC, [G.R. No. 126805, March 16, 2000],** involving the commission of fraud against the company, it was ruled that the fact that the employer failed to show that it suffered losses in revenue as a consequence of the employee's act is immaterial. It must be stressed that actual defraudation is not necessary in order that an employee may be held liable under the company rule against fraud. That the dismissed employee attempted to deprive the employer of its lawful revenue is already tantamount to fraud against the company which should warrant dismissal from the service.

c. Restitution does not have absolutory effect.

In **Gonzales v. NLRC and Pepsi-Cola Products, Phils., Inc., [G.R. No. 131653, March 26, 2001],** it was held that the fact that the employer ultimately suffered no monetary damage as the employee subsequently settled his account is of no moment. This was not the reason for the termination of his employment in the company but the anomalous scheme he engineered to cover up his past due account which constitutes a clear betrayal of trust and confidence.

The Supreme Court has reiterated this rule in **Santos v. San Miguel Corporation, [G.R. No. 149416, March 14, 2003].** Hence, even if the shortages have been fully restituted, the fact that the employee has misappropriated company funds is a valid ground to terminate his services for loss of trust and confidence.

d. Failure to deposit collection constitutes fraud.

In **Aldeguer & Co., Inc./Loalde Boutique v. Tomboc, [G.R. No. 147633, July 28, 2008],** the dismissal of respondent on the ground of fraud or willful breach by the employee of the trust reposed in her by her employer or duly authorized representative was upheld because, as the officer-in-charge of petitioner's boutique in Ayala Center, Cebu City, she was found to have misappropriated the ₱12,090.00 cash sales for May 11, 1997, ₱9,203.40 cash sales for May 12, 1997, and ₱6,844.30 cash sales for May 13, 1997 – all duly receipted – but were not deposited in petitioner's account with Solidbank. Petitioner presented deposit slips showing that, contrary to its policy, cash sales for the day were on several occasions not deposited by respondent on the next banking day.

e. Lack of misappropriation or shortage is immaterial in case of unauthorized encashment of personal checks by teller and cashier.

Where there was a series of unauthorized encashments of personal checks, the Supreme Court in **Central Pangasinan Electric Cooperative, Inc. v. Macaraeg, [G.R. No. 145800, January 22, 2003],** ruled that it is not material that the teller and cashier did not *"misappropriate any amount of money, nor incur any shortage relative to the funds in their possession."* The basic premise for dismissal on the ground of loss of confidence is that the employees concerned hold positions of trust. The betrayal of this trust is the essence of the offense for which an employee is penalized. The respondents held positions of utmost trust and confidence. As teller and cashier, they are expected to possess a high degree of fidelity. They are entrusted with considerable amounts of cash. They did not live up to their duties and obligations.

WILLFUL BREACH OF TRUST AND CONFIDENCE.

a. Doctrine of loss of trust and confidence; Requisites..

The following are the requisites or guidelines for the application of the doctrine of loss of trust and confidence:

1. The loss of confidence must not be simulated;
2. It should not be used as a subterfuge for causes which are illegal, improper or unjustified;
3. It may not be arbitrarily asserted in the face of overwhelming evidence to the contrary;
4. It must be genuine, not a mere afterthought, to justify earlier action taken in bad faith; and
5. The employee involved holds a position of trust and confidence.

b. Breach must be willful and without justifiable excuse.

Under the doctrine of loss of trust and confidence, the breach of trust must be willful. 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.

Ordinary breach of trust will not suffice.

c. Breach must be work-related.

In order to constitute a just cause for dismissal, the act complained of should be "*work-related*" and must show that the employee concerned is unfit to continue to work for the employer. *(Sulpicio Lines, Inc. v. Gulde, G.R. No. 149930, Feb. 22, 2002; Gonzales v. NLRC and Pepsi-Cola Products, Phils., Inc., G.R. No. 131653, March 26, 2001).*

The loss of confidence should relate to acts inimical to the interest of the employer and must have arisen from the performance of the employee's duties. (*Genuino v. NLRC, G.R. Nos. 142732-33, Dec. 4, 2007*).

For instance, in the case of **Philippine National Construction Corporation v. Matias, [G.R. No. 156283, May 6, 2005],** the position of project controller - the position of respondent at the time of his dismissal – undeniably requires trust and confidence, for it relates to the handling of business expenditures or finances. However, his act allegedly constituting breach of trust and confidence was not in any way related to his official functions and responsibilities as project controller. In fact, the questioned act pertained to an unlawful scheme deliberately engaged in by

petitioner PNCC in order to evade a constitutional and legal mandate. The said unlawful scheme by petitioner refers to its use of its employees as *"dummies"* for purposes of acquiring vast tracts of land in Bukidnon and thereafter compelling them to assign all rights over same properties in its favor - a scheme which is a flagrant violation of the Constitution as regards the maximum area of real property which a corporation can acquire under the CARP Law.

In **Metropolitan Bank and Trust Company v. Barrientos, [G.R. No. 157028, January 31, 2006].** the Supreme Court held that respondent therein was not liable for misconduct for allowing the opening of fictitious accounts because he was merely a cashier and had no authority to approve new accounts and had no way of knowing the anomalous transactions.

In **Premier Development Bank v. Mantal, [G.R. No. 167716, March 23, 2006],** although respondent's position as accounting clerk involves a high degree of responsibility requiring trust and confidence carrying with it the duty to observe proper company procedures in the fulfillment of her job as it relates closely to the financial interests of the company, the charge against her relative to bank guarantees is not reasonably connected to her job of opening of savings, current and/or time deposits and the payment of withdrawals. The duty and ultimately the responsibility of approving transactions relating to bank guarantees lie with the branch manager and the management personnel of the petitioner's head office.

d. Loss of confidence must not be a mere afterthought.

In the case of **Salas v. Aboitiz One, Inc., [G.R. No. 178236, June 27, 2008],** petitioner Salas was dismissed for neglect of duties and willful breach of trust. Respondent employer asserted and zeroed in on these grounds before the Labor Arbiter, the NLRC and the CA. However, respondent employer later tried to validate Salas' dismissal on the ground of serious misconduct for his alleged failure to account for unused accountable forms amounting to ₱57,850.00. As aptly found by the NLRC, the charge came only after Salas' dismissal. Inexplicably, this alleged infraction was never included as ground in the notice of termination. It was only on November 23, 2003 or three (3) months after the filing of the complaint for illegal dismissal that Aboitiz asserted that Salas failed to account for these unused accountable forms amounting to ₱57,850.00. It is clear that such assertion of serious misconduct was a mere afterthought to justify the illegal dismissal. It was, therefore, error for the CA to include serious misconduct, which had never been raised in the proceedings below, as ground to sustain the legality of Salas' dismissal.

e. Employee's position must be reposed with trust and confidence.

According to *Bristol Myers Squibb [Phils.], Inc. v. Baban*, [G.R. No. 167449, December 17, 2008], there are two (2) classes of positions of trust. The *first class* consists of managerial employees. They are defined as those vested with the powers or prerogatives to lay down management policies and to hire, transfer suspend, lay-off, recall, discharge, assign or discipline employees or effectively recommend such managerial actions. The *second class* consists of cashiers, auditors, property custodians, etc. They are defined as those who in the normal and routine exercise of their functions, regularly handle significant amounts of money or property.

A few examples were given by the Supreme Court in the case of **Globe-Mackay Cable and Radio Corporation v. NLRC, [G.R. No. 82511, March 3, 1992]** to illustrate this principle: "xxx where the employee is a Vice-President for Marketing and as such, enjoys the full trust and confidence of top management *(Asiaworld Publishing House, Inc. v. Ople, 152 SCRA 219 [1987])*; or is the Officer-In-Charge of the extension office of the bank where he works *(Citytrust Finance Corp. v. NLRC, 157 SCRA 87 [1988])*; or is an organizer of a union who was in a position to sabotage the union's efforts to organize the workers in commercial and industrial

establishments *(Bautista v. Inciong, 158 SCRA 665 [1988])*; or is a warehouseman of a non-profit organization whose primary purpose is to facilitate and maximize voluntary gifts by foreign individuals and organizations to the Philippines *(Esmalin v. NLRC, 177 SCRA 537 [1989])*; or is a manager of its Energy Equipment Sales *(Maglutac v. NLRC, 189 SCRA 767 [1990]).* "

f. There must be "some basis" for the loss of trust and confidence.

The loss of trust and confidence must have *some basis*. Proof beyond reasonable doubt is not required. It is sufficient that there must only be some basis for such loss of confidence or that there is reasonable ground to believe if not to entertain the moral conviction that the concerned employee is responsible for the misconduct and that the nature of his participation therein rendered him absolutely unworthy of trust and confidence demanded by his position. (*Uniwide Sales Warehouse Club v. NLRC, G.R. No. 154503, Feb. 29, 2008; Norsk Hydro [Phils.], Inc. v. G.R. No. 162871, Jan. 31, 2007; Alcazaren v. Univet Agricultural Products, Inc., G.R. No. 149628, Nov. 22, 2005).*

The High Court followed this precept in **Gana v. NLRC, Aboitiz Haulers, Inc. and Carl Wozniak, [G.R. No. 164640, June 13, 2008].** Petitioner, a managerial employee, does not deny having sent the subject e-mails to an official of Trans-America, an entity which has an existing contract with one of the sister companies of respondent Aboitiz Haulers, Inc. as its container depot. Petitioner's intention in sending the e-mails was to inform Trans-America of the supposed inefficiency in the operations of respondent company as well as the company's poor services to its clients. These pieces of information necessarily diminished the credibility of respondent company and besmirched its reputation. In fact, Trans-America wrote respondent company expressing its disappointment in the services that the Aboitiz companies were rendering. Even if petitioner had no other intention but to improve the business of respondent company, she should have first coursed the said information to her superiors instead of hastily sending correspondence to their client, considering that the information she possessed was prejudicial to her employer's business. She should have confined her grievance or complaint regarding the conduct of her employer's business within the company. As a managerial employee, she is expected to exercise her judgment and discretion with utmost care and concern for her employer's business. Petitioner is tasked to perform key functions and, unlike ordinary employees, she is bound by more exacting work ethics. In sending e-mails to Trans-America, she unnecessarily and prematurely exposed the company's shortcomings in handling the business of its clients when the company could have possibly rectified or remedied the matter before any damage was done. Hence, respondent company cannot be faulted for having lost its trust and confidence in petitioner and in refusing to retain her as its employee considering that her continued employment is patently inimical to respondent company's interest.

g. Rules on termination of managerial and supervisory employees different from those applicable to rank-and-file employees.

The nature of the job of an employee becomes relevant in termination of employment by the employer because the rules on termination of managerial and supervisory employees are different from those on the rank-and-file employees. Managerial employees are tasked to perform key and sensitive functions, and thus are bound by more exacting work ethics. As a consequence, managerial employees are covered by the trust and confidence rule. The same holds true for supervisory employees occupying positions of responsibility. (*Sagales v. Rustan's Commercial Corp., G.R. No. 166554, Nov. 27, 2008).*

Thus, with respect to rank-and-file personnel, loss of trust and confidence as a ground for valid dismissal requires proof of involvement in the alleged events in question and that mere

uncorroborated assertions and accusations by the employer will not be sufficient. But as regards a managerial employee, the mere existence of a basis for believing that such employee has breached the trust of his employer would suffice for his dismissal. Hence, in the case of managerial employees, proof beyond reasonable doubt is not required, it being sufficient that there be some basis for such loss of confidence, such as when the employer has reasonable ground to believe that the employee concerned is responsible for the purported misconduct, and the nature of his participation therein renders him unworthy of the trust and confidence demanded by his position.

h. Command responsibility of managerial employees, a ground to dismiss.

The principle of *respondeat superior* or command responsibility may be cited as basis for the termination of employment of managerial employees based on loss of trust and confidence.

On the basis of this principle alone, it was held in the case of **Muaje-Tuazon v. Wenphil Corp., [G.R. No. 162447, December 27, 2006],** that the managerial employees may be held liable for negligence in the performance of their managerial duties, unless they can positively show that they were not involved. Their position requires a high degree of responsibility that necessarily includes unearthing of fraudulent and irregular activities. Their bare, unsubstantiated and uncorroborated denial of any participation in the cheating does not prove their innocence nor disprove their alleged guilt. More so in this case where some employees declared in their affidavits that the cheating was actually the idea of said managers.

The Supreme Court, in **House of Sara Lee v. Rey, [G.R. No. 149013, August 31, 2006],** emphasized the same command responsibility rule in upholding the validity of the dismissal of respondent. Here, the NLRC and the CA held that there were other co-employees who had access to the same computer terminals used in the computation of commissions paid to salesmen, hence, it cannot be pinpointed who was responsible for the anomaly. It was held, however, that even if this is true as respondent argues, this point is not material. It must be stressed that the respondent was the Credit Administration Supervisor of the company, one tasked to directly supervise each and every collectible due to the petitioner. The records show that respondent, by her very own admission, actually participated in the foregoing irregularities. Although the petitioner could not directly and wholly attribute the monetary loss of ₱211,000.00 linked to the 15 samples as reflected in the Auditor's Report, to the actuations of the respondent, it is conceded in all quarters that the repeated and unauthorized extensions of the credit terms made by respondent no doubt have serious financial implications that affected the company as a whole. Whether the petitioner was financially prejudiced is immaterial. What matters is not the amount involved, rather, it is the fraudulent scheme in which the respondent was involved, and which constitutes a clear betrayal of trust and confidence. In fact, there are indications that these acts had been done before, and probably would have continued had it not been discovered.

k. When rank-and-file employees may be dismissed based on loss of trust and confidence.

While generally, the doctrine of loss of trust and confidence may only be invoked against managerial employees, there are instances when the doctrine may also be successfully invoked against rank-and-file employees who, by reason of the nature of their positions, are reposed with trust and confidence.

For example, in the case of **Alcazaren v. Univet Agricultural Products, Inc., [G.R. No. 149628, November 22, 2005],** the petitioner was declared not an ordinary rank-and-file employee as he was a sales representative reposed with managerial duties in overseeing the respondent's business in his assigned area. As a managerial employee, the petitioner was tasked to perform key

and sensitive functions, and thus "bound by more exacting work ethics." He should have realized that such sensitive position required the full trust and confidence of his employer in every exercise of managerial discretion insofar as the conduct of the latter's business is concerned. Hence, his termination based on loss of trust and confidence was held valid.

In **Arlyn Bago v. NLRC, [G.R. No. 170001, April 4, 2007],** it was held that petitioner's claim that as encoder, she is an ordinary rank-and-file employee, hence, she cannot be dismissed for loss of trust and confidence does not lie. The observation of the Court of Appeals that "[h]er work is of such nature as to require a substantial amount of trust and confidence on the part of xxx her employer" is well-taken in the light of her functions which "required the use of judgment and discretion." Petitioner, of course, incorrectly assumes that mere rank-and-file employees cannot be dismissed on the ground of loss of confidence. Jurisprudence holds otherwise albeit it requires *"a higher proof of involvement"* in the questioned acts.

l. Confidential employee may be dismissed for loss of trust and confidence.

A confidential employee is a rank-and-file employee whose position is highly fiduciary in nature and is thus reposed with trust and confidence. He may be dismissed in case of breach of such trust and confidence.

For instance, the Service Representative in **PLDT v. Buna, [G.R. No. 143688, August 17, 2007],** is not merely a rank-and-file employee but a confidential employee. In fact, her position is classified as *"High Priority."* She does not only screen and process telephone applications but also recommend them for approval. She likewise handles the transfer of subscriptions from existing clients to new applicants. Her job entails the observance of proper company procedures relating to the evaluation and subsequent recommendation of prospective clients to PLDT. Her assessment of the fitness of such applicants is relied upon by PLDT in giving its approval to the subscription applications which in turn results in a client-provider relationship between PLDT and its subscribers. Thus, her job involves a high degree of responsibility requiring a substantial amount of trust and confidence on the part of PLDT. Hence, her dismissal based on loss of trust and confidence is valid.

The respondent in **Divine Word College of San Jose v. Aurelio, [G.R. No. 163706, March 29, 2007],** was employed as a Senior Bookkeeper of petitioner but was designated as the Acting Finance Officer, a confidential position *vis-à-vis* her employer. Respondent, without proper authorization and using her position, procured a report from the external auditor indicating under-application of tuition fee proceeds and maliciously disseminated it. The report, sadly, was inaccurate, because a second report showed that some salaries and employee benefits were not included in the determination of the application of the 70% tuition fee increase. Respondent did not bother to explain that what she disseminated was only a preliminary report; worse, she added fuel to the controversy by making malicious statements to the effect that petitioner school and its Administrative and Finance Officer were trying to cheat the employees, resulting to unrest among the employees. Dialogue with the teachers and employees proved too late.

Holding that there was just cause to terminate her employment, the Supreme Court declared:

> "A perusal of the records and the evidence indicates that there was. The dissemination of confidential information by the respondent and the pointless labor dispute following its misinterpretation have been sufficiently proven. Procuring a report without authority, then covertly furnishing copies of the incomplete report to parties in an attempt to unfairly discredit one's superiors, to our mind, constituted serious breach of trust and confidence. It was grossly

> inappropriate for respondent to misrepresent herself in order to procure the external auditor's report. It was even worse to use the report against the college authorities who reposed on her their confidence. Passing off the report as complete when it was not, then falsely accusing one's superiors as cheating their employees based on the report, is morally reprehensible of the highest order. These highly condemnable acts made by Aurelio as the Acting Finance Officer shows her unfitness to continue working with DWC management. The law, in protecting the rights of workers, authorizes neither oppression nor self-destruction of the employer. The employer may dismiss an employee if the former has reasonable grounds to believe, or to entertain the moral conviction, that the latter is responsible for the misconduct, and the nature of her participation therein renders her absolutely unworthy of the trust and confidence demanded by her position. DWC, in this case, was acting within its rights under the law to terminate the services of Aurelio as the Acting Finance Officer of the college".

In **Cruz, Jr. v. Court of Appeals, [G.R. No. 148544, July 12, 2006, 494 SCRA 643],** petitioner held the confidential position of Micro Technical Support Officer in private respondent Citytrust Banking Corporation. He supervised the maintenance of computer hardware including the installation of computers for Citytrust in all of its branches nationwide. It is clear that petitioner is not an ordinary rank-and-file employee. There is, therefore, no dispute that petitioner is a confidential employee. He may thus be dismissed based on the ground of loss of trust and confidence.

m. Confidential employee under the concept of labor relations different from confidential employee for purposes of applying the doctrine of loss of trust and confidence.

In **Santos v. Shing Hung Plastics Co., Inc., [G.R. No. 172306, September 29, 2008],** petitioner, as administrative assistant whose responsibilities included purchasing equipment and supplies of respondent company, argues that the latter failed to prove its claim that he is a confidential employee, hence, his tenure depended not on the trust and confidence he enjoyed from it. He advances that he is "not involved in the labor relation matter[s] in the respondent company."

The Supreme Court declared, however, that petitioner's position should fail. For the purpose of applying the provisions of the Labor Code on who may join unions of the rank-and-file employees, jurisprudence defines "confidential employees" as those who "assist or act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." However, for the purpose of applying the Labor Code provision on loss of confidence as a just cause for the dismissal of an employee, jurisprudence teaches in *Mabeza v. NLRC,* [G.R. No. 118506, April 18, 1997, 271 SCRA 670, 682], that:

> "xxx [L]oss of confidence should ideally apply only to cases involving employees occupying positions of trust and confidence or to those situations where the employee is routinely charged with the care and custody of the employer's money or property. To the first class belong managerial employees, i.e., those vested with the powers or prerogatives to lay down management policies and/or to hire, transfer, suspend, lay-off, recall, discharge, assign or discipline employees or effectively recommend such managerial actions; and [to] the second class belong cashiers, auditors, property custodians, etc., or those who, in the normal and routine exercise of their functions, regularly handle

significant amounts of money or property." (Emphasis and underscoring supplied)

As stated early on, petitioner's duties included purchasing supplies and equipment of the corporation. He thus regularly handled significant amounts of money and property in the normal and routine exercise of his functions. His position was thus one of trust and confidence, loss of which is a just cause for dismissal.

n. Grant of promotions and bonuses negates loss of trust and confidence.

In **Easycall Communications Phils., Inc. v. King, [G.R. No. 145901, December 15, 2005],** it was held that petitioner's claim of loss of confidence due to inefficiency crumbled in the light of respondent's promotion not only to assistant vice-president but to the even higher position of vice-president. This self-contradictory position of petitioner negates its claim of loss of confidence in respondent.

o. Long years of service, absence of derogatory record and small amount involved, when deemed inconsequential insofar as loss of trust and confidence is concerned.

In **Central Pangasinan Electric Cooperative, Inc. v. NLRC, [G.R. No. 163561, July 24, 2007],** it was held that although long years of service might generally be considered for the award of separation benefits or some form of financial assistance to mitigate the effects of termination, this case is not the appropriate instance for generosity under the Labor Code nor under prior decisions. The fact that private respondent served petitioner for more than twenty (20) years with no negative record prior to his dismissal, does not call for such award of benefits since his violation reflects a regrettable lack of loyalty and worse, betrayal of the company. The High Court reiterated the rule that if an employee's length of service is to be regarded as a justification for moderating the penalty of dismissal, such gesture will actually become a prize for disloyalty, distorting the meaning of social justice and undermining the efforts of labor to cleanse its ranks of undesirables.

In **Enriquez v. Bank of the Philippine Islands, [G.R. No. 172812, February 12, 2008],** the Supreme Court considered the failure of petitioners (branch manager and assistant branch manager) to report the cash shortage of teller Descartin, even if done in good faith, as having resulted in their abetting the dishonesty committed by the latter. Under the personnel policies of respondent bank, this act of petitioners justifies their dismissal even on the first offense. Even assuming the version of petitioners as the truth, the fact remains that they willfully decided against reporting the shortage that occurred. As a result, in either situation, petitioners' acts have caused respondents to have a legitimate reason to lose the trust reposed in them as senior managerial employees. Their participation in the cover-up of the misconduct of teller Descartin makes them unworthy of the trust and confidence demanded by their positions. Thus, to compel respondent bank to keep petitioners in its employ after the latter have betrayed the confidence given to them would be unjust to respondent bank. The expectation of trust is more so magnified in the instant case in light of the nature of respondent bank's business. The banking industry is imbued with public interest and is mandated by law to serve its clients with extraordinary care and diligence. To be able to fulfill this duty, it in turn must rely on the honesty and loyalty of its employees. Indeed, in cases of this nature, the fact that petitioners had been employees of BPI for a long time, if it is to be considered at all, should be taken against them. Their manifest condonation and even concealment of an offense prejudicial to their employer's interest committed by a subordinate under their supervision reflect a regrettable lack of loyalty which they should have reinforced, instead of betrayed.

The long years of service (15 years) was also disregarded in **PLDT v. Bolso, [G.R. No. 159701, August 17, 2007].**

COMMISSION OF CRIME OR OFFENSE.

a. Concept.

Under Article 282 [d] of the Labor Code, the commission of a crime or offense by the employee may justify the termination of his employment, if such crime or offense is committed against any of the following persons:

1. His employer;
2. Any immediate member of his employer's family; or
3. His employer's duly authorized representative.

OTHER ANALOGOUS CAUSES UNDER ARTICLE 282.

a. Concept.

Paragraph [e] of Article 282 is a *"catch-all"* provision. It includes any other causes that may be deemed analogous to or similar with the first four (4) grounds specifically described and enumerated thereunder. The underlying characteristic of any such analogous cause should be that it arose from the employee's fault, culpability, or commission of a wrongful act. Absent this element, the invocation of an analogous cause is misplaced. For instance, since illness is not a voluntary or willful act of an employee, it cannot be treated as an analogous cause under the said provision.

b. Theft of property of co-employee, an analogous cause.

In the case of **John Hancock Life Insurance Corp. v. Davis, [G.R. No. 169549, September 3, 2008],** petitioner dismissed respondent based on the NBI's finding that the latter stole and used a co-employee's credit cards. But since the theft was not committed against petitioner itself but against one of its employees, respondent's misconduct was not work-related and, therefore, she could not be dismissed for serious misconduct. Nonetheless, Article 282 [e] of the Labor Code talks of other analogous causes or those which are susceptible of comparison to another in general or in specific detail. For an employee to be validly dismissed for a cause analogous to those enumerated in Article 282, the cause must involve a voluntary and/or willful act or omission of the employee. A cause analogous to serious misconduct is a voluntary and/or willful act or omission attesting to an employee's moral depravity. Theft committed by an employee against a person other than his employer, if proven by substantial evidence, is a cause analogous to serious misconduct.

c. Violation of company rules and regulations, an analogous cause.

The employer usually promulgates a set of rules and regulations governing the conduct and discipline of its employees. The offenses and the corresponding penalties prescribed therein constitute analogous causes which may lawfully be invoked to justify termination of employment. Hence, violation thereof is generally based on the principle of analogous cause.

d. When "attitude problem" becomes analogous to loss of trust and confidence.

According to **Heavylift Manila, Inc. v. The CA, [G.R. No. 154410, October 20, 2005],** an employee who cannot get along with his co-employees is detrimental to the company for he

can upset and strain the working environment. Without the necessary teamwork and synergy, the organization cannot function well. Thus, management has the prerogative to take the necessary action to correct the situation and protect its organization. When personal differences between employees and management affect the work environment, the peace of the company is affected. Hence, an employee's attitude problem is a valid ground for his termination. It is a situation analogous to loss of trust and confidence that must be duly proved by the employer.

However, in said case of *Heavylift*, petitioners have not shown sufficiently clear and convincing evidence to justify respondent employee's termination for her attitude problem. The mere mention of negative feedback from her team members regarding her low performance rating and her work attitude is not proof of her attitude problem. Likewise, her failure to refute petitioners' allegations of her negative attitude does not amount to admission.

e. Inefficiency or failure to attain work quota, an analogous cause.

By virtue of well-settled jurisprudence, the ground of incompetence or inefficiency has been considered an analogous cause which may not correctly fall within any of the first four (4) circumstances mentioned in Article 282. (*Skippers United Pacific, Inc. v. Maguad, G.R. No. 166363, Aug. 15, 2006).*

f. Failure to comply with weight standards of employer, an analogous cause.

Yrasuegui v. Philippine Airlines, Inc., [G.R. No. 168081, October 17, 2008], is a unique case. Petitioner was a former international flight steward of respondent. He stands five feet and eight inches (5'8") with a large body frame. The proper weight for a man of his height and body structure is from 147 to 166 pounds, the ideal weight being 166 pounds, as mandated by the Cabin and Crew Administration Manual of PAL. The weight problem of petitioner dates back to 1984. From that time, he was given by respondent on various occasions the opportunity to reduce his weight to meet the weight standard, but he failed. After due administrative proceedings, petitioner was formally informed by respondent on June 15, 1993, that due to his inability to attain his ideal weight, "and considering the utmost leniency" extended to him "which spanned a period covering a total of almost five (5) years," his services were considered terminated "effective immediately."

In holding that the obesity of petitioner is a valid ground for dismissal under Article 282 [e] of the Labor Code, the Supreme Court pronounced:

> "A reading of the weight standards of PAL would lead to no other conclusion than that they constitute a continuing qualification of an employee in order to keep the job. Tersely put, an employee may be dismissed the moment he is unable to comply with his ideal weight as prescribed by the weight standards. The dismissal of the employee would thus fall under Article 282(e) of the Labor Code. As explained by the CA:
>
> > 'xxx [T]he standards violated in this case were not mere 'orders' of the employer; they were the 'prescribed weights' that a cabin crew must maintain *in order to qualify for and keep his or her position in the company*. In other words, they were standards that establish *continuing qualifications* for an employee's position. In this sense, the failure to maintain these standards does not fall under Article 282(a) whose express terms require the element of willfulness in order to be a ground for dismissal. The failure to meet the employer's *qualifying*

> *standards* is in fact a ground that does not squarely fall under grounds (a) to (d) and is therefore one that falls under Article 282(e) – the 'other causes analogous to the foregoing.'
>
> 'By its nature, these 'qualifying standards' are norms that apply *prior to and after* an employee is hired. They apply *prior to employment* because these are the standards a job applicant must initially meet in order to be hired. They apply *after hiring* because an employee must continue to meet these standards while on the job in order to keep his job. Under this perspective, a violation is not one of the faults for which an employee can be dismissed pursuant to pars. (a) to (d) of Article 282; the employee can be dismissed simply because he no longer 'qualifies' for his job irrespective of whether or not the failure to qualify was willful or intentional. xxx'
>
> xxx
>
> "In fine, We hold that the obesity of petitioner, when placed in the context of his work as flight attendant, becomes an analogous cause under Article 282(e) of the Labor Code that justifies his dismissal from the service. His obesity may not be unintended, but is nonetheless voluntary. As the CA correctly puts it, '[v]oluntariness basically means that the just cause is solely attributable to the employee without any external force influencing or controlling his actions. This element runs through all just causes under Article 282, whether they be in the nature of a wrongful action or omission. Gross and habitual neglect, a recognized just cause, is considered voluntary although it lacks the element of intent found in Article 282(a), (c), and (d). '"

OTHER JUST CAUSES RECOGNIZED UNDER OTHER PROVISIONS OF THE LABOR CODE.

Besides the just causes mentioned in Article 282, the Labor Code likewise provides for other just causes to terminate employment in other provisions thereof, thus:

1. Union officers who knowingly participate in an illegal strike are deemed to have lost their employment status. *(Article 264[a], Labor Code).*

2. Any employee, union officer or ordinary member who knowingly participates in the commission of illegal acts during a strike (irrespective of whether the strike is legal or illegal), is also deemed to have lost his employment status. *(Article 264[a], Labor Code).*

3. Strikers, who violate orders, prohibitions and/or injunctions as are issued by the Secretary of Labor and Employment or the NLRC, may be imposed immediate disciplinary action, including dismissal or loss of employment status. *(Article 263[g], Labor Code).*

4. Violation of the union security clause stipulated in the CBA pursuant to Article 248 [e] of the Labor Code may result in termination of employment. The contracting union can demand from the employer the dismissal of an employee who commits a breach of union security arrangement, such as failure to join the union or to maintain his membership in good standing therein. The contracting union can also demand for the dismissal of a member who commits an

act of disloyalty to the union, such as when the member organizes a rival union. *(Lirag Textile Mills v. Blanco, G.R. No. L-27029, Nov. 12, 1981, 109 SCRA 87).*

Dismissal based on this ground has lately been reiterated in the case of **Alabang Country Club, Inc. v. NLRC, [G.R. No. 170287, February 14, 2008],** where the Supreme Court declared that in addition to the grounds mentioned in Articles 282, 283, 284 and 285 of the Labor Code, another cause for termination is dismissal from employment due to the enforcement of the union security clause in the CBA. Here, Article II of the CBA on union security contains the provision on union shop and maintenance of membership shop. Termination of employment by virtue of a union security clause embodied in a CBA is recognized and accepted in our jurisdiction. This practice strengthens the union and prevents disunity in the bargaining unit within the duration of the CBA. By preventing member disaffiliation with the threat of expulsion from the union and the consequent termination of employment, the authorized bargaining representative gains more numbers and strengthens its position as against other unions which may want to claim majority representation.

AUTHORIZED CAUSES FOR TERMINATION OF EMPLOYMENT BY THE EMPLOYER

AUTHORIZED CAUSES FOR TERMINATION.

a. Grounds.

The grounds cited in Article 283 are technically called the authorized causes for termination of employment. They are:

1. Installation of labor-saving devices;
2. Redundancy;
3. Retrenchment; and
4. Closure or cessation of business operations of an establishment or an undertaking.

In addition to the said grounds, Article 284 of the Labor Code cites **disease** as an authorized ground to terminate employment.

b. Previous misdemeanors cannot be cited as additional grounds.

A convenient reliance on previous misdemeanors of employees as additional grounds for easing them out of the company by way of any of the authorized causes provided by law is not proper. The reason is that misdemeanors of an employee are not at all relevant to any of the authorized causes provided under the law.

In addition to the alleged streamlining of its operations and to further justify its dismissal of respondents Garcia and Balla, petitioner in **AMA Computer College, Inc. v. Garcia, [G.R. No. 166703, April 14, 2008],** presented several memoranda to prove that Garcia and Balla had been remiss in the performance of their duties, as well as perennially tardy and absent. The Supreme Court ruled that other than being self-serving, said memoranda are irrelevant to prove redundancy of the positions held by Garcia and Balla. Redundancy arises because there is no more need for the employee's position in relation to the whole business organization, and not because the employee unsatisfactorily performed the duties and responsibilities required by his position. Redundancy is an authorized cause for termination of employment under Article 283; while serious misconduct or willful disobedience or gross and habitual neglect of duties by the employee is a just cause for dismissal under Article 282 of the Labor Code.

INSTALLATION OF LABOR-SAVING DEVICES.

a. Requisites.

In order to validly invoke this ground, the following requisites must concur:

1. The introduction of the machinery, equipment or other devices must be done in good faith;
2. The purpose for such introduction must be valid, such as to save on cost, enhance efficiency and other justifiable economic reasons;
3. There is no other option available to the employer but the introduction of the machinery, equipment or device and the consequent termination of employment of those affected thereby;
4. The one (1) month prior written notice requirement under Article 283 should be complied with;
5. There should be reasonable and fair standards or criteria in selecting who to terminate such as nature of work, status of the employees (whether casual, temporary or regular), experience, efficiency rating and seniority, among other considerations; and
6. Separation pay must be paid to the affected employees in such amount equivalent to at least his one (1) month pay or to at least one (1) month pay for every year of service, whichever is higher, a fraction of at least six (6) months shall be considered as one (1) whole year. In case the CBA or company policy provides for a higher separation pay, the same must be followed instead of the one provided in Article 283.

b. Modernization program through introduction of machines, held valid.

In **Abapo v. CA, [G.R. No. 142405, September 30, 2004],** the company (San Miguel Corporation) conducted a viability study of its business operations and adopted a modernization program. It then brought into its Mandaue plant high-speed machines to be used in the manufacture of its beer. The Supreme Court held that the installation of labor-saving devices at its Mandaue plant was a proper ground for terminating employment.

c. Proof of losses, not required.

As earlier mentioned, in installation of labor-saving devices, there is no need for the employer to show proof of losses or imminent losses. This is not a requisite for its validity.

REDUNDANCY.

a. When redundancy exists.

Redundancy exists where the services of an employee are in excess of what is reasonably demanded by the actual requirements of the enterprise. A position is redundant where it is superfluous, and superfluity of a position or positions may be the outcome of a number of factors, such as over-hiring of workers, decreased volume of business, dropping of a particular product line or service activity previously manufactured or undertaken by the enterprise. An employer has no legal obligation to keep on the payroll employees more than the number needed for the operation of the business.

Redundancy may also be validly resorted to as a cost-cutting measure and to streamline operations so as to make them more viable. Positions which overlapped each other, or which are in excess of the requirements of the service, may be declared redundant.

b. Requisites.

The following requisites must be present to validly invoke redundancy:

1. There is good faith in abolishing the redundant positions;
2. There is no other option available to the employer except to terminate redundant employees;
3. Written notice is served on both the affected employees and the Department of Labor and Employment at least one (1) month prior to the intended date of termination;
4. Separation pay is paid to the affected employees in such amount equivalent to at least his one (1) month pay or to at least one (1) month pay for every year of service, whichever is higher, a fraction of at least six (6) months shall be considered as one (1) whole year. In case the CBA or company policy provides for a higher separation pay, the same must be followed instead of the one provided in Article 283.
5. Fair and reasonable criteria in ascertaining what positions are to be declared redundant and accordingly abolished.

c. Evidence of losses, not required.

Just like installation of labor-saving devices, the ground of redundancy does not require the exhibition of proof of losses or imminent losses.

An employer is not precluded from adopting a new policy conducive to a more economical and effective management even if it is not experiencing economic reverses. Neither does the law require that the employer should suffer financial losses before it can terminate the services of its employees on the ground of redundancy. (*Smart Communications, Inc. v. Astorga, G.R. No. 148132, Jan. 28, 2008).*

d. Fair and reasonable basis for redundancy.

Well-settled is the principle that in selecting the employees to be dismissed based on redundancy, fair and reasonable criteria must be used such as, but not limited to: (a) less preferred status [*e. g.,* temporary employee]; (b) efficiency; and (c) seniority.

Verily, the *absence* of criteria or the *erroneous* implementation of the criterion selected would render invalid the redundancy because both have the ultimate effect of illegally dismissing an employee. (*San Miguel Corp. v. Del Rosario, G.R. Nos. 168194 & 168603, Dec. 13, 2005).*

e. Elimination of undesirables, abusers and worst performers through redundancy, not an indication of bad faith.

In **Dole Philippines, Inc. v. NLRC, [G.R. No. 120009, September 13, 2001],** the private respondent-employees point to references in petitioner's studies of the redundancy program to the elimination of *"undesirables," "abusers"* and *"worst performers"* as another indicia of petitioner's bad faith. The Supreme Court, however, ruled that it is not too keen on attaching such a sinister significance to these allusions. It may be argued that the elimination of the so-called *"undesirables"* was merely incidental to the redundancy program or that past transgressions could have been part of the criteria in determining who among the redundant employees is to be dismissed.

f. Rule in case of hiring of replacements of employees terminated due to redundancy.

In **Santos v. CA, [G.R. No. 141947, July 5, 2001],** the act of the employer in hiring replacements was not deemed an indication of bad faith since the positions have no similar job descriptions. The job descriptions submitted by respondent company are replete with information that may be used as an adequate basis to compare and contrast the two (2) positions. Therefore, the two (2) positions being different, it follows that the redundancy program instituted by the respondent company was undertaken in good faith.

But in **Caltex [Phils.], Inc. v. NLRC, [G.R. No. 159641, October 15, 2007],** the Supreme Court found the act of the petitioner of hiring new accountants inconsistent with private respondent's termination on the ground of redundancy. The private respondent, who was a Senior Accounting Analyst at the time of his termination, could have qualified for the said position rather than be dismissed. Moreover, there is no showing that private respondent could not perform the functions demanded of the vacant positions considering his experience as petitioner's Senior Accounting Analyst for thirteen (13) years and to which he could have been transferred instead of being dismissed.

g. Redundancy to save on labor costs, held valid.

Private respondents in **Dole Philippines, Inc. v. NLRC, [G.R. No. 120009, September 13, 2001]**, harped on the fact that petitioner's desire to save on labor costs was the motivation for the redundancy program. The Supreme Court, however, said that the law does not prevent employers from saving on labor costs. Such right is recognized.

Therefore, so long as the undertaking to save on labor costs is not attended by malice, arbitrariness, or intent on the part of the employer to circumvent the law, courts should not interfere with such endeavor.

h. Redundancy resulting from use of high technology equipment, held valid.

It was held in **Soriano, Jr. v. NLRC and PLDT, [G.R. No. 165594, April 23, 2007],** that respondent PLDT's utilization of high technology equipment in its operation such as computers and digital switches necessarily resulted in the reduction of the demand for the services of a Switchman since computers and digital switches can aptly perform the function of several Switchmen. Indubitably, the position of Switchman has become redundant. Hence, petitioner, a Switchman, may be terminated based on redundancy.

i. Abolition of positions or departments, held valid.

The abolition of departments or positions in the company is one of the recognized management prerogatives. In the absence of proof that the act of the employer was ill-motivated, it is presumed that it acted in good faith. *(San Miguel Corporation v. NLRC, G.R. No. 99266, March 2, 1999; Pantranco North Express, Inc. v. NLRC, G.R. No. 106516, Sept. 21, 1999).*

j. Reorganization through redundancy held valid.

Reorganization as a cost-saving device effected through redundancy is acknowledged as valid by jurisprudence. An employer is not precluded from adopting a new policy conducive to a more economical and effective management. *(International Harvester Macleod, Inc. v. IAC, 149 SCRA 641 [1987]; See also Dole Philippines, Inc. v. NLRC, G.R. No. 120009, Sept. 13, 2001).*

k. Contracting out of abolished positions to independent contractors held valid.

In **Serrano v. NLRC, [G.R. No. 117040, January 27, 2000],** the act of the employer in phasing-out its security section and hiring an independent security agency to perform its task was

held to constitute a legitimate business decision. Consequently, absent proof that management acted in a malicious or arbitrary manner, courts should not interfere with the exercise of judgment by the employer.

l. Hiring of casuals or contractual employees after redundancy, held valid.

In **Soriano, Jr. v. NLRC and PLDT, [G.R. No. 165594, April 23, 2007],** the High Court declared that the fact that respondent PLDT hired contractual employees after implementing its redundancy program does not necessarily negate the existence of redundancy. As amply stated by respondent PLDT, such hiring was intended solely for the winding up of its operations using the old system.

m. Duplication of work.

Where two or more persons are performing the same work which may be effectively accomplished by only one, the employer may terminate the excess personnel and retain only one.

Redundancy in an employer's personnel force, however, does not necessarily or even ordinarily refer to duplication of work. That no other person was holding the same position that private respondent held prior to the termination of his services does not show that his position had not become redundant. Indeed, in any well-organized business enterprise, it would be surprising to find duplication of work and two (2) or more people doing the work of one person. *(Wiltshire File Co., Inc. v. NLRC, G.R. No. 82249, Feb. 7, 1991, 193 SCRA 665; See also Becton Dickinson Phils., Inc. v. NLRC, G.R. Nos. 159969 & 160116, Nov. 15, 2005, 475 SCRA 123).*

n. LIFO or FILO rule has no basis in law.

No law mandates the so-called rule of "*Last in, First out*" [LIFO] or "*First in, Last out*" [FILO] and the reason is simple enough. A host of relevant factors come into play in determining cost-efficient measures and in choosing the employees who will be retained or separated to save the company from closing shop. In determining these issues, management has to enjoy a pre-eminent role. *(Asian Alcohol Corporation v. NLRC, G.R. No. 131108, March 25, 1999).*

o. LIFO rule, not controlling as employer has prerogative to choose who to terminate.

In the case of **De la Salle University v. De la Salle University Employees Association, [G.R. No. 109002, April 12, 2000],** the union proposed the use of the *"last-in-first-out"* method in case of lay-off, termination due to retrenchment and transfer of employees. The union relied on social justice and equity to support its proposition and submitted that the University's prerogative to select and/or choose the employees it will hire is limited, either by law or agreement, especially where the exercise of this prerogative might result in the loss of employment. The union further insisted that its proposal is "…in keeping with the avowed State policy '(q) To ensure the participation of workers in decision and policy-making processes affecting their rights, duties and welfare' (Article 211, Labor Code, as amended). " On the other hand, the University asserted its management prerogative and countered that "[w]hile it is recognized that this right of employees and workers to 'participate in policy and decision-making processes affecting their rights and benefits as may be provided by law' has been enshrined in the Constitution (Article III, [should be Article XIII], Section 3, par. 2 thereof), said participation, however, does not automatically entitle the union to dictate as to how an employer should choose the employees to be affected by a retrenchment program." It further claimed that "the employer still retains the prerogative to determine the reasonable basis for selecting such employees."

The Supreme Court ruled as follows:

> "We agree with the voluntary arbitrator that as an exercise of management prerogative, the University has the right to adopt valid and equitable grounds as basis for terminating or transferring employees. As we ruled in the case of *Autobus Workers' Union (AWU) and Ricardo Escanlar v. National Labor Relations Commission*, [291 SCRA 219 (1998)], '[a] valid exercise of management prerogative is one which, among others, covers: work assignment, working methods, time, supervision of workers, **transfer of employees**, work supervision, and the discipline, **dismissal** and recall of workers. **Except as provided for, or limited by special laws, an employer is free to regulate, according to his own discretion and judgment, all aspects of employment**.'" (Emphasis supplied)

On the same note, it was held in **Soriano, Jr. v. NLRC and PLDT, [G.R. No. 165594, April 23, 2007],** that the petitioner's contention that he should be the last switchman to be laid-off by reason of his qualifications and outstanding work must fail. The respondent PLDT, as employer, has the recognized right and prerogative to select the persons to be hired and to designate the work as well as the employee or employees to perform it. This includes its right to determine the employees to be retained or discharged and who among the applicants are qualified and competent for a vacant position. The rationale for this principle is that respondent PLDT is in the best position to ascertain what is proper for the advancement of its interest. Thus, the wisdom and soundness of its decision as to who among the Switchmen should be retained or discharged or who should be transferred to vacant positions cannot be interfered with, as long as such was made in good faith and not for the purpose of curbing the rights of an employee.

p. Hobson's choice.

"Hobson's choice" means no choice at all; a choice between accepting what is offered or having nothing at all. It refers to the practice of Tobias Hobson, an English stable-owner in the 17th century, of offering only the horse nearest the stable door.

This principle was applied in **Asufrin, Jr. v. San Miguel Corporation, [G.R. No. 156658, March 10, 2004],** where the employees, even if given the option to retire, be retrenched or dismissed, were made to understand that they had no choice but to leave the company. More bluntly stated, they were forced to swallow the bitter pill of dismissal but afforded a chance to sweeten their separation from employment. They either had to voluntarily retire, be retrenched with benefits or be dismissed without receiving any benefit at all. All that the employees were offered was a choice on the *means or method of terminating their services* but never as to the status of their employment. In short, *they were never asked if they wanted to work for petitioner-company*.

REDUNDANCY AND RETRENCHMENT, DISTINGUISHED.

The grounds of redundancy and retrenchment are two different concepts and cannot be cited interchangeably. (*Andrada v. NLRC, G.R. No. 173231, Dec. 28, 2007).*

In the case of **AMA Computer College, Inc. v. Garcia, [G.R. No. 166703, April 14, 2008],** petitioner ACC itself apparently is confused as to the real reason why it terminated respondents as it raised different grounds to justify their dismissal, *i.e.*, before the Labor Arbiter, it cited retrenchment; before the NLRC, it claimed redundancy; and before the Court of Appeals, it averred both retrenchment and redundancy. The High Court observed that although governed

by the same provision of the Labor Code, retrenchment and redundancy are two distinct grounds for termination arising from different circumstances, thus, they are in no way interchangeable.

"*Redundancy*" exists when the services of an employee are in excess of what is required by an enterprise. "*Retrenchment,*" on the other hand, is resorted to primarily to avoid or minimize business losses. Thus, a "*Redundancy Program,*" while denominated as such, is more precisely termed "*retrenchment*" if it was primarily intended to prevent serious business losses.

RETRENCHMENT.

a. Concept and nature.

Retrenchment is the only statutory ground in Article 283 which requires proof of losses or possible losses as justification for termination of employment. The other grounds, particularly closure or cessation of business operations, may be resorted to with or without losses. *(Precision Electronics Corporation v. NLRC, G.R. No. 86657, Oct. 23, 1989).*

Retrenchment has been defined as "the termination of employment initiated by the employer through no fault of the employees and without prejudice to the latter, resorted by management during periods of business recession, industrial depression, or seasonal fluctuations; or during lulls occasioned by lack of work or orders, shortage of materials; or considerable reduction in the volume of the employer's business, conversion of the plant for a new production program or the introduction of new methods or more efficient machinery, or of automation." *(F. F. Marine Corporation v. The Hon. Second Division, NLRC, G.R. No. 152039, April 8, 2005).*

b. Requisites.

The following are requisites for a valid retrenchment which must be proved by clear and convincing evidence:

(1) That the retrenchment is reasonably necessary and duly proved and likely to prevent business losses which, *if already incurred*, are not merely *de minimis* but substantial, serious, actual and real or, *if only expected*, are reasonably imminent as perceived objectively and in good faith by the employer;

(2) That the employer serves a written notice both to the affected employees and to the Department of Labor and Employment at least one (1) month prior to the intended date of retrenchment;

(3) That the employer pays the retrenched employees separation pay equivalent to one (1) month pay or at least one-half (½) month pay for every year of service, whichever is higher;

(4) That the employer exercises its prerogative to retrench employees in good faith for the advancement of its interest and not to defeat or circumvent the employees' right to security of tenure; and

(5) That the employer uses fair and reasonable criteria in ascertaining who would be dismissed and who would be retained among the employees, such as status (*i.e.*, whether they are temporary, casual, regular or managerial employees), efficiency, seniority, physical fitness, age, and financial hardship for certain workers.

c. Standards to determine validity of losses as justification for retrenchment.

The general standards in terms of which the act of an employer in retrenching or reducing the number of its employees must be appraised are as follows:

Firstly, *the losses expected should be substantial and not merely de minimis in extent.* If the loss purportedly sought to be forestalled by retrenchment is clearly shown to be insubstantial and inconsequential in character, the *bona-fide* nature of the retrenchment would appear to be seriously in question.

Secondly, *the substantial loss apprehended must be reasonably imminent, as such imminence can be perceived objectively and in good faith by the employer.* There should, in other words, be a certain degree of urgency for the retrenchment which is, after all, a drastic recourse with serious consequences for the livelihood of the employees retrenched or otherwise laid off.

Thirdly, *retrenchment, because of its consequential nature, must be reasonably necessary and likely to effectively prevent the expected losses.* The employer should have taken other measures prior or parallel to retrenchment to forestall losses, *i.e.*, cut other costs than labor costs.

Lastly, but certainly not the least important, *the alleged losses, if already realized, and the expected imminent losses sought to be forestalled, must be proved by sufficient and convincing evidence.* The reason for requiring this quantum of proof is apparent; any less exacting standard of proof would render too easy the abuse of this ground for termination of services of employees.

Indeed, not all business losses suffered by the employer would justify retrenchment under Article 283 of the Labor Code. *(Manatad v. Philippine Telegraph and Telephone Corp., G.R. No. 172363, March 7, 2008).*

d. Failure to follow fair criteria in selection would render retrenchment invalid.

While an employer may be justified in ordering retrenchment because it actually suffered financial distress, however, its manner of implementing the scheme of selecting the employees to be retrenched may render the retrenchment invalid.

In **Oriental Petroleum and Minerals Corp. v. Fuentes, [G.R. No. 151818, October 14, 2005],** while petitioner contends that the termination of two (2) non-regular employees ahead of respondents showed that it complied with the requisite fair and reasonable criteria, that fact alone, however, is insufficient, considering the importance the Court has given to the observance of fair and reasonable criteria in the implementation of a retrenchment scheme. In this case, petitioner alleges, in rebuttal of the appellate court's finding that it failed to comply with the required criteria set by jurisprudence in effecting retrenchment, "that with the retrenchment of *non-regular* employees in the person of Atty. Sison and Mr. Gagni, the petitioner was not remised (*sic*) in complying with the required fair and reasonable criteria laid down by the Supreme Court in cases of retrenchment." The Supreme Court, however, found such a bare allegation obviously unsatisfactory. It said: "If we struck down the retrenchment undertaken by the *Philippine Tuberculosis Society, Inc.* … for failure to take seniority into account, with more reason should the retrenchment in this case be held invalid, considering that petitioner utterly failed to show that it had any standard at all in selecting the employees to be retrenched. Verily, the (insistence) that two (2) non-regular employees were similarly retrenched ahead of respondents appears more like a handy excuse than a deliberate effort on petitioner's part to follow the fair and reasonable criteria established by jurisprudence."

e. Cost-reduction measures prior to retrenchment, necessary.

The employer is required to take other measures prior or parallel to retrenchment to forestall losses, *i.e.*, cut other costs than labor costs. An employer who, for instance, lays off substantial number of workers while continuing to dispense fat executive bonuses and perquisites

or so-called *"golden parachutes,"* can scarcely claim to be retrenching in good faith to avoid losses. To impart operational meaning to the constitutional policy of providing *"full protection"* to labor, the employer's prerogative to bring down labor costs by retrenching must be exercised essentially as a measure of last resort, after less drastic means - *e.g.*, reduction of both management and rank-and-file bonuses and salaries, going on reduced time, improving manufacturing efficiencies, trimming of marketing and advertising costs, etc. - have been tried and found wanting. *(F. F. Marine Corporation v. The Hon. Second Division NLRC, G.R. No. 152039, April 8, 2005; See also Oriental Petroleum and Minerals Corp. v. Fuentes, G.R. No. 151818, Oct. 14, 2005).*

In **Emco Plywood Corporation v. Abelgas, [G.R. No. 148532, April 14, 2004],** where the only less drastic measure that the company undertook was the rotation work scheme, *i.e.*, the three-day-work per employee per week schedule, the Supreme Court noted that it did not try other measures, such as cost reduction, lesser investment on raw materials, adjustment of the work routine to avoid the scheduled power failure, reduction of the bonuses and salaries of both management and rank-and-file, improvement of manufacturing efficiency, trimming of marketing and advertising costs, and so on. The fact that the company did not resort to such other measures seriously belies its claim that retrenchment was done in good faith to avoid losses.

f. Meaning of the phrase "retrenchment to prevent losses."

Article 283 uses the phrase "*retrenchment to prevent losses.*" In its ordinary connotation, this phrase means that retrenchment must be undertaken by the employer before the losses anticipated are actually sustained or realized. The Supreme Court in a plethora of cases has thus interpreted it to mean that the employer need not keep all his employees until after his losses shall have materialized. Otherwise, the law could be vulnerable to attack as undue taking of property for the benefit of another.

g. Best evidence of losses – externally audited financial statements.

Unaudited financial statements cannot be accorded any probative value.

Unless duly audited by independent auditors, the financial statements can be assailed as self-serving documents. (*Danzas Intercontinental, Inc. v. Daguman, G.R. No. 154368, April 15, 2005).*

The Supreme Court has consistently ruled that financial statements audited by independent external auditors constitute the normal method of proof of the profit and loss performance of a company. (*Sari-Sari Group of Companies, Inc. v. Piglas Kamao [Sari-Sari Chapter], G.R. No. 164624, Aug. 11, 2008),*

Such audited financial documents shall consist of yearly balance sheets and profit and loss statements as well as annual income tax returns.

As held in **Manatad v. Philippine Telegraph and Telephone Corp., [G.R. No. 172363, March 7, 2008],** since the financial statements submitted by respondent were audited by reputable auditing firms, petitioner's assertion that respondent merely manipulated its financial statements to make it appear that it was suffering from business losses that would justify the retrenchment is incredible and baseless. In addition, the fact that the financial statements were audited by independent auditors settles any doubt on the authenticity of these documents for lack of signature of the person who prepared it.

h. When audited financial statements will not suffice.

While an audited financial statement is indeed the normal method of proof, even this, however, is not a hard and fast rule as the norm does not compel the court to accept the *contents* of the said documents blindly and without thinking.

As held in **Oriental Petroleum and Minerals Corp. v. Fuentes, [G.R. No. 151818, October 14, 2005],** while the financial statements audited by independent external auditors constitute the normal method of proof of the profit and loss performance of a company, financial statements, in themselves, do not suffice to meet the stringent requirement of the law that the losses must be substantial, continuing and without any immediate prospect of being abated. Retrenchment being a measure of last resort, petitioner should have been able to demonstrate that it expected no abatement of its losses in the coming years. Petitioner having failed in this regard, it was declared that its audited financial statements are unimpressive and insufficient.

i. Income tax returns, self-serving documents.

Income tax returns are self-serving documents because they are generally filled up by the taxpayer himself and are still to be examined by the Bureau of Internal Revenue for their correctness. (*Casimiro v. Stern Real Estate, Inc., Rembrandt Hotel, G.R. No. 162233, March 10, 2006; Favila v. NLRC, G.R. No. 126768, June 16, 1999, 367 Phil. 584, 595).*

j. Mere affidavit on alleged losses, not sufficient.

The bare assertion of the company that it suffered substantial losses would not constitute sufficient and convincing evidence in the absence of any proof to that effect. An affidavit executed by a corporate officer on the alleged losses is a self-serving evidence. (*Polymart Paper Industries, Inc. v. NLRC, G.R. No. 118973, Aug. 12, 1998).*

k. Mere notice of intention to implement a retrenchment program, not sufficient.

Petitioner, in the case of **Composite Enterprises, Inc. v. Caparoso, [G.R. No. 159919, August 8, 2007],** only submitted as evidence the notice of its intention to implement a retrenchment program which it sent to the Department of Labor and Employment. It did not submit its financial statements duly audited by an independent external auditor. Its failure to do so seriously casts doubt on its claim of losses and insistence on the payment of separation pay.

l. Best evidence of losses in a government-controlled corporation - financial statements audited by COA.

In the case of **NDC-Guthrie Plantations, Inc. v. NLRC, [G.R. No. 110740, August 9, 2001]**, involving the retrenchment of workers in a government-controlled corporation, the financial statements submitted as evidence to prove losses were duly audited by the Commission on Audit (COA) and yet, the Labor Arbiter and the NLRC rejected them. The Supreme Court ruled that in the context of the submitted financial statements prepared by COA itemizing and explaining the losses suffered by petitioner companies, it is unable to understand the rationale behind the NLRC's challenged judgment. These financial documents duly audited by COA constitute the normal and reliable method of proof of the profit and loss performance of a government-controlled corporation.

m. Rehabilitation receivership presupposes existence of losses.

In **Clarion Printing House, Inc. v. NLRC, [G.R. No. 148372, June 27, 2005],** it was held that the appointment of a receiver or management committee by the SEC (now RTC under Republic Act No. 8799, otherwise known as the "*Securities Regulation Code*") presupposes a finding that, *inter alia*, a company possesses sufficient property to cover all its debts but foresees the impossibility of meeting them when they respectively fall due and there is imminent danger of

dissipation, loss, wastage or destruction of assets or other properties or paralyzation of business operations. That the SEC appointed an *interim* receiver for the EYCO Group of Companies of which petitioner is a part, on its petition in light of "factors beyond the control and anticipation of the management" rendering it unable to meet its obligation as they fall due, and thus resulting to "complications and problems . . . to arise that would impair and affect [its] operations . . ." shows that petitioner Clarion, together with the other member-companies of the EYCO Group of Companies, was suffering business reverses justifying, among other things, the retrenchment of its employees.

n. Profitable operations in the past does not affect validity of retrenchment.

In a situation where, in a span of six (6) years, the establishment experienced profitability only in one year, the Supreme Court ruled that the validity of the retrenchment is not affected thereby. Thus, in the case of **Manatad v. Philippine Telegraph and Telephone Corp., [G.R. No. 172363, March 7, 2008],** the Supreme Court pronounced:

> "Being guided accordingly, we find that respondent was fully justified in implementing a retrenchment program since it was undergoing business reverses, not only for a single fiscal year but for several years prior to and even after the program. In a span of six years, respondent realized profits only in one year, in 1997. We thus quote with approval the disquisition of the Court of Appeals:
>
> > 'As shown in the financial statements, during the years ended June 1995, 1996, 1998, 1999 and 2000, [herein respondent] incurred net losses of ₱40 million, ₱85 million, ₱555 million, ₱558 million, ₱700 million and ₱1.196 billion, respectively, resulting in a deficit of ₱2.169 billion as of June 30, 2000. We note, however, that [herein respondent] earned income in 1997 in the amount of ₱1.4 million. But it is clear that petitioner suffered a major setback when after earning ₱1.4 Million (as of June 1997), [respondent] posted an astronomical financial loss of ₱555 million in the succeeding year (as of June 1998). '"

o. Validity of retrenchment when other outlets/branches are not suffering from business losses.

In an enterprise which has several branches nationwide, profitable operations in some of them will not affect the validity of the retrenchment if overall, the financial condition thereof reflects losses. Thus, in **Manatad v. Philippine Telegraph and Telephone Corp., [G.R. No. 172363, March 7, 2008],** the Supreme Court ruled that "(e)ven if we take into consideration the figures submitted by petitioner and accede to her position that respondent was gaining substantial profits from its Central Visayas office, the said numbers, nonetheless, do not bespeak respondent's overall financial standing in light of the fact that respondent is operating nationwide and the Central Visayas office is only one of its many branches. Losses or gains of a business entity cannot be fully assessed by isolating or selecting only particular branches or offices. There are recognized accounting principles and methods by which the business firm's performance can be objectively and thoroughly evaluated at the end of every fiscal year, and the assessment accurately reported in the company's financial statement."

But in the earlier case of **San Miguel Corp. v. Aballa, [G.R. No. 149011, June 28, 2005],** the retrenchment of the employees in a particular department (aquaculture operations) under the SMC Group of Companies which was suffering losses was declared valid and legal

despite the fact that the company itself is still very much an on-going and highly viable business concern.

CLOSURE OR CESSATION OF BUSINESS OPERATIONS.

a. Concept.

Closure or cessation of business is the complete or partial cessation of the operations and/or shutdown of the establishment of the employer. It is carried out to either stave off the financial ruin or promote the business interest of the employer.

b. Requisites.

The requisites for the valid invocation of the ground of closure or cessation of business operations are as follows:

1. The decision to close or cease operations should be made in good faith;
2. The purpose should not be to circumvent the provisions of *Title I* (Termination of Employment) of *Book Six* (Post Employment) of the Labor Code;
3. There is no other option available to the employer except to close or cease its business operations;
4. The notice requirement under Article 283 should be complied with by serving a copy thereof to the affected employees and to the Department of Labor and Employment at least one (1) month prior to the effectivity of the termination. This requisite applies irrespective of whether or not the closure or cessation of operations is due to serious business losses or financial reverses; and
5. When the closure or cessation of business operations is *not* due to serious business losses or financial reverses, the affected employees should be paid a separation pay equivalent to one (1) month pay or at least one-half (½) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year.

   If the ground is serious business losses or financial reverses, there should be clear proof thereof since no separation pay to the employees is required to be paid under the law.

c. Employer may close its business whether it is suffering from business losses or not; court cannot order employer to continue its business.

A careful examination of Article 283 indicates that closure or cessation of business operations as a valid and authorized ground for terminating employment is not limited to those resulting from business losses or financial reverses. Said provision, in fact, provides for the payment of separation pay to employees terminated only in cases of closure or cessation of business operations *not* due to serious business losses or financial reverses thus indicating too clearly that such termination may be validly resorted to even if the closure or cessation of business operations is not due to such losses or reverses. *(J.A.T. General Services v. NLRC, G. R. No. 148340, Jan. 26, 2004).*

The closure or cessation of business operations is, therefore, valid and legal for as long as the employer pays its employees their separation pay in the amount corresponding to their length of service and complies with the notice requirement. It would, indeed, be stretching the intent and

spirit of the law if the court is to unjustly interfere with management's prerogative to close or cease its business operations just because it is not suffering from any loss.

The closure or cessation under Article 283 may either be due to serious business losses or financial reverses or otherwise. Under the *first* kind, the employer must sufficiently and convincingly prove its allegation of substantial losses; while under the *second* kind, the employer can lawfully close shop anytime as long as cessation of or withdrawal from business operations was *bona fide* in character and not impelled by a motive to defeat or circumvent the tenurial rights of employees. (*Industrial Timber Corp. v. Ababon, G.R. No. 164518, Jan. 25, 2006),*

In **Angeles v. Polytex Design, Inc., [G.R. No. 157673, October 15, 2007],** it was held that an employer is not prevented from exercising its prerogative to close shop so long as it is done in good faith to advance its interest and not for the purpose of defeating or circumventing the rights of employees under the law or a valid agreement. Thus, while respondents failed to sufficiently establish substantial losses to justify its closure, there is reasonable basis in its claim that the fire that razed the Weaving Department of the company totally rendered it inoperational, and a considerable amount of capital is needed to make it functional once more. It was a business judgment on the part of its owners and stockholders to cease operations, a judgment which the Court has no business interfering with. It would be stretching the intent and spirit of the law if a court interferes with management's prerogative to close or cease its business operations just because the business is not suffering from any loss or because of the desire to provide the workers continued employment.

In declaring as valid and not tainted with bad faith the closure of the Manila and Antipolo plants of Coca-Cola Bottlers' Phils., Inc., and the resulting termination of the employment of 646 employees, the High Court, in **Kasapian ng Malayang Manggagawa sa Coca-Cola [KASAMMA-CCO]- CFW LOCAL 245 v. The Hon. CA, [G.R. No. 159828, April 19, 2006],** upheld the finding of the NLRC that the private respondent's decision to close the plants was a result of a study conducted which established that the most prudent course of action for the private respondent was to stop operations in said plants and transfer production to its other more modern and technologically advanced plants. The subject closure and the resulting termination of the employees was due to legitimate business considerations as evidenced by the technical study conducted by private respondent.

d. Principle of closure under Article 283 applies in cases of both total and partial closure or cessation of business operations.

Although Article 283 uses the phrase "*closure or cessation of operation of an establishment or undertaking,*" the Supreme Court ruled in **Coca-Cola Bottlers [Phils.], Inc. v. NLRC, [G.R. Nos. 93530-36, February 27, 1991],** that the said statutory provision applies to closure or cessation of an establishment or undertaking, whether it be a complete or partial cessation or closure of business operations.

e. Closure of department or section and hiring of workers supplied by independent contractor as replacements, held valid.

In **Association of Integrated Security Force of Bislig [AISFB] - ALU v. Hon. CA, and PICOP, [G.R. No. 140150, August 22, 2005],** where the entire section of company-hired security force was closed due to the non-renewal of security license by the government, it was held that by and large, the determination of whether to maintain or phase-out an entire department or section or to reduce personnel lies with the management. The cessation of operation of its security force was a business judgment properly within the exercise of the management prerogative of private respondent PICOP especially considering the need for continuous security

around the premises of the private respondent in view of insurgents in the area, a fact which was never challenged by petitioner. Being a valid exercise of management prerogative, the need by private respondent PICOP to close its own security force and the ensuing resolution to hire out the vacant positions is beyond inquiry and the court cannot probe into the wisdom of such decisions. Private respondent PICOP has exercised said right fairly, practically and in accordance with law.

f. Relocation of business may amount to cessation of operations.

In **Cheniver Deco Print Technics Corporation v. NLRC, [G.R. No. 122876, February 17, 2000],** petitioner contends that the transfer of its business from its site in Makati to Sto. Tomas, Batangas is neither a closure nor retrenchment, hence, separation pay should not be awarded to the private respondents. The Supreme Court considered this contention without merit. It ruled that even though the transfer was due to a reason beyond its control, petitioner has to accord its employees some relief in the form of severance pay. Broadly speaking, there appears no complete dissolution of petitioner's business undertaking but the relocation of petitioner's plant to Batangas amounts to cessation of petitioner's business operations in Makati. It must be stressed that the phrase "closure or cessation of operation of an establishment or undertaking not due to serious business losses or reverses" under Article 283 of the Labor Code includes both the complete cessation of all business operations and the cessation of only part of a company's business.

g. When closure constitutes an unfair labor practice act.

The closure or cessation of business operations, whether permanent or temporary, should not be resorted to as a ruse or scheme to get rid of employees on account of their union activities. If the closure of a department or section is meant to defeat the exercise by the affected employees of their right to self-organization, such closure may be treated as unfair labor practice and the consequent termination of the affected employees will be declared illegal.

In **Eastridge Golf Club, Inc. v. Eastridge Golf Club, Inc. Labor Union – Super, [G.R. No. 166760, August 22, 2008],** the evidence presented by respondents overwhelmingly shows that petitioner did not cease its F&B operations but merely simulated its transfer to the concessionaire. The payslips alone, the authenticity of which petitioner did not dispute, bear the name of petitioner's Eastridge Golf Club, Food and Beverage Department. The payroll register for the Food and Beverage Department is verified correct by petitioner's Chief Accountant, Nestor Rubis. The Philhealth and Social Security System (SSS) remittance documents are likewise certified correct by the same Chief Accountant. These pieces of documentary evidence convincingly, even conclusively, establish that petitioner remained the employer of the F&B staff even after the October 1, 1999 alleged take-over by the concessionaire. There is no doubt, therefore, that the CA was correct in ruling that the cessation of petitioner's F&B operations and transfer to the concessionaire were a mere subterfuge, and that the dismissal of respondents by reason thereof was illegal. The Court also sustains the judgment of the CA on the existence of unfair labor practice.

h. Closure by reason of enactment of a law.

Closure is a valid ground to terminate employment if it is the result of the application of a law. For instance, the phasing out of the retail operations of the employer to conform to Republic Act No. 1180, [approved on June 19, 1954] otherwise known as the *"Retail Trade Law"* (which, however, was repealed by Republic Act No. 8762, otherwise known as *"The Retail Trade Liberalization Act of 2000"*), justifies termination of employment.

In **Cornista-Domingo v. NLRC, [G.R. No. 156761, October 17, 2006],** the Supreme Court pronounced that the forcible closure of the Philippine Veterans Bank by operation of law (Republic Act No. 7169 [An Act to Rehabilitate the Philippine Veterans Bank Created Under Republic Act 3518, Providing the Mechanisms Therefor and for other Purposes], necessarily resulted in the permanent severance of the employer-employee relationship between said bank and its employees when it ceased operations from April 10, 1983 to August 3, 1992. Thus, it was held that the claim for reinstatement and payment of backwages and other benefits by the affected employees, having no leg to stand on, must necessarily fall.

i. Closure due to Martial Law.

In a case decided by the NLRC, a newspaper company which closed down its business due to Proclamation No. 1081 (Martial Law) was held not liable to pay separation pay to its employees. The reason is that its closure was brought about by an "*act of State.*" It would be the height of injustice if the company be ordered to pay separation pay when the separation from employment was not caused by the company. (*Antonio v. Fookien Times Co., NLRC Case Nos. RO4-2206-74 and 5-2595-74, June 8, 1976).*

j. Closure of business to merge or consolidate with another or to sell or dispose all of its assets, held valid.

In **Espina v. Hon. CA, [G.R. No. 164582, March 28, 2007],** the High Court affirmed the validity of closure of business for purposes of selling all its assets to another entity. Consequently, the termination of the employees affected thereby was held legal and valid. An employer may adopt policies or changes or adjustments in its operations to insure profit to itself or protect the investments of its stockholders and in the exercise of such management prerogative, the employer may merge or consolidate its business with another, or sell or dispose all or substantially all of its assets and properties which may bring about the dismissal or termination of its employees in the process. (*Citing Corporal, Sr. v. NLRC, G.R. No. 129315, Oct. 2, 2000, 395 Phil. 890).*

k. Closure due to execution of lease contract in favor of another or due to expiration thereof.

In **Elcee Farms, Inc. v. NLRC, [G.R. No. 126428, January 25, 2007],** it was held that petitioner Elcee Farms effectively ceased to operate and manage Hacienda Trinidad when, through Garnele Aqua Culture Corporation, it leased the hacienda to Daniel Hilado. The validity of the aforementioned lease was not questioned by any of the parties. There is no question that the lease to Daniel Hilado effectively terminated the employer-employee relationship between Elcee Farms and the farmworkers. After the said lease was executed, the employer-employee relationship between the farm employees and Elcee Farms was severed. The lease agreement between Garnele and Daniel Hilado identified the employees who will continue working with the new management and stipulated that workers who were not in the list, whether new or employed in the past, will not be employed by the lessee. The lease contract even specified that Daniel Hilado will only be liable for all future labor cases, the cause of which should arise during or by virtue of the sublease. Clearly, there was a cessation of operations of Elcee Farms which renders it liable for separation pay to its employees under Article 283 of the Labor Code.

l. Audited financial statements necessary only in closure due to losses.

The condition of business losses is normally shown by financial documents duly audited by independent auditors. According to the case of ***Danzas Intercontinental, Inc. v. Daguman,* [G.R. No. 154368, April 15, 2005],** the same evidence is generally required when the termination

of employees is by reason of closure of the establishment or a division thereof for economic reasons, although the more overriding consideration is, of course, good faith. The employer must prove that the cessation of or withdrawal from business operations was *bona-fide* in character and not impelled by a motive to defeat or circumvent the tenurial rights of employees. Parenthetically, if the business losses that justify the closure of the establishment are duly proved, the right of affected employees to separation pay is lost for obvious reasons. Otherwise, the employer closing its business is obligated to pay its employees their separation pay.

RETRENCHMENT AND CLOSURE OF BUSINESS, DISTINGUISHED.

a. Principal distinction.

The 2004 case of *J.A.T. General Services v. NLRC*, [G.R. No. 148340, January 26, 2004], expounds in clear terms the major distinctions between retrenchment and closure of business. In this case, while the Court of Appeals defined the issue to be the validity of dismissal due to alleged *closure of business*, it cited jurisprudence relating to *retrenchment* to support its resolution and conclusion. While the two are often used interchangeably and are interrelated, they are actually two separate and independent authorized causes for termination of employment. Termination of an employment may be predicated on one without need of resorting to the other.

Closure of business, on one hand, is the reversal of fortune of the employer whereby there is a complete cessation of business operations and/or an actual locking-up of the doors of the establishment, usually due to financial losses. Closure of business as an authorized cause for termination of employment aims to prevent further financial drain upon an employer who cannot pay anymore his employees since business has already stopped. On the other hand, retrenchment is a reduction of personnel usually due to poor financial returns so as to cut down on costs of operations in terms of salaries and wages to prevent bankruptcy of the company. It is sometimes also referred to as down-sizing. Retrenchment is an authorized cause for termination of employment which the law accords an employer who is not making good in its operations in order to cut back on expenses for salaries and wages by laying off some employees. The purpose of retrenchment is to save a financially ailing business establishment from eventually collapsing.

b. Closure of a department or section due to losses amounts to retrenchment.

The closure of an outlet, a branch, department, section, or any aspect of the operations of an establishment is similar in legal effect to retrenchment under Article 283. As held in **Edge Apparel, Inc. v. NLRC, [G.R. No. 121314, February 12, 1998, 286 SCRA 302],** the fact alone that a mere portion of the business of an employer, not the whole of it, is shut down does not necessarily remove that measure from the ambit of the term "*retrenchment*" within the meaning of Article 283 of the Labor Code.

In **San Miguel Corp. v. Aballa, [G.R. No. 149011, June 28, 2005],** a particular department (aquaculture operations) under the SMC Group of Companies was closed allegedly due to serious business reverses. It was held that this constitutes retrenchment by, and not closure of, the enterprise or the company itself as SMC has not totally ceased operations but is still very much an on-going and highly viable business concern. Hence, what should apply are the requisites of retrenchment and not those of closure under Article 283. (*See also Catatista v. NLRC, G.R. No. 102422, Aug. 03, 1995; Construction & Development Corporation of the Philippines v. Leogardo, Jr., G.R. Nos. L-64207-08 Nov. 25, 1983, 125 SCRA 863, 867).*

But a different ruling was made in the case of **Alabang Country Club, Inc. v. NLRC, [G.R. No. 157611, August 9, 2005].** The ground cited by petitioner in terminating its employees

working in its Food and Beverage Department (F & B Department) was retrenchment. The Supreme Court, however, found closure as the most appropriate ground. The reason is that when petitioner decided to cease operating its F & B Department and open the same to a concessionaire, it did not reduce the number of personnel assigned thereat. It terminated the employment of all personnel assigned at the department.

NOTICES REQUIRED IN TERMINATION OF EMPLOYMENT UNDER ARTICLE 283.

a. Notice requirement, mandatory.

Article 283 requires that separate 30-day prior notices should be sent to the affected employees and to the Department of Labor and Employment. This requirement is mandatory.

c. Rationale for the notice requirement.

1. Notice to DOLE; rationale.

The notice to the Department of Labor and Employment (DOLE) is necessary to enable it to ascertain the verity and truth of the cause of termination.

2. Notice to the employee; rationale.

The notice to the employee is required to enable him to contest the factual bases of the management decision or good faith of the termination before the DOLE. Its purpose is to inform the employees of the specific date of their termination or closure of business operations, and must be served upon them at least one (1) month before the date of effectivity to give them sufficient time to make the necessary arrangements.

d. Knowledge by the employee of the redundancy program prior to service of notice, not material.

In **Smart Communications, Inc. v. Astorga, [G.R. No. 148132, January 28, 2008],** the Supreme Court considered as not persuasive the assertion of petitioner (SMART) that respondent (Astorga) cannot complain of lack of notice because the organizational realignment was made known to all the employees as early as February 1998. It declared that Astorga's actual knowledge of the reorganization cannot replace the formal and written notice required by law. In the written notice, the employees are informed of the specific date of the termination, at least a month prior to the effectivity of such termination, to give them sufficient time to find other suitable employment or to make whatever arrangements are needed to cushion the impact of termination. In this case, notwithstanding Astorga's knowledge of the reorganization, she remained uncertain about the status of her employment until SMART gave her formal notice of termination. But such notice was received by Astorga barely two (2) weeks before the effective date of termination, a period very much shorter than that required by law.

k. Notice should be served to affected employees individually.

A notice sent to the foremen, the section heads, the supervisors and the department heads instructing them to retrench some of the workers based on certain guidelines is not the required notice contemplated by law. The written notice should be served on the employees themselves, not on their supervisors. *(Emco Plywood Corporation v. Abelgas, G.R. No. 148532, April 14, 2004).*

In order to meet the purpose behind the requirement of notice, service of the written notice must be made *individually* upon each and every employee of the company. (*Galaxie Steel Workers Union [GSWU-NAFLU-KMU] v. NLRC, G.R. No. 165757, Oct. 17, 2006).*

l. Posting of notice on the bulletin board, not sufficient.

The mere posting on the company bulletin board of the written notice intended to inform the workers of their impending termination does not meet the requirement of *"serving a written notice on the workers"* under Article 283. (*Galaxie Steel Workers Union [GSWU-NAFLU-KMU] v. NLRC, supra).*

m. Notice to DOLE need not be complied with in case of voluntary personnel reduction program.

Well-settled is the rule that notice to the DOLE need not be complied with if the termination of employment under Article 283 was consented to and made voluntarily by the employees pursuant to a valid personnel reduction program.

In **International Hardware, Inc. v. NLRC, [G. R. No. 80770, August 10, 1989, 176 SCRA 256],** it was ruled that if an employee consented to the retrenchment or voluntarily applied for retrenchment with the employer due to the installation of labor-saving devices, redundancy, closure or cessation of operation or to prevent financial losses to the business of the employer, the required previous notice to the DOLE is not necessary as the employee thereby acknowledged the existence of a valid cause for termination of his employment.

n. Notice to DOLE is unnecessary if NCMB supervised the negotiation for the separation package.

In **Manatad v. Philippine Telegraph and Telephone Corp., [G.R. No. 172363, March 7, 2008],** the Supreme Court ruled that although respondent failed to furnish DOLE with a formal letter notifying it of the retrenchment, it still substantially complied with the requirement since the National Conciliation and Mediation Board (NCMB), the reconciliatory arm of DOLE, supervised the negotiation for the separation package to be given to the affected employees. Under this situation, it would be superfluous to still require respondent to serve notice of the retrenchment to DOLE.

o. Advance payment of one month salary, not a substitute for written notice requirement.

May the employer validly pay in advance, *upon the service of notice to the employee and to the DOLE*, the salary of the employee equivalent to said one (1) month period but without requiring him to report for work within said period?

This question may be answered in the *affirmative* considering that the law does not preclude such procedure and the same is more beneficial to the employee who will then have enough, unimpeded time to look for a new job during the one (1) month period he is no longer required to work by his employer. However, it must be stressed that the service of separate notices to the affected employees and to the Department of Labor and Employment at least thirty (30) days from the effectivity of the termination for authorized cause should still be duly complied with.

In other words, the advance payment of the salary for one (1) month does not dispense with the requirement of the 1-month prior notice. Such advance payment cannot be treated as a *replacement* or *substitute* for the notices required under the law. The employer paying the

advance salaries should still comply with said notice requirement one (1) month prior to the intended effectivity of the termination.

Of relevance on this point is the 2000 *en banc* case of *Serrano v. NLRC*, [G.R. No. 117040, May 4, 2000], where the Supreme Court, in its *Resolution* on the Motion for Reconsideration, had the occasion to reiterate the rule that nothing in Article 283 of the Labor Code gives the employer the option to *substitute* the required prior written notice with payment of thirty (30) days salary. It is not for the employer to make a substitution for a right that a worker is legally entitled to.

p. One-month notice requirement applies to both permanent and temporary lay-off.

Compliance with the one-month notice rule is mandatory regardless of whether the retrenchment is temporary or permanent. This is so because Article 283 itself does not speak of temporary or permanent retrenchment; hence, there is no need to qualify the term. *Ubi lex non distinguit nec nos distinguere debemus* (when the law does not distinguish, we must not distinguish). *(Philippine Telegraph & Telephone Corporation v. NLRC, [G.R. No. 147002, April 15, 2005]).*

HEARING NOT REQUIRED IN TERMINATION OF EMPLOYMENT UNDER ARTICLE 283.

Hearing in termination of employment for authorized causes need not be conducted by the employer. The rationale behind this rule is that where the ground for the dismissal or termination of services does not relate to a blameworthy act or omission on the part of the employee, there is no need for an investigation or hearing to be conducted by the employer who does not, to begin with, allege any malfeasance or nonfeasance on the part of the employee. In such a case, there are no allegations which the employee should refute and defend himself from. Thus, to require the company to hold a hearing at which the employee would have had a right to be present, on the business and financial circumstances compelling retrenchment or redundancy or closure or cessation of business operations, would be to impose upon the employer an unnecessary and inutile hearing as a condition for legality of termination.

SEPARATION PAY UNDER ARTICLE 283.

a. Amount of separation pay depends on the ground cited.

For purposes of reckoning the appropriate separation pay to be paid to terminated employees under Article 283, the grounds of installation of labor-saving devices and redundancy are grouped together; while the other two grounds of retrenchment and closure or cessation of business operations *not* due to serious business losses or financial reverses are also separately grouped as one.

b. Separation pay in case of installation of labor-saving devices or redundancy.

An employee is entitled to separation pay equivalent to at least his one (1) month salary or at least one (1) month salary for every year of service, whichever is higher, a fraction of at least six (6) months being considered as one (1) whole year, in case his termination is due to the installation of labor-saving devices or redundancy.

c. Separation pay in case of retrenchment or closure not due to serious business losses as well as disease (under Article 184).

An employee is entitled to separation pay equivalent to his one (1) month pay or at least one-half (½) month pay for every year of service, whichever is higher, a fraction of at least six (6) months being considered as one (1) whole year, where the termination of employment is due to either:

1. Retrenchment to prevent losses; or
2. Closure or cessation of operations of establishment or undertaking ***not*** due to serious business losses or financial reverses; or
3. Disease under Article 284.

d. One month pay, the minimum amount of separation pay under Article 283.

Under Article 283, the phrase *"separation pay equivalent to at least his one (1) month pay or to at least one (1) month pay for every year of service, whichever is higher"* in case of termination due to the installation of labor-saving devices or redundancy, or *"separation pay equivalent to one (1) month pay or at least one-half (½) month pay for every year of service, whichever is higher"* in case of retrenchment to prevent losses and in cases of closure or cessation of operations of establishment or undertaking *not* due to serious business losses or financial reverses, simply means that:

(1) *"One month pay"* is the minimum amount an employee terminated under Article 283 should receive, irrespective of the period of service he has rendered for the employer since the law itself does not impose any such minimum period of service as requisite for entitlement thereto.

(2) The employee should receive either *"one month pay for every year of service"* or *"one-half (½) month pay for every year of service"* depending on the ground invoked for the termination. Thus, the former will be applied if the ground is installation of labor-saving devices or redundancy; while the latter will be paid if the ground is retrenchment or closure or cessation of business operations *not* due to serious business losses or financial reverses.

(3) In case the employee has served for one (1) year, he shall be entitled to at least one (1) month pay, irrespective of the ground invoked for the termination under Article 283.

(4) In case the employee has served for at least two (2) years:

a. If the ground invoked is installation of labor-saving devices or redundancy, he shall be entitled to a separation pay equivalent to two (2) months pay *(1 month pay x 2 years)*; or

b. If the ground invoked is retrenchment or closure or cessation of business operations *not* due to serious business losses or financial reverses, he shall be entitled to a separation pay equivalent to one (1) month pay *(½ month pay x 2 years).*

It must be noted that the phrase *"a fraction of at least six (6) months shall be considered one (1) whole year"* found in Article 283 refers only to the computation or reckoning of the separation pay of affected employees who have served for more than one (1) year. It does not pertain to employees whose service is less than one (1) year as the law, as earlier posited, grants the minimum amount of separation pay of one (1) month pay, irrespective of the length of service of the affected employee. Indeed, it is absurd to hold that affected employees who have served for less than six (6) months are not entitled to the minimum separation pay of one (1) month prescribed thereunder. When the law does not distinguish, no distinction should be made.

In **Smart Communications, Inc. v. Astorga, [G.R. No. 148132, January 28, 2008],** the employee who was terminated for redundancy had served for less than a year. She was declared to be entitled to a separation pay equivalent to one (1) month pay.

e. No separation pay if closure is due to serious business losses or financial reverses.

In the leading 1996 case of **North Davao Mining Corporation v. NLRC, [G.R. No. 112546, March 13, 1996, 254 SCRA 721, 727],** the Supreme Court *en banc* completely changed the rule. It categorically declared that when the closure or cessation of operations is due to serious business losses or financial reverses, the employer is not liable to pay any separation pay.

f. If termination is illegal, separation pay should not be the one provided under Article 283.

As held in **F. F. Marine Corporation v. The Honorable Second Division NLRC, [G.R. No. 152039, April 8, 2005],** and reiterated in ***Philippine Carpet Employees Association [PHILCEA] v. Hon. Sto. Tomas, [G.R. No. 168719, February 22, 2006],*** if the termination due to any of the authorized causes under Article 283 is declared illegal, the separation pay to be paid to the illegally dismissed employee should not be the one provided under Article 283 but the separation pay contemplated under the law to be awarded in lieu of reinstatement, in case reinstatement is not feasible or possible. The separation pay, therefore, should be computed at one (1) month pay for every year of service - which is the lawful amount of separation pay awarded to illegally dismissed employees; hence, it is different from the amount of separation pay provided in Article 283 for termination due to any of the authorized causes provided therein.

g. Quitclaim, not a bar to question validity of termination under Article 283.

Receipt of separation pay and execution of quitclaims by employees terminated under Article 283 do not bar them from instituting an action for illegal dismissal. *(Bogo-Medellin Sugarcane Planters Association, Inc. v. NLRC, G. R. No. 97846, Sept. 25, 1998).*

h. Receipt of separation pay does not mean consent to termination due to authorized causes.

Petitioner's claim in **Caltex [Phils.], Inc. v. NLRC, [G.R. No. 159641, October 15, 2007]**, that private respondent consented to his termination as shown by his acceptance of his separation pay deserves scant consideration. Private respondent had no other recourse but to accept his separation pay since petitioner's letter made it clear that his position had been determined to be redundant and his services shall be terminated effective July 31, 1997. As private respondent was dismissed allegedly due to redundancy, he is entitled to separation pay under Article 283 of the Labor Code. And since there was no extra consideration for the private respondent to give up his employment, such undertaking cannot be allowed to bar the action for illegal dismissal.

i. Separation pay received by an illegally dismissed employee under Article 283 should be returned to the employer.

In the same case of *Caltex* [supra], the Supreme Court found meritorious petitioner's claim that private respondent should return the amount of ₱206,737.65 representing *ex-gratia* benefit paid only to terminated employees on account of the redundancy program. The *ex-gratia* benefit should be returned following the principle against unjust enrichment which is held applicable in labor cases.

In **Philippine Carpet Employees Association [PHILCEA] v. Hon. Sto. Tomas, [G.R. No. 168719, February 22, 2006],** the retrenchment of workers was declared illegal due to non-

compliance with the substantial requirements to effect a valid retrenchment. As such, the petitioner union's members are entitled to reinstatement with full backwages. In the case of members of petitioner union who had received their respective separation pay, the amounts of such payments should be deducted from the backwages due them. *(See also Ariola v. PHILEX Mining Corporation, G.R. No. 147756, Aug. 9, 2005, 466 SCRA 152, 175).*

j. When receipt of separation pay constitutes a bar to question the validity of termination due to authorized causes.

Petitioner in **Soriano, Jr. v. NLRC, [G.R. No. 165594, April 23, 2007],** asseverates that his acceptance of separation pay from the respondent PLDT does not bar the filing of his complaint for illegal dismissal against the latter, nor does it imply that he had already waived his right to question the validity of his dismissal. The Supreme Court, however, ruled that:

> "It cannot be gainfully said that the petitioner did not fully understand the consequences of signing the "Receipt, Release, and Quitclaim" dated 15 August 1996. Petitioner is not an illiterate person who needs special protection. He held responsible positions in the office of the respondent PLDT and had attended and passed various training courses for his position. It is thus assumed that he comprehended the contents of the "Receipt, Release, and Quitclaim" which he signed on 15 August 1996. There is also no showing that the execution thereof was tainted with deceit or coercion. By his own admission, petitioner signed the quitclaim voluntarily, compelled by personal circumstances, rather than by respondent PLDT. He had received his separation pay and benefited therefrom. Certainly, it would result in unjust enrichment on the part of the petitioner if he is allowed to question the legality of his dismissal from work.
>
> "Further, the petitioner received separation pay from the respondent PLDT, the amount of which was more than the amount required under Article 283 of the Labor Code. Indeed, there was a credible and reasonable consideration for his separation from work." *(See also Amkor Technology Philippines, Inc. v. Juangco, [G.R. No. 166507, Jan. 23, 2007).*

SALE OR TRANSFER OF BUSINESS.

a. Change of ownership of business, not an authorized cause.

The sale of business or change in the ownership or management of a business enterprise is not one of the authorized causes provided by law for the termination of employment. *(Sunio v. NLRC, G.R. No. L-57767, Jan. 31, 1984).*

b. Sale or transfer of business may be treated as closure or cessation of business operations by previous owner.

There are certain legal consequences, however, that should be recognized resulting from such sale, transfer or change in ownership. As far as the previous owner is concerned, the effect thereof is the cessation of the operation of the business sold or transferred. It may thus be treated, within the contemplation of Article 283, as closure or cessation of business operation by the previous owner. In such an event, termination of its employees and payment of separation pay to them may be justified under the concept of closure or cessation of business operation under Article 283.

In the case of **Espina v. Hon. CA, [G.R. No. 164582, March 28, 2007],** the Supreme Court affirmed the validity of closure of business for purposes of selling all its assets to another entity. Consequently, the termination of the employees affected by the said closure was held as valid. (*Citing Corporal, Sr. v. NLRC, G.R. No. 129315, Oct. 2, 2000, 395 Phil. 890, 901).*

c. Notice required in sale or transfer of assets or business.

The notice requirement in case of closure of business or cessation of operations is also applicable to the sale or transfer of assets or business. (*Associated Labor Unions-VIMCONTU v. NLRC, [204 SCRA 913 [1991]).*

d. Separation pay due to sale or transfer of business.

The minimum separation pay required in the case of termination of employment due to sale or transfer of assets or business enterprise is similar to the separation pay for closure of business or cessation of operations under Article 283 of the Labor Code. It shall be equivalent to at least one month pay or at least one-half (½) month pay for every year of service, whichever is higher. *(Associated Labor Unions-VIMCONTU v. NLRC, G.R. No. 74841 and Associated Labor Unions-VIMCONTU v. Mobil Oil Philippines, Inc., G.R. No. 75667, Dec. 29, 1991).*

e. Obligation to hire employees, when provided in contract of sale or transfer of assets or business.

Where the contract of sale or transfer of assets or business provides for the absorption by the new owner of the employees of the previous owner, such contract is binding on the new owner.

In **Marina Port Services, Inc. v. Iniego, [G.R. No. 77853, January 22, 1990],** the contract awarded to a new operator of the arrastre services in the South Harbor provides as one of its conditions that it shall absorb all the employees and shall be liable for all benefits provided under the CBA. The Supreme Court ruled that the new operator should absorb the said employees of the old operator. When the words and language of documents are clear and plain or readily understandable by an ordinary reader thereof, there is absolutely no room for interpretation or construction anymore. Therefore, when said contract was accepted by the grantee-petitioner, it had stepped into the shoes of its predecessor. Accordingly, petitioner had bound itself to whatever judgment that awaited the new operator in the labor case.

f. Previous owner remains liable to its employees even if there is an undertaking to assume responsibility by the new owner.

The liability of the former owner is not extinguished by an undertaking made by the new owner assuming responsibility therefor. Such undertaking does not bind the employees as would release the former from its liability to the latter.

In **Philimare Shipping & Equipment Supply, Inc. v. NLRC, [G.R. No. 126764, December 23, 1999],** the petitioner-employer claims that it cannot be made liable to the respondent-employee for illegal dismissal because it had been replaced by another entity as the new manning agent of *M/V Mico* by virtue of an Affidavit of Assumption of Responsibility executed by said new manning agent, stating that it is willing to assume any and all liabilities that may arise or that may have arisen with respect to the seamen recruited and deployed by the former manning agent. The Supreme Court, however, ruled that the former employer remains liable. Respondent-employee was not privy to the assumption of responsibility by a new manning agent substituting petitioner. Such contract or agreement cannot, therefore, be binding on him.

As the local recruiter who employed him for or on behalf of the foreign principal, petitioner is the one liable to him for breach of contract of employment.

g. Sale or transfer of business in bad faith.

Although the purchaser of the assets or enterprise is not legally bound to absorb in its employ the employees of the seller, the parties are liable to the employees if the transaction is colored or clothed with bad faith. *(Associated Labor Unions-VIMCONTU v. NLRC, G.R. No. 74841, Dec. 29, 1991; Philippine Airlines, Inc. v. NLRC, G.R. No. 125792, Nov. 9, 1998, 298 SCRA 430).*

h. Generous termination pay package indicates good faith.

The generous termination pay package given to employees argues strongly that the cessation of business operations by the employer was a *bona-fide* one. It is very difficult to believe, said the Supreme Court in *Associated Labor Unions-VIMCONTU v. NLRC*, [G. R. No. 74841, December 29, 1991], that the former employer would be dissolved and all its employees separated with generous separation pay benefits, for the sole purpose of circumventing the requirements of its CBA with petitioner unions. Indeed, petitioners have not suggested any reason why the former employer should have undertaken such a fundamental and non-reversible business reorganization merely to evade its obligations under the CBA.

i. Appointment of same directors and employees, not indicative of bad faith.

In the same case of Associated Labor Unions-VIMCONTU [supra], it was ruled that the establishment of the new owner with the same directors who had served as such in the old business and the hiring of some former employees of the previous owner for the purpose of settling and winding up the affairs thereof, do not detract from the *bona fide* character of the dissolution and withdrawal from business of the previous owner. The new owner's residual business consisting of the marketing of chemicals, aviation and marine fuels as well as exports, all of which constituted a fraction of the prior business of the previous owner, similarly does not argue against the *bona fide* character of the corporate reorganization which took place in this case.

j. New owner is not assignee of CBA in sale in good faith.

Further, it was ruled in the same case of *Associated Labor Unions-VIMCONTU* [supra] that since what was effected was a cessation of business and the requirement of notice was substantially complied with, the allegations that both the old owner and the new owner merely intended to evade the provisions of the CBA cannot be sustained. There was nothing irregular in the closure by the old owner of its business operation. The new owner may not be said to have stepped into the picture as an assignee of the CBA because of the very fact of such closure.

MERGER.

In merger, the employees of the merged companies or entities are deemed absorbed by the new company. The obligation of the new company involves not only to absorb the workers of the dissolved companies but also to include the length of service earned by the absorbed employees with their former employers as well. To rule otherwise would be manifestly less than fair, certainly, less than just and equitable. *(Filipinas Port Services, Inc. v. NLRC, infra).*

By the fact of merger, a succession of employment rights and obligations occurs. Thus, as held in **Filipinas Port Services, Inc. v. NLRC, [G.R. No. 97237, August 16, 1991],** granting

that the new corporation had no contract whatsoever with the employees regarding the services rendered by them prior to February 16, 1977, by the fact of merger, such succession of employment rights and obligations had occurred between the new corporation and the said employees.

Under the Corporation Code, the surviving or consolidated corporation shall be responsible and liable for all the liabilities and obligations of each of the constituent corporations in the same manner as if such surviving or consolidated corporation had itself incurred such liabilities or obligations. Any claim, action or proceeding pending by or against any of such constituent corporations may be prosecuted by or against the surviving or consolidated corporation, as the case may be. Neither the rights of creditors nor any lien upon the property of any of such constituent corporations shall be impaired by such merger or consolidation. *(National Union of Bank Employees v. Lazaro, G.R. No. L-56431, Jan. 19, 1988).*

DISSOLUTION OF A CORPORATION.

Dissolution alone does not end the legal existence of a corporation. In **Pepsi-Cola Products Philippines, Inc. v. Court of Appeals, [G.R. No. 145855, November 24, 2004],** the High Tribunal had the occasion to discuss the effects of dissolution of a corporate entity:

> "We agree with the ruling of the CA that the NLRC committed a grave abuse of its discretion amounting to lack of jurisdiction in dismissing the case. The NLRC clearly erred in perceiving that, upon the petitioner's acquisition of the PCDP, the latter lost its corporate personality. The appellate court delved into and resolved the issue with sufficient fullness, and supported the same with statutory provisions and applicable case law. Under Section 122 of the Corporation Code, a corporation whose corporate existence is terminated in any manner continues to be a body corporate for three (3) years after its dissolution for purposes of prosecuting and defending suits by and against it and to enable it to settle and close its affairs, culminating in the disposition and distribution of its remaining assets. It may, during the three-year term, appoint a trustee or a receiver who may act beyond that period. The provision which reads in full:
>
> > 'SEC. 122. *Corporate Liquidation*. – Every corporation whose charter expires by its own limitation or is annulled by forfeiture or otherwise, or whose corporate existence for other purposes is terminated in any other manner, shall nevertheless be continued as a body corporate for three (3) years after the time when it would have been so dissolved, for the purpose of prosecuting and defending suits by or against it and enabling it to settle and close its affairs, to dispose of and convey its property and to distribute its assets, but not for the purpose of continuing the business for which it was established.
> >
> > 'At any time during the said three (3) years, the corporation is authorized and empowered to convey all of its properties to trustees for the benefit of stockholders, members, creditors, and other persons in interest.
> >
> > From and after any such conveyance by the corporation of its properties in trust for the benefit of its stockholders, members, creditors and others in interest, all interest which the corporation

had in the properties terminates the legal interest vests in the trustees, and the beneficial interest in the stockholders, members, creditors or other persons in interest.

'Upon the winding up of the corporate affairs, any asset distributable to any creditor or stockholder or member, who is unknown or cannot be found, shall be escheated to the city or municipality where such assets are located.

'Except by decrease of capital stock and as otherwise allowed by this Code, no corporation shall distribute any of its assets or property except upon lawful dissolution and after payment of all its debts and liabilities.'

"The termination of the life of a corporate entity does not by itself cause the extinction or diminution of the rights and liabilities of such entity. *(Citing Gonzales v. Sugar Regulatory Administration, 174 SCRA 377 [1989]).* If the three-year extended life has expired without a trustee or receiver having been expressly designated by the corporation, within that period, the board of directors (or trustees) itself, may be permitted to so continue as 'trustees' by legal implication to complete the corporate liquidation." *(Gelano v. CA, 103 SCRA 90 [1981]).*

TRANSFER OF BUSINESS DUE TO DEATH OF OWNER.

In case the transfer of business is occasioned by the death of the owner, the heir is not bound by the labor contracts between the deceased and his employees. The rule is settled that unless expressly assumed, labor contracts are not enforceable against the transferee of an enterprise. Thus, claims for unpaid benefits should be filed in the intestate proceedings involving the estate of the deceased in accordance with *Section 5, Rule 86* of the *Rules of Court. (Martinez v. NLRC, G.R. No. 117495, May 29, 1997, 272 SCRA 793).*

DISEASE AS AN AUTHORIZED CAUSE FOR TERMINATION OF EMPLOYMENT BY THE EMPLOYER

• ***What are the requisites for the ground of disease?***

The following requisites must be complied with before termination of employment due to disease may be justified:

1. the employee is suffering from a disease;
2. his continued employment is either:
    a. prohibited by law; or
    b. prejudicial to his health; or
    c. prejudicial to the health of his co-employees;
3. there is a certification by a competent public health authority that the disease is of such nature or at such stage that it cannot be cured within a period of six (6) months even with proper medical treatment;
4. notice of termination based on this ground should be served to the employee; and

1. separation pay shall be paid to him in the amount equivalent to at least one (1) month salary or to one-half (1/2) month salary for every year of service, whichever is greater, a fraction of at least six (6) months being considered as one (1) whole year.

• ***Summary of some principles:***

- Burden of proof rests on the employer.
- Company physician is **not** a *"competent public health authority."*
- Medical certificate issued by *company doctor* is **not** sufficient.

• ***Competent public health authority.***

"Competent public health authority" refers to a government doctor whose medical specialization pertains to the disease being suffered by the employee. For instance, an employee who is sick of tuberculosis should consult a government-employed pulmonologist who is competent to make an opinion thereon. If the employee has cardiac symptoms, the competent physician in this case would be a cardiologist.

A medical certificate issued by a company's own physician is not an acceptable certificate for purposes of terminating an employment based on Article 284, it having been issued not by a "*competent public health authority*," the person referred to in the law. (*Cebu Royal Plant [San Miguel Corporation] vs. Hon. Deputy Minister of Labor, G. R. No. 58639, Aug. 12, 1987, 153 SCRA 38 [1987]).*

• ***Medical certificate, an indispensable requisite.***

In the absence of the required certification by a competent public health authority, the Supreme Court has consistently ruled against the validity of the employee's dismissal. (*Cruz vs. NLRC, G. R. No. 116384, Feb. 7, 2000).*

In the 2003 case of **Sy vs. CA, [G. R. No. 142293, February 27, 2003]**, the High Court reiterated its earlier ruling in **Triple Eight Integrated Services, Inc. vs. NLRC**, **[299 SCRA 608, 614 1998]**, that the requirement for a medical certificate under Article 284 cannot be dispensed with; otherwise, it would sanction the unilateral and arbitrary determination by the employer of the gravity or extent of the employee's illness and thus defeat the public policy in the protection of labor.

In the 2001 case of **Cathay Pacific Airways, Ltd. vs. NLRC**, **[G. R. No. 141702-03, August 2, 2001],** the dismissal of the employee based on a finding that she was suffering from asthma was declared illegal because of the absence of a certification by a competent public health authority that the disease is of such nature or at such a stage that it cannot be cured within a period of six (6) months even with proper medical treatment, a requirement under *Section 8, Rule I, Book VI,* of the *Rules to Implement the Labor Code.* Here, the employee was dismissed based only on the recommendation of its company doctors who concluded that she was afflicted with asthma. It did not likewise show proof that the employee's asthma could not be cured in six (6) months even with proper medical treatment. On the contrary, when she returned to the company clinic five (5) days after her initial examination, the company doctor diagnosed her condition to have vastly improved.

In **General Textile, Inc. vs. NLRC**, ***[G. R. No. 102969, April 4, 1995],*** the termination of the employee due to PTB sickness was declared not justified in the absence of medical certificate issued by a competent public health authority that the disease is of such nature or at such a stage that it cannot be cured within a period of six (6) months even with proper medical treatment.

• ***Medical certificate as evidence of illness.***

Medical certificates presented by an employee to prove (a) his illness, the nature and the duration of the procedures performed by the dentist on him; and (b) the period during which he was incapacitated to work are admissible in evidence and have probative weight even if not notarized. It is sufficient that the physician and the dentist who examined the employee, aside from their respective letterheads, had written their respective license numbers below their names and signatures, hence, they bear all the earmarks of regularity in their issuance and are entitled to full probative weight. Common sense dictates that an ordinary worker does not need to have these medical certificates to be notarized for proper presentation to his company to prove his ailment. It has been said that verification of documents is not necessary in order that the said documents could be considered as substantial evidence. (*Union Motor Corporation vs. NLRC, G. R. No. 159738, Dec. 9, 2004)*

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• ***Medical certificate issued by Labor Attache and Ministry of Public Health of Kuwait, not sufficient.***

In the 2001 case of **ATCI Overseas Corporation vs. CA**, **[G. R. No. 143949, August 9, 2001],** involving two (2) overseas Filipino workers who were recruited by the Ministry of Public Health of Kuwait to work as dental hygienists in that country for a period of 2 years but who were terminated after working for only two months based on alleged tuberculosis and heart disease, the Supreme Court, in declaring the termination as illegal, ruled that there is nothing in the records to show that petitioner complied with *Sec. 8, Rule I, Book VI* of the *Rules to Implement the Labor Code* before private respondent-doctors were dismissed. In the proceedings before the POEA, petitioner did not present any certification whatsoever. It was only when the case was appealed to the NLRC that petitioner belatedly introduced in evidence a letter from the Ministry stating that private respondents were found to be positive for tuberculosis and heart disease. In addition, petitioner presented a certification issued by the Philippine labor attache attesting to the fact that private respondents were subjected to a medical examination after their arrival in Kuwait and were found to be unfit for employment due to lung defects. The letter from the Ministry and the certification by the Philippine labor attache fall short of the demands of the Omnibus Rules. First of all, there is no finding that the disease allegedly afflicting private respondents is of such nature or at such a stage that it cannot be cured within a period of six (6) months with proper medical treatment. Secondly, even assuming that the letter from the Ministry complied with the Omnibus Rules, petitioner has not proven that the same was presented to private respondents *prior* to their termination. Rather, the letter appears to have been an afterthought, a belated, yet grossly unsuccessful attempt at compliance with Philippine laws, produced by petitioner after an adverse judgment was rendered against it by the POEA. Clearly, *Sec. 8, Rule I, Book VI, of the Omnibus Rules* was not complied with, thus making private respondents' dismissal illegal.

• ***The certificate should be procured by the employer.***

It devolves upon the employer the obligation to obtain a certificate from a competent public authority that the employee's disease is at such stage or of such nature that it cannot be cured within six (6) months even with prior medical treatment. It is the employer, and not the employee, who has the burden of proof to justify that the termination was supported by said certificate. Clearly, it is only where there is such prior certification that the employee could be validly terminated from his job. (*Tan vs. NLRC, G. R. No. 116807, April 14, 1997, 271 SCRA 216; See also Phil. Employ Services and Resources, Inc. vs. Paramio, G. R. No. 144786, April 15, 2004; Sy vs. CA, supra).*

In the case of **Duterte v. Kingswood Trading Co., Inc., [G.R. No. 160325, October 4, 2007].** instead of requiring the employer to present the required medical certificate from a competent public health authority before dismissing the employee, both the NLRC and the appellate court placed on the petitioner-employee the burden of establishing, by a certification of a competent public authority that his ailment is such that it cannot be cured within a period of six (6) months even with proper medical treatment. And pursuing their logic, petitioner could not claim having been illegally dismissed due to disease failing, as he did, to present such certification. To be sure, the NLRC's above posture is, to say the least, without basis in law and jurisprudence. And when the CA affirmed the NLRC, the appellate court in effect placed on the petitioner the *onus* of proving his entitlement to separation pay and thereby validated herein respondents' act of dismissing him from employment even without proof of existence of a legal ground for dismissal.

• ***Existence of certificate, burden of proof is on the employer.***

The burden of proving the existence of such a medical certificate required under the law is upon the employer, not the employee. (*ATCI Overseas Corporation vs. CA, G. R. No. 143949, Aug. 9, 2001; Tan vs. NLRC, 271 SCRA 216 [1997]; Cebu Royal Plant vs. Deputy Minister of Labor, supra).*

• ***Employee dismissed without the medical certificate is entitled to moral and exemplary damages.***

In the same 2001 case of **Cathay Pacific Airways** [supra], because the employer summarily dismissed the employee from the service based only on the recommendation of its medical officers, in effect, failing to observe the provision of the Labor Code which requires a certification by a competent public health authority, it was held that the award of moral and exemplary damages to the employee should be affirmed. Notably, the decision to dismiss the employee was reached after a single examination only. The employer's medical officers recommended the employee's dismissal even after having diagnosed her condition to have vastly improved. It did not make even a token offer for the employee to take a leave of absence as what it provided in its Contract of Service. The employer is presumed to know the law and the stipulation in its Contract of Service with the employee.

• ***Notice to employee and the DOLE regarding termination due to disease, necessary.***

Although Article 284 does not require the service of notice to the employee, however, it is necessary under the following circumstances, if only to document the procedure taken by the employer prior to terminating the employment:

1. Notice to the sick employee to submit himself for medical examination by a competent public health authority to determine not only his fitness for work but, more importantly, for the purpose of having his sickness certified that it is of such nature or at such a stage that it can be cured within a period of six (6) months with proper medical treatment; and

2. Notice of termination in case the certification of the competent public health authority is to the effect that the sickness is of such nature or at such a stage that it cannot be cured within a period of six (6) months even with proper medical treatment.

The *second* notice above should be given not only to the employee but also to the Department of Labor and Employment, in accordance with the ruling in the case of **Agabon vs. NLRC**, **[G.R. No. 158693, November 17, 2004],** where the Supreme Court opined that if the dismissal is based on authorized causes under Articles 283 and 284, the employer must give the employee and the Department of Labor and Employment written notices thirty (30) days prior to the effectivity of his separation.

• ***No hearing required in case of termination due to disease.***

Being an authorized cause, as distinguished from just cause, hearing is not necessary to be conducted by the employer prior to the termination of employment of the sick employee.

• ***Separation pay in case of lawful dismissal based on disease.***

The separation pay of an employee terminated on the ground of disease is equivalent to at least one (1) month salary or to one-half (½) month salary for every year of service, whichever is greater, a fraction of at least six (6) months being considered as one (1) whole year. (*Article 284, Labor Code; Baby Bus, Inc. vs. Minister of Labor, G. R. No. 54223, Feb. 26, 1988).*

TERMINATION OF EMPLOYMENT BY EMPLOYEE. (RESIGNATION)

• ***What are the requisites for termination of employment by employee without just cause?***

In case of termination without just cause, the following requisites must be complied with by the employee:

1. written (not verbal or oral) notice of the termination (commonly known as resignation letter); and
2. service of such notice to the employer at least one (1) month in advance.

• ***Acceptance of resignation, necessary.***

Acceptance of the resignation tendered by an employee is necessary to make the resignation effective. (*Shie Jie Corp. vs. National Federation of Labor, G. R. No. 153148, July 15, 2005).*

However, the acceptance of a resignation does not require the conformity of the resigning employee. Such conformity only indicates that the employee was forced to resign for which

reason her "*conformity*" was obtained to make it appear as voluntary or legal. *(Rase vs. NLRC, G. R. No. 110637, Oct. 07, 1994).*

Once resignation is accepted, the employee no longer has any right to the job. It goes without saying, therefore, that resignation terminates the employer-employee relationship. (*Philippine National Construction Corporation vs. NLRC, G. R. No. 120961, Oct. 2, 1997, 280 SCRA 116).*

• ***Withdrawal of resignation; effect of acceptance thereof.***

A resignation tendered by an employee, irrespective of whether it was made revocable or irrevocable, may still be withdrawn anytime before its acceptance by the employer. Once accepted, however, withdrawal thereof can no longer be made by the resigning employee, except with the consent or agreement of the employer. (*Custodio vs. Ministry of Labor and Employment, G. R. No. 643174, July 19, 1990).*

The acceptance of the withdrawal of resignation is the employer's sole prerogative. The employee who resigned cannot unilaterally withdraw his resignation. Once accepted, the employee no longer has any right to the job. If the employee later changes his mind, he must ask for approval of the withdrawal of his resignation from his employer, as if he were re-applying for the job. It will then be up to the employer to determine whether or not his services would be continued. If the employer accepts said withdrawal, the employee retains the job. If the employer does not, the employee cannot claim illegal dismissal for the employer has the right to determine who his employees will be. To say that the employee who has resigned is illegally dismissed is to encroach upon the right of the employers to hire persons who will be of service to them. (*Intertrod Maritime, Inc. vs. NLRC, G. R. No. 81087, June 19, 1991, 198 SCRA 318).*

• ***Assumption of new job by employee prior to employer's acceptance of resignation, effect.***

The assumption of a new job by an employee prior to receiving his employer's acceptance of his resignation is clearly inconsistent with any desire to remain in employment. His resignation is, therefore, deemed effective. (*Philippines Today, Inc. vs. NLRC, G. R. No. 112965, Jan. 30, 1997, 267 SCRA 202).*

• ***Employment elsewhere during the pendency of case, effect.***

In the 2005 case of **Great Southern Maritime Services Corporation vs. Acuña**, **(G. R. No. 140189, Feb. 28, 2005),** the employer's submission that respondent-employees voluntarily resigned because of their desire to seek employment elsewhere, as accentuated by the concurrent fact that two of the respondents already have jobs in Singapore, was held as an unreasonable inference. The fact that these two have already found employment elsewhere should not be weighed against their favor. It should be expected that they would seek other means of income to tide them over during the time that the legality of their termination is under litigation. They should not be faulted for seeking employment elsewhere for their economic survival.

• ***Re-employment after acceptance of resignation.***

A resigned employee who desires to take his job back has to reapply therefor, and he shall have the status of a stranger who cannot unilaterally demand an appointment. He cannot

arrogate unto himself the same position which he earlier decided to leave. To allow him to do so would be to deprive the employer of his basic right to choose whom to employ. It has been held that an employer is free to regulate, according to his own discretion and judgment, all aspects of employment including hiring. The law, in protecting the rights of the laborer, impels neither the oppression nor self-destruction of the employer. (*Philippines Today, Inc. vs. NLRC, supra).*

• ***Acts before and after resignation should be considered to determine its validity.***

Resignation is a formal pronouncement of relinquishment of an office, with the intention of relinquishing the office accompanied by the act of relinquishment. As the intent to relinquish must concur with the overt act of relinquishment, the acts of the employee before and after the alleged resignation must be considered in determining whether in fact he intended to sever his employment. (*Fortuny Garments v. Castro, G.R. No. 150668, Dec. 15, 2005, 478 SCRA 125, 130).*

The High Court, in ***BMG Records [Phils.], Inc. v. Aparecio,*** **[G.R. No. 153290, September 5, 2007],** agreed with petitioners' contention that the circumstances surrounding the resignation of the employee (Aparecio) should be given due weight in determining whether she had intended to resign. In this case, such intent is very evident:

> "*First*, Aparecio already communicated to other people that she was about to resign to look for a better paying job since she had been complaining that employees like her in other companies were earning much more;
>
> "*Second*, prior to the submission of her resignation letter, Aparecio and two other promo girls, Soco and Mutya, approached their supervisor, intimated their desire to resign, and requested that they be given financial assistance, which petitioners granted on the condition that deductions would be made in case of shortage after inventory;
>
> "*Third*, Aparecio, Soco, and Mutya submitted their duly signed resignation letters, which were accepted by petitioners; and
>
> "*Fourth*, Aparecio already initiated the processing of her clearance; thus, she was able to receive her last salary, 13th month pay, and tax refund but refused to receive the financial assistance less the deductions made.
>
> "The foregoing facts were affirmatively narrated and attested to in the notarized affidavit of Soco and Cinco and have remained incontrovertible as they were never denied by Aparecio. The NLRC, thus, erred when it did not give probative weight to their testimonies even if belatedly presented in petitioners' motion for reconsideration."

Petitioner in **Domondon v. NLRC, [G.R. No. 154376, September 30, 2005, 471 SCRA 559],** was found to have relinquished his position when he submitted his letter of resignation. His subsequent act of receiving and keeping his requested *"soft landing"* financial assistance of ₱300,000.00, and his retention and use of the car subject of his arrangement with his employer showed his resolve to relinquish his post.

• ***Resignation and execution of quitclaim, effect.***

Once an employee resigns and executes a quitclaim in favor of the employer, he is thereby estopped from filing any further money claims against the employer arising from his employment. Such money claims may be given due course *only* when the voluntariness of the execution of the quitclaim or release is put in issue, or when it is established that there is an

unwritten agreement between the employer and employee which would entitle the employee to other remuneration or benefits upon his or her resignation. (*Philippine National Construction Corporation vs. NLRC, G. R. No. 120961, Oct. 2, 1997).*

• ***What are the just causes for termination of employment by employee with just cause?***

An employee may put an end to the relationship **without serving any notice** on the employer for any of the following just causes:

1. serious insult by the employer or his representative on the honor and person of the employee;
2. inhumane and unbearable treatment accorded the employee by the employer or his representative;
3. commission of a crime or offense by the employer or his representative against the person of the employee or any of the immediate members of his family; and
4. other causes analogous to any of the foregoing.

• ***What are the requisites for serious insult as a ground to terminate employment by employee?***

In order to be considered a just cause to warrant the valid termination of employment by the employee without notice, the following requisites must concur:

1. the insult must be serious in character;
2. it must be committed by the employer or his representative; and
3. it must injure the honor and person of the employee.

• ***What are the requisites for serious inhumane and unbearable treatment as a ground to terminate employment by employee?***

This ground may be invoked if the following requisites concur:

1. the treatment is inhumane and unbearable in nature; and
2. it is perpetrated by the employer or his representative.

• ***What are the requisites for commission of crime as a ground to terminate employment by employee?***

The requisites for this ground are as follows:

1. a crime or offense is committed;
2. it was committed by the employer or his representative; and
3. it was perpetrated against the person of the employee or any of the immediate members of his family.

• ***What are other analogous causes that may be invoked as a ground to terminate employment by employee?***

Other analogous causes that may be cited are: **constructive dismissal** or **forced resignation**.

• ***What are the distinctions between constructive dismissal and forced resignation?***

Both *forced resignation* and *constructive dismissal* consist in the act of quitting because continued employment is rendered impossible, unreasonable or unlikely as in the case of an offer involving a demotion in rank and a diminution in pay. However, in *forced resignation*, as distinguished from *constructive dismissal*, the employee is made to do or perform an involuntary act - submission or tender of resignation - meant to validate the action of management in inveigling, luring or influencing or practically forcing the employee to effectuate the termination of employment, instead of doing the termination himself.

• ***Examples of forced resignation.***

An example is the case of **Nitto Enterprises v. NLRC, [G.R. No. 114337, September 29, 1995],** where the employer "*strong-armed*" the employee into signing the resignation letter and quitclaim without explaining to him the contents thereof. Moreover, the fact that the employee filed a case for illegal dismissal with the Labor Arbiter only three (3) days after he was made to sign the quitclaim is a clear indication that such resignation was not voluntary and deliberate.

Another example is the case of **Phil. Employ Services and Resources, Inc. v. Paramio, [G.R. No. 144786, April 15, 2004],** where the OFWs were forced to submit resignation letters by their foreign employer in Taiwan which they signed if only to be repatriated to the Philippines because of poor working conditions and maltreatment. The agreement signed by one of the OFWs was mimeographed and prepared by his employer. Except for his handwritten name, the words "*I'm go* (sic) *very verry* (sic)" and his signature at the bottom of the document, the rest of the spaces to be filled up were all blank. Most of the contents of the agreement were even in Chinese characters.

The case of **Siemens Philippines, Inc. v. Domingo, [G.R. No. 150488, July 28, 2008],** where the respondent was forced to resign because of diminution of pay is another instance of constructive dismissal. A diminution of pay is prejudicial to the employee. Domingo's resignation was brought about by the decision of the management of Siemens Philippines not to renew - or work for the renewal of - his consultancy contract with Siemens Germany which clearly resulted in the substantial diminution of his salary. The situation brought about the feeling of oppression which compelled Domingo to resign. The diminution in pay created an adverse working environment that rendered it impossible for Domingo to continue working for Siemens Philippines. His resignation from the company was in reality not his choice but a situation created by the company, thereby amounting to constructive dismissal. (*See also Francisco v. NLRC, G.R. No. 170087, Aug. 31, 2006, 500 SCRA 690, 702).*

• ***Test of constructive dismissal.***

According to **Uniwide Sales Warehouse Club v. NLRC, [G.R. No. 154503, February 29, 2008],** the test of constructive dismissal is whether a reasonable person in the employee's position would have felt compelled to give up his position under the circumstances. It is an act amounting to dismissal but made to appear as if it were not. In fact, the employee who is constructively dismissed may be allowed to keep on coming to work. Constructive dismissal is, therefore, a *dismissal in disguise.* The law recognizes and resolves this situation in favor of the employees in order to protect their rights and interests from the coercive acts of the employer. (*See also Aguilar v. Burger Machine Holdings Corporation, G.R. No. 172062, Oct. 30, 2006, 506 SCRA 266, 273; Globe Telecom, Inc. v. Florendo-Flores, G.R. No. 150092, Oct. 20, 2003, SC E-Library).*

In the said *Uniwide* case, private respondent claims that from the months of February to June 1998, she had been subjected to constant harassment, ridicule and inhumane treatment by

Apduhan, with the hope that the latter can get the former to resign. The harassment allegedly came in the form of successive memoranda which she would receive almost every week, enumerating a litany of offenses and maligning her reputation and spreading rumors among the employees that she would be dismissed soon. The last straw of the imputed harassment was the July 31, 1998 incident wherein her life was put in danger when she lost consciousness due to hypertension as a result of Apduhan's alleged hostility and shouting.

The Supreme Court, however, found that private respondent's allegation of harassment is a specious statement which contains nothing but empty imputation of a fact that could hardly be given any evidentiary weight. Her bare allegations of constructive dismissal, when uncorroborated by the evidence on record, cannot be given credence.

The sending of several memoranda addressed to a managerial or supervisory employee concerning various violations of company rules and regulations, committed on different occasions, are not unusual. The alleged February to June 1998 series of memoranda given by petitioners to private respondent asking the latter to explain the alleged irregular acts should not be construed as a form of harassment but merely an exercise of management's prerogative to discipline its employees.

The right to impose disciplinary sanctions upon an employee for just and valid cause, as well as the authority to determine the existence of said cause in accordance with the norms of due process pertains in the first place to the employer. Precisely, petitioners gave private respondent successive memoranda so as to give the latter an opportunity to controvert the charges against her. Clearly, the memoranda are not forms of harassment, but petitioners' compliance with the requirements of due process.

The July 31, 1998 confrontation where Apduhan allegedly shouted at private respondent which caused the latter's hypertension to recur and eventually caused her to collapse cannot by itself support a finding of constructive dismissal by the NLRC and the CA. Even if true, the act of Apduhan in shouting at private respondent was an isolated outburst on the part of Apduhan that did not show a clear discrimination or insensibility that would render the working condition of private respondent unbearable.

The Supreme Court has consistently held that litigations cannot be properly resolved by suppositions, deductions, or even presumptions, with no basis in evidence, for the truth must have to be determined by the hard rules of admissibility and proof. (*Id.).*

• ***Voluntary resignation is different from constructive dismissal.***

An employee who tendered her voluntary resignation and signed the quitclaim after receiving all the benefits due her for her separation cannot claim that she was constructively dismissed. The fact of her transfer due to a new secretarial staffing pattern which she objected to, or the alleged hostility on the part of her employer, cannot render nugatory the voluntary nature of her resignation. She was not eased out much less was she forced to resign. This is a case of voluntary resignation and not a constructive dismissal. (Concrete Aggregates v. NLRC, G.R. No. 82458, Sept. 7, 1989; See also Philippine Wireless, Inc. [Pocketbell] v. NLRC, G.R. No. 112963, July 20, 1999).

The transfer of the location of an employee's office from under the steps of the stairs to the kitchen which allegedly caused her mental torture which forced her to resign does not amount to constructive dismissal but a case of voluntary resignation. It was not shown that her transfer was prompted by ill will of management. It merely involved a change in location of the office

and not a change of her position. (Admiral Realty Company, Inc. [Admiral Hotel] v. NLRC, G.R. No. 112043, May 18, 1999).

An indication that the resignation was voluntary and does not constitute constructive dismissal is the act of the employee who resigned and took a leave of absence on the date of effectivity of his resignation and while on leave, he worked for the release of his clearance and the payment of his 13th month pay and leave pay benefits. In doing so, he in fact performed all that an employee normally does after he resigns. If indeed he was forced into resigning, he would not have sought to be cleared by his employer and to be paid the monies due him. The voluntary nature of his acts has manifested itself clearly and belied his claim of constructive dismissal. (Go v. CA, G.R. No. 158922, May 28, 2004).

• ***Resignation letter written and prepared by employer; effect.***

According to the 2000 case of **A' Prime Security Services, Inc. vs. NLRC, [G. R. No. 107320, January 19, 2000],** no weight should be given to the employee's resignation letter which appears to have been written and submitted at the instance of the petitioner-employer. Its form is of the company's and its wordings are more of a waiver and quitclaim. More so when the supposed resignation was not acknowledged before a notary public.

In the 2005 case of **Mobile Protective & Detective Agency vs. Ompad**, **[G. R. No. 159195, May 9, 2005],** the High Court agreed with the NLRC and the CA that the two resignation letters at issue are dubious, to say the least. A bare reading of their content would reveal that they are in the nature of a quitclaim, waiver or release. They were written in a language obviously not of respondent's and "lopsidedly worded" to free the employer from liabilities. The CA's ruling was upheld thus: "[w]hen the first resignation letter was a *pro forma* one, entirely drafted by the petitioner Agency for the private respondent to merely affix his signature, and the second one entirely copied by the private respondent with his own hand from the first resignation letter, voluntariness is not attendant."

• ***Resignation letters similarly worded and of same tenor, effect.***

In the 2005 case of **Great Southern Maritime Services Corporation vs. Acuña, [G. R. No. 140189, Feb. 28, 2005],** it was held that resignation letters which were all prepared by the employer and were substantially similarly worded and of the same tenor would reveal the true nature of these documents - they are waivers or quitclaims which are not sufficient to show valid separation from work or bar the employees from assailing their termination. They also constitute evidence of forced resignation or that they were summarily dismissed without just cause.

• ***Voluntariness of resignation may be inferred from the language thereof.***

In the 2005 case of **Willi Hahn Enterprises, vs. Maghuyop**, **[G. R. No. 160348, December 17, 2004],** the employee's resignation letter reads:

"July 22, 1998

"Dear Mr. and Mrs. Hahn

> **"I am respectfully submitting my resignation from Willi Hahn Enterprises effective today, July 22, 1998. I hope that in some way, I was of some help to you and your family.**
>
> **"Thank you for your assistance during the past.**
>
> **"Very truly yours,**
>
> **"LILIA MAGHUYOP"**

In holding that the afore-quoted letter was voluntarily tendered by the employee, the Supreme Court declared:

> "The letter is simple, candid and direct to the point. We find no merit in respondent's claim that being a mere clerk, she did not realize the consequences of her resignation. Although she started as nanny to the son of petitioner Willi Hahn, she has risen to being the manager and officer-in-charge of the Willi Hahn Enterprises in SM Cebu branch."

• ***Act of employer in giving the employee the choice between resignation or investigation, not illegal.***

In a case where the employer asked the employee to submit her resignation letter or, if not, to submit her written explanation to the complaints against her, and consequently, the employee immediately filed a complaint for illegal dismissal thereby preempting an investigation by the employer on the matter, the Supreme Court ruled that the employer did not violate any law when it gave the employee the option to resign because there is nothing illegal with the practice of allowing an employee to resign instead of being separated for just cause, so as not to smear her employment record. (*Belaunzaran vs. NLRC, G. R. No. 120038, Dec. 23, 1996).*

• ***Failure of employer to criminally prosecute employee who resigned, effect.***

In **Willi Hahn Enterprises, vs. Maghuyop**, **[G. R. No. 160348, Dec. 17, 2004)],** it was held that the failure of the employer to pursue the termination proceedings against an employee who resigned and to make her pay for the shortage incurred did not cast doubt on the voluntary nature of her resignation. A decision to give a graceful exit to an employee rather than to file an action for redress is perfectly within the discretion of an employer. It is not uncommon that an employee is permitted to resign to save face after the exposure of her malfeasance. Under the circumstances, the failure of petitioner to file action against the employee should be considered as an act of compassion for one who used to be a trusted employee and a close member of the household.

• ***Filing of complaint negates resignation; exception.***

The general rule is that the filing of a complaint for illegal dismissal is inconsistent with resignation. (*Cheniver Deco Print Technics Corporation vs. NLRC, G. R. No. 122876, Feb. 17, 2000).*

Citing **Molave Tours Corporation vs. NLRC**, **[G.R. No. 112909, November 24, 1995, 250 SCRA 325, 330],** the Supreme Court in **Shie Jie Corp. vs. National Federation of Labor, [G. R. No. 153148, July 15, 2005],** held:

> "By vigorously pursuing the litigation of his action against petitioner, private respondent clearly manifested that he has no intention of relinquishing his employment, which act is wholly incompatible to petitioner's assertion that he voluntarily resigned."

In **Great Southern Maritime Services Corporation vs. Acuña**, **[G. R. No. 140189, Feb. 28, 2005],** it was ruled that the execution of the alleged "resignation letters *cum* release and quitclaim" to support the employer's claim that respondents voluntarily resigned is unavailing as the filing of the complaint for illegal dismissal is inconsistent with resignation.

It would have been illogical for the employee to resign and then file a complaint for illegal dismissal. (*Emco Plywood Corporation vs. Abelgas, G. R. No. 148532, April 14, 2004).*

Hence, the finding that the employee's resignation is involuntary is further strengthened by the fact that he filed an illegal dismissal case the day after the alleged tender of resignation. (*Mobile Protective & Detective Agency vs. Ompad, G. R. No. 159195, May 9, 2005).*

However, this rule does not apply to a case where the filing of an illegal dismissal case by the employee who resigned was evidently a mere afterthought. It was filed not because she wanted to return to work but to claim separation pay and backwages. (*Willi Hahn Enterprises, vs. Maghuyop, supra).*

• ***Expression of gratitude to employer, effect.***

A resignation letter which contains words of gratitude and appreciation to the employer can hardly come from employees who are forced to resign. (*St. Michael Academy vs. NLRC, G. R. No. 119512, July 13, 1998, 292 SCRA 478).*

• ***Resigning employee's obligation to reimburse cost of training him for higher position.***

The case of **Almario v. Philippine Airlines, Inc., [G.R. No. 170928, September 11, 2007]**, is informative on the right of the employer to be reimbursed for the cost of training a resigning employee to higher position. In this case, petitioner was hired by respondent as a Boeing 747 Systems Engineer. Later, petitioner, then about 39 years of age and a Boeing 737 (B-737) First Officer at PAL, successfully bid for the higher position of Airbus 300 (A-300) First Officer. Since said higher position required additional training, he underwent, at PAL's expense, more than five (5) months of training consisting of ground schooling in Manila and flight simulation in Melbourne, Australia. After completing the training course, petitioner served as A-300 First Officer of PAL, but after eight (8) months of service as such, he tendered his resignation, for "*personal reasons.*"

Respondent PAL filed a Complaint against petitioner before the Makati Regional Trial Court (RTC), for reimbursement of ₱851,107 worth of training costs, attorney's fees equivalent to twenty percent (20%) of the said amount and costs of litigation. PAL invoked the existence of an innominate contract of *do ut facias* (I give that you may do) with petitioner in that by spending for his training, he would render service to it until the costs of training were recovered in at least

three (3) years. Petitioner having resigned before the 3-year period, PAL prayed that he should be ordered to reimburse the costs for his training.

In holding petitioner liable to reimburse PAL for the training costs, the Supreme Court cited, among other grounds, Article 22 of the Civil Code which reads:

> "Art. 22. Every person who through an act of performance by another, or any other means, acquires or comes into possession of something at the expense of the latter without just or legal ground, shall return the same to him,"

This provision on unjust enrichment recognizes the principle that one may not enrich himself at the expense of another. Thus, in holding that petitioner must pay PAL the sum of ₱559,739.90, to bear the legal interest rate of six percent (6%) per annum from the filing of PAL's complaint on February 11, 1997 until the finality of the decision, the High Court ratiocinated:

"Admittedly, PAL invested for the training of Almario to enable him to acquire a higher level of skill, proficiency, or technical competence so that he could efficiently discharge the position of A-300 First Officer. Given that, PAL expected to recover the training costs by availing of Almario's services for at least three years. The expectation of PAL was not fully realized, however, due to Almario's resignation after only eight months of service following the completion of his training course. He cannot, therefore, refuse to reimburse the costs of training without violating the principle of unjust enrichment.

BONA-FIDE SUSPENSION OF OPERATION OF BUSINESS FLOATING STATUS OR "OFF-DETAIL" STATUS UNDER ARTICLE 286

• ***What are the situations contemplated under Article 286 of the Labor Code when employment not deemed terminated?***

Based on the provisions of Article 286, the following situations are contemplated therein:

1. *bona-fide* suspension by the employer of the operation of his business or undertaking for a period not exceeding six (6) months;
2. fulfillment by the employee of a military duty; or
3. fulfillment by the employee of a civic duty.

• ***What is bona-fide suspension of operations for a period not exceeding six months?***

- No law on temporary retrenchment or lay-off, Article 286 applies only by analogy.
- Extent of suspension of operation - may involve only a section or department of the company - not necessarily the entire operations.
- Burden to prove bona-fide suspension of operation is on the employer.

• ***Requisites of a valid suspension of operation for six (6) months.***

Based on Article 286 and established jurisprudence, the following are the essential requisites for the valid suspension of the operation of a business or undertaking:

1. The suspension of the operation of the business or undertaking should be made in good faith;
2. The period of such suspension should not exceed six (6) months;
3. The employer should resume operations on or before the lapse of said six-month period;
4. Upon resumption of operations, the employer should reinstate the employees to their former position without loss of seniority rights if the employees indicate their desire to resume their work not later than one (1) month from the said resumption of operations;
5. In the event that the employer, instead of resuming its operations, decides to retrench or close or cease its business before the lapse of the six-month period, it shall fully comply with the requirements for retrenchment or closure or cessation of business operations, as the case may be, under Article 283, to wit:
   a. Service of written notice of termination on the workers and the Department of Labor and Employment at least one (1) month before the intended date thereof; and
   b. Payment to the affected employees of separation pay equivalent to one (1) month pay or at least one-half (½) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year.

• ***Suspension of operation prior to closure, held as evidence of good faith.***

In the 2004 case of **J.A.T. General Services vs. NLRC**, **[G. R. No. 148340, Jan. 26, 2004]**, it was ruled that the closure of business operation was deemed not tainted with bad faith because the decision to permanently close business operations was arrived at, among others, after a suspension of operation for several months precipitated by a slowdown in sales without any prospects of improving.

• ***Compensation of employees during the six-month suspension.***

Employees are not entitled to their wages and benefits during the 6-month period. The reason is, within the said period, the employer-employee relationship is deemed suspended. The employment relationship being suspended, both the employer and the employees cease to be bound, at least temporarily, by the basic terms and conditions of their employment contract - the employer regarding his obligation to provide salary to his workers; and on the part of the workers, to provide their services to the former.

• ***Employer may suspend his business operation for less than six months but not more.***

Article 286 of the Labor Code and the *Rules to Implement the Labor Code* are clear in stating that the period of suspension of operation of the employer's business or undertaking shall not exceed six (6) months. Therefore, the employer may validly suspend his business operation for a period of less than six (6) months.

• ***Suspension of work exceeding 6 months, effect.***

According to **De Guzman v. NLRC, [G.R. No. 167701, December 12, 2007]**, when the *bona-fide* suspension of the operation of a business or undertaking exceeds six (6) months, the

employment of the affected employees is deemed terminated. By the same token and applying said rule by analogy, if the employee was forced to remain without work or assignment for a period exceeding six (6) months, he is then in effect constructively dismissed.

In the 2005 case of **Mayon Hotel & Restaurant vs. Adana**, **[G. R. No. 157634, May 16, 2005]**, the High Court declared that Article 286 is clear - there is termination of employment when an otherwise *bona fide* suspension of work exceeds six (6) months. Moreover, even assuming *arguendo* that the cessation of employment on April 1997 was merely temporary when hotel operations were suspended due to the termination of the lease of the old premises, it became dismissal *by operation of law* when petitioners failed to reinstate respondents after the lapse of six (6) months, pursuant to Article 286. And even assuming that the closure was due to a reason beyond the control of the employer, it still has to accord its employees some relief in the form of severance pay.

• ***Effect of employment of the employee in other establishments during 6-month period.***

In the 2005 case of **JPL Marketing Promotions vs. CA**, **[G. R. No. 151966, July 8, 2005]**, it was established that private respondent-employees sought employment from other establishments even before the expiration of the six (6)-month period provided by law. They admitted that all three of them applied for and were employed by another establishment after they received the notice from JPL. Consequently, it was held that petitioner JPL cannot be said to have terminated their employment for it was they themselves who severed their relations with JPL. Thus, they are not entitled to separation pay, even on the ground of compassionate justice. Clearly, the principle in the law which grants separation pay applies only when the employee is dismissed by the employer, which is not the case in this instance. In seeking and obtaining employment elsewhere, private respondents effectively terminated their employment with JPL.

• ***Temporary "off-detail" or "floating status" of security guards.***

Temporary "*off-detail*" or "*floating status,*" as applied to security guards, refer to the period of time they are made to wait until they are transferred or assigned to a new post or client. It does not constitute constructive dismissal as their assignments primarily depend on the contracts entered into by the security agency with third parties. This ruling is based on Article 286 of the Labor Code. (*Philippine Industrial Security Agency Corporation vs. Dapiton, G. R. No. 127421, Dec. 8, 1999; Superstar Security Agency, Inc. vs. NLRC, 184 SCRA 74 [1990]).*

In a 2005 case, the Supreme Court said that when a security guard is placed on "*off detail*" or "*floating status,*" in security agency parlance, it means "*waiting to be posted.*" Consequently, a relief and transfer order in itself does not sever employment relationship between a security guard and her agency. And the mere fact that the transfer would be inconvenient for her does not by itself make her transfer illegal. (*Mobile Protective & Detective Agency vs. Ompad, G. R. No. 159195, May 9, 2005).*

"*Off-detailing*" is not equivalent to dismissal, so long as such status does not continue beyond a reasonable time. (*Agro Commercial Security Services Agency, Inc. vs. NLRC, 175 SCRA 790, 797, July 31, 1989).*

"*Floating status,*" therefore, is lawful. However, such "*floating status*" should last only for a reasonable time. When the "*floating status*" or "*reserve status*" lasts for more than six (6)

months, the employee may be considered to have been constructively dismissed from his employment. (*United Special Watchman Agency vs. CA, G. R. No. 152476, July 8, 2003; Pulp and Paper, Inc. vs. NLRC, G. R. No. 116593, Sept. 24, 1997, 279 SCRA 408).*

• ***Applicability of "floating status" rule to employees other than security guards.***

Although the application of this principle on temporary *"off detail"* or *"floating status"* is often confined to security guards, it may also be applied to employees of legitimate contractors or subcontractors under a valid independent contracting or subcontracting arrangement under Article 106 of the Labor Code.

For example, in the case of **JPL Marketing Promotions v. CA, [G.R. No. 151966, July 8, 2005],** this principle was applied to merchandisers hired by petitioner which is engaged in the business of recruitment and placement of workers. After they were notified of the cancellation of the contract of petitioner with a client where they were assigned and pending their reassignment to other clients, the merchandisers are deemed to have been placed under *"floating status"* for a period of not exceeding six (6) months under Article 286. Such notice, according to the Court, should not be treated as a notice of termination but a mere note informing them of the termination of the client's contract and their re-assignment to other clients. The thirty (30)-day notice rule under Article 283 does not, therefore, apply to this case.

• ***Floating status beyond six (6) months amounts to constructive dismissal under Article 286.***

"*Off-detailing*" or *"floating status"* is not equivalent to dismissal so long as such status does not continue beyond a reasonable time. *(Agro Commercial Security Services Agency, Inc. v. NLRC, 175 SCRA 790, 797, July 31, 1989).*

Under Article 286, reasonable time should not exceed six (6) months. When the "*floating status*" or "*reserve status*," therefore, lasts for more than six (6) months, the employee may be considered to have been constructively dismissed from his employment under the said provision.

Security guards may be temporarily sidelined by their security agency as their assignments primarily depend on the contracts entered into by the latter with third parties. However, the sidelining should continue only for six (6) months. If after said period, the security guards placed on *"off-detail"* or *"floating status"* are not recalled and given any assignment, they are deemed constructively dismissed. Consequently, they are entitled to the corresponding benefits for their separation and this would apply to the two (2) types of work suspension heretofore noted, that is, either of the entire business or of a specific component thereof.

• ***No salary or benefit during period of "floating status."***

When an employee like a security guard is placed on a *"floating status,"* he is not entitled to any salary or financial benefit provided by law. 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. (*Pido v. NLRC, G.R. No. 169812, Feb. 23, 2007 citing Agro Commercial Security Services Agency, Inc. v. NLRC, G.R. Nos. 82823-24, July 31, 1989, 175 SCRA 790, 793).*

• ***Off-detail status for 29 days, not constructive dismissal.***

In **Soliman Security Services, Inc. v. CA, [G.R. No. 143215, July 11, 2002],** the issue of whether or not private respondent should be deemed constructively dismissed by petitioner for having been placed on "*floating status*," *i.e.*, with no reassignment, for a period of twenty-nine

(29) days was answered in the negative. It was ruled that the charge of illegal dismissal was prematurely filed.

• ***Off-detail status for 7 days, declared as constructive dismissal.***

The said case of *Soliman* should be distinguished from the case of ***Megaforce Securty and Allied Services, Inc. v. Lactao,* [G.R. No. 160940, July 21, 2008].** Here, 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 (7) 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 Labor Arbiter and beyond the reasonable six-month period makes it liable for constructive dismissal. While Megaforce alleged that Lactao was not dismissed, the former failed to offer the latter reinstatement or give him work assignment during the mandatory conciliation of this case before the Labor Arbiter. Even when the writ of execution for his reinstatement was served upon the former, it refused to reinstate him. Clearly, the supposed temporary *"off-detail"* of Lactao was meant to be a permanent one.

• ***"Floating status" is different from preventive suspension.***

Floating status is distinct from preventive suspension which is allowed under *Sections 8* and *9* of *Rule XXIII, Book V* of the *Rules to Implement the Labor Code.* In the case of floating status, the employee is out of work because his employer has no available work or job to assign him to. He is thus left with no choice but to wait for at least six (6) months before he could claim having been constructively dismissed, should his employer fail to assign him to any work or job within said period. In the case of preventive suspension, the employee is out of work because he has committed a wrongful act and his continued employment or presence in the company premises poses a serious and imminent threat to the life or property of the employer or of his co-workers. Without this kind of threat, preventive suspension is not proper. Further, the period of preventive suspension under the said provisions of the Implementing Rules should not exceed thirty (30) days.

The case of ***Pido v. NLRC,* [G.R. No. 169812, February 23, 2007],** is enlightening on this point. In this case, petitioner-security guard was suspended for almost nine (9) months on the guise of conducting an investigation on his administrative case with no categorical finding resulting therefrom. From the Recall Order issued to him, it is gathered that respondent intended to put petitioner under preventive suspension for an indefinite period of time pending the investigation of the complaint against him. The allowable period of suspension in such a case is not six (6) months but only thirty (30) days, following Sections 8 and 9 of Rule XXIII, Book V of the Omnibus Rules Implementing the Labor Code. Under Section 9 of the said Implementing Rules, in the event the employer chooses to extend the period of suspension, he is required to pay the wages and other benefits due the worker and the worker is not bound to reimburse the amount paid to him during the extended period of suspension even if, after the completion of the hearing or investigation, the employer decides to dismiss him.

Respondent did not inform petitioner that it was extending its investigation, nor did it pay him his wages and other benefits after the lapse of the 30-day period of preventive suspension. Neither did respondent issue an order lifting petitioner's preventive suspension, or any official assignment, memorandum or detail order for him to assume his post or another post. Respondent merely chose to dawdle with the investigation, in absolute disregard of petitioner's welfare. At the time petitioner filed the complaint for illegal suspension and/or constructive dismissal, petitioner had already been placed under preventive suspension for nine (9) months. To date, there is no showing or information that, if at all, respondent still intends to conclude its

investigation. It was thus ruled that petitioner's prolonged preventive suspension, owing to respondent's neglect to conclude the investigation, had ripened to constructive dismissal.

RETIREMENT

97. What is the coverage of the Retirement Pay Law?

The *Retirement Pay Law* applies to all employees in the private sector, *regardless of their position, designation or status and irrespective of the method by which their wages are paid*, **except** those specifically exempted. It also includes and covers **part-time employees**, employees of service and other job contractors and *domestic helpers or persons in the personal service of another*.

• Employees not covered.

Retirement under Article 287 does not apply to the following employees:

1. Employees of the national government and its political subdivisions, including government-owned and/or controlled corporations, if they are covered by the Civil Service Law and its regulations.
2. Employees of retail, service and agricultural establishments or operations regularly employing not more than ten (10) employees. As used herein:
   2.1. "*Retail establishment*" is one principally engaged in the sale of goods to end-users for personal or household use. It shall lose its retail character qualified for exemption if it is engaged in both retail and wholesale of goods.
   2.2. "*Service establishment*" is one principally engaged in the sale of service to individuals for their own or household use and is generally recognized as such.
   2.3. "*Agricultural establishment/operation*" refers to an employer which is engaged in agriculture. This term refers to all farming activities in all branches and includes, among others, the cultivation and tillage of soil, production, cultivation, growing and harvesting of any agricultural or horticultural commodities, dairying, raising of livestock or poultry, the culture of fish and other aquatic products in farms or ponds, and any activities performed by a farmer or on a farm as an incident to, or in conjunction with, such farming operations, but does not include the manufacture and/or processing of sugar, coconut, abaca, tobacco, pineapple, aquatic or other farm products. *(Section 2, Rule II, Implementing Rules of the Retirement Pay Law; Labor Advisory on Retirement Pay Law dated Oct. 24, 1996).*

RETIREMENT PLAN *VIS-À-VIS* ARTICLE 287, AS AMENDED BY R. A. NO. 7641.

a. Retirement plan, nature.

A retirement plan in a company partakes of the nature of a contract, with the employer and the employee as the contracting parties. It creates a contractual obligation in which the promise to pay retirement benefits is made in consideration of the continued faithful service of the employee for the requisite period. (*Brion v. South Philippine Union Mission of the Seventh Day Adventist Church, G.R. No. 135136, May 19, 1999, 307 SCRA 497, 504).*

Being a contract, the employer and the employee may establish such stipulations, clauses, terms, and conditions as they may deem convenient. (*See Article 1306, Civil Code).*

The employees' right to payment of retirement benefits is governed by the retirement plan agreed upon by the parties. The provisions of the retirement plan are controlling in determining such entitlement. *(Cruz v. Philippine Global Communications, Inc., G.R. No. 141868, May 28, 2004; Aquino v. NLRC, G.R. No. 87653, Feb. 11, 1992; Cipriano v. San Miguel Corporation, G.R. No. L-24774, Aug, 21, 1968).*

This is best illustrated in the case of **Oxales v. United Laboratories, Inc., [G.R. No. 152991, July 21, 2008].** The retirement plan of respondent company excludes commissions, overtime, bonuses, or extra compensations in the computation of the basic salary for purposes of retirement. Ruling that petitioner Oxales is not entitled to the additional retirement benefits he is asking for, the Supreme Court affirmed the validity of the said exclusions in the retirement plan. The retirement plan is very clear: "basic monthly salary" for purposes of computing the retirement pay is "the basic monthly salary, or if daily[,] means the basic rate of pay converted to basic monthly salary of the employee excluding any commissions, overtime, bonuses, or extra compensations." *Inclusio unius est exclusio alterius.* The inclusion of one is the exclusion of others. *Ang pagsama ng isa, pagpwera naman sa iba.*

b. Application of Article 287, as amended by R. A. No. 7641 vis-à-vis retirement plan in the CBA or employment contract.

As held in *Oxales* [supra], R.A. No. 7641 only applies in a situation where:

(1) there is no collective bargaining agreement or other applicable employment contract providing for retirement benefits for an employee; or

(2) there is a collective bargaining agreement or other applicable employment contract providing for retirement benefits for an employee, but it is below the requirements set for by law.

The reason for the *first* situation is to prevent the absurd situation where an employee, who is otherwise deserving, is denied retirement benefits by the nefarious scheme of employers in not providing for retirement benefits for their employees. The reason for the *second* situation is expressed in the Latin maxim *pacta privata juri publico derogare non possunt*. Private contracts cannot derogate from the public law. *Ang kasunduang pribado ay hindi makasisira sa batas publiko*.

CONTRIBUTORY OR NON-CONTRIBUTORY RETIREMENT PLAN.

a. Right to contributory retirement plan.

Where both the employer and the employee contribute to a retirement fund in accordance with a CBA or other applicable employment contract, the employer's total contribution thereto should not be less than the total retirement benefits to which the employee would have been entitled had there been no such retirement fund. In case the employer's contribution is less than the retirement benefits provided under the law, the employer should pay the deficiency. *(Section 3.3, Rule II, Implementing Rules of the Retirement Pay Law).*

b. Right to non-contributory retirement plan.

The employees have a vested and demandable right to a non-contributory retirement plan. It is an existing benefit voluntarily granted to them by their employer. The latter may not unilaterally withdraw, eliminate or diminish such benefits. *(Nestle Philippines, Inc. v. NLRC,*

G.R. No. 91231, Feb. 4, 1991; Republic Cement Corporation v. Honorable Panel of Arbitrators, G.R. No. 89766, Feb. 19, 1990; Tiangco v. Leogardo, G.R. No. L-57636, May 16, 1983, 122 SCRA 267).

OPTIONAL OR COMPULSORY RETIREMENT UNDER ARTICLE 287.

a. Optional or compulsory age of retirement.

Article 287 provides for two (2) types of retirement:

1. *Optional retirement* which may be availed of by an employee upon reaching the age of sixty (60) years.
2. *Compulsory retirement* which may be availed of by an employee upon reaching the age of sixty-five (65) years.

It must be noted that the *optional* and *compulsory* retirement schemes provided under Article 287 come into play only in the absence of a retirement plan or agreement setting forth other forms of optional or compulsory retirement schemes. Thus, if there is a retirement plan or agreement in an establishment providing for an earlier or older age of retirement (but not beyond 65 which has been declared the *compulsory* retirement age), the same shall be controlling.

RETIREMENT AT AN EARLIER AGE OR AFTER RENDERING CERTAIN PERIOD OF SERVICE.

a. Agreement determines retirement age.

Article 287 states that "*(a)ny employee may be retired upon reaching the retirement age established in the collective bargaining agreement or other applicable employment contract,*" which means that employers and employees are free to agree and stipulate on the retirement age, either in a CBA or employment contract. It is only in the absence of such agreement that the retirement age shall be in accordance with the optional and compulsory retirement age prescribed under Article 287. (*Eastern Shipping Lines, Inc. v. Sedan, G.R. No. 159354, April 7, 2006; Universal Robina Sugar Milling Corporation [URSUMCO] v. Caballeda, G.R. No. 156644, July 28, 2008).*

b. By agreement, employers may be granted the sole and exclusive prerogative to retire employees at an earlier age or after rendering a certain period of service.

By agreement of the parties, the employer may be granted the sole and exclusive right and prerogative to retire its employees at an earlier age or after rendering a certain period of service. Such agreement may be stipulated in an employment contract or a CBA. By entering into an employment contract containing such stipulation, the employee is bound to adhere thereto. In the same vein, by their acceptance of the CBA, the union and its members are obliged to abide by the commitments and limitations they had agreed to cede to the employer. The retirement provisions thereof cannot be deemed as an imposition foisted on the union, which very well has the right to have refused to agree to allowing the employer to retire employees at an earlier age or after rendition of a specified number of years of service.

The Supreme Court thus consistently upheld the validity of the exercise by the employer of its sole right and prerogative to retire employees at an earlier age or after certain specific years of service on the basis of the mutual agreement by the parties. It is not repugnant to the constitutional guaranty of security of tenure. *(Espejo v. NLRC, G. R. No. 112678, March 29, 1996, 255 SCRA 430).*

Said the Supreme Court in ***Cainta Catholic School v. Cainta Catholic School Employees Union [CCSEU],*** **[G.R. No. 151021, May 4, 2006]:**

> "We affirm the continued validity of *Pantranco* and its kindred cases, and thus reiterate that under Article 287 of the Labor Code, a CBA may validly accord management the prerogative to optionally retire an employee under the terms and conditions mutually agreed upon by management and the bargaining union, even if such agreement allows for retirement at an age lower than the optional retirement age or the compulsory retirement age."

In this case of *Cainta*, the Supreme Court upheld the exercise by the school of its option to retire employees pursuant to the existing CBA where it is provided that the school has the option to retire an employee upon reaching the age limit of sixty (60) or after having rendered at least twenty (20) years of service to the school, the last three (3) years of which must be continuous. Hence, the termination of employment of the employees, arising as it did from an exercise of a management prerogative granted by the mutually-negotiated CBA between the school and the union, is valid.

The CBA in *Cainta* established sixty (60) as the compulsory retirement age. However, it is not alleged that either of the two employees who were retired had reached the compulsory retirement age of sixty (60) years, but instead that they had rendered at least twenty (20) years of service in the school, the last three (3) years of which were continuous. Clearly, the CBA provision allows the employee to be retired by the school even before reaching the age of sixty (60), provided that he/she has rendered twenty (20) years of service. In holding that the said stipulation in the CBA is valid, the Supreme Court cited jurisprudence affirming the position of the school, such as the cases of *Pantranco North Express, Inc. v. NLRC*, [G.R. No. 95940, July 24, 1996, 259 SCRA 161], *Progressive Development Corporation v. NLRC*, [G.R. No. 138826, October 30, 2000], and *Philippine Airlines, Inc. v. Airline Pilots Association of the Philippines*, [G.R. No. 143686, January 15, 2002]

In **Pantranco North Express, Inc. v. NLRC, [G.R. No. 95940, July 24, 1996, 259 SCRA 161],** the CBA allowed the employee to be compulsorily retired upon reaching the age of sixty (60) "or upon completing [25] years of service to [Pantranco]." On the basis of the CBA, private respondent was compulsorily retired by Pantranco at the age of fifty-two (52), after twenty-five (25) years of service. Interpreting Article 287, the Supreme Court ruled that the Labor Code permits employers and employees to fix the applicable retirement age at below sixty (60) years of age. Moreover, the Court also held that there was no illegal dismissal since it was the CBA itself that incorporated the agreement reached between the employer and the bargaining agent with respect to the terms and conditions of employment; hence, when the private respondent ratified the CBA with his union, he concurrently agreed to conform to and abide by its provisions. Thus, the Court asserted, "[p]roviding in a CBA for compulsory retirement of employees after twenty-five (25) years of service is legal and enforceable so long as the parties agree to be governed by such CBA."

The CBA in **Progressive Development Corporation v. NLRC, [G.R. No. 138826, October 30, 2000],** stipulated that an employee "with [20] years of service, regardless of age, may be retired at his option or at the option of the company." The stipulation was used by management to compulsorily retire two (2) employees with more than twenty (20) years of service, at the ages of 45 and 38. The Court affirmed the validity of the stipulation on retirement as being consistent with Article 287 of the Labor Code.

In **Philippine Airlines, Inc. v. Airline Pilots Association of the Philippines, [G.R. No. 143686, January 15, 2002],** at contention was a provision of the PAL-ALPAP Retirement Plan, the Plan having subsequently been misquoted in the CBA mutually negotiated by the parties. The Plan authorized PAL to exercise the option of retirement over pilots who had chosen not to retire after completing twenty (20) years of service or logging over 20,000 hours for PAL. After PAL exercised such option over a pilot, ALPAP charged PAL with illegal dismissal and union-busting. While the Secretary of Labor upheld the unilateral retirement, it nonetheless ruled that PAL should first consult with the pilot to be retired before it could exercise such option. The Supreme Court, however, struck down that proviso, ruling that "the requirement to consult the pilots prior to their retirement defeats the exercise by management of its option to retire the said employees, [giving] the pilot concerned an undue prerogative to assail the decision of management."

In the 2006 case of **Eastern Shipping Lines, Inc. v. Sedan, [G.R. No. 159354, April 7, 2006],** employees of herein petitioners who are under the age of sixty (60) years, but have rendered at least 3,650 days (10 years) on board ship or fifteen (15) years of service for land-based employees, are allowed to avail of optional retirement, but subject to the exclusive prerogative and sole option of petitioner company. Records show that private respondent Sedan was only forty-eight (48) years old when he applied for optional retirement. Thus, he cannot claim optional retirement benefits as a matter of right. His application for optional retirement was subject to the exclusive prerogative and sole option of the shipping company pursuant to the agreement between the workers and the company. In this regard, no error was committed by the appellate court when it set aside the ruling of the Labor Arbiter and the NLRC granting herein private respondent ₱253,000 retirement gratuity/separation pay.

c. To be valid, retirement at an earlier age must be voluntarily agreed upon by the employee.

In **Jaculbe v. Silliman University, [G.R. No. 156934, March 16, 2007],** the Supreme Court qualified the validity of retirement at an age earlier than that provided under Article 287. In declaring that the retirement plan of respondent school runs afoul of the constitutional guaranty of security of tenure contained in its Article XIII, also known as the provision on Social Justice and Human Rights, it articulated that in order to be valid, it must be shown that the employee's participation in the plan should be voluntary. From the language of the respondent's retirement plan rules, the compulsory nature of both membership in and contribution to the plan debunked the Court of Appeals' theory that petitioner's "voluntary contributions" were evidence of her willing participation therein. It was through no voluntary act of her own that petitioner became a member of the plan. In fact, the only way she could have ceased to be a member thereof was if she stopped working for respondent altogether. Furthermore, in the rule on contributions, the repeated use of the word *"shall"* ineluctably pointed to the conclusion that employees had no choice but to contribute to the plan even when they were on leave.

In contrast, in *Pantranco North Express, Inc. v. NLRC,* [G.R. No. 95940, July 24, 1996, 259 SCRA 161], the imposition of a retirement age below the compulsory age of sixty-five (65) was deemed acceptable because this was part of the CBA between the employer and the employees. The consent of the employees, as represented by their bargaining agent, to be retired even before the statutory retirement age of sixty-five (65) was laid out clearly in black and white and was, therefore, in accord with Article 287.

In *Jaculbe*, neither the Court of Appeals nor the respondent school cited any agreement, collective or otherwise, to justify the latter's imposition of the early retirement age in its retirement plan, opting instead to harp on petitioner's alleged *"voluntary"* contributions to the plan which was simply untrue. The truth was that petitioner had no choice but to participate in the

plan, given that the only way she could refrain from doing so was to resign or lose her job. It is axiomatic that employer and employee do not stand on equal footing, a situation which often causes an employee to act out of need instead of any genuine acquiescence to the employer. This was clearly such an instance.

d. Retiring at an earlier age may amount to illegal dismissal if employee did not consent thereto.

In the same case of *Jaculbe*, it was held that an employer is free to impose a retirement age at less than sixty-five (65) for as long as it has the employees' consent. Stated conversely, employees are free to accept the employer's offer to lower the retirement age if they feel they can get a better deal with the retirement plan presented by the employer. Thus, having terminated petitioner solely on the basis of a provision of a retirement plan which was not freely assented to by her, respondent was held guilty of illegal dismissal.

MINIMUM SERVICE REQUIREMENT FOR ENTITLEMENT TO RETIREMENT BENEFITS UNDER ARTICLE 287.

a. Parties are free to stipulate on minimum years of service.

The minimum five (5) years of service required under Article 287 before an employee, who has reached either the optional or compulsory retirement age therein specified, may be entitled to the retirement benefits provided thereunder, holds true only "in the absence of a retirement plan or agreement providing for retirement benefits of employees in the establishment." Simply stated, said minimum number of years of service mentioned in the said provision need not be similarly stipulated by the employer and its employees in their mutually agreed retirement plan, employment contract, CBA or other agreements. They may thus provide for lesser number of years as minimum requirement for entitlement to the retirement benefits provided therein or they may not stipulate any similar minimum years of service at all.

b. Component of the minimum 5-year service requirement under Article 287.

The minimum length of service of at least five (5) years required for entitlement to retirement pay under Article 287 includes authorized absences and vacations, regular holidays, and mandatory fulfillment of a military or civic duty. *(Section 4.4, Rule II, Implementing Rules of the Retirement Pay Law).*

c. Effect of interruption in the service of the retiring employee.

The decision of the Supreme Court in the case of **Sta. Catalina College v. NLRC, [G.R. No. 144483, November 19, 2003]** is instructive on the issue of interruption in the service. In this case, the teacher was hired by the Sta. Catalina College in June 1955 as an elementary school teacher. In 1970, she applied for and was granted a one-year leave of absence without pay on account of the illness of her mother. After the expiration in 1971 of her leave of absence, she had not been heard from by petitioner school. In the meantime, she was employed as a teacher in another school - the San Pedro Parochial School during school year 1980-1981 and later, at the Liceo de San Pedro, Biñan, Laguna during school year 1981-1982. In 1982, she applied anew at petitioner school which hired her again. In 1997, the teacher reached compulsory retirement age. The threshold issue is whether the teacher's services for petitioner school during the period from 1955 to 1970 should be factored in the computation of her retirement benefits.

The Supreme Court ruled that she cannot be credited for her services in 1955-1970 in the determination of her retirement benefits. For, after her one-year leave of absence expired in 1971

without her requesting for extension thereof as in fact she had not been heard from until she resurfaced in 1982 when she reapplied with petitioner school, she abandoned her teaching position as in fact she was employed elsewhere in the interim and effectively relinquished the retirement benefits accumulated during the said period. As the teacher was considered a new employee when she rejoined petitioner school upon reapplying in 1982, her retirement benefits should thus be computed only on the basis of her years of service from 1982 to 1997.

RETIREMENT BENEFITS.

a. One-half (½) month salary.

In the absence of a retirement plan or agreement providing for retirement benefits of employees in the establishment, an employee, upon reaching the optional or compulsory retirement age specified in Article 287, shall be entitled to retirement pay equivalent to at least one-half (½) month salary for every year of service, a fraction of at least six (6) months being considered as one (1) whole year.

b. Components of one-half (½) month salary.

For the purpose of determining the minimum retirement pay due an employee under Article 287, the term "*one-half month salary*" shall include all of the following:

(a) Fifteen (15) days salary of the employee based on his latest salary rate. As used herein, the term "*salary*" includes all remunerations paid by an employer to his employees for services rendered during normal working days and hours, whether such payments are fixed or ascertained on a time, task, piece or commission basis, or other method of calculating the same, and includes the fair and reasonable value, as determined by the Secretary of Labor and Employment, of food, lodging or other facilities customarily furnished by the employer to his employees. The term does not include cost of living allowances, profit-sharing payments, and other monetary benefits which are not considered as part of or integrated into the regular salary of the employees;

(b) The cash equivalent of five (5) days of service incentive leave;

(c) One-twelfth (1/12) of the 13th month pay due the employee; and

(d) All other benefits that the employer and employee may agree upon that should be included in the computation of the employee's retirement pay. *(Article 287, Labor Code; Section 5.2, Rule II, Implementing Rules of the Retirement Pay Law).*

c. "One-half (½) month salary" means 22.5 days.

To dispel any further confusion on the meaning of "*one-half [½] month salary*" provided in Article 287, the Supreme Court, in the case of **Capitol Wireless, Inc. v. Confesor, [G.R. No. 117174, November 13, 1996, 264 SCRA 68, 77],** simplified its computation by declaring that it means the total of *"22.5 days"* arrived at after adding 15 days plus 2.5 days representing one-twelfth [1/12] of the 13th month pay plus 5 days of service incentive leave.

d. Five (5) days of service incentive leave, how reckoned.

The five (5) days of service incentive leave provided under Article 287 as part of the retirement benefit of one-half (½) month salary for every year of service should be paid in full. This was the holding of the Supreme Court in the case of **Enriquez Security Services, Inc. v. Cabotaje, [G.R. No. 147993, July 21, 2006].** Petitioner in this case insisted that only 1/12 of the

service incentive leave (SIL) should be included in the computation of the retirement benefit. Finding this contention wanting in basis, it declared that under *Section 5.2, Rule II* of the *Implementing Rules* of Book VI of the Labor Code, it is provided that *"(b) The cash equivalent of not more than five (5) days of service incentive leave"* should be paid to a retiring employee. The foregoing rule is clear that the whole five (5) days of SIL are included in the computation of a retiring employees' pay.

e. 1/12 of 13th month pay and 5 days of service incentive leave (SIL) should not be included if the employee was not entitled to 13th month pay and SIL during his employment.

Supposing the retiring employee, by reason of the nature of his work, was not entitled to 13th month pay or to the service incentive leave pay pursuant to the exceptions mentioned in the 13th Month Pay Law and the Labor Code, should he be paid upon retirement, in addition to the salary equivalent to fifteen (15) days, the additional 2.5 days representing one-twelfth [1/12] of the 13th month pay as well as the five (5) days representing the service incentive leave for a total of 22.5 days?

This question was answered in the negative in the case of **R & E Transport, Inc. v. Latag, [G.R. No. 155214, February 13, 2004].** The Supreme Court in this case ruled that employees who are not entitled to 13th month pay and service incentive leave pay while still working should not be paid the entire *"22.5 days"* but only the fifteen (15) days salary. In other words, the additional 2.5 days representing one-twelfth [1/12] of the 13th month pay and the five (5) days of service incentive leave should not be included as part of the retirement benefits.

The employee in the said case was a taxi driver who was being paid on the "*boundary*" system basis. It was undisputed that he was entitled to retirement benefits after working for fourteen (14) years with R & E Transport, Inc. On the question of how much he should receive as and by way of retirement benefits, the Supreme Court declared:

> "The rules implementing the New Retirement Law similarly provide the above-mentioned formula for computing the one-half month salary. *(Section 5, Rule II of the Rules Implementing RA 7641 or the New Retirement Law).* Since Pedro was paid according to the 'boundary' system, he is not entitled to the 13th month in accordance with Section 3 of the Rules and Regulations Implementing P. D. No. 851 [which exempts from its coverage employers of those who are paid on purely boundary basis], and the service incentive leave pay pursuant to Section 1 of Rule V, Book III of the Rules to Implement the Labor Code [which expressly excepts field personnel and other employees whose performance is unsupervised by the employer, including those who are engaged on task or contract basis, purely commission basis, or those who are paid a fixed amount for performing work irrespective of the time consumed in the performance]. *Hence, his retirement pay should be computed on the sole basis of his salary.*
>
> "It is accepted that taxi drivers do not receive fixed wages, but retain only those sums in excess of the 'boundary' or fee they pay to the owners or operators of their vehicles. *(Jardin v. NLRC, 383 Phil. 187, 196, February 23, 2000; Martinez v. NLRC, 339 Phil. 176, 182, May 29, 1997; National Labor Union v. Dinglasan, 98 Phil. 649, 652, March 3, 1956).* Thus, the basis for computing their benefits should be the *average* daily income. In this case, the CA found that Pedro was earning an average of five hundred pesos (₱500) per day. We thus compute his retirement pay as follows: ₱500 x 15 days x 14 years

of service equals ₱105,000. Compared with this amount, the ₱38,850 he received, which represented just over one third of what was legally due him, was unconscionable." (Underscoring supplied)

RETIREMENT AND DISMISSAL, DISTINGUISHED.

a. Distinction between retirement and dismissal.

Retirement is the result of a bilateral act of the parties, a voluntary agreement between the employer and the employee whereby the latter, after reaching a certain age, agrees or consents to sever his employment with the former.

Dismissal, on the other hand, refers to the unilateral act of the employer in terminating the services of an employee with or without cause.

Thus, if the intent to retire is not clearly established or if the retirement is involuntary, it is to be treated as a discharge.

b. Effect of dismissal for a just cause on entitlement to retirement benefits.

Management discretion may not be exercised arbitrarily or capriciously especially with regards to the implementation of the retirement plan.

As held in **Razon, Jr. v. NLRC, [G.R. No. 80502, May 7, 1990, 185 SCRA 44],** upon acceptance of employment, a contractual relationship is established giving the employee an enforceable vested interest in the retirement fund. Hence, the dismissed employee is entitled to the retirement benefits provided thereunder.

However, in **San Miguel Corporation v. Lao, [G.R. No. 143136-37, July 11, 2002],** an employee who was dismissed for cause was held not entitled to the retirement benefits under the company's retirement plan which concededly prohibits the award of retirement benefits to an employee dismissed for a just cause, a proscription that binds the parties to it.

Distinguishing *Razon* and *San Miguel*, the Supreme Court declared that in *Razon*, the employer's refusal to give the employee his retirement benefits is based on the provision of the retirement plan giving management wide discretion to grant or not to grant retirement benefits, a prerogative that obviously cannot be exercised arbitrarily or whimsically.

But in *San Miguel*, the retirement plan expressly prohibits the grant of retirement benefits in case of dismissal for cause. Hence, the employee is bound by such prohibition.

In the case of **PLDT v. Bolso, [G.R. No. 159701, August 17, 2007],** the same ruling in *San Miguel* was made. Thus, it was held in this case that since the employee was dismissed for a just cause, neither he nor his heirs can avail of the retirement benefits.

c. When financial assistance, instead of retirement pay, was ordered paid to an employee whose dismissal was declared valid and legal.

In **Piñero v. NLRC, [G.R. No. 149610, August 20, 2004],** the petitioner employee who turned sixty (60) years old and retired on March 1, 1996 after twenty-nine (29) years of service was declared not entitled to the payment of retirement benefits because he lost his employment status effective as of the date of the decision of the Labor Arbiter on October 28, 2004 which declared as legal the termination of his employment as a consequence of an illegal strike. At that time, his employer refused to pay his retirement benefits pending the final resolution of the case. Instead, the Supreme Court, on ground of equity for his long years of service without any

derogatory record, awarded him financial assistance equivalent to one-half (½) month's pay for every year of service computed from his date of employment up to October 28, 1994 when he was declared to have lost his employment status.

d. Effect of receipt of retirement benefits and execution of quitclaim.

The receipt of retirement benefits and the execution of quitclaim indicate that the retirement was done voluntarily and validly.

The case in point is **Amkor Technology Philippines, Inc. v. Juangco, [G.R. No. 166507, January 23, 2007].** Respondent in this case who was the Executive Director of petitioner company, alleged that she signed the Release, Quitclaim and Waiver under duress and intimidation. She claimed that she was threatened that she will receive nothing if she will not sign it. With the prospect of receiving nothing, she consented to sign the waiver. Consequently, she received ₱3,704,517.98 as her voluntary retirement package. Disagreeing with her claim that she was illegally dismissed, the Supreme Court ruled that respondent is a well-educated woman holding a managerial position. It is highly improbable that with her employment stature and educational attainment, she could have been duped into signing a retirement letter against her will. In signifying her intention to retire, she even made a proposition as to the amount she believed she was entitled to. Being a woman of high educational attainment and qualifications, she is expected to know the import of everything she executes. Having been granted a retirement package which is very much higher than the amount being received by an employee terminated for an authorized cause under Article 283 or one who retires under Article 287 of the Labor Code, the court was not swayed by her argument that she was intimidated or coerced into signing her retirement letter. Indeed, it is safe to conclude that such retirement package was the reason why she opted to retire. (*Note: This is the Resolution on the Motion for Partial Reconsideration filed by petitioners where the Supreme Court reconsidered its earlier Decision promulgated on September 27, 2006)*

GRATUITY PAY AND RETIREMENT PAY, DISTINGUISHED.

Gratuity pay, being a separate and distinct benefit from retirement pay, should not be deducted from the latter. It is paid purely out of generosity.

Republic Planters Bank v. NLRC, [G.R. No. 117460, January 6, 1997, 266 SCRA 142, 150] explains:

> "Gratuity pay xxx is paid to the beneficiary for the past services or favor rendered purely out of the generosity of the giver or grantor. Gratuity, therefore, is not intended to pay a worker for actual services rendered or for actual performance. It is a money benefit or bounty given to the worker, the purpose of which is to reward employees who have rendered satisfactory service to the company." (Underscoring supplied)

Retirement benefits, on the other hand, are intended to help the employee enjoy the remaining years of his life, releasing him from the burden of worrying for his financial support, and are a form of reward for his loyalty to the employer. *(Sta. Catalina College v. NLRC, G. R. No. 144483, Nov. 19, 2003; Producers Bank of the Philippines v. NLRC, G.R. No. 118069, Nov. 16, 1998, 298 SCRA 517, 524).*

RETIREMENT PAY AND SEPARATION PAY, DISTINGUISHED.

a. Distinctions between retirement pay and separation pay.

Retirement pay and separation pay are two distinct benefits granted under the law. Their distinctions are as follows:

1. While both retirement pay and separation pay are fixed by law, retirement pay differs from separation pay in that the former is paid by reason of retirement; while the latter is required in the cases enumerated in Articles 283 and 284 of the Labor Code and as substitute remedy in cases where reinstatement is not possible. *(Aquino v. NLRC, G.R. No. 87653, Feb. 11, 1992).*

2. The purpose for the grant of retirement pay is to help the employee enjoy the remaining years of his life thereby lessening the burden of worrying for his financial support. It is also a form of reward for the employee's loyalty and service to the employer. *(Aquino v. NLRC, supra; Laginlin v. WCC, G.R. No. L-45785, March 21, 1988, 159 SCRA 91, 99).*

Separation pay, on the other hand, is designed as a wherewithal during the period that an employee is looking for another employment after his termination. *(Ibid.).*

b. Cases where both separation pay and retirement pay must be paid.

In the case of **University of the East v. Hon. Minister of Labor, [G.R. No. 74007, July 31, 1987],** the school claims that teachers who were terminated because of phased-out units cannot be considered retired and, therefore, entitled to retirement benefits and, at the same time, retrenched, which would entitle them to separation pay. This would be tantamount to enriching them at the expense of the school. The Supreme Court, however, ruled that separation pay arising from a forced termination of employment and retirement benefits given as a contractual right to the teachers for many years of faithful service are not necessarily antagonistic to each other. Moreover, the retirement scheme has become part of the school's policy and, therefore, it should be enforced separately from the provision of the Labor Code. Consequently, the teachers were ordered paid for both retirement pay and separation pay.

In another case, **Aquino v. NLRC, [G.R. No. 87653, February 11, 1992],** the Supreme Court ordered the payment to the retrenched employees of both the separation pay for retrenchment embodied in the CBA as well as the retirement pay provided under a separate Retirement Plan to the retrenched employees. The argument of the company that it has more than complied with the mandate of the law on retrenchment by paying separation pay double that required by the Labor Code (at the rate of one [1] month pay instead of the one-half [½] month pay per year of service) was not favorably considered by the Supreme Court because the employees were not pleading for generosity but demanding their rights embodied in the CBA which was the result of negotiations between the company and the employees.

On the issue of mutual exclusivity of the CBA-mandated separation pay in case of retrenchment, on the one hand, and the retirement benefits provided in the Retirement Plan, on the other, the Supreme Court in this case of *Aquino* opined that:

> "The Court feels that if the private respondent (company) really intended to make the separation pay and the retirement benefits mutually exclusive, it should have sought inclusion of the corresponding provision in the Retirement Plan and the Collective Bargaining Agreement so as to remove all possible ambiguity regarding this matter.
>
> "We may presume that the counsel of the respondent company was aware of the prevailing doctrine embodied in the cases earlier cited. Knowing this, he should have made it a point to categorically provide in the Retirement

> Plan and the CBA that an employee who had received separation pay would no longer be entitled to retirement benefits. Or to put it more plainly, collection of retirement benefits was prohibited if the employee had already received separation pay."

c. Case where separation pay was charged to retirement pay.

In **Ford Philippines Salaried Employees Association v. NLRC, [G.R. No. 75347, December 11, 1987],** a case decided before the advent of Republic Act No. 7641, the Supreme Court ruled that if it is provided in the retirement plan of the company that the retirement, death and disability benefits paid in the plan are considered *integrated with* and *in lieu of* termination benefits under the Labor Code, then the retirement fund may be validly used to pay such termination or separation pay because of closure of business.

d. Cases where employees are entitled to only one form of benefit.

In **Cipriano v. San Miguel Corporation, [G.R. No. L-24774, August 21, 1968],** it was ruled that in case the retirement plan of the company provides that the employee shall be entitled to either the retirement benefit provided therein or to the separation pay provided by law, whichever is higher, the employee cannot be entitled to both benefits. Article X of the retirement plan in this case reads:

> "Regular employees who are separated from the service of the company for any reason other than misconduct or voluntary resignation shall be entitled to *either* 100% of the benefits provided in Section 2, Article VIII hereof, regardless of their length of service in the company or to the severance pay provided by law, *whichever is the greater amount.*"

In **Cruz v. Philippine Global Communications, Inc., [G.R. No. 141868, May 28, 2004],** the Supreme Court reiterated the said rule in *Cipriano* under the following provision in the retirement plan:

> "b) *Adjustment of Benefits Payments.* - xxx, in the event the Company is required under the law or by lawful order of competent authority to pay to the Member benefits or emoluments similar or analogous to those already provided in the Plan, the **Member concerned shall not be entitled to both what the law or the lawful order of competent authority requires the Company to give and the benefits provided by the Plan, but shall only be entitled to whichever is the greatest among them**, xxx." *(Section 6 (b), Article XI of the Retirement Plan).*

The employees in this case who were terminated due to closure of the company's branches, were held to be entitled only to *either* the separation pay provided under Article 283 of the Labor Code *or* retirement benefits prescribed by the retirement plan, whichever is higher. Consequently, they were paid separation benefits computed under the retirement plan, the same being higher than what Article 283 provides.

Citing *Cruz*, the Supreme Court ruled that the petitioner in **Santos v. Servier Philippines, Inc., [G.R. No. 166377, November 28, 2008],** is entitled only to the retirement benefits under the retirement plan. Section 2, Article XII of the retirement plan bars the petitioner from claiming additional benefits on top of that provided therein, thus:

"Section 2. NO DUPLICATION OF BENEFITS

> "No other benefits other than those provided under this Plan shall be payable from the Fund. Further, in the event the Member receives benefits under the Plan, he shall be precluded from receiving any other benefits under the Labor Code or under any present or future legislation under any other contract or Collective Bargaining Agreement with the Company."

In **Salomon v. Association of International Shipping Lines, Inc., [G.R. No. 156317, April 26, 2005],** petitioners who were duly paid separation pay when they were retrenched, claim that they are, in addition, entitled to the retirement benefits under the CBA, citing **Aquino v. NLRC, [G.R. No. 87653, February 11, 1992]** as basis thereof. Said CBA provides:

> "*Section 1.* In case of termination due to redundancy, retrenchment, dissolution of a department/conference/section and/or the whole ASSOCIATION, sickness or physical disability, a regular employee shall be entitled to a separation pay equivalent to his one (1) month basic pay for every year of service. A fraction of at least six (6) months shall be considered as one (1) whole year and less than six (6) months shall be prorated accordingly.
>
> xxx
>
> "*Section 3. Optional Retirement.* – An employee shall have the option to retire regardless of age provided he/she has rendered at least 15 years of continuous service to the ASSOCIATION. An employee shall be entitled to the following benefits.
>
> a. 15 to less than 20 years of service – 50% of the monthly basic salary for every year of service.
>
> b. 20 years of service – 100% of the monthly basic salary for every year of service."

According to the Supreme Court, it is obvious that petitioners, as prescribed by the parties' CBA quoted above, are entitled only to either the separation pay, if they are terminated for cause, or optional retirement benefits, if they rendered at least fifteen (15) years of continuous services. Petitioners were separated from the service for cause. Accordingly, pursuant to the CBA, what each actually received is a separation pay. Hence, considering their Releases and Quitclaims, they are no longer entitled to retirement benefits.

In **Suarez, Jr. v. National Steel Corp., [G.R. No. 150180, October 17, 2008],** respondent adopted an organizational streamlining program that resulted in the retrenchment of seven hundred (700) employees in its main plant in Iligan City, among whom were herein petitioners. The separation package consisted of the following: (1) separation pay equivalent to two (2) months salary for every year of service; (2) leave balance credits; (3) 13th month pay; and (4) uniform plus rice subsidy differential. After having been paid their separation benefits, the employees, including herein petitioners, each executed and signed a release and quitclaim, written in English and containing a translation in the Visayan dialect in the same document. The release and quitclaims were acknowledged before a notary public. Nothing was heard from the retrenched employees, until February 1997 or about two and half years after their separation from the company, when herein petitioners wrote respondent demanding payment of retirement benefits under the CBA. Citing *Aquino v. NLRC*, [G.R. No. 87653, February 11, 1992, 206 SCRA 118], *University of the East v. Minister of Labor*, [G.R. No. L-74007, June 31, 1987, 152 SCRA 676], and *Batangas Laguna Tayabas Bus Co. v. CA.* [G.R. No. L-38482, June 18, 1976, 71 SCRA 470], they claimed that they were qualified for optional retirement after having rendered services for at least ten (10) years when they were retrenched on August 18, 1994.

Respondent rejected petitioners' claim, forcing petitioners to file a complaint for payment of retirement benefits against respondent. Respondent contends that since the petitioners were terminated for cause, they are not entitled to retirement benefits under the retirement plan of respondent company which states:

> "X. OTHER GENERAL PROVISIONS
>
> xxx
>
> "E. ***Resignations and Terminations.*** **- No retirement benefits are payable in instances of resignations or terminations for cause**; provided, however, that an employee who resigns voluntarily after he has qualified for optional early retirement under Article IV, B, 2 or 3 shall be deemed to have opted to avail of such early retirement and paid the applicable and corresponding retirement pay/benefit provided therein. All terminations other than for cause will be governed by the applicable provisions of the Labor Code of the Philippines." (Emphasis supplied)

Stating that petitioners' reliance on the afore-cited cases is misplaced, the Supreme Court ruled that from the foregoing provision of the CBA, it is clear that respondent's retirement plan explicitly prohibits the recovery of retirement benefits in cases of terminations for cause. Here, there is no dispute that petitioners were separated from the service for cause, as it was due to a valid retrenchment undertaken by respondent company. Unarguably, retrenchment is recognized as one of the authorized causes for termination of employment under Article 283 of the Labor Code. Having been separated from employment due to an authorized cause, petitioners are barred from receiving retirement benefits pursuant to Article X (E) of respondent's retirement plan. With the inclusion of such provision in the retirement plan, respondent categorically disallows payment of retirement benefits to retrenched employees. They are thus only entitled to payment of separation pay in accordance with Article 283 of the Labor Code.

Petitioners further argue that the term "terminations for cause" under Article X(E) of the retirement plan should be read to only include terminations for "just cause" under Article 282 of the Labor Code, or to situations wherein it is the employee that is at fault. The Supreme Court was not persuaded by this argument. Petitioners concede that the Labor Code allows terminations by the employer for "just causes" under Article 282 or "authorized causes" under Articles 283 and 284. Terminations covered by Articles 282 to 284 are all terminations by the employer for a lawful cause. In the past, the Supreme Court has had occasion to use the term "dismissal for cause" to refer to dismissals for just and/or authorized cause. Respondent's retirement plan, in referring to "terminations for cause," plainly does not distinguish between just causes and authorized causes for termination. Moreover, there is nothing in the said retirement plan which limits the term "terminations for cause" to terminations under Article 282. (*Id.).*

e. The provisions of the retirement plan on entitlement to benefits are controlling.

As held in **Cipriano v. San Miguel Corporation, [G.R. No. L-24774, August 21, 1968],** and **Aquino v. NLRC, [G.R. No. 87653, February 11, 1992],** the employees' right to payment of retirement benefits and/or separation pay is governed by the retirement plan of the parties. The provisions of the retirement plan are controlling in determining such entitlement.

In other words, if the retirement plan mandates that the employees who are separated under any of the authorized causes under Article 283 of the Labor Code are entitled to both the separation pay provided therein as well as the retirement benefits under the said retirement plan, then, they shall be so paid. Otherwise, if the retirement plan states that the employees shall be

entitled to either the separation pay under the said provision of the law or the retirement benefits under the retirement plan, whichever is higher, then, they should not be allowed to claim both.

Clearly, under the above cases, the right of the concerned employees to receive both retirement benefits and separation pay depends upon the provisions in the retirement plan.

EMPLOYEES WHO HAVE ALREADY VOLUNTARILY AVAILED OF THE EARLY RETIREMENT PACKAGE ARE NO LONGER ENTITLED TO ANY BENEFITS GRANTED AFTER THE TERMINATION OF THEIR EMPLOYMENT.

Kimberly-Clark Philippines, Inc. v. Dimayuga, G.R. No. 177705, September 18, 2009

This case involves a tax-free *early retirement package* for its employees as a cost-cutting and streamlining measure.

Respondents were already resigned prior to the effectivity of the retirement package but the benefits thereunder were extended to them out of generosity. Still later or on January 16, 2003, petitioner announced that it would the grant a *lump sum retirement pay* in the amount of ₱200,000, in addition to the early retirement package benefit, to those who signed up for early retirement and who would sign up until January 22, 2003. Respondents claim for this additional benefit. In holding that they are not so entitled, the Supreme Court ruled that neither are Nora and Rosemarie entitled to the economic assistance which petitioner awarded to "all monthly employees who are under regular status as of November 16, 2002," they having resigned earlier or on October 21, 2002.

Again, contrary to the appellate court's ruling that Nora and Rosemarie already earned the economic assistance, the same having been given in lieu of the performance-based annual salary increase, the Court finds that the economic assistance was a *bonus* over and above the employees' salaries and allowances. A perusal of the memorandum regarding the grant of economic assistance shows that it was granted in lieu of salary increase (the grant of which depends on petitioner's financial capability) and that it was not intended to be a counterpart of the Collective Bargaining Agreement grant to members of the K-CPI union. The grant of economic assistance to all monthly employees under regular status as of November 16, 2002 was thus well within petitioner's prerogatives.

Moreover, petitioner's decision to give economic assistance was arrived at more than a month after respondents' resignation and, therefore, it was a benefit not yet existing at the time of their separation.

f. Forced retirement.

If the intention to retire is not clearly established or if the retirement is involuntary, it is to be treated as a discharge. *(De Leon v. NLRC, 100 SCRA 691 [1980]).*

In **San Miguel Corporation v. NLRC, [G.R. No. 107693, July 23, 1998],** the employees were given the option to retire, be retrenched or dismissed but they were made to understand that they had no choice but to leave the company. It was in reality a *Hobson's choice* which means that they have no choice at all. All that the private respondents were offered was a choice on the means or method of terminating their services but never as to the status of their employment. In short, they were never asked if they still wanted to work for petitioner. The mere

absence of actual physical force to compel private respondents to ink an application for retirement did not make their retirement voluntary. Confronted with the danger of being jobless, unable to provide their families even with the basic needs or necessities of life, the private respondents had no choice but to sign the documents proffered to them. But neither their receipt of separation pay nor their negotiating for more monetary benefits estopped private respondents from questioning and challenging the legality of the nature or cause of their separation from the service.

A CASE WHERE EMPLOYEE RECEIVED MORE THAN TWICE WHAT ARTICLE 283 GRANTS.

Quevedo v. Benguet Electric Cooperative, Inc. (BENECO), G.R. No. 168927, September 11, 2009

Said the Supreme Court: The line between voluntary and involuntary retirement is thin but it is one which this Court has drawn. Voluntary retirement cuts employment ties leaving no residual employer liability; involuntary retirement amounts to a discharge, rendering the employer liable for termination without cause. The employee's intent is the focal point of analysis. In determining such intent, the fairness of the process governing the retirement decision, the payment of stipulated benefits, and the absence of badges of intimidation or coercion are relevant parameters.

Nothing in the records offends any of these criteria.

The manner by which BENECO arrived at its decision to downsize and at the same time spare petitioners the lesser benefits under Article 283 of the Labor Code by creating a more generous retirement package was regular, transparent and fully documented.

Nor were petitioners here denied the stipulated benefits. It is telling, but not surprising, that petitioners kept clear of this subject. The records show that on average, the benefits each of the petitioners received under the EVR program were more than twice their statutory counterpart under Article 183.

CAN THE EMPLOYER ACCELERATE THE RETIREMENT DATE OF AN EMPLOYEE? YES IF IT IS SO PROVIDED IN THE SPECIAL RETIREMENT PLAN.

Magdadaro v. Philippine National Bank, G.R. No. 166198, July 17, 2009

The Labor Arbiter in this case ruled that petitioner was not illegally dismissed from the service. Even the NLRC ruled that petitioner could no longer withdraw his application for early retirement under the SSIP. However, the NLRC ruled that respondent could not accelerate the petitioner's retirement date. The NLRC ruled that it could not imagine how petitioner's continued employment until 31 December 1999 would impair the delivery of bank services and attribute bad faith on respondent when it accelerated petitioner's retirement.

The Supreme Court did not agree to the said postulation. Whether petitioner's early retirement within the SSIP period will improve or impair the delivery of bank services is a

business decision properly within the exercise of management prerogative. More importantly, the SSIP provides:

> 7. Management shall have the discretion and prerogative in approving the applications filed under the Plan, **as well as in setting the effectivity dates for separation within the implementation period of the Plan.** **(**Emphasis supplied)

It is clear that it is within respondent's prerogative to set the date of effectivity of retirement and it may not be necessarily what is stated in the application. We see no grave abuse of discretion on the part of respondent in the exercise of this management prerogative. The exercise of management prerogative is valid provided it is not performed in a malicious, harsh, oppressive, vindictive or wanton manner or out of malice or spite. In this case, the NLRC's finding that petitioner received a rating of 70.5% in his working and business relations is not enough reason to ascribe bad faith on the part of respondent in accelerating the date of effectivity of petitioner's retirement.

REPUBLIC ACT NO. 8558 [RETIREMENT OF UNDERGROUND MINE WORKERS].

a. Underground mine employee.

An underground mine employee refers to any person employed to extract mineral deposits underground or to work in excavations or workings such as shafts, winzes, tunnels, drifts, crosscuts, raises, working places whether abandoned or in use beneath the earth's surface for the purpose of searching for and extracting mineral deposits.

c. Optional retirement of underground mine employees.

In the absence of a retirement plan or other applicable agreement providing for retirement benefits of underground mine employees in the establishment, any such employee may retire upon reaching the age of fifty (50) years or more if he has served for at least five (5) years as underground mine employee or in underground mine of the establishment.

d. Compulsory retirement of underground mine employees.

Where there is no retirement plan or other applicable agreement providing for retirement benefits of underground mine employees in the establishment, an underground mine employee shall be compulsorily retired upon reaching the age of sixty (60) years.

e. Minimum years of service requirement.

To be entitled to retirement benefits, the underground mine worker should have rendered service as such for at least five (5) years, in addition to the age requirement.

RETIREMENT OF PART-TIME EMPLOYEES.

There can be no question that part-time workers are also entitled to retirement pay of *"one-half month salary"* for every year of service under Article 287, as amended by Republic Act No. 7641, after satisfying the following conditions precedent for optional retirement: (a) there is no retirement plan between the employer and employee; (b) the employee should have reached the age of sixty (60) years; and (c) should have rendered at least five (5) years of service with the

employer. Meanwhile, the compulsory retirement age under the law is sixty-five (65) years. (*Explanatory Bulletin on Part-Time Employment dated Jan. 02, 1996 issued by Acting DOLE Secretary Jose S. Brillantes).*

Applying, therefore, the principles under Republic Act No. 7641, the components of retirement benefits of part-time workers may likewise be computed at least in proportion to the salary and related benefits due them.

REPUBLIC ACT NO. 7742 [PAG-IBIG FUND AS SUBSTITUTE RETIREMENT PLAN].

As provided in Republic Act No. 7742 [approved on June 17, 1994], a private employer shall have the option to treat the coverage of the Pag-IBIG Fund as a substitute retirement benefit for the employee concerned within the purview of the Labor Code as amended, provided that such option does not in any way contravene an existing CBA or other employment agreement.

Thus, the Pag-IBIG Fund can be considered as a substitute retirement plan of the company for its employees provided that such scheme offers benefits which are more than or at least equal to the benefits under Republic Act No. 7641. If said scheme provides for less than what the employee is entitled to under Republic Act No. 7641, the employer is liable to pay the difference.

If both the employee and the employer contribute to a retirement plan, only the employer's contribution and its increments shall be considered as full or partial compliance with the benefit under Republic Act No. 7641. On the other hand, where the employee is the lone contributor to the Pag-IBIG Fund, the employer being exempted from its coverage, the employer is under obligation to give his employee retirement benefits under Republic Act No. 7641. *(Labor Advisory on Retirement Pay Law dated Oct. 24, 1996 issued by Secretary Leonardo A. Quisumbing).*

SSS RETIREMENT PAY IS SEPARATE FROM RETIREMENT PAY UNDER THE LABOR CODE.

The employee's retirement pay under Article 287 of the Labor Code or under a unilaterally promulgated retirement policy or plan of the employer or under a CBA, is separate and distinct from the retirement benefits granted under Republic Act No. 8282, otherwise known as the *"Social Security Act of 1997"* (formerly known as the *"Social Security Law"* [Republic Act No. 1161, as amended]).

GSIS RETIREMENT BENEFITS.

a. GSIS retirement applies to government employees.

For government employees, Republic Act No. 8291, otherwise known as the *"Government Service Insurance System Act of 1997"* [formerly Presidential Decree No. 1146, otherwise known as *"The Revised Government Insurance Act of 1977"*], provides for separate retirement benefits.

b. Case where employees covered by the GSIS law are also entitled to retirement pay under the Labor Code.

Postigo v. Philippine Tuberculosis Society, Inc., [G.R. No. 155146, January 24, 2006], presents quite a unique case. The employees of respondent are covered by the GSIS Law.

Upon retirement from the service, some of the petitioners who were compulsory members of the GSIS obtained retirement benefits from the GSIS. Contending that respondent is a private sector employer, the retired employees also claimed retirement benefits under Article 287 of the Labor Code, as amended by Republic Act No. 7641. Respondent denied their claims on the ground that the accommodation extended by the GSIS to the petitioners removed them from the coverage of the law. The Supreme Court, however, affirmed their entitlement to the retirement benefits under the Labor Code since the respondent was incorporated under the general corporation law and not under a special charter, thus making it a private and not a public corporation. Further, respondent admitted that although its employees are compulsory members of the GSIS, said employees are not governed by the Civil Service Law but by the Labor Code. The accommodation under Republic Act No. 1820 extending GSIS coverage to respondent's employees did not take away from petitioners the beneficial coverage afforded by Republic Act No. 7641. Hence, the retirement pay payable under Article 287 of the Labor Code as amended by Republic Act No. 7641 should be considered apart from the retirement benefit claimable by the petitioners under the social security law or, as in this case, the GSIS Law.

PRESCRIPTIVE PERIOD

• ***What is the prescriptive period for offenses penalized under the Labor Code?***

General rule. - The prescriptive period of all criminal offenses penalized under the Labor Code and the *Rules to Implement the Labor Code* is three (3) years from the time of commission thereof.

Exception. - Criminal cases arising from ULP which prescribe within one (1) year from the time the acts complained of were committed; otherwise, they shall be forever barred. The running of the 1 year period, however, is interrupted during the pendency of the labor case.

• ***What is the prescriptive period for money claims?***

Prescriptive period is three (3) years from accrual of cause of action.

• ***Meaning of "accrued" cause of action.***

To properly construe Article 291, it is essential to ascertain the time when the third element of a cause of action transpired. Stated differently, in the computation of the three-year prescriptive period, a determination must be made as to the period when the act constituting a violation of the workers' right to the benefits being claimed was committed. For if the cause of action accrued more than three (3) years before the filing of the money claim, said cause of action has already prescribed in accordance with Article 291. *(Auto Bus Transport System, Inc. vs. Bautista, supra; Serrano vs. CA, G. R. No. 139420, Aug. 15, 2001; De Guzman vs. CA and Nasipit Lumber Co., G.R. No.132257, Oct. 12, 1998, 297 SCRA 743).*

It is well-settled that an action accrues until the party obligated to do or perform an act, refuses, expressly or impliedly, to comply with the duty. A case in point is **Baliwag Transit, Inc. vs. Ople**, **[G. R. No. 57642, March 16, 1989].** A bus of petitioner Baliwag Transit driven by the respondent driver figured in an accident with a train of the Philippine National Railways

(PNR) on August 10, 1974. This resulted to the death of eighteen (18) passengers and caused serious injury to fifty-six (56) other passengers. The bus itself also sustained extensive damage. The bus company instituted a complaint against the PNR. The latter was held liable for its negligence in the decision rendered on April 6, 1977. The respondent driver was absolved of any contributory negligence. However, the driver was also prosecuted for multiple homicide and multiple serious physical injuries, but the case was provisionally dismissed in March 1980 for failure of the prosecution witness to appear at the scheduled hearing. Soon after the PNR decision was rendered, the driver renewed his license and sought reinstatement with Baliwag Transit. He was advised to wait until his criminal case was terminated. He repeatedly requested for reinstatement thereafter, but to no avail, even after termination of the criminal case against him. Finally, on May 2, 1980, he demanded reinstatement in a letter signed by his counsel. On May 10, 1980, petitioner Baliwag Transit replied that he could not be reinstated as his driver's license had already been revoked and his driving was "extremely dangerous to the riding public." This prompted respondent driver to file on July 29, 1980 a formal complaint with the Ministry of Labor and Employment for illegal dismissal against Baliwag Transit praying for reinstatement with backwages and emergency cost-of-living allowance. The complaint was dismissed by the Regional Director on the ground of prescription under Article 291 of the Labor Code. This was reversed by then Labor and Employment Minister Ople. On appeal to the Supreme Court, it was ruled that the action had not prescribed, *viz.*:

> ". . . (T)he antecedent question that has to be settled is the date when the cause of action accrued and from which the period shall commence to run. The parties disagree on this date. The contention of the petitioner is that it should be August 10, 1974, when the collision occurred. The private respondent insists it is May 10, 1980, when his demand for reinstatement was rejected by the petitioner.
>
> "It is settled jurisprudence that a cause of action has three elements, to wit, (1) a right in favor of the plaintiff by whatever means and under whatever law it arises or is created; (2) an obligation on the part of the named defendant to respect or not to violate such right; and (3) an act or omission on the part of such defendant violative of the right of the plaintiff or constituting a breach of the obligation of the defendant to the plaintiff.
>
> "The problem in the case at bar is with the third element as the first two are deemed established.
>
> "We hold that the private respondent's right of action could not have accrued from the mere fact of the occurrence of the mishap on August 10, 1974, as he was not considered automatically dismissed on that date. At best, he was deemed suspended from his work, and not even by positive act of the petitioner but as a result of the suspension of his driver's license because of the accident. There was no apparent disagreement then between (respondent driver) Hughes and his employer. As the private respondent was the petitioner's principal witness in its complaint for damages against the Philippine National Railways, we may assume that Baliwag Transit and Hughes were on the best of terms when the case was being tried. Hence, there existed no justification at that time for the private respondent to demand reinstatement and no opportunity warrant (sic) either for the petitioner to reject that demand.

> "We agree with private respondent that May 10, 1980, is the date when his cause of action accrued, for it was then that the petitioner denied his demand for reinstatement and so committed that act or omission 'constituting a breach of the obligation of the defendant to the plaintiff.' The earlier requests by him having been warded off with indefinite promises, and the private respondent not yet having decided to assert his right, his cause of action could not be said to have then already accrued. The issues had not yet been joined, so to speak. This happened only when the private respondent finally demanded reinstatement on May 2, 1980, and his demand was categorically rejected by the petitioner on May 10, 1980." *(Baliwag Transit, Inc. vs. Ople, G. R. No. 57642, March 16, 1989).*

Finding analogy with the case of *Baliwag Transit* [supra], the Supreme Court, in **Serrano vs. CA**, **[G. R. No. 139420, August 15, 2001],** ruled that the cause of action of petitioner has not yet prescribed. From 1974 to 1991, respondent Maersk-Filipinas Crewing, Inc., the local agent of respondent foreign corporation A.P. Moller, deployed petitioner Serrano as a seaman to Liberian, British and Danish ships. As petitioner was on board a ship most of the time, respondent Maersk offered to send portions of petitioner's salary to his family in the Philippines. The amounts would be sent by money order. Petitioner agreed and from 1977 to 1978, he instructed respondent Maersk to send money orders to his family. Respondent Maersk deducted the amounts of these money orders totaling HK$4,600.00 and £1,050.00 Sterling Pounds from petitioner's salary. Respondent Maersk deducted various amounts from his salary for Danish Social Security System (SSS), welfare contributions, ship club, and SSS Medicare.

It appears that petitioner's family failed to receive the money orders petitioner sent through respondent Maersk. Upon learning this in 1978, petitioner demanded that respondent Maersk pay him the amounts the latter deducted from his salary. Respondent Maersk assured him that they would look into the matter, then assigned him again to board one of their vessels.

Whenever he returned to the Philippines, petitioner would go to the office of respondent Maersk to follow up his money claims but he would be told to return after several weeks as respondent Maersk needed time to verify its records and to bring up the matter with its principal employer, respondent A.P. Moller. Meantime, respondent Maersk would hire him again to board another one of their vessels for about a year.

Finally, in October 1993, petitioner wrote to respondent Maersk demanding immediate payment to him of the total amount of the money orders deducted from his salary from 1977 to 1978. On November 11, 1993, respondent A.P. Moller replied to petitioner that they keep accounting documents only for a certain number of years, thus data on his money claims from 1977 to 1978 were no longer available. Likewise, it was claimed that it had no outstanding money orders. A.P. Moller declined petitioner's demand for payment.

In ruling that the cause of action has not yet prescribed, the Supreme Court declared:

> "The facts in the case at bar are similar to the *Baliwag* case. Petitioner repeatedly demanded payment from respondent Maersk but similar to the actuations of Baliwag Transit in the above cited case, respondent Maersk warded off these demands by saying that it would look into the matter until

years passed by. In October 1993, Serrano finally demanded in writing payment of the unsent money orders. Then and only then was the claim categorically denied by respondent A.P. Moller in its letter dated November 22, 1993. Following the Baliwag Transit ruling, petitioner's cause of action accrued only upon respondent A.P. Moller's definite denial of his claim in November 1993. Having filed his action five (5) months thereafter or in April 1994, it was held that it was filed within the three-year (3) prescriptive period provided in Article 291 of the Labor Code."

In **Philippine National Construction Corporation [PNCC] vs. NLRC**, **[G. R. No. 100353, October 22, 1999],** the complainant was not dismissed but merely asked to go on vacation in May, 1985. It was only on August 16, 1989 that he was informed of the termination of his services. Hence, when he brought his complaint in 1989, his cause of action was not yet barred by prescription. It was within the three-year prescriptive period under Article 291 of the Labor Code.

In the 2003 case of **Ludo & Luym Corporation vs. Saornido**, **[G. R. No. 140960, January 20, 2003],** petitioner contended that the money claim in this case is barred by prescription. The Supreme Court disagreed and ruled that this contention is without merit. Such determination is a question of fact which must be ascertained based on the evidence, both oral and documentary, presented by the parties before the Voluntary Arbitrator. In this case, the Voluntary Arbitrator found that prescription has not as yet set in to bar the respondents' claims for the monetary benefits awarded to them. As elucidated by the Voluntary Arbitrator:

"The respondents had raised prescription as defense. The controlling law, as ruled by the High Court, is:

'The cause of action accrues until the party obligated refuses xxx to comply with his duty. Being warded off by promises, the workers not having decided to assert [their] right[s], [their] causes of action had not accrued…' (Citation omitted)

"Since the parties had continued their negotiations even after the matter was raised before the Grievance Procedure and the voluntary arbitration, the respondents had not refused to comply with their duty. They just wanted the complainants to present some proofs. The complainant's cause of action had not therefore accrued yet. Besides, in the earlier voluntary arbitration case aforementioned involving exactly the same issue and employees similarly situated as the complainants', the same defense was raised and dismissed by Honorable Thelma Jordan, Voluntary Arbitrator.

"In fact, the respondents' promised to correct their length of service and grant them the back CBA benefits if the complainants can prove they are entitled rendered the former in estoppel, barring them from raising the defense of laches or prescription. To hold otherwise amounts to rewarding the respondents for their duplicitous representation and abet them in a dishonest scheme against their workers." *(Ludo & Luym Corporation vs. Saornido, G. R. No. 140960, Jan. 20, 2003).*

However, in the 2004 case of **Kar Asia, Inc. vs. Corona**, **[G. R. No. 154985, August 24, 2004],** it was pronounced that there was unreasonable length of time in pursuing respondents' claim for the December 1993 COLA when they filed their complaint for underpayment of wage only on September 24, 1997. Thus, the action for the payment of the December 1993 COLA has already prescribed.

• ***Time to reckon prescription; date of filing of complaint.***

As a general rule, the date of filing of the complaint should be the determining factor in reckoning the prescriptive period.

However, in case the complaint is amended, the date of filing should be reckoned on the date said amended pleading is filed. Thus, in the case of **Philippine Industrial Security Agency Corporation vs. Dapiton**, **[G. R. No. 127421, December 8, 1999],** it was held that respondent-employee filed his money claims only on June 15, 1994 when he filed his *Amended* Complaint and Position Paper. As a consequence thereof, his money claims from November 2, 1990 to June 14, 1992, are already barred by prescription pursuant to Article 291 of the Labor Code. Apparently, the Labor Arbiter mistakenly relied on the date of filing of the *original* complaint of respondent. It is true that said complaint was filed on April 22, 1994, however, at that time, respondent merely accused petitioner of illegal dismissal and has not yet charged petitioner with underpayment of wages or non-payment of overtime pay, 13th month pay, etc.

Prescription of claims for allowances and other benefits.

In cases of nonpayment of allowances and other monetary benefits, if it is established that the benefits being claimed have been withheld from the employee for a period longer than three (3) years, the amount pertaining to the period beyond the three-year prescriptive period is barred by prescription. The amount that can only be demanded by the aggrieved employee shall be limited to the amount of the benefits withheld within three (3) years before the filing of the complaint.

Thus, in the case of **E. Ganzon, Inc. vs. NLRC**, **[G. R. No. 123769, December 22, 1999],** involving claims for regular holiday pay and service incentive leave, the Supreme Court observed that the Labor Arbiter should not have awarded the money claims that were beyond three (3) years. There are ten (10) regular holidays under Executive Order No. 203 and five (5) days of service incentive leave in a year. At most, private respondents (employees) can only claim thirty (30)-day holiday pay and fifteen (15)-day service incentive leave pay with respect to their amended complaint of 25 January 1991. Any other claim is now barred by prescription.

• ***Different prescriptive rule for service incentive leave.***

The Supreme Court clarified in the 2005 case of **Auto Bus Transport System, Inc. vs. Bautista**, **[G. R. No. 156367, May 16, 2005],** the correct reckoning of the prescriptive period for service incentive leave, considering that "the service incentive leave is a curious animal in relation to other benefits granted by the law to every employee" because "in the case of service incentive leave, the employee may choose to either use his leave credits or commute it to its monetary equivalent if not exhausted at the end of the year. Furthermore, if the employee entitled to service incentive leave does not use or commute the same, he is entitled upon his resignation or separation from work to the commutation of his accrued service incentive leave."

Applying Article 291 of the Labor Code as well as the three (3) elements of a cause of action [supra], the Supreme Court ruled:

> "Correspondingly, it can be conscientiously deduced that the cause of action of an entitled employee to claim his service incentive leave pay accrues from the moment the employer refuses to remunerate its monetary equivalent if the employee did not make use of said leave credits but instead chose to avail of its commutation. Accordingly, if the employee wishes to accumulate his leave credits and opts for its commutation upon his resignation or separation from employment, his cause of action to claim the whole amount of his accumulated service incentive leave shall arise when the employer fails to pay such amount at the time of his resignation or separation from employment.
>
> "Applying Article 291 of the Labor Code in light of this peculiarity of the service incentive leave, we can conclude that the three (3)-year prescriptive period commences, not at the end of the year when the employee becomes entitled to the commutation of his service incentive leave, but from the time when the employer refuses to pay its monetary equivalent after demand of commutation or upon termination of the employee's services, as the case may be.
>
> "In the case at bar, respondent had not made use of his service incentive leave nor demanded for its commutation until his employment was terminated by petitioner. Neither did petitioner compensate his accumulated service incentive leave pay at the time of his dismissal. It was only upon his filing of a complaint for illegal dismissal, one month from the time of his dismissal, that respondent demanded from his former employer commutation of his accumulated leave credits. His cause of action to claim the payment of his accumulated service incentive leave thus accrued from the time when his employer dismissed him and failed to pay his accumulated leave credits.
>
> "Therefore, the prescriptive period with respect to his claim for service incentive leave pay only commenced from the time the employer failed to compensate his accumulated service incentive leave pay at the time of his dismissal. Since respondent had filed his money claim after only one month from the time of his dismissal, necessarily, his money claim was filed within the prescriptive period provided for by Article 291 of the Labor Code."

• ***What is the prescriptive period for illegal dismissal?***

An action for illegal dismissal prescribes in 4 years from accrual of cause of action.

• ***What is the prescriptive period for actions involving the funds of the union?***

Any action involving the funds of a labor organization shall prescribe after three (3) years from the date of submission of the annual financial report to the Department of Labor and Employment or from the date the same should have been submitted as required by law, whichever comes earlier.

• ***What is the prescriptive period for illegal recruitment?***

Generally, an illegal recruitment case prescribes in 5 years. The *exception* is in case of illegal recruitment involving economic sabotage which prescribes in 20 years.

• ***What is the prescriptive period for SSS violations?***

In cases involving refusal or neglect by the employer in the remittance of contributions to the SSS, prescriptive period is twenty (20) years from the time the delinquency is known or the assessment is made by the SSS, or from the time the benefit accrues, as the case may be.

In **Chua vs. CA**, **[G. R. No. 125837, Oct. 6, 2004],** where only eight (8) years had passed from the time delinquency was discovered or the proper assessment was made, the Supreme Court ruled that the claim has not yet prescribed because Republic Act No. 1161, as amended, *(*now *Republic Act No. 8282*, otherwise known as the *Social Security Act of 1997),* prescribes a period of twenty (20) years, from the time the delinquency is known or assessment is made by the SSS, within which to file a claim for non-remittance against employers. (*Section 22(b), R.A. 1161).*

• ***What is the prescriptive period for employees' compensation claims?***

Three (3) years from accrual of cause of action.

-END OF PART FOUR-