

STATEMENT OF COVERAGE

This *Pre-Week 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 2006 Bar Examinations. This is presented in three (3) parts. PART ONE covers Books 1 to 4 of the Labor Code and some important social legislations. PART TWO covers Book 5 and PART THREE covers Books 6 and 7 of the Labor Code.

LABOR LAWS OF THE PHILIPPINES**PART THREE****LAW ON TERMINATION OF EMPLOYMENT****SECURITY OF TENURE****1. 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.**2. 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*).

3. 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*).

4. 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).

5. 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.

An employee who refuses to be transferred, when such transfer is valid, is guilty of insubordination. (*Westin Philippine Plaza Hotel vs. NLRC, G. R. No. 121621, May 3, 1999*).

It constitutes willful disobedience of a lawful order of an employer. (*Benguet Electric Cooperative vs. Fianza, G. R. No. 158606, March 9, 2004*).

The refusal of the employees 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. vs. Ministry of Labor and Employment**, [G. R. No. 75656, May 28, 1990], the employees were being transferred during the height of union 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 job assigned to the employees sought to be transferred, which job did not require any special dexterity which only said employees can perform.

In **Abbott Laboratories, Inc. vs. 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, 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.

But, in the case of **Zafra vs. Hon. CA**, [G. R. No. 139013, September 17, 2002], despite the petitioner-employees’ agreement in their application 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. According to the High Court, the fact that petitioners, in their application 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 respondent employer) of disseminating a notice of transfer to 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 preemptorily withdrawn, discontinued, or eliminated by the employer. Fairness at the workplace and settled expectations among 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 complaining workers any other option but placed them in an either/or straightjacket that appeared too oppressive for those concerned. 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.

While transfer of an employee ordinarily lies within the ambit of management prerogatives, however, a transfer amounts to constructive dismissal when the transfer is unreasonable, inconvenient, or prejudicial to the employee, and involves a demotion in rank or diminution of salaries, benefits, and other privileges. In the present case, petitioners were unceremoniously transferred, necessitating their families’ relocation from Cebu to Manila. This act of management appears to be arbitrary without the usual notice that should have been done

even prior to their training abroad. From the employees' viewpoint, such action affecting their families are burdensome, economically and emotionally. It is no exaggeration to say that their forced transfer is not only unreasonable, inconvenient, and prejudicial, but also in defiance of basic due process and fair play in employment relations.

In **Damasco vs. 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 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.

f. Continued refusal to report to new work assignment.

In **Westin Philippine Plaza Hotel vs. NLRC**, [G. R. No. 121621, May 3, 1999, 306 SCRA 631], the willfulness of the employee's insubordination was shown by his continued refusal to report to his new work assignment. Thus, upon receipt of the order of transfer, the employee simply took an extended vacation leave. Then, when he reported back to work, he did not discharge his duties as linen room attendant despite repeated reminders from the personnel office as well as his union. Worse, while he came to the hotel everyday, he just went to the union office instead of working at the linen room. More than that, when he was asked to explain why no disciplinary action should be taken against him, the employee merely questioned the transfer order without submitting the required explanation. Based on the foregoing facts, the employee's intransigence was very evident.

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

An employee could not validly refuse the lawful transfer orders on the ground of parental obligations, additional expenses, and the anguish he would suffer if assigned away from his family. (*Allied Banking Corporation vs. CA*, G. R. No. 144412, Nov. 18, 2003).

In **Phil. Telegraph and Telephone Corp. vs. 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 at 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. It said: "Certainly the Court cannot accept the proposition that when an employee opposes his employer's decision to transfer him to another workplace, there being no bad faith or underhanded motives on the part of either party, it is the employee's wishes that should be made to prevail."

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. Frequent transfers of short duration, effect.

In a case where the security agency, in a span of less than three (3) months, has assigned the security guard to at least four (4) different establishments, leaving him uncertain as to when and where his next assignments would be, it was held that such frequent transfers to different posts on short periods of time were indirect ways of dismissing him. (*Philippine Industrial Security Agency Corporation vs. Dapiton, supra*).

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.”

r. Damages, in addition to reinstatement, may be recovered for illegal transfer.

An employee who was illegally transferred is entitled to damages. Under Article 21 of the Civil Code, any person who willfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage. The illegal transfer of an employee to a functionless office is clearly an abuse on the part of the employer of its right to control the structure of its organization. (*De la Salle University vs. De la Salle University Employees Association*, 330 SCRA 363 [2000]).

In the case of *Paguio vs. Philippine Long Distance Telephone Co., Inc.*, [G. R. No. 154072, December 3, 2002], where there was no clear justification for the transfer of the employee except that it was done as a result of his disagreement with his superiors with regard to company policies, the Supreme Court ordered the payment in his favor of moral and exemplary damages as well as attorney’s fees. And with the finding that the transfer was illegal, the employee was ordered reinstated to his former, or a substantially equivalent, position without loss of seniority rights.

6. 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.*).

7. 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.*).

8. 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*).

9. 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*).

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.

In a similar case, **A' Prime Security Services, Inc. vs. NLRC**, [G. R. No. 107320, Jan. 19, 2000], the Supreme Court ruled that the employee's violations of the company rules against *sleeping on post* and *quarrelling with a co-worker*, cannot be considered proper grounds for dismissal as the same were *first* infractions which merit only "*warning*" and "*one-month suspension*," respectively, under said rules.

The dismissal meted out on the teachers, under the attendant factual antecedents in **St. Michael's Institute vs. Santos**, [G. R. No. 145280, December 4, 2001], for dereliction of duty for one school day when they participated in a rally denouncing school authority, was also declared too harsh a penalty considering that they are being held liable for a first time offense and despite long years of unblemished service. Even when an employee is found to have transgressed the employer's rules, in the actual imposition of penalties upon the erring employee, due consideration must still be given to his length of service and the number of violations committed during his employment. Where a penalty less punitive would suffice, whatever missteps may have been committed by the employee ought not to be visited with a consequence so severe such as dismissal from employment.

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.*).

Moreover, as early as **Tide Water Associated Oil Co. vs. Victory Employees and Laborers' Association**, [85 Phil. 166 (1949)], it was ruled that, 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.

DUE PROCESS

10. 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.”

11. What are “just causes” and “authorized causes”?

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.

12. 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.

13. 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.

14. What are the six (6) situations in termination disputes?

The rules on termination of employment in the Labor Code and pertinent jurisprudence are applicable to six (6) 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 (PER AGABON CASE). THE AMOUNT OF NOMINAL DAMAGES VARY FROM CASE TO CASE.**
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.**

In connection with situation *No. 4* above, the Supreme Court, in the 2005 case of **Jaka Food Processing Corporation vs. Pacot**, [G. R. 151378, March 28, 2005], distinguished the legal effects and consequences of termination for *just* cause but without due process (as in the *Agabon* case) and termination for *authorized* cause but also without due process.

In this case, the employees were terminated due to valid retrenchment but it was effected without Jaka complying with the 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.”

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*).

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 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.

Separation pay, according to **Capili vs. NLRC**, [G. R. No. 117378, March 26, 1997, 270 SCRA 488], cannot likewise be ordered paid to the employees who were not dismissed by the employer. The common denominator of those instances where payment of separation pay is warranted is that the employee was dismissed by the employer. In a case where there was no dismissal at all, separation pay should not be awarded. The employee should instead be ordered reinstated - not as and by way of relief proceeding from illegal dismissal but as and by way of a declaration or affirmation that the employee may return to work because he was not dismissed in the first place, and he should be happy that his employer is accepting him back.

But in **Cals Poultry Supply Corporation vs. Alfredo Roco**, [G. R. No. 150660, July 30, 2002], the Supreme Court found that respondent employee has not established convincingly that he was dismissed. No notice of termination was given to him by CALS. There is no proof at all, except his self-serving assertion, that he was prevented from working after the end of his leave of absence on January 18, 1996. In fact, CALS notified him in a letter dated March 12, 1996 to resume his work. Both the Labor Arbiter and the NLRC found that Alfredo was not dismissed and their findings of fact are entitled to great weight. His complaint for illegal dismissal, therefore, was properly dismissed by the Labor Arbiter for lack of merit as Alfredo was not dismissed; it was he who unilaterally severed his relation with his employer.

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.

15. 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;
2. Full backwages, inclusive of allowances;
3. Other benefits or their monetary equivalent;
4. Damages (moral, exemplary, if the dismissal is with malice or effected in bad faith);
5. Attorney's fees (10% of all monetary awards).

[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].

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.

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).

16. How should the due process requirement under the law be standardized?

[NOTE: For years, the due process requirement had been interpreted in so many ways. While the two-fold requirement of substantive and procedural due process as well as the twin requirements of notice and hearing are the well-known and well-entrenched features thereof, there had been no clear-cut standards, however, which were prescribed by the Department of Labor and Employment that may be used as simple guideposts to gauge whether due process was indeed observed in a given case or situation].

The following is an attempt at standardizing the due process requirement under the different situations contemplated under the law.

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

Due process under Article 282 means compliance with the following requirements of two (2) notices and a hearing:

- (a) A written notice (*first notice*) served on the employee specifying the ground or grounds for termination, and giving to said employee reasonable opportunity to explain his side;
- (b) A hearing or conference (or at least an opportunity to be heard) during which the employee concerned, with the assistance of counsel if the employee so desires, is given opportunity to respond to the charge, present his evidence or rebut the evidence presented against him; and
- (c) A written notice of termination (*second notice*) served on the employee indicating that upon due consideration of all the circumstances, grounds have been established to justify his termination. (*PNB vs. Cabansag, G. R. No. 157010, June 21, 2005; Millares vs. PLDT, G. R. No. 154078, May 6, 2005*).

These requirements are mandatory, non-compliance with which renders any judgment reached by management void and inexistent. (*Skippers Pacific, Inc. vs. Mira, G. R. No. 144314, Nov. 21, 2002; Concorde Hotel vs. CA, G. R. No. 144089, Aug. 9, 2001*).

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

The requirements of due process is deemed complied with upon the service of a written notice to:

- (1) the employee; and
- (2) the appropriate Regional Office of the Department of Labor and Employment at least thirty (30) days before the effectivity of the termination, specifying the ground or grounds for termination. (*Article 283, Labor Code*).

c. For termination based on 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 vs. NLRC*, [G.R. No. 158693, Nov. 17, 2004], the Supreme Court observed that the procedural requirements under Article 283 are likewise applicable to Article 284.

d. For termination based on completion of contract or phase thereof.

If the termination is brought about by the completion of the contract or phase thereof, no prior notice is required. (*Section 2, Rule I, Book VI, Rules to Implement the Labor Code, as amended by Article III, Department Order No. 10, Series of 1997*).

e. For termination of probationary employment based on failure to meet the standards of employment.

If the termination of probationary employment is brought about by the failure of an employee to meet the standards of the employer, it is sufficient that a written notice is served the employee within a reasonable time from the effective date of termination. (*Section 2, Rule I, Book VI, Rules to Implement the Labor Code, as amended by Article III, Department Order No. 10, Series of 1997*).

f. Monthly report of dismissal to DOLE for policy guidance and statistical purposes; when treated as evidence of valid dismissal.

In **R. Transport Corporation vs. Ejandra**, [G. R. no. 148508, May 20, 2004], it was held that the fact that the employer who claimed that the employee had abandoned his job, did not report such fact to the nearest Regional Office of the Department of Labor and Employment in accordance with Section 7, Rule XXIII, Book V of Department Order No. 9, series of 1997 is an *indicium* that the employee did not commit said offense. If the employee really abandoned his work, the employer should have reported that fact accordingly.

17. Is there any instance where notices alone, without the benefit of hearing, were held to be compliant with due process requirement?

There are certain cases decided by the Supreme Court where the dismissal was held valid despite the fact that no hearing was conducted after the respondent employee has explained his side in answer to the first notice apprising him of the administrative charges.

In the 2005 case of **Glaxo Wellcome Phils., Inc. vs. Nagkakaisang Empleyado ng Wellcome-DFA**, [G. R. No. 149349, March 11, 2005], the Court of Appeals held that the dismissal and suspension meted upon two employees of petitioner company were not legal because they were not accorded the benefit of a proper charge, an opportunity to defend themselves, and a formal investigation. In reversing said CA ruling, the High Tribunal ruled that the three (3) Memoranda served on the errant employees were sufficient compliance with the due process rule. The Memoranda specified the acts that constituted gross insubordination. The Memoranda served the purpose of informing them of the pending matters beclouding their employment and of extending to them an opportunity to clear the air. To each Memorandum, respondents were able to reply and explain, with the aid of their counsel, why they had refused to return the vehicles; and, in effect, why they should not be dismissed for gross insubordination. Moreover, petitioner's Memoranda amply gave them a distinct, different and effective first level of remedy (which was to surrender the vehicles) to protect their jobs. Furthermore, they were still able to file a Complaint with the Labor Arbiter, with *better knowledge* of the cause of their dismissal, with *longer time* to prepare their case, and with *greater opportunity* to take care of the financial needs of their family *pendente lite*.

In the earlier case of **Nuez vs. NLRC**, [239 SCRA 518, December 28, 1994], the errant employee, Federico Nuez, was the company driver. He was ordered by a superior officer to drive some of the employees to the head office. However, he refused. Thus, he was required to explain why he should not be administratively dealt with for disobeying the order of an officer. In his written reply, Nuez said that he had a previous engagement, and that what was asked of him was not an emergency that warranted the charge of disobedience. Thereafter, the company vice president issued a Memorandum to Nuez terminating the latter's employment for insubordination. It must be noted that in this case, the notice served on the employee merely asked him to explain why he should not be administratively dealt with for his refusal to comply with a valid order of his superior. The notice did not state that the employee was being dismissed, but it was still deemed sufficient compliance with the notice required under the Implementing Rules.

Without a doubt, respondents in *Glaxo* deliberately disregarded or disobeyed a company policy. Their written explanations admitted their refusal to obey petitioner's directive to return the vehicles. Their justification of their refusal to obey the lawful orders of their employer did not militate against their obvious disobedience. Consistent with *San Miguel Corporation vs. Ubaldo* [supra], there was no necessity for an actual hearing. Under the circumstances, they were nonetheless given adequate opportunity to answer the charge, which in fact they did. In arriving at the decision to dismiss them, petitioner took into consideration the explanations they had offered.

The factual milieu in *Glaxo*, however, must be differentiated from **Loadstar vs. Mesano**, [408 SCRA 478, August 7, 2003]. In this case, the employee was not apprised of the particular acts for which his employment was terminated. He was dismissed immediately after he had submitted his written explanation to his employer. That the employee was able to present, bare as it was, a written explanation did not excuse the fact that there was a complete absence of the required notice. His explanations were futile, as he did not even know which particular acts or omissions should be explained. In the *Glaxo* case, respondents' explanations were in response to specific acts and grounds that had duly been stated with clarity.

Thus, a memorandum to an employee which does not state with particularity the acts and omission for which he is being charged does not comply with the first kind of notice preparatory to his dismissal.

In the same vein, a memorandum advising an employee of his dismissal but which does not "clearly" cite the reason for the dismissal does not comply with the second kind of notice required prior to dismissal. (*Bondoc vs. NLRC*, G. R. No. 103209, July 28, 1997, 276 SCRA 288).

18. When notice alone will not suffice.

In **Philippine National Bank vs. Cabansag**, [G. R. No. 157010, June 21, 2005], the employment contract between the parties stipulated, among others, thus:

“6. Termination of your employment with the Bank may be made by either party after notice of one (1) day in writing during probation, one month notice upon confirmation or the equivalent of one (1) day’s or month’s salary in lieu of notice.”

After probationary period, the employee was terminated by a mere notice, without citing any ground. The Supreme Court said that as a regular employee, respondent was entitled to all rights, benefits and privileges provided under our labor laws. One of her fundamental rights is that she may not be dismissed without due process of law. The twin requirements of notice and hearing constitute the essential elements of procedural due process, and neither of these elements can be eliminated without running afoul of the constitutional guarantee. In dismissing employees, the employer must furnish them the two written notices. The evidence in this case is crystal-clear. Respondent was not notified of the specific act or omission for which her dismissal was being sought. Neither was she given any chance to be heard, as required by law. At any rate, even if she were given the opportunity to be heard, she could not have defended herself effectively, for she knew no cause to answer to. All that petitioner tendered to respondent was a notice of her employment termination effective the very same day, together with the equivalent of a one-month pay. It has already been held that nothing in the law gives an employer the option to substitute the required prior notice and opportunity to be heard with the mere payment of 30 days’ salary.

19. Notice to explain must correctly and fully inform the employee of the charges against him.

The notice to the employee should embody the specific charges for which he is being asked to explain. An employee cannot be dismissed if the charges mentioned in the notice for which he was required to explain and for which he was heard, were different from the ones cited for his termination. There is here a deprivation of procedural due process. (*BPI Credit Corporation vs. NLRC*, G. R. No. 106027, July 25, 1994).

In the 2005 case of **Cruz vs. 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 violation happened. The notice was also couched in general terms that it only mentions the specific sections and rule numbers of the Red Book that was violated without defining what such violation was. A cursory reading of this notice likewise shows that it does 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.

In **Philippine Pizza, Inc. vs. Bungabong**, [G. R. No. 154315, May 9, 2005], petitioners violated respondent’s right to due process, particularly the requirement of first notice because the offense notice petitioners gave to respondent is insufficient since it did not comply with the requirement of the law that the first written notice must apprise the employee that his termination is being considered due to the acts stated in the notice. The first notice issued in this case merely stated that respondent is being charged of dispensing and drinking beer on December 5, 1997, around 11:30 to 11:45 p.m., and nothing more.

20. The employee must be dismissed based on the same grounds mentioned in the first notice.

The dismissal of an employee must be based on the same grounds cited in the first notice given to him to explain. If an employee is dismissed based on grounds different from those cited in said notice, he is deemed to have been deprived of procedural due process. For in this situation, he could not be expected to adequately defend himself as he was not fully or correctly informed of the charges against him which management intended to prove. It is less than fair for management to charge an employee with one offense and to dismiss him for having committed another offense with which he had not been charged and against which he was unable to adequately defend himself. (*Glaxo Wellcome Phils., Inc. vs. Nagkakaisang Empleyado ng Wellcome-DFA*, *supra*; *BPI Credit Corporation vs. NLRC*, *supra*).

In **Artemio Labor vs. NLRC**, [G. R. No. 110388, Sept. 14, 1995], the Supreme Court declared that there was no abandonment or commission of dishonest acts by the dismissed workers when the employer merely sent notices individually addressed to the workers on 6 September 1991, where it sought an explanation from them on their alleged absence without official leave or, in short, their abandonment, and warned them in the form of a reminder that such absence is a ground for separation or dismissal from the company. Nothing was mentioned therein about dishonesty or any other misconduct on the part of the petitioners.

If indeed, according to the Supreme Court, the petitioners were guilty of both abandonment and dishonesty or misconduct, then the company should have put them down in black and white. The letters *cum* notice cannot be considered to include dishonesty or misconduct. It would be a gross violation of the workers' right to due process to dismiss them for that cause of which they were not given notice or for a charge for which they were never given an opportunity to defend themselves. A dismissal must not only be for a valid or substantial cause; the employer must also observe the procedural aspect of due process in giving the employee notice and the opportunity to be heard to defend himself. (*See also Imperial Textile Mills, Inc. vs. NLRC*, 217 SCRA 237 [1993]; *San Miguel Corporation vs. NLRC*, 222 SCRA 818 [1993]).

21. Notice should be served at employee's last known address.

In case of termination, the notices shall be served on the employee's last known address. (*Section 2, Rule I, Book VI, Rules to Implement the Labor Code, as amended by Article III, Department Order No. 10, Series of 1997; Agabon vs. NLRC*, G.R. No. 158693, Nov. 17, 2004).

22. Notice posted in bulletin board, not sufficient.

The mere posting of the notice to terminate the employee's employment on the employees' bulletin board is not sufficient compliance with the statutory requirement. (*Shoppers Gain Supermart vs. NLRC*, G. R. No. 110731, July 26, 1996, 259 SCRA 411).

23. Notice in a newspaper, not sufficient.

In the 2005 case of **Caingat vs. NLRC**, [G. R. No. 154308, March 10, 2005], the respondent-employer denied it dismissed the complainant. In the position paper, it stated that "there is no evidence that respondents dismissed the complainant." On record, however, it was shown that on July 31, 1996, the following appeared in the *Philippine Daily Inquirer*:

"NOTICE TO THE PUBLIC

"This is to notify the public that as of June 20, 1996, MR. BERNARDINO A. CAINGAT is no longer connected with RS Night Hawk Security and Investigation Agency and with RS Maintenance and Services.

"All transactions with Mr. Caingat after June 20, 1996 are no longer honored by these offices." (Underscoring supplied)

The Supreme Court ruled that neither the public notice in the *Philippine Daily Inquirer*, a newspaper of general circulation, nor the demand letter could constitute substantial compliance. What the public notice did was to inform the public that petitioner was already separated as of June 20, 1996, the same day he was suspended. The order for petitioner to submit a written explanation under oath was just a formality. The termination was a *fait accompli*. The *pro-forma* notice made even more glaring management's intent to separate him from the companies' service.

24. Remedy if employee refused to receive notice - service by registered mail to last known address.

In the 2005 case of **Nueva Ecija Electric Cooperative [NEECO] II vs. NLRC**, [G. R. No. 157603, June 23, 2005], it was held that the allegation on the part of the petitioner-employer that the respondent-employee refused to receive the memorandum that is why it was not served to him is too self-serving a claim in the absence of any showing of the signature or initial of the proper serving officer. Moreover, petitioner could have easily remedied the situation by the expediency of sending the memorandum to private respondent by registered mail at his last

known address as usually contained in the Personal Data Sheet or any personal file containing his last known address.

25. How should answer be made in case of termination for just cause?

The worker may answer the allegations stated against him in the first notice within a reasonable period from receipt of such notice. The decision to dismiss must come only after the employee is given a reasonable period from receipt of the first notice within which to answer the charge and ample opportunity to be heard and defend himself with the assistance of a representative, if he so desires. This is in consonance with the express provision of the law on the protection to labor and the broader dictates of procedural due process. Non-compliance therewith is fatal because these requirements are conditions *sine qua non* before dismissal may be validly effected. (*Austria vs. Hon. NLRC, G. R. No. 124382, Aug. 16, 1999*).

The law mandates that every opportunity and assistance must be accorded to the employee by the management to enable him to prepare adequately for his defense. (*IBM Philippines, Inc. vs. NLRC, 305 SCRA 592 [1999]*).

The law does not specify what constitutes reasonable period within which an employee being cited administratively must submit his answer or explanation. The reasonableness of the period necessarily depends on the distinctive circumstances of each case.

For instance, in the case of **Asuncion vs. NLRC**, [G. R. No. 129329, July 31, 2001], the Supreme Court, considered the two-day period given to petitioner to explain and answer the charges against her as most unreasonable, considering that she was charged with several offenses and infractions (35 absences, 23 half-days and 108 tardiness), some of which were allegedly committed almost a year before, not to mention the fact that the charges leveled against her lacked particularity. Apart from chronic absenteeism and habitual tardiness, petitioner was also made to answer for loitering and wasting company time, getting salary of an absent employee without acknowledging or signing for it and disobedience and insubordination.

26. What is hearing requirement in termination for cause?

The essence of due process is simply *an opportunity to be heard*, or as applied to administrative proceedings, an opportunity to explain one's side or an opportunity to seek a reconsideration of the action or ruling complained of. A formal or trial-type hearing is not at all times and in all instances essential, as the due process requirements are satisfied where the parties are afforded fair and reasonable opportunity to explain their side of the controversy at hand. What is frowned upon is the absolute lack of notice and hearing. (*Valiao vs. Hon. CA, G. R. No. 146621, July 30, 2004; Cindy & Lynsy Garment vs. NLRC, 284 SCRA 38 [1998]*).

"Ample opportunity" means every kind of assistance that management must accord to the employee to enable him to prepare adequately for his defense including legal representation. (*IBM Philippines, Inc. vs. NLRC, G. R. No. 117221, April 13, 1999, 305 SCRA 592*).

Outright termination violates due process.

The employer should give an employee who committed an act considered lawful cause for his dismissal, the opportunity to explain or present his side. There should be no outright termination of his employment without due process. Otherwise, it will be a violation of his right to security of tenure and due process of law. (*Robusta Agro Marine Products, Inc. vs. Gorombalem, G. R. No. 80500, July 5, 1989*).

Bizarre case of employee illegally dismissed twice.

Benguet Corporation vs. NLRC and Felizardo A. Guianan, [G. R. No. 124166, November 16, 1999] presents an extreme case of illegal dismissal. The employee who had served the company for more than two decades was first dismissed on the basis of an anonymous letter. The employer investigated him 22 days after the first dismissal and was again served with a termination letter for the second time sometime later. The Supreme Court ruled that the composition of the fact-finding committee 22 days after the employee was first terminated was obviously an afterthought to give a semblance of compliance with the 30-day notice requirement

provided by law. It was merely a token gesture to cure the obviously defective earlier dismissal. Thus, his termination was tinged with bad faith.

When dismissal was already a foregone conclusion.

In **Philippine Pizza, Inc. vs. Bungabong**, [G. R. No. 154315, May 9, 2005], while there was just cause for the employee's dismissal, the records of the case, however, show that he was not afforded due process. He was able to submit his explanation denying that he stole beer from the company dispenser, but he was not given a fair and reasonable opportunity to confront his accusers and defend himself against the charge of theft. The termination letter was issued by the HRD Vice President on December 15, 1997, one day before respondent went to the HRD Office for the alleged investigation. Clearly then, the decision to terminate respondent which was made effective on December 19, 1997, was already final, even before respondent could present his side and refute the charges against him. Indeed, at that point, nothing that respondent could say or do would have changed the decision to dismiss him. Such failure by petitioners to give respondent the benefit of a hearing and an investigation before his termination constitutes an infringement of respondent's constitutional right to due process.

27. 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.

28. 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).

29. 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).

30. May the right against self-incrimination be invoked in administrative proceedings?

The Constitution provides:

“SECTION 17. No person shall be compelled to be a witness against himself.” (*Section 17, Article III [Bill of Rights], 1987 Constitution*).

May this constitutionally-guaranteed right, usually invoked in criminal cases, be validly invoked in administrative proceedings?

The answer is in the affirmative, if the hearing partakes of the nature of a criminal proceeding because of the nature of the penalty that may be imposed for the offense. (*Pascual*,

Jr. vs. Board of Medical Examiners, G. R. No. L-25018, May 16, 1969; *Cabal vs. Kapunan, Jr.*, G. R. No. L-19052, Dec. 29, 1962).

31. May the right to counsel be asserted in administrative proceedings?

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

32. May the right against unreasonable searches and seizures be invoked in administrative proceedings?

As applied to labor cases, the Supreme Court declared that it finds no reason to revise the doctrine laid down in **People vs. Marti**, [193 SCRA 57 (1991)], 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 vs. NLRC*, G. R. No. 113271, Oct. 16, 1997, 280 SCRA 735).

33. May the right to equal protection of the laws be asserted in administrative proceedings?

In the case of **Duncan Association of Detailman-PTGWO vs. Glaxo Welcome Philippines, Inc.**, [G. R. No. 162994, September 17, 2004], where the employer prohibited its employees against personal or marital relationships with employees of competitor companies, it was held that such prohibition is reasonable under the circumstances because relationships of that nature might compromise the interests of the company and the same does not violate the equal protection clause in the Constitution. 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. 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. Obviously, however, this exception is not present in this case. Significantly, the company actually enforced the policy after repeated requests to the employee to comply with the policy. 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 Glaxo 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 employee and the company that may arise out of such relationships. (*Ibid.*).

34. 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]*)

35. 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**.

36. 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.

37. What is reinstatement?

a. Reinstatement under Articles 279 and 223 of the Labor Code, distinguished.

Reinstatement under Article 279 presupposes that the judgment has already become final and executory. Consequently, there is nothing left to be done except the execution thereof. Reinstatement under Article 223 of the Labor Code, however, may be availed of as soon as the Labor Arbiter renders a judgment declaring that the dismissal of the employee is illegal and ordering said reinstatement. It may be availed of even pending appeal.

- *In case of illegal dismissal* - The consequence of illegality thereof is reinstatement without loss of seniority rights and with full backwages (*inclusive* of allowances and other benefits computed from the time his compensation was withheld up to the time of his actual reinstatement).

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. (*See also General Baptist Bible College vs. NLRC, 219 SCRA 549 [1993]*).

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.

A different rule, however, applies in a case where reinstatement was not prayed for in the complaint but the payment of separation pay in lieu thereof. As pronounced in **Dela Cruz vs. NLRC**, [G. R. No. 121288, Nov. 20, 1998, 299 SCRA 1, 13], the petitioner therein would have been entitled to reinstatement as a consequence of his illegal dismissal from employment. However, by expressly asking for separation pay, he is deemed to have opted for separation pay in lieu of reinstatement. This is the tenor of the holding in *Reformist Union vs. NLRC*, [266 SCRA 713, 728-729 (1997)] to the effect that separation pay is awarded as an alternative to reinstatement.

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.

While reinstatement is a relief mandated in illegal dismissal cases, the same cannot be awarded in instances where it is no longer feasible as in a case where private respondent is already over-aged. In such a case, the proper remedy is to award separation pay in lieu of

reinstatement.. (*Benguet Corporation vs. NLRC and Felizardo A. Guianan*, G. R. No. 124166, Nov. 16, 1999; *Espejo vs. NLRC*, G. R. No. 112678, March 29, 1996, 255 SCRA 430, 435).

Reinstatement when position no longer exists.

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 vs. Castro*, G. R. No. 70361, Jan. 30, 1986).

However, as held in **Tanduay Distillery Labor Union vs. NLRC**, [G. R. No. 73352, Dec. 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, private respondent-employer has to pay, in lieu of reinstatement and in addition to the three-year back salaries, separation pay equivalent to at least one (1) month pay for every year of service. (*See also RCPI vs. NLRC*, 210 SCRA 222; *Torillo vs. Leogardo, Jr.*, 197 SCRA 471).

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 by the court. (*Electruck Asia, Inc. vs. Meris*, G. R. No. 147031, July 27, 2004).
2. Fire which gutted the hotel and resulted in its total destruction. (*Bagong Bayan Corporation vs. 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; Philtread Tire & Rubber Corporation vs. 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 vs. 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 vs. Carnation Philippines*, G. R. No. 70615, Oct. 28, 1986).

38. What is the distinction between reinstatement and backwages?

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.

39. What is the doctrine of "Strained Relations"?

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. (*Cabatulan vs. Buat*, G. R. No. 147142, Feb. 14, 2005).

a. Strained relations must be raised before the Labor Arbiter.

Strained relations must be demonstrated as a fact. (*Paguio Transport Corporation vs. NLRC*, G. R. No. 119500, Aug. 28, 1998).

In **Quijano vs. Mercury Drug Corporation**, [292 SCRA 109 (1998)], the Supreme Court ruled that the existence of strained relations is a factual issue which must be raised before the Labor Arbiter for the proper reception of evidence. If the issue of strained relations is raised only in the appeal from the Labor Arbiter's decision, the same may not be allowed. (*Sagum vs. CA*, G. R. No. 158759, May 26, 2005; *PLDT vs. Tolentino*, G. R. No. 143171, Sept. 21, 2004).

b. Litigation, by itself, does not give rise to strained relations

that may justify non-reinstatement.

As a rule, the filing of the complaint for illegal dismissal does not by itself justify the invocation of this doctrine. (*Paguio Transport Corporation vs. NLRC, supra*).

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*).

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

This doctrine should 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. vs. Daniel, G. R. No. 156893, June 21, 2005; Pheschem Industrial Corporation vs. Moldez, G. R. No. 161158, May 9, 2005*).

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

It appears from the Supreme Court rulings involving the doctrine of "strained relations" that the common denominator which bars reinstatement is the nature of the position of the employee. Hence, this doctrine should not be applied to a situation where the employee has no say in the operation of the employer's business.

As held in the *Quijano vs. Mercury Drug* case [*supra*]:

"To protect labor's security of tenure, we emphasize that the doctrine of strained relations should be strictly applied so as not to deprive an illegally dismissed employee of his right to reinstatement. Every labor dispute almost always results in strained relations and the phrase cannot be given an overarching interpretation, otherwise an unjustly dismissed employee can never be reinstated."

In the same breadth, this doctrine was not applied in the 2002 case of **Abalos vs. Philex Mining Corporation**, [G. R. No. 140374, November 27, 2002] to deprive the workers of their right to reinstatement. Here, the complainants are mere rank-and-file workers consisting of cooks, miners, helpers and mechanics of the respondent company.

If the nature of the position, therefore, requires the trust and confidence of the employer upon the employee occupying it as would make reinstatement adversely affect the efficiency, productivity and performance of the latter, then, strained relations will justify non-reinstatement. Absent this circumstance, whatever antagonism occasioned by the litigation should not be taken as a bar to reinstatement. (*Maranaw Hotels and Resorts Corp. vs. CA, 215 SCRA 501, 507 [1992]*).

Thus, in **Acesite Corporation vs. NLRC, G. R. No. 152308** and **Gonzales vs. Acesite [Philippines] Hotel Corporation**, [G. R. No. 152321, Jan. 26, 2005], where 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," the Supreme Court ruled that such position is one of trust and confidence, he being in charge of the over-all security of said hotel. Hence, in view of the strained relations between him and management, reinstatement is no longer possible. In lieu thereof, the hotel is liable to pay separation pay of one (1) month for every year of service.

d. Non-settlement of dispute after long period of time does not indicate strained relations.

Long period of time that elapsed without any settlement of the case does not, by itself, indicate the existence of strained relations. In *Palmeria vs. NLRC*, [G. R. No. 113290-91, Aug. 3, 1995], it was held that the fact that for six years, the complainant and his employer failed to settle their dispute amicably does not prove that the relationship between them is already too strained as to be beyond redemption.

e. Refusal to be reinstated, indicates strained relations.

The refusal of the employees to be reinstated is indicative of strained relations. (*Sentinel Security Agency, Inc. vs. NLRC*, G. R. No. 122468, Sept. 3, 1998).

f. Criminal prosecution indicates strained relations.

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

As held in **Cabatulan vs. Buat**, [G. R. No. 147142, Feb. 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 than the categorical fact that antagonism already caused a severe strain in the relationship between them.

g. Non-reinstatement of a managerial employee; exception.

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. vs. NLRC**, [G. R. Nos. 105758-59, Feb. 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 her reinstatement with facility. But she 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. (*See also Asiaworld Publishing House, Inc. vs. Ople*, G. R. No. L-56398, July 23, 1987).

But if the alleged strained relations between a managerial employee and his employer was not adequately proven, reinstatement should be ordered. Hence, in **Philippine Long Distance Telephone Company vs. 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. Thus, absent any competent evidence in the records to support the employer’s assertion that a peaceful working relationship with the employee is no longer possible, the latter must be reinstated.

h. Reinstatement is proper if strained relations existed with former owner but not with new owner.

In the same case of **PLDT** [supra], the alleged strained relations can no longer be invoked since there has been a change in the ownership and control of the company. While strained relations may have existed between the employee and the former owner of the company, the same do not exist now between him and the new owner. The new owner, in fact, has absolutely nothing to do with the controversy involved in the case. This fact makes reinstatement feasible.

i. Length of time may prevent reinstatement.

In addition to existence of strained relations, the Supreme Court, in the case of **EDI Staff Builders International, Inc. vs. Magsino**, [G. R. No. 139430, June 20, 2001], considered as additional ground for ordering payment of separation pay in lieu of reinstatement, the length of time respondent-employee has been out of petitioners’ employ, thereby making such award of separation pay appropriate. (*See also Jardine Davies, Inc. vs. NLRC*, 311 SCRA 289 [1999]).

40. *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.

41. *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. A reading of Article 279 in relation to Article 282 of the Labor Code reveals that an employee who is dismissed for cause after appropriate proceedings in compliance with due process requirements is not entitled to an award of 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*).

Consequently, if the employee is dismissed due to some grounds other than serious misconduct, say loss of trust and confidence, separation pay may be awarded to the employee. There had been jurisprudence granting separation pay for dismissals based on this ground. (*Camua vs. NLRC, 344 Phil. 460, 466, Sept. 12, 1997*).

Moreover, if the dismissal does not fall under the *first* qualification (serious misconduct), the next query shifts to whether the alleged wrongful act was reflective of the moral character of the employee. If the answer is in the negative, separation pay may be awarded to him. (*See also PCIB vs. Abad, supra*).

Incidentally, in San Miguel, the High Court reversed the decision and resolution of the Court of Appeals insofar as it decreed the payment of retirement benefits or separation pay to respondent but, in the light of the plight of respondent who has spent the best years of his useful life with petitioner, the High Court "commiserate(d) with him but it can do no more than to appeal to an act of compassion by SMC and to ask it to see its way clear to affording some form of financial assistance to respondent who has served it for almost three decades with no previous blemished record." While the Supreme Court did not mention any amount of such financial assistance, it reiterated its wish in the decretal portion of the decision when it said: "It is hoped, however, that petitioner will heed the Court's call for compassion." Indeed, the sympathy of the Supreme Court towards the workingmen is best exemplified in this case.

42. What is the amount of separation pay in lieu of reinstatement?

Separation pay is only proper to substitute for reinstatement (not for backwages)].

Separation pay, in lieu of reinstatement, shall include the amount equivalent at least to one (1) month salary or to 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 including *regular* allowances. If not regular, not included.

43. 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.”

When backwages should only be for one (1) year.

In **Procter and Gamble Philippines vs. Bondesto**, [G. R. No. 139847, March 5, 2004], the Supreme Court, while affirming the illegality of the dismissal of the employee, did not, however, grant full backwages. It agreed with the findings of the NLRC and the Court of Appeals that in view of the respondent-employee's absences that were not wholly justified, he should be entitled to backwages which should be limited to one (1) year.

When backwages should not only be for one (1) year.

In **Viernes vs. NLRC**, [G. R. No. 108405, April 4, 2003], the Supreme Court, following the mandate of Article 279 on the payment of full backwages to an illegally dismissed employee, considered it patently erroneous, tantamount to grave abuse of discretion on the part of the NLRC, in limiting to one (1) year the backwages awarded to petitioners.

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.

This rule holds true even if the employer is found guilty of unfair labor practice in dismissing the employee. As held in the case of *Pizza Inn/Consolidated Foods Corporation vs. NLRC*, [G.R. No. L-74531, 28 June 1988, 162 SCRA 773], an employer found guilty of unfair labor practice in dismissing his employee may not be ordered so to pay backwages beyond the date of closure of business where such closure was due to legitimate business reasons and not merely an attempt to defeat the order of reinstatement.

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."

Period of suspension, deductible from backwages.

In **Metro Transit Organization, Inc. vs. NLRC**, [G. R. No. 119724, May 31, 1999], the employee's dismissal on the ground of abandonment was declared illegal but he was found guilty of absence without official leave (AWOL) for which he was ordered suspended for three (3) months. In reckoning the backwages, the Supreme Court directed the payment thereof from the time of his illegal dismissal on March 29, 1990 up to the time of his actual reinstatement, *less* backwages for three (3) months corresponding to the period of his suspension for the period March 29, 1990 to June 26, 1990, inclusive, and including allowances and other benefits or their monetary equivalent. No deductions therefrom were allowed for the earnings derived elsewhere by the employee during the period of his illegal dismissal.

In **Acesite Corporation vs. NLRC**, [G. R. No. 152308, Jan. 26, 2005], the computation of backwages was made subject to deduction for the three (3) days when the employee was under suspension.

Backwages should include period of preventive suspension.

In the 2002 case of **Buhain vs. The Hon. CA**, [G. R. No. 143709, July 2, 2002], the Supreme Court ruled that the Court of Appeals committed a reversible error in merely fixing the backwages from the time he was placed under preventive suspension up to the time he was illegally dismissed. This period covers only a total of eight days, from May 13, 1996 to May 21, 1996. Such formula runs counter to the letter and spirit of the Labor Code. In conformity with Article 279, petitioner should be given full backwages and all the benefits accruing to him from the first day of his preventive suspension, May 13, 1996, up to the date of the finality of this judgment, in light of the Voluntary Arbitrator's conclusion that reinstatement is no longer possible.

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.

Full backwages, in case of refusal of employer to reinstate.

The unjustified refusal of the employer to reinstate an illegally dismissed employee entitles him to payment of his salaries effective from the time the employer failed to reinstate him despite the issuance of a writ of execution. (*Medina vs. Consolidated Broadcasting System, G. R. Nos. 99054-56, May 28, 1993, 222 SCRA 707*).

Therefore, the payment of backwages by petitioner to respondent employee for the period he was not reinstated despite the *alias* writ of execution up to the time he opted for separation pay in lieu of reinstatement is equitable and justified under the law. (*Philippine Rabbit Bus Lines, Inc. vs. NLRC, G. R. No. 122078, April 21, 1999, 306 SCRA 155*).

44. What are the distinctions between separation pay and backwages?

Separation pay and backwages are two (2) different things. Payment of separation pay is **not inconsistent** with payment of backwages.

The two may be distinguished as follows:

1. Separation pay is paid when reinstatement is not possible; while backwages is paid for the compensation which otherwise the employee should have earned had he not been illegally dismissed.
2. The former is computed normally on the basis of the employee's length of service; while the latter is normally computed until the employee is reinstated, or when reinstatement is no longer possible, until the finality of the decision.
3. The former is paid as a wherewithal during the period that an employee is looking for another employment; while the latter is 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 is restoration of the past income lost.
5. Separation pay cannot be paid in lieu of backwages.

45. 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.

46. Is legal interest allowed?

In a 1998 case, the dismissed employee was awarded a separation pay of 1/2 month salary for every year of service inclusive of allowances, if any, with twelve percent (12%) interest per annum from the date of promulgation of the decision until fully paid. (*Magos vs. NLRC, et al., G. R. No. 123421, December 28, 1998*).

In another 1998 case, *backwages* were made subject to interest of 6% per annum for the period from the date the employee was illegally dismissed from service until the decision becomes final and executory, after which time, the interest rate shall be 12% per annum until the amounts due are actually paid or satisfied; and *separation pay* at the rate of one (1) month's pay for every year of service computed from the date he was first employed until the finality of the decision, with interest at 12% per annum from the date of promulgation of the decision until actually paid. (*Dela Cruz vs. NLRC, et al., G. R. No. 121288, November 20, 1998, 299 SCRA 1, 15*).

In a 1997 case, the Supreme Court has imposed interest at the legal rate on the full backwages awarded to an illegally dismissed employee computed from the time she was temporarily laid off until she is fully paid her separation pay. (*De la Cruz vs. NLRC, et al., G. R. No. 119536, February 17, 1997*).

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

a. 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*).

As early as the 1995 case of **Coyoca vs. NLRC**, [G.R. No. 113658, March 31, 1995, 243 SCRA 190 (1995)], the Supreme Court had already declared that a seafarer, not being a regular employee, is not entitled to separation or termination pay. (See *Ravago vs. Esso Eastern Marine, Ltd.*, G. R. No. 158324, March 14, 2005).

b. Monetary awards to illegally dismissed OFWs, how reckoned.

Section 10 of Republic Act No. 8042 (*Migrant Workers and Overseas Filipinos Act of 1995*) 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)

In **Skippers Pacific, Inc. vs. Mira**, [392 SCRA 371 (2002)], it was held that an overseas Filipino worker who is illegally terminated shall be entitled to his salary equivalent to the unexpired portion of his employment contract if such contract is *less than one year*. However, if his contract is for a period of at least one year, he is entitled to receive his salaries equivalent to the unexpired portion of his contract, or three months’ salary for every year of the unexpired term, whichever is lower. (*Phil. Employ Services and Resources, Inc. vs. Paramio*, G. R. No. 144786, April 15, 2004).

In the earlier case of **Marsaman Manning Agency, Inc. vs. NLRC**, [313 SCRA 88 (1999)], the Supreme Court explained when an OFW is entitled to the three (3) months salary mentioned in the aforementioned Section 10 of R. A. No. 8042. It was ruled therein that a plain reading of said provision clearly reveals that the choice of which amount to award an illegally dismissed overseas contract worker, *i.e.*, whether his salaries for the unexpired portion of his employment contract or three (3) months salary for every year of the unexpired term, whichever is less, comes into play only when the employment contract concerned has a term of at least one (1) year or more. This is evident from the words “for every year of the unexpired term” which follows the words “salaries xxx for three months.” To follow petitioners’ thinking that private respondent is entitled to three (3) months salary only simply because it is the lesser amount is to completely disregard and overlook some words used in the statute while giving effect to some. This is contrary to the well-established rule in legal hermeneutics that interpreting a statute, care should be taken that every part or word thereof be given effect since the lawmaking body is presumed to know the meaning of the words employed in the statute and to have used them advisedly. *Ut res magis valeat quam pereat*. (See also *Phil. Employ Services and Resources, Inc. vs. Paramio*, G. R. No. 144786, April 15, 2004).

OFW who worked for only 21 days of her 1-year contract.

Noteworthy is the holding of the Supreme Court in **Olarte vs. Nayona**, [G. R. No. 148407, November 12, 2003], which involves a one-year contract and yet, it was ruled therein that the 3-month salary principle should be applied thereto, the OFW having worked for only 21 days of the 1-year period. To reiterate, said the High Court, a plain reading of the provision of Section 10 of Republic Act No. 8042 [supra] clearly reveals that the choice of which amount to award an illegally dismissed overseas contract worker comes into play only when the employment contract has a term of at least one (1) year or more. Consequently, an illegally dismissed overseas Filipino worker whose actual employment was only for twenty-one (21) days of her 1-year contract, is entitled only to an amount corresponding to her three (3) months salary, which is obviously less than her salaries for the unexpired portion of her one-year employment contract.

OFW who worked for only a month of his contract for 1 year, 10 months and 28 days.

As held in **Athenna International Manpower Services, Inc. vs. Villanos**, [G. R. No. 151303, April 15, 2005], for the computation of the lump-sum salary due an illegally dismissed overseas employee, there are two clauses as points of reckoning: first is the cumulative salary for

the unexpired portion of his employment; and the other is the grant of three months salary for every year of the unexpired term, whichever is lesser.

The OFW in *Athena* was contracted to render work in Taiwan for one year, ten months and twenty-eight days. He was, however, terminated after only a month of service. Consequently, since respondent was dismissed after only one month of service, the unexpired portion of his contract is admittedly one year, nine months and twenty-eight days. But the applicable clause is not the first but the second: three months salary for every year of the unexpired term, as the lesser amount, hence it is what is due the respondent.

Note that the fraction of nine months and twenty-eight days is considered as one whole year following the Labor Code. Thus, respondent's lump-sum salary should be computed as follows:

$$\begin{aligned} 3 \text{ months} \times 2 \text{ (years)} &= 6 \text{ months worth of salary} \\ 6 \text{ months} \times (\text{NT\$}) 15,840 &= \text{NT\$}95,040, \text{ subject to proper conversion} \\ &\text{to Philippine currency by Labor Arbiter Cresencio Iniego.} \end{aligned}$$

OFW's monetary awards include reimbursement of placement fee.

In **Phil. Employ Services and Resources, Inc. vs. Paramio**, [G. R. No. 144786, April 15, 2004], the Supreme Court, in addition to the monetary award, had granted full reimbursement of the placement fee with 12% interest per annum.

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

Likewise, in *Athena* [supra], 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*.

Reimbursement of repatriation expenses such as return airfare.

The case of **Sevillana vs. I.T. [International] Corp.**, [G. R. No. 99047, April 16, 2001], allowed the refund for the repatriation plane ticket of the OFW. This was by reason of the illegality of his dismissal.

Award of backwages and separation pay to OFWs, upheld.

In the case of **ATCI Overseas Corporation vs. CA**, [G. R. No. 143949, August 9, 2001], where the two (2) private respondent-OFWs were declared as regular employees, the Supreme Court awarded them backwages and separation pay in lieu of reinstatement. The High Court ruled:

“In order to give substance to the constitutional right of labor to security of tenure, Article 279 provides that the illegally dismissed employee shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full backwages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement.

“The award of backwages is intended to restore to the employee the earnings which he lost due to his illegal dismissal. The POEA held that the backwages to be awarded to private respondents should be computed from the time they were illegally dismissed until the expiration of their contract of employment, or from 17 October 1991 to 19 August 1993. We concur for this is the amount which private respondents would have received had they not been unlawfully dismissed.

“As to the second remedy granted by Article 279, nowhere in the records does it appear that private respondents desire to be reinstated to their former employment. But more significantly, any order of reinstatement issued by this Court will be difficult for private respondents to enforce against the Ministry of Public Health of Kuwait. Therefore, in lieu of reinstatement, private respondents are entitled to separation pay. The illegally dismissed employee is granted separation pay in order to provide him with ‘the wherewithal during the period that he is looking for another employment.’ Prevailing jurisprudence dictates that the employee be given one month pay for every year of service, as an alternative to reinstatement. Considering that private respondents herein have only worked for two months, they are entitled to a separation pay equivalent to one-sixth of their monthly salary.”

Entitlement to moral and exemplary damages and attorney’s fees.

In the same 2005 case of *Athena* [supra], the High Tribunal ruled that because of the breach of contract and bad faith alleged against the employer and the petitioner recruitment agency, the award of ₱50,000 in moral damages and ₱50,000 as exemplary damages, in addition to attorney’s fees of ten percent (10%) of the aggregate monetary awards, must be sustained.

Likewise, in the case of *ATCI Overseas* [supra], the award of attorney’s fees equivalent to ten percent (10%) of the total award was held legally and morally justified as the OFWs were compelled to litigate and thus incur expenses to protect their rights and interests.

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*).

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

a. 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*).

Thus, it was held in **Malayang Samahan ng mga Manggagawa sa M. Greenfield [MSMG-UWP] vs. Ramos**, [G. R. No. 113907, April 20, 2001]:

“Petitioners’ claim that the jobs intended for the respondent company’s regular employees were diverted to its satellite companies where the respondent company officers are holding key positions is not substantiated and was raised for the first time in this motion for reconsideration. Even assuming that the respondent company officials are also officers and incorporators of the satellite companies, such circumstance does not in itself amount to fraud. The documents attached to petitioners’ motion for reconsideration show that these satellite companies were established prior to the filing of petitioners’ complaint against private respondents with the Department of Labor and Employment on September 6, 1989 and that these corporations have different sets of incorporators aside from the respondent officers and are holding their principal offices at different locations. Substantial identity of incorporators between respondent company and these satellite companies does not necessarily imply fraud. (*Citing Del Rosario vs. NLRC, 187 SCRA 777*). In such a case, respondent company’s corporate personality remains inviolable.”

In **Acesite Corporation vs. NLRC**, [G. R. No. 152308, Jan. 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.

b. 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.

c. 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*).

d. 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*).

e. 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.

f. 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.

g. 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

REGULAR EMPLOYMENT

49. *What are the kinds of employment?*

1. “*Regular employment*” where, notwithstanding any written or oral agreement between the employer and the employee to the contrary:

- a. the employee has been engaged to perform activities which *are usually necessary or desirable in the usual business or trade of the employer*.
- b. 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. 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*” which is not in the nature of a regular, project or seasonal employment as these kinds of employment are defined under Article 280 of the Labor Code. 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; provided, that any employee who has rendered at least one 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.

50. When does a casual employee become a regular employee?

- a. ***Casual employee becomes regular after one year of service by operation of law.***

The status of regular employment attaches to the casual worker on the day immediately after the end of the first year of service. (*Kay Products, Inc. vs. CA, G. R. No. 162472, July 28, 2005*).

- b. ***Repeated rehiring, effect.***

If the employee has been performing the job for at least one 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 business. Hence, the employment is also considered regular but only with respect to such activity and while such activity exists. (*Tan vs. Lagrama, G. R. No. 151228, Aug. 15, 2002*).

51. What is the concept of regular and casual employment?

Once it is established that the employees are regular under the first paragraph of Article 280 (*regularity of employment by nature of work*), there is no more need to dwell further on the question of whether or not they had rendered one (1) year of service (*regularity of employment by period of service*) under the second paragraph thereof which applies only to casual employees.

52. When may a project employee become regular employee?

A project employee, according to *Maraguinot, Jr. vs. NLRC*, [284 SCRA 539, 556 (1998)], 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. (*See also Imbuido vs. NLRC, G. R. No. 114734, March 31, 2000*).

In **Chua vs. Court of Appeals**, [G. R. No. 125837, October 6, 2004], the petitioner-employer insisted that the employees were project employees. The facts, however, show that as masons, carpenters and fine graders in petitioner’s various construction projects, they performed work which was usually necessary and desirable to petitioner’s business which involves construction of roads and bridges. As held in **Violeta vs. NLRC**, [345 Phil. 762 (1997)], to be exempted from the presumption of regularity of employment, the agreement between a project employee and his employer must strictly conform to the requirements and conditions under Article 280 of the Labor Code. It is not enough that an employee is hired for a specific project or phase of work. There must also be a determination of, or a clear agreement on, the completion or termination of the project at the time the employee was engaged if the objectives of Article 280 are to be achieved.

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 exceptions mentioned therein following the general description of regular employees refer to either *project* or *seasonal* employees. (*Magcalas vs. NLRC, G. R. No. 100333, March 13, 1997, 269 SCRA 453, 468*).

Project employment is akin to seasonal employment.

The term “*project employee*” has also been equated to seasonal employee where the work or service to be performed is seasonal in nature and the employment is for the duration of the season. (*Mercado vs. NLRC, G. R. No. 79869, Sept. 5, 1991, 201 SCRA 332*).

Like regular seasonal employees, the employment of project employees is not severed but merely suspended after the completion of the project. The employees are, strictly speaking, not separated from service but merely on leave of absence without pay until they are reemployed in another project. (*Maraguinot, Jr. vs. NLRC, G. R. No. 120969, Jan. 22, 1998*).

Moreover, in the construction industry, the employees of a particular project are not separated from work at the same time. Some phases of the project are completed ahead of others. For this reason, the completion of a phase of the project is considered the completion of the project for an employee employed in such phase. Meanwhile, those employed in a particular phase of a construction project are also not separated at the same time. Normally, less and less employees are required as the phase draws closer to completion.

Upon completion of the project or a phase thereof, the project employee may be re-hired for another undertaking provided, however, that such rehiring conforms with the provisions of law and *Department Order No. 19, Series of 1993*. In such a case, the last day of service with the employer in the preceding project should be indicated in the employment agreement. (*Section 2.3.[a] and [b], Department Order No. 19, Series of 1993*).

Length of service, not determinant of regularity of employment.

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. (*Raycor Aircontrol Systems, Inc. vs. NLRC, G. R. No. 114290, Sept. 9, 1996*).

In **D.M. Consunji, Inc. vs. NLRC**, [348 SCRA 441, 447, December 18, 2000], citing *Rada vs. NLRC*, [205 SCRA 69, January 9, 1992], the Supreme Court ruled that “the length of service of a project employee is not the controlling test of employment tenure but whether or not ‘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.’”

In **Cioco vs. C. E. Construction Corporation**, [G. R. No. 156748, Sept. 8, 2004], it was emphasized that the fact that the workers have been employed with the company for several years on various projects, the longest being nine (9) years, did not automatically make them regular employees considering that the definition of regular employment in Article 280 of the Labor Code, makes specific exception with respect to project employment. The re-hiring of petitioners on a project-to-project basis did not confer upon them regular employment status. The practice was dictated by the practical consideration that experienced construction workers are more preferred. It did not change their status as project employees. (*See also Millares vs. NLRC*, 385 SCRA 306 [2002]).

The same holding was made in **Filipinas Pre-Fabricated Building Systems [Filsystems], Inc. vs. Puente**, [G. R. No. 153832, March 18, 2005] where the employee involved was employed with the company for ten (10) years in *various* projects. The Supreme Court said that such length of time did not *ipso facto* make him a regular employee or change his status as a project employee.

When length of service of project employee indicates regularity of employment.

Where the employment of project employees, however, is extended long after the supposed project had been finished, the employees are removed from the scope of project employees and they shall 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. (*Phesco, Inc. vs. NLRC*, G. R. Nos. 104444-49, Dec. 27, 1994).

For while length of time may not be a controlling test for project employment, it can be a strong factor in determining whether the employee was hired for a specific undertaking or in fact tasked to perform functions which are vital, necessary and indispensable to the usual business or trade of the employer as when 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 re-hired due to the demands of the employer’s business and were re-engaged for many more projects without interruption. (*Tomas Lao Construction, vs. NLRC*, G. R. No. 116781, Sept. 5, 1997).

Thus, in **Integrated Contractor and Plumbing Works, Inc. vs. NLRC**, [G. R. No. 152427, August 9, 2005], private respondent had been a project employee several times over. Consequently, his employment was held to have ceased to be coterminous with specific projects when he was repeatedly re-hired due to the demands of petitioner’s business. Where from the circumstances it is apparent that periods have been imposed to preclude the acquisition of tenorial security by the employee, they should be struck down as contrary to public policy, morals, good customs or public order.

Termination of employment of project and regular employees, distinguished.

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

Regular employees, in contrast, are legally entitled to remain in the service of their employer until that service is terminated by one or another of the recognized modes of termination of service under the Labor Code. (*Magcalas vs. NLRC, supra; ALU-TUCP vs. NLRC*, 234 SCRA 678).

Notice of termination, not required; report to DOLE necessary.

No prior notice of termination is required if the termination is brought about by completion of the contract or phase thereof for which the worker has been engaged. This is

because completion of the work or project automatically terminates the employment. (*Cioco vs. C. E. Construction Corporation*, G. R. No. 156748, Sept. 8, 2004).

Being project employees whose nature of employment they were fully informed about at the time of their engagement, their employment legally ends upon completion of said project. The termination of their employment could not be regarded as illegal dismissal. (*Association of Trade Unions [ATU] vs. Abella*, G. R. No. 100518, Jan. 24, 2000).

Policy Instructions No. 20 required the employer-company to report to the nearest Public Employment Office the fact of termination of project employees as a result of the completion of the project or any phase thereof, in which one is employed. *Department Order No. 19*, [April 1, 1993] which superseded said Policy Instructions, did not eradicate the notice requirement but, instead, enshrined it as one of the “indicators” that a worker is a project employee. (*Salinas vs. NLRC*, G. R. No. 114671, Nov. 24, 1999).

Accordingly, instead of the notice of termination to the affected project employees upon completion of the project, the law merely requires that the employer should render a report to the DOLE on the termination of the employment. (*Cioco vs. C. E. Construction Corporation*, G. R. No. 156748, Sept. 8, 2004).

Legal consequences of termination of project employment.

The legal effects of termination of project employees is best exemplified by the 2005 case of **Filipinas Pre-Fabricated Building Systems [Filsystems], Inc. vs. Puente**, [G. R. No. 153832, March 18, 2005]. Here, petitioners claim that respondent-employee’s services were terminated due to the completion of the project. There is no allegation or proof, however, that the World Finance Plaza project - or the phase of work therein to which respondent had been assigned - was already completed by October 1, 1999, the date when he was dismissed. The inescapable presumption is that his services were terminated for no valid cause *prior* to the expiration of the period of his employment; hence, the termination was illegal. Reinstatement with full back wages, inclusive of allowances and other benefits or their monetary equivalents - computed from the date of his dismissal until his reinstatement - is thus in order.

However, if indeed the World Finance Plaza project has already been completed during the pendency of this suit, then respondent - being a project employee - can no longer be reinstated. Instead, he shall be entitled to the payment of his salary and other benefits corresponding to the unexpired portion of his employment, specifically from the time of the termination of his employment on October 1, 1999, until the date of the completion of the World Finance Plaza project.

53. May OFWs acquire regularity of employment?

No, they can never become regular employees because their employment contract is for a fixed term. (*Millares, et al. vs. NLRC*, G. R. No. 110524, July 29, 2002).

That overseas Filipino workers cannot acquire regularity of employment was reiterated in the 2004 case of **Gu-Miro vs. Adorable**, [G. R. No. 160952, August 20, 2004] and in the 2005 case of **Ravago vs. Esso Eastern Marine, Ltd.**, [G. R. No. 158324, March 14, 2005].

And as held in **Pentagon International Shipping, Inc. vs. Adelantar**, [G. R. No. 157373, July 27, 2004], even if the contract provides for an unlimited period, the same is not valid as it contravenes the explicit provision of the said POEA Rules and Regulations on fixed period employment.

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, as clearly expounded in the above-mentioned cases. The exigencies of their work necessitates that they be employed on a contractual basis. (*Gu-Miro vs. Adorable, supra*).

In the same *Gu-Miro* case [supra], it was stated that even with the continued re-hiring by the company of the OFW to serve as Radio Officer on board the employer's different vessels, this 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* case [supra] rendered on July 29, 2002. [Note: in the first decision in the same case (March 14, 2000), the Supreme Court ruled that OFWs can become regular employees]. 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.

The contracts of OFWs cease upon expiration thereof.

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

Hiring of seaman for overseas employment but assigning him to local vessel, effect.

In **OSM Shipping Philippines, Inc. vs. 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.

54. What is regular seasonal employment? Is it valid?

Yes. The validity of regular seasonal employment has been affirmed by the Supreme Court in a plethora of cases.

Seasonal workers who are called to work from time to time and are temporarily laid off during off-season are **not** separated from the service in said period, but are merely considered **on leave** until re-employed. (*Hacienda Fatima vs. National Federation of Sugarcane Workers-Food and General Trade* (G. R. No. 149440, January 28, 2003))

The 2003 case of **Hacienda Fatima vs. National Federation of Sugarcane Workers - Food and General Trade**, [G. R. No. 149440, January 28, 2003], reiterated this rule. For respondent-workers to be excluded from those classified as regular employees, it is not enough that they perform work or services that are seasonal in nature. They must have also been employed **only for the duration of one season**. If the evidence proves the existence of the *first*, but not of the *second*, condition, then, the workers have become regular employees. The fact that the employees repeatedly worked as sugarcane workers for petitioner-employer for several years is not denied by the petitioners. Evidently, petitioners employed respondents for more than one season. Therefore, the general rule of regular employment is applicable. This is so because although the employer had shown that the employees performed work that was seasonal in nature, the former failed to prove that the latter worked only for the duration of one particular season. In fact, the employer does not deny that the workers have served for several years already. Hence, they are regular - not seasonal - employees. (See also *Hacienda Bino/Hortencia Starke, Inc./Hortencia L. Starke vs. Cuenca*, G. R. No. 150478, April 15, 2005; *Benares vs. Pancho*, [G. R. No. 151827, April 29, 2005].)

Failure to re-hire regular seasonal employee for next season amounts to illegal dismissal.

The refusal of the employer to furnish work to regular seasonal workers would amount to 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. (*Hacienda Fatima vs. National Federation of Sugarcane Workers – Food and General Trade, supra*).

55. What are the criteria for fixed contracts of employment?

In the case of **Philippine National Oil Company-Energy Development Corporation vs. NLRC**, [G. R. No. 97747, March 31, 1993], the Supreme Court set 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. (*Philips Semiconductors [Phils.], Inc. vs. Fadriquela*, G. R. No. 141717, April 14, 2004).

If the foregoing criteria are not present, the contract should be struck down for being illegal.

In **Philips Semiconductors [Phils.], Inc. vs. Fadriquela**, [G. R. No. 141717, April 14, 2004], the Supreme Court rejected petitioner's submission that it resorted to hiring employees for fixed terms to augment or supplement its regular employment "*for the duration of peak loads*" during short-term surges to respond to cyclical demands; hence, it may hire and retire workers on fixed terms, *ad infinitum*, depending upon the needs of its customers, domestic and international. Under the petitioner's submission, any worker hired by it for fixed terms of months or years can never attain regular employment status.

Fixed-term employment; effect if duties are usually necessary or desirable in the employer's usual business.

It should be noted that it does not necessarily follow that where the duties of the employee consist of activities usually necessary or desirable in the usual business of the employer, the parties are forbidden from agreeing on a period of time for the performance of such activities. There is thus nothing essentially contradictory between a definite period of employment and the nature of the employee's duties. (*Pangilinan vs. General Milling Corporation*, G. R. No. 149329, July 12, 2004).

In the 2004 case of **Pangilinan vs. General Milling Corporation**, [G. R. No. 149329, July 12, 2004], the petitioners were hired as "emergency workers" and assigned as chicken dressers, packers and helpers at the Cainta Processing Plant of General Milling Corporation (GMC). The respondent GMC is a domestic corporation engaged in the production and sale of livestock and poultry, and is a distributor of dressed chicken. While the petitioners' employment as chicken dressers is necessary and desirable in the usual business of the respondent, they were employed on a mere temporary basis, since their employment was limited to a fixed period. As such, they cannot be said to be regular employees, but are merely "contractual employees." Consequently, there was no illegal dismissal when the petitioners' services were terminated by reason of the expiration of their contracts.

In the 2000 case of **Medenilla vs. Philippine Veterans Bank**, [G. R. No. 127673, March 13, 2000], the petitioners were employees of the Philippine Veterans Bank (PVB). On June 15, 1985, their services were terminated as a result of the liquidation of PVB pursuant to the order of the Monetary Board of the Central Bank embodied in MB Resolution No. 612 dated June 7, 1985. On the same day of their termination, petitioners were re-hired through PVB's Bank Liquidator. However, all of them were required to sign employment contracts which provided that "[t]he employment shall be on a strictly temporary basis and only for the duration of the particular undertaking for which you are hired and only for the particular days during which actual work is available as determined by the Liquidator or his representatives since the work requirements of the liquidation process merely demand intermittent and temporary rendition of services." The Supreme Court interpreted this stipulation as a valid form of fixed-term employment. Furthermore, it is evident from the records that the subsequent re-hiring of petitioners which was

to continue during the period of liquidation and the process of liquidation ended prior to the enactment of RA 7169 entitled, “An Act to Rehabilitate Philippine Veterans Bank”, which was promulgated on January 2, 1992.

In the case of **Philippine Village Hotel vs. NLRC**, [G. R. No. 105033, February 28, 1994], the Supreme Court ruled that the fact that the private respondents therein were required to render services necessary or desirable in the operation of the petitioner’s business for the duration of the one month dry-run operation period, did not in any way impair the validity of the contractual nature of private respondents’ contracts of employment which specifically stipulated that their employment was only for one month.

In the case of **Pantranco North Express, Inc. vs. NLRC**, [G. R. No. 106654, December 16, 1994], a bus driver was, long time ago, dismissed by the bus company for cause. Fifteen (15) years later, he reappeared and out of generosity, was re-hired on a fixed-term contractual basis of one (1) month. Fifteen days into his one-month employment, he figured in a vehicular mishap. After investigation, he was dismissed and his contract was no longer renewed. Later, he filed against the company a complaint for illegal dismissal, claiming that he was constructively dismissed because of the refusal of the latter to renew his contract.

The Supreme Court ruled against the complainant, holding that his termination was justified and that the one-month fixed-term contract was valid following the consistent rulings in the cases of *Brent School, PNOC and Philippine Village Hotel* [supra].

Notice to terminate not necessary in fixed-term employment.

In a fixed-period employment, lack of notice of termination is of no consequence because when the contract specifies the period of its duration, it terminates on the expiration of such period. A contract for employment for a definite period terminates by its own term at the end of such period. (*Pangilinan vs. General Milling Corporation, supra; Blancaflor vs. NLRC, 218 SCRA 366 [1993]*).

Employees allowed to work beyond fixed term become regular employees.

In the 2004 case of **Viernes vs. NLRC**, [G. R. No. 108405, April 4, 2003], the petitioner-employees were initially employed on a fixed-term basis as their employment contracts were only for 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, the employment of the employees should no longer be treated as being on a fixed-term basis. The complexion of the employment relationship of the employees and private respondent-employer is thereby totally changed. Petitioner-employees have attained the status of regular employees. Hence, since petitioners 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.

Work rendered for more than one year, effect.

In **Megascope General Services vs. NLRC**, [G. R. No. 109224, June 19, 1997, 274 SCRA 147, 156], the private respondent-workers were hired as gardeners, helpers and maintenance workers. In hiring laborers, petitioner whose business is contracting out general services, would give them work from 5 to 10 days as the need arose and there were periodical gaps in the hiring of employees. In resolving the issue of whether they had become regular employees, the Supreme Court pronounced that even if there was a contrary agreement between the parties, if the worker has worked for more than a year and there is a reasonable connection between the particular activity performed by the employee in relation to the usual business or trade of the employer, not only an employment relationship is deemed to exist between them but the workers, although hired initially as contractual employees, had been converted into regular employees by the sheer length of service they had rendered for the employer by virtue of the proviso in the second paragraph of Article 280.

Successive renewal of fixed-period contracts, effect.

In the 2004 case of **Philips Semiconductors [Phils.], Inc. vs. Fadriquela**, [G. R. No. 141717, April 14, 2004], it 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 to three months over a period of one year and twenty-eight 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 had attained the regular status of her employment and is thus entitled to security of tenure as provided for in Article 279 of the Labor Code.

Hiring of employees on a 5-month period basis.

In **Pure Foods Corporation vs. NLRC**, [G. R. No. 122653, Dec. 12, 1997, 283 SCRA 133], the scheme of the employer in hiring workers on a uniformly fixed contract basis of 5 months and replacing them upon the expiration of their contracts with other workers with the same employment status was found to have been designed to prevent the "casual" employees from attaining the status of a regular employee. 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.

Employment on a "day-to-day basis for a temporary period."

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 the worker's length of service with the company and considering that the nature of his work is usually necessary or desirable in the usual trade or business of the company, he became a regular employee, by operation of law, one year after he was employed. (*Baguio Country Club Corporation vs. NLRC*, G. R. No. 71664, Feb. 28, 1992; *De Leon vs. NLRC*, G. R. No. 70705, Aug. 21, 1989).

In the 2003 case of **Magsalin & Coca-Cola Bottlers Phils., Inc. vs. National Organization of Working Men (N.O.W.M.)**, [G. R. No. 148492, May 9, 2003], Coca-Cola Bottlers Phils., Inc., engaged the services of respondent workers as "sales route helpers" for a limited period of five months. After five months, respondent workers were employed by petitioner company on a day-to-day basis. According to petitioner company, respondent workers were hired to substitute for regular sales route helpers whenever the latter would be unavailable or when there would be an unexpected shortage of manpower in any of its work places or an unusually high volume of work. The practice was for the workers to wait every morning outside the gates of the sales office of petitioner company. If thus hired, the workers would then be paid their wages at the end of the day. Ultimately, respondent workers asked petitioner company to extend to them regular appointments. Petitioner company refused. In declaring that the workers have become regular employees, the Supreme Court reasoned that the repeated rehiring of respondent workers and the continuing need for their services clearly attest to the necessity or desirability of their services in the regular conduct of the business or trade of petitioner company. More so here where the Court of Appeals has found each of respondents to have worked for at least one year with petitioner company. The pernicious practice of having employees, workers and laborers, engaged for a fixed period of few months, short of the normal six-month probationary period of employment, and, thereafter, to be hired on a day-to-day basis, mocks the law. Any obvious circumvention of the law cannot be countenanced. The fact that respondent workers have agreed to be employed on such basis and to forego the protection given to them on their security of tenure, demonstrate nothing more than the serious problem of impoverishment of so many of our people and the resulting unevenness between labor and capital.

Employment on "as the need arises" basis.

In the same 2004 case of *Philips Semiconductors* [supra], 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.

Illegal dismissal of fixed-term employee, liability is only for salary for unexpired portion.

As held in the case of **Medenilla vs. Philippine Veterans Bank**, [G. R. No. 127673, March 13, 2000], if the contract is for a fixed term and the employee is dismissed without just cause, he is entitled to the payment of his salaries corresponding to the unexpired portion of the employment contract.

56. May part-time workers attain regularity of employment?

Yes.

Probationary employment of part-time employees.

Using the legal principles enunciated in Article 281 of the Labor Code on probationary employment *vis-à-vis* Article 13 of the Civil Code on the proper reckoning of periods, a part-time employee shall become regular in status after working for such number of hours or days which equates to or completes a six-month probationary period in the same establishment doing the same job under the employment contract.

Once a part-time employee becomes a regular employee, he is entitled to security of tenure under the law and he can only be separated for a just or authorized cause and after due process.

Indicators of regular employment of part-time employees.

One may know if a part-time worker is a regular employee if any of the following conditions exist:

- a. the terms of his employment show that he is engaged as regular or permanent employee;
- b. the terms of his employment indicate that he is employed for an indefinite period;
- c. he has been engaged for a probationary period and has continued in his employment even after the expiration of the probationary period; or
- d. 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 tenorial rights during the entire period of their fixed employment. In other words, they cannot be separated from work without just or authorized cause.

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

PROBATIONARY EMPLOYMENT

57. Who is a probationary employee?

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 employee while the latter seeks to prove to the employer that he has the qualifications to meet the reasonable standards for permanent employment. (*De la Cruz, Jr. vs. NLRC, G. R. No. 145417, Dec. 11, 2003*).

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 vs. NLRC, G. R. No. 72222, Jan. 30, 1989*).

The length of time is immaterial in determining the correlative rights of both the employer and the employee in dealing with each other during said period. (*Escorpizo vs. University of Baguio, 306 SCRA 497, 507 [1999]*).

58. What is the period of probationary employment?

General rule. - Probationary period should not exceed six (6) months from the date the employee started working. One becomes a regular employee upon completion of his six-month period of probation.

Exceptions. - The six (6) months period provided in the law admits of certain exceptions such as:

1. when the employer and the employee mutually 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.

In **Buiser vs. Leogardo**, (G. R. No. L-63316, July 13, 1984), the Supreme Court considered the probationary period of employment of eighteen (18) months as valid since it was shown that the company needs at least 18 months to determine the character and selling capabilities of the employees as sales representatives.

59. May probationary employment be extended?

Extension of probationary period. - Probationary period of employment may be extended provided there is mutual consent thereto by the employer and the employee.

Employer’s act of rehiring a probationary employee, effect.

The act of the 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, vs. NLRC**, [G. R. No. 88636, Oct. 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.

If no stipulation on probationary period, employment is deemed regular.

In the case of **ATCI Overseas Corporation vs. CA**, [G. R. No. 143949, August 9, 2001], it was ruled that in the absence of any evidence that there is a provision in the employment contract providing for a probationary period, or that the employees were apprised of the fact that they were to be placed on probationary status and the requirements that they should comply with in order to qualify as regular employees, no other conclusion can be drawn but that they were regular employees at the time they were dismissed.

Probationary employment cannot be ad infinitum.

In the 2005 case of **Voyeur Visage Studio, Inc. vs. CA**, [G. R. No. 144939, March 18, 2005], the Supreme Court had occasion to reiterate its earlier ruling in *Bernardo vs. NLRC*, [310 SCRA 186 (1999)] that “Articles 280 and 281 of the Labor Code put an end to the pernicious

practice of making permanent casuals of our lowly employees by the simple expedient of extending to them probationary appointments, *ad infinitum*. The contract signed by petitioners is akin to a probationary employment during which the bank determined the employees' fitness for the job. *When the bank renewed the contract after the lapse of the six-month probationary period, the employees thereby became regular employees. No employer is allowed to determine indefinitely the fitness of its employees.*" (Emphasis supplied)

60. How should the six-month probationary period be computed?

The computation of the 6-month probationary period should be reckoned **from the date of appointment up to the same calendar date of the 6th month following.** (*Cals Poultry Supply Corp. vs. Roco* G.R. No.150660. July 30, 2002).

However, in the 2004 case of **Mitsubishi Motors Philippines Corporation vs. Chrysler Philippines Labor Union**, [G. R. No. 148738, June 29, 2004], the Supreme Court, in reckoning the probationary period, applied to the letter, Article 13 of the Civil Code which basically states:

"Article 13. When the law speaks of years, months, days or nights, it shall be understood that years are of three hundred sixty-five days each; months, of thirty days; days, of twenty-four hours; and nights from sunset to sunrise.

"If months are designated by their name, they shall be computed by the number of days which they respectively have.

"In computing a period, the first day shall be excluded, and the last day included."

In this case, the respondent employee (Paras) was employed as a management trainee on a probationary basis. During the orientation conducted on May 15, 1996, he was apprised of the standards upon which his regularization would be based. He reported for work on May 27, 1996. As per the company's policy, the probationary period was from three (3) months to a maximum of six (6) months. Applying said Article 13 of the Civil Code, the probationary period of six (6) months consists of one hundred eighty (180) days. This is in conformity with paragraph one, Article 13 of the Civil Code, which provides that the months which are not designated by their names shall be understood as consisting of thirty (30) days each. The number of months in the probationary period, six (6), should then be multiplied by the number of days within a month, thirty (30); hence, the period of one hundred eighty (180) days.

As clearly provided for in the last paragraph of Article 13, *in computing a period, the first day shall be excluded and the last day included.* Thus, the one hundred eighty (180) days commenced on May 27, 1996, and ended on November 23, 1996. Consequently, when the termination letter dated November 25, 1996 was served on respondent Paras at 3:00 a.m. of November 26, 1996, he was, by then, already a regular employee of the petitioner under Article 281 of the Labor Code.

But in the earlier case of *Cebu Royal vs. Deputy Minister of Labor*, [153 SCRA 38 (1987)], the 6-month probationary period was reckoned *from the date of appointment up to the same calendar date of the 6th month following.*

The 2002 case of **Cals Poultry Supply Corporation vs. Roco**, [G. R. No. 150660, July 30, 2002], followed the said reckoning/computation enunciated in the *Cebu Royal* case [supra].

In this case, the probationary employee was hired on May 16, 1995 and her services were terminated on November 15, 1995. The Court of Appeals set aside the NLRC ruling on the ground that at the time the probationary employee's services were terminated, she had attained the status of a regular employee as the termination on November 15, 1995 was effected four (4) days after the 6-month probationary period had expired, hence, she is entitled to security of tenure in accordance with Article 281 of the Labor Code.

Petitioner Cals argues that the Court of Appeals' computation of the 6-month probationary period is erroneous as the termination of the probationary employee's services on November 15, 1995 was exactly on the last day of the 6-month period.

Citing *Cebu Royal* [supra], the Supreme Court agreed with petitioner Cals' contention as upheld by both the Labor Arbiter and the NLRC that the probationary employee's services were terminated within and not beyond the 6-month probationary period.

61. Standards should be made known to employee at start of engagement.

The rudiments of due process demand that an employee should be apprised beforehand of the conditions of his employment and the basis for his advancement. (*Servidad vs. NLRC*, G. R. No. 128682, March 18, 1999; *Orient Express Philippines, vs. NLRC*, G. R. No. 113713, June 11, 1997).

If standards are not made known to the employee at start of employment, he is deemed a regular employee from day one.

According to the *Rules to Implement the Labor Code*, in all cases of probationary employment, the employer should make known to the employee the standards under which he will qualify as a regular employee at the time of his engagement. Where no standards are made known to the employee at that time, he should be deemed a regular employee. (*Section 6 [d], Rule I, Book VI, Rules to Implement the Labor Code, as amended by Article V, Department Order No. 10, Series of 1997*).

This rule was applied in the 2005 case of **Clarion Printing House, Inc. vs. NLRC**, [G. R. No. 148372, June 27, 2005], where it was held that since at the time the employee was hired on probationary basis she was not informed of the standards that would qualify her as a regular employee, she was deemed to have been hired from day one as a regular employee. (*See also Cielo vs. NLRC, 193 SCRA 410, 418 [1991]*).

However, in the case of **Aberdeen Court, Inc. vs. Agustin, Jr.**, [G. R. No. 149371, April 13, 2005], the Supreme Court cautioned that the above rule should not be used to exculpate a probationary employee who acts in a manner contrary to basic knowledge and common sense, in regard to which there is no need to spell out a policy or standard to be met. In this case, the electrical engineer undergoing probationary employment was dismissed because he failed in the performance of his task as such. Quoting with approval the findings of the NLRC, the Supreme Court ruled:

“It bears stressing that even if technically the reading of air exhaust balancing is not within the realm of expertise of the complainant, still it ought not to be missed that prudence and due diligence imposed upon him not to readily accept the report handed to him by the workers of Centigrade Industries. Required of the complainant was that he himself proceed to the work area, inquire from the workers as to any difficulties encountered, problems fixed and otherwise observe for himself the progress and/or condition/quality of the work performed.

“As it is, We find it hard to believe that complainant would just have been made to sign the report to signify his presence. By saying so, complainant is inadvertently degrading himself from an electrical engineer to a mere watchdog. It is in this regard that We concur with the respondents that by his omission, lack of concern and grasp of basic knowledge and common sense, complainant has shown himself to be undeserving of continued employment from probationary employee to regular employee.”

62. What is the effect of allowing an employee to work beyond the 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 vs. Cabansag*, G. R. No. 157010, June 21, 2005).

An employee who is allowed to work after a probationary period shall be considered a regular employee. Thus, in one case, an employee was considered already on permanent status

when he was dismissed four (4) days after he ceased to be a probationer. (*Cals Poultry Supply Corp. vs. Roco* G.R. No.150660. July 30, 2002).

63. What are the grounds to terminate probationary employment?

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

- (a) for a just cause; or
- (b) when 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. (*Aberdeen Court, Inc. vs. Agustin, Jr.*, G. R. No. 149371, April 13, 2005).

Assignment to a job different from that applied for.

In the 3005 case of **Athena International Manpower Services, Inc. vs. Villanos**, [G. R. No. 151303, April 15, 2005], the OFW was terminated while, as alleged by petitioner, still undergoing probationary employment for a period of forty (40) days. In declaring the termination as illegal, the Supreme Court ruled that even assuming respondent was a mere probationary employee as claimed by petitioner, respondent could only be terminated for a pertinent and just cause, such as when he fails to qualify as a regular employee in accordance with reasonable standards of employment made known to him by his employer at the time of his engagement. Here, it appears that the petitioner failed to prove that, at the time of respondent's engagement, the employer's reasonable standards for the job were made known to respondent. Moreover, in this case, respondent was assigned to a job different from the one he applied and was hired for.

Termination due to poor performance; effect of high performance rating after temporary reinstatement.

A probationary employee was dismissed in **Lucero vs. CA**, [G. R. No. 152032, July 3, 2003], for unsatisfactory performance prior to the expiration of his probationary employment. He was ordered reinstated by the NLRC while the case was pending appeal. During the period of his reinstatement, he was given a high rating of "very satisfactory" in his work performance. The Supreme Court, however, did not give any weight to said high rating. It ruled: "It would be difficult to sustain the stand taken by petitioner that the Court of Appeals erred in ignoring his subsequent high performance rating. The high rating of "very satisfactory" obtained by petitioner after his reinstatement, in compliance with the order of the NLRC, was not controlling, the point in question being his performance during the probationary period of the employment."

Peremptory termination of probationary employment.

In the 2003 case of **Cebu Marine Beach Resort vs. NLRC**, [G. R. No. 143252, October 23, 2003], the respondents-probationary employees, while undergoing special training in Japanese customs, traditions, discipline as well as hotel and resort services of the newly opened resort, were suddenly scolded by the Japanese conducting the training and hurled brooms, floor mats, iron trays, fire hoses and other things at them. In protest, respondents staged a walk-out and gathered in front of the resort. Immediately, the Japanese reacted by shouting at them to go home and never to report back to work. Heeding his directive, respondents left the premises. Eventually, they filed a complaint for illegal dismissal and other monetary claims against petitioners.

The Supreme Court, in holding that the dismissal of the probationary employees were illegal, ruled that the respondents could not have failed to qualify for their positions since at the time they were dismissed, they were still in a "trial period" or probationary period. Being in the nature of a "trial period," the essence of a probationary period of employment fundamentally lies in the purpose or objective sought to be attained by both the employer and the employee during said period. While the employer observes the fitness, propriety and efficiency of a probationer to ascertain whether he is qualified for permanent employment, the probationer, on the other hand, seeks to prove to the employer that he has the qualifications to meet the reasonable standards for permanent employment which obviously were made known to him. To reiterate, in the case at bar, far from allowing the respondents to prove that they possessed the qualifications to meet the

reasonable standards for their permanent employment, petitioners peremptorily dismissed them from the service.

Agabon doctrine applies if dismissal of probationary employee is without due process.

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

TERMINATION OF EMPLOYMENT BY THE EMPLOYER

JUST CAUSES FOR TERMINATION OF EMPLOYMENT

64. What are the just causes for termination of employment under Article 282 of the Labor Code?

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.

65. What is serious misconduct?

Requisites.- For misconduct or improper behavior to be a just cause for dismissal:

- (a) it must be serious;
- (b) it must relate to the performance of the employee's duties; and
- (c) it must show that the employee has become unfit to continue working for the employer.

In the 2005 case of **Fujitsu Computer Products Corporation of the Philippines vs. CA**, [G. R. No. 158232, April 8, 2005], 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 or relation on 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.*

Series of irregularities, when put together, may constitute serious misconduct.

An employee's fitness for continued employment cannot be compartmentalized or taken in isolation from one act to another. A series of irregularities, when considered together or in their entirety, may constitute serious misconduct, a valid ground to terminate employment. (*Piedad vs. Lanao del Norte Electric Cooperative, Inc.*, G. R. No. 73735, Aug. 31, 1987, 153 SCRA 500).

In a 2004 case where the employee was shown to have committed various violations of the company's rules and regulations, the Supreme Court ruled that his dismissal from the service

is in order. Indeed, a series of irregularities when put together may constitute serious misconduct. (*Gustilo vs. Wyeth Phils., Inc.*, G. R. No. 149629, Oct. 4, 2004).

Throwing a stapler and uttering invectives against a plant manager.

Applying the foregoing standards, the Supreme Court ruled in a 2000 case that the act of the employee 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. (*Philippine Aeolus Automotive United Corporation vs. NLRC*, G. R. No. 124617, April 28, 2000).

Use of shabu, valid ground to terminate employment.

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

In the 2003 case of **Roquero vs. 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 *methamphetamine 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."

Immorality.

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 may be considered calculated to undermine or injure such interest or which would make the worker incapable of performing his work.

For instance, in a case 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 to elevate, the same including sexual misconduct. 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. (*Santos, Jr. vs. NLRC*, G. R. No. 115795, March 6, 1998, 287 SCRA 117).

In another case, 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. (*Sanchez vs. Ang Tibay*, 54 O. G. 4515).

Immoral act committed beyond office hours.

The act of sexually harassing a co-employee within the company premises (ladies' dormitory) even after office hours is 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. (*Navarro III vs. Damasco*, G. R. No. 101875, July 14, 1995).

Sexual intercourse inside company premises constitutes serious misconduct.

A security coordinator 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. (*Stanford Microsystems, Inc. vs. NLRC*, G. R. No. L-74187, Jan. 28, 1988).

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

The act of a 30-year old lady teacher, of falling in love with her student whose age is 16, is not an immoral act which would justify the termination of her employment. The school utterly failed to show that petitioner 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. (*Chua-Qua vs. Clave*, G. R. No. L-49549, Aug. 30, 1990).

Fighting as ground for termination.

Fighting within work premises may be deemed 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. vs. NLRC*, G. R. No. 125548, Sept. 25, 1998).

Not every fight, however, within company premises in which an employee is involved would warrant his dismissal. 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 vs. NLRC*, G. R. No. 116568, Sept. 3, 1999).

The fact that an employee filed a criminal case against the other employee involved in a fight while the latter did not, does not necessarily mean that the former was the aggrieved party. (*Flores vs. NLRC*, G. R. No. 109362, May 15, 1996, 256 SCRA 735).

In one case where the fisticuffs between an employee and a security guard occurred in a store within the company auxiliary compound, about 15 meters from the gate, the Supreme Court ruled that the penalty of dismissal was not commensurate with the misconduct, considering the length of service and the surrounding circumstances of the incident. (*North Camarines Lumber Co., Inc. vs. Barreda*, G. R. No. 75436, Aug. 21, 1987).

And in another case where the fight occurred outside the work premises and did not lead to any disruption of work or any hostile environment in the work premises, the dismissal of the employee who figured in the fight was considered too harsh a penalty. (*Solvic Industrial Corp. vs. NLRC*, G. R. No. 125548, Sept. 25, 1998; 296 SCRA 432, 441).

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

The act of an employee in hurling obscene, insulting or offensive language against his superior is not only destructive of the morale of his co-employees and a violation of the company rules and regulations, but also constitutes gross misconduct which is one of the grounds provided for by law to terminate the services of an employee. This attitude towards a supervisor amounted to insubordination and conduct unbecoming of an employee which should merit the penalty of

dismissal. (*Autobus Workers' Union vs. NLRC*, G. R. No. 117453, June 26, 1998, 291 SCRA 219, 228).

In **Reynolds Philippine Corporation vs. Eslava**, [137 SCRA 259 (1985)], the dismissed employee circulated several letters to the members of the company's board of directors calling the executive vice-president and general manager a "big fool," "anti-Filipino," and accusing him of "mismanagement, inefficiency, lack of planning and foresight, petty favoritism, dictatorial policies, one-man rule, contemptuous attitude to labor, anti-Filipino utterances and activities." As a result of this, said employee's dismissal was held legal in view of these utterances.

In **Asian Design and Manufacturing Corporation vs. Deputy Minister of Labor**, [142 SCRA 79 (1986)], the dismissed employee made false and malicious statements against the foreman (his superior) by telling his co-employees: "If you don't give a goat to the foreman, you will be terminated. If you want to remain in this company, you have to give a goat." Further, the dismissed employee therein likewise posted a notice in the comfort room of the company premises which read: "Notice to all Sander – Those who want to remain in this company, you must give anything to your foreman. Failure to do so will be terminated – Alice 80." The Supreme Court declared the dismissal of said employee based on these malicious statements valid and legal.

In **De la Cruz vs. NLRC**, [G. R. No. 82703, September 15, 1989, 177 SCRA 626], the act of an 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 an employee which should warrant his dismissal.

In **Bondoc vs. NLRC**, [G. R. No. 103209, July 28, 1997, 276 SCRA 288], utterances on different occasions towards a co-employee of the following: "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 vs. NLRC**, [G. R. No. 117453, June 26, 1998, 291 SCRA 219, 228], the act of the employee in calling his supervisor "gago ka" and taunting the latter by saying "bakit anong gusto mo, tang ina mo" was held sufficient ground to dismiss the former.

But in **Samson vs. NLRC**, [G. R. No. 121035, April 12, 2000], the following utterances: "Si EDT (referring to Eпитacio 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 not held to be 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 11 years of service to the company.

Gambling within company premises, a serious misconduct.

In one case, an employee was validly terminated when he was caught gambling within the company premises, it being a prohibited act carrying the penalty of termination under the Company Rules. (*Dimalanta vs. Secretary of Labor*, G. R. No. 83854, May 24, 1989).

Intoxication as ground for termination.

As a general rule, intoxication of an employee which interferes with his work, constitutes serious misconduct. It is well-settled by jurisprudence that serious misconduct in the form of drunkenness and disorderly or violent behavior is a just cause for the dismissal of an employee. (*Sanyo Travel Corporation vs. NLRC*, G. R. No. 121449, Oct. 2, 1997; *Club Filipino, Inc. vs. Sebastian*, G. R. No. 85490, July 23, 1992, 211 SCRA 717).

However, the nature of the employee's work, the dignity of his position and the surrounding circumstances of the intoxication, must be taken into account.

For instance, the act of a managerial employee of reporting for work under the influence of liquor and sleeping while on duty reflect his unworthiness of the trust and confidence reposed on him. (*Del Val vs. NLRC, G. R. No. 121806, Sept. 25, 1998, 296 SCRA 283*).

The act of a pilot with the rank of captain, of forcing two co-pilots with the rank of First Officers, to drink one evening at the coffee shop of a hotel in Cebu City, six bottles of beer each, within thirty minutes, failing which, he ordered them to stand erect and were hit on the stomach, was held as constitutive of serious misconduct. The incident occurred with his full knowledge that his co-pilots have flight duties as early as 7:10 a.m. the next day and as late as 12:00 p.m. (*Philippine Airlines, Inc. vs. NLRC, G. R. No. L-62961, Sept. 2, 1983*).

In another case involving two (2) security guards who, while off-duty, joined a drinking spree at a birthday party of a co-guard in a sari-sari store near the FTI security office, the lesser penalty of 30-day suspension, not dismissal, was the penalty held to be appropriate under the circumstances. The reason cited was the fact that the company rules and regulations merely provided for suspension for first offenders. (*Quiñones vs. NLRC, G. R. No. 105763, July 14, 1995*).

Pressure exerted by a teacher upon a colleague to change a failing grade of a student.

The pressure and influence exerted by a teacher on his colleague to change a 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 vs. NLRC, G. R. No. 114764, June 13, 1997, 273 SCRA 457*).

Sleeping while on duty as a ground for termination.

In **Luzon Stevedoring Corporation vs. CIR**, [*G. R. No. L-18683, Dec. 31, 1965*], and **A' Prime Security Services, Inc. vs. NLRC**, [220 SCRA 142 (1993)], the act of an employee of sleeping in his post, coupled with gross insubordination, dereliction of duty and challenging superiors to a fight, was held as serious misconduct.

However, in the 2000 case of **VH Manufacturing, Inc. vs. NLRC**, [G. R. No. 130957, Jan. 19, 2000], it was pronounced that to cite that sleeping on the job is always a valid ground for dismissal is misplaced not only because the same was not substantiated by any convincing evidence other than the bare allegation of the employer but most significantly, because the authorities cited, *Luzon Stevedoring* [supra] and *A' Prime* [supra], are not applicable in this case since the function involved in said cases was "to protect the company from pilferage or loss." Accordingly, the doctrine laid down in those cases is not applicable to the case at bar.

In the 2004 case of **Electruck Asia, Inc. vs. Meris**, [G. R. No. 147031, July 27, 2004], where more than fifty employees were alleged to have slept at the same time, the Supreme Court found it "highly unlikely and contrary to human experience that all fifty-five employees including respondents were at the same time sleeping." If indeed the Night Manager chanced upon respondent-employees sleeping on the job, why he did not at least rouse some or all of them to put them on notice that they were caught *in flagrante* defies understanding.

Eating while at work.

Dismissal is too harsh a penalty for the offense of eating while at work, under the attendant circumstances of the case. (*Tanduay Distillery Labor Union vs. NLRC, G. R. No. 73352, Dec. 06, 1995*).

Urinating in the workplace.

In a 2002 case, it was held that urinating in a workplace other than the one designated for the purpose by the employer constitutes violation of reasonable regulations intended to promote a healthy environment under Art. 282 [1] of the Labor Code for purposes of terminating employment, but the same must be shown by evidence. An employee cannot be terminated based on this ground if there is no evidence that he did urinate in a place other than a rest room in the premises of his work. (*Tan vs. Lagrama, G. R. No. 151228, Aug. 15, 2002*).

66. *Sexual Harassment.*

Republic Act No. 7877, approved on February 14, 1995, otherwise known as the “*Anti-Sexual Harassment Act of 1995*” declares sexual harassment unlawful in the employment, education or training environment.

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.*).

Who may be liable for sexual harassment.

Work, education or training-related sexual harassment is committed by any employer, employee, manager, supervisor, agent of the employer, teacher, instructor, professor, coach, trainer, or 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. (*Section 3, Ibid.*).

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.*).

In a sexual harassment case involving a manager, the Supreme Court said:

“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.” (*Villarama vs. NLRC and Golden Donuts, Inc., supra*).

In another case, the act of the manager in “touching a female subordinate’s hand and shoulder, caressing her nape and telling other people that the subordinate was the one who hugged and kissed or that she responded to the sexual advances” was considered act of sexual harassment for which he was penalized by the company with a 30-day suspension which the Supreme Court affirmed. (*Libres vs. NLRC, supra*).

Jacutin vs. People.

An illustrative criminal case involving sexual harassment is the 2002 case of **Dr. Rico S. Jacutin vs. 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 Republic Act 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.

Prescription of action.

Any action arising from sexual harassment shall prescribe in three (3) years. (*Section 7, Republic Act No. 7877*).

Delay in filing the case for sexual harassment.

According to **Libres vs. 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.

Likewise, in the 2002 case of **Philippine Aeolus Automotive United Corporation vs. NLRC**, [G. R. No. 124617, April 28, 2000], it was held that the delay of more than four (4) years to expose the manager's sexual harassment is of no moment. The gravamen of the offense in sexual harassment is not the violation of the employee's sexuality but the abuse of power by the employer. Any employee, male or female, may rightfully cry "*foul*" provided the claim is well substantiated. Strictly speaking, there is no time period within which he or she is expected to complain through the proper channels. The time to do so may vary depending upon the needs, circumstances, and more importantly, the emotional threshold of the employee.

Private respondent admittedly allowed four (4) years to pass before finally coming out with her employer's sexual impositions. Not many women, especially in this country, are made of the stuff that can endure the agony and trauma of a public, even corporate, scandal. If petitioner corporation had not issued the third memorandum that terminated the services of private respondent, we could only speculate how much longer she would keep her silence. Moreover, few persons are privileged indeed to transfer from one employer to another. The dearth of quality employment has become a daily "*monster*" roaming the streets that one may not be expected to give up one's employment easily but to hang on to it, so to speak, by all tolerable means. (*Ibid.*)

67. What legal ground/s may be cited for acts of dishonesty?

An *act of dishonesty* may constitute either of the following grounds: serious misconduct, fraud, willful breach of trust and confidence.

68. What are the requisites to validly invoke willful disobedience of lawful orders as a just ground to terminate employment?

In order that the willful disobedience by the 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 which the employee has been engaged to discharge.

Requisites of lawful dismissal on the ground of willful disobedience. - For the ground of "*willful disobedience*" to be considered a just cause for termination of employment, the following requisites must concur, namely:

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 which he had been engaged to discharge.

Rule where violation of the rules was tolerated by employer.

Where a violation of company policy or breach of company rules and regulations was found to have been tolerated by management, the same could not serve as a basis for termination.

As held in the 2004 case of **Coca-Cola Bottlers Philippines, Inc. vs. Vital**, [G. R. No. 154384, Sept. 13, 2004], if an employee was merely following the instructions of his supervisor, his act should be deemed in good faith. Clearly, his dismissal from the service on the ground of willful disobedience or violation of company rules and regulations is not justified.

Rule against marriage, when not valid.

Article 136 of the Labor Code considers as an unlawful act of the employer to stipulate, as a condition of employment or continuation of employment, that a woman employee shall not get married, or that upon getting married, a woman employee shall be deemed resigned or separated. It is likewise an unlawful act of the employer, to actually dismiss, discharge, discriminate or otherwise prejudice a woman employee merely by reason of her marriage. (*See also Section 13 [e], Rule XII, Book III, Rules to Implement the Labor Code; Gualberto vs. Marinduque Mining Industrial Corporation, C. A.-G. R. No. 52753-R, June 28, 1978*).

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. (*PT&T vs. NLRC, G. R. No. 118978, May 23, 1997*).

The provision in a contract between an airline company and a flight attendant which states that “flight attendant-applicants must be single and that they shall be automatically separated from employment in the event they subsequently get married” is a null and void provision, hence, cannot be enforced for being contrary to Article 136 of the Labor Code and the protection-to-labor clause in the Constitution. (*Zialcita vs. Philippine Airlines, Inc., Case No. RO4-3-398-76, Feb. 20, 1977, decided by the Office of the President*).

Rule against marriage, when valid.

In the 2004 case of **Duncan Association of Detailman-PTGWO vs. 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 secrets and procedures.

69. What constitutes the ground of gross and habitual neglect of duties?

- Element of habituality may be disregarded where loss is substantial.
- Element of habituality may be disregarded if totality of evidence justifies dismissal.
- Element of actual loss or damage, not an essential requisite.
- Habitual tardiness or habitual absenteeism may be a ground for termination.

Test to determine negligence.

According to the Supreme Court in the 2003 case of **Reyes vs. Maxim’s Tea House**, [G. R. No. 140853, February 27, 2003], the test to determine the existence of negligence is as follows: Did the employee, in doing the alleged negligent act, use that reasonable care and caution which an ordinarily prudent person would use in the same situation?

In this case involving a vehicular collision leading to the dismissal of the petitioner-employee on the ground of gross negligence, the Supreme Court found that the petitioner tried to turn left to avoid a collision. To put it otherwise, petitioner did not insist on his right of way, notwithstanding the green light in his lane. Still, the collision took place as the ten-wheeler careened on the wrong lane. Clearly, petitioner exerted reasonable effort under the circumstances

to avoid injury not only to himself but also to his passengers and the van he was driving. To hold that petitioner was grossly negligent under the circumstances goes against the factual circumstances shown. It appears that he was more a victim of a vehicular accident rather than its cause. There being no clear showing that petitioner was culpable for gross negligence, petitioner's dismissal is illegal.

70. What are the requisites to validly invoke abandonment of work?

Requisites. - Abandonment of work is a valid ground to terminate an employment. To constitute abandonment, two (2) elements must concur, namely:

1. the failure to report for work or absence without valid or justifiable reason; and
2. a clear intention to sever the employer-employee relationship. This is the more determinative factor being manifested by some overt acts.

Requirement of notice before declaring abandonment. - The notice required consists of two (2) parts to be separately served on the employee *in his last known address*, to wit:

1. notice to apprise the employee of the particular acts or omissions for which his dismissal is sought; and
2. subsequent notice to inform him of the employer's decision to dismiss him.

This notice requirement is not a mere technicality but a requirement of due process to which every employee is entitled to insure that the employer's prerogative to dismiss or lay-off is not abused or exercised in an arbitrary manner.

Notices in abandonment cases, where sent.

In case of abandonment of work, the notices should be served at the worker's last known address. (*Icawat vs. NLRC, G. R. No. 133573, June 20, 2000*).

In the 2004 case of **Agabon vs. NLRC**, [G.R. No. 158693, Nov. 17, 2004], while the validity of the dismissal based on abandonment was upheld, however, the employer was deemed to have violated due process when it did not follow the notice requirements and instead argued that sending notices to the last known addresses would have been useless because they did not reside there anymore. Unfortunately for the employer, this is not a valid excuse because the law mandates the twin notice requirements be sent to the employee's last known address. Thus, it should be held liable for non-compliance with the procedural requirements of due process.

Immediate filing of complaint negates abandonment.

In a 2004 case, it was ruled that the immediate filing of complaint for illegal dismissal by the employees 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 is proof enough of his desire to return to work, thus negating the employer's charge of abandonment. (*Unicorn Safety Glass, Inc. vs. Basarte, G. R. No. 154689, Nov. 25, 2004*).

An employee who had truly forsaken his job would not have bothered to file a complaint for illegal dismissal. (*Hodieng Concrete Products vs. Dante Emilia, G. R. No. 149180, Feb. 14, 2005*).

For instance, the filing of such complaint the very next day after the employee was removed (*Anflo Management & Investment Corp. vs. Bolanio, G. R. No. 141608, Oct. 4, 2002*) or two (2) days after receiving the termination letter (*EgyptAir, vs. NLRC, G. R. No. 63185, Feb. 27, 1989*) or six (6) days (*Masagana Concrete Products vs. NLRC, G. R. No. 106916, Sept. 3, 1999*) or four (4) days from the time the employees were prevented from entering their workplace, is an indication that they have not abandoned their work. (*Artemio Labor vs. NLRC, G. R. No. 110388, Sept. 14, 1995*).

The Supreme Court did not likewise consider the lapse of nine (9) months (*Kingsize Manufacturing Corp. vs. NLRC, G. R. Nos. 110452-54, Nov. 24, 1994*) or six (6) months before filing the complaints 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. (*Pare vs. NLRC*, G. R. No. 128957, Nov. 16, 1999).

***When filing of complaint does not negate abandonment;
consequence of failure to pray for reinstatement.***

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 and just asks for separation pay instead. It goes without saying that the prayer for separation pay, being the alternative remedy to reinstatement, contradicts private respondent-employee's stance. That he was illegally dismissed is belied by his own pleadings as well as contemporaneous conduct. (*Jo vs. NLRC*, G. R. No. 121605, Feb. 2, 2000).

But in **Sentinel Security Agency, Inc. vs. NLRC**, [G. R. No. 122468, Sept. 3, 1998], the fact that complainants did not pray for reinstatement was considered by the Supreme Court as not sufficient proof of abandonment. A strong indication of the intention of the complainants to resume work is their allegation that on several dates, they reported to the Security Agency for reassignment, but were not given any. In fact, the contention of complainants was that the Agency constructively dismissed them. Abandonment has recently been ruled to be incompatible with constructive dismissal.

When refusal to return to work does not constitute abandonment.

In the 2004 case of **The Philippine American Life and General Insurance Co. vs. Gramaje**, [G. R. No. 156963, Nov. 11, 2004], the Assistant Vice-President was directed to report to her new assignment and submit to a medical examination. She did not comply leading to her being declared as having abandoned her work. However, the Supreme Court ruled that there could not have been an abandonment since at the time she was being asked to report to her new assignment, she had already filed a case for illegal dismissal against her employer. For the employer to anticipate the employee to report for work after the latter already filed a case for illegal dismissal before the NLRC, would be absurd. The two requisites for abandonment are not present here. There was no abandonment as the latter is not compatible with constructive dismissal.

Offer of reinstatement during proceedings before Labor Arbiter, effect.

The respondent-employee in the 2002 case of **Hantex Trading Co., Inc. vs. 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 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 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 disprove 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.

In **Ranara vs. NLRC**, [212 SCRA 631], where the employer offered to re-employ the illegally dismissed employee, the Supreme Court stated:

“The fact that his employer later made an offer to re-employ him did not cure the vice of his early arbitrary dismissal. The wrong had been committed and the wrong done. Notably, it was only after the complaint had been filed that it occurred to Chang, in a belated gesture of good will, to invite Ranara back to work in his store. Chang’s sincerity is suspect. We doubt if his offer would have been made if Ranara had not complained against him. At any rate, sincere or not, the offer of reinstatement could not correct the earlier illegal dismissal of the petitioner. The private respondents incurred liability under the Labor Code from the moment Ranara was illegally dismissed and the liability did not abate as a result of Chang’s repentance.”

In the 2001 case of **Suan vs. NLRC**, [G. R. No. 141441, June 19, 2001], a letter was sent to the petitioner almost one (1) month after the filing of the complaint for illegal dismissal which required him to explain his absence without leave (AWOL). He found refuge in the above case of *Ranara*. The Supreme Court, however, did not find any analogy between the two cases as the factual backdrop of *Ranara* [supra] is not the same as *Suan*. In contrast, petitioner Jose Suan in the latter case who suffered a stroke, was not dismissed but was only asked to go on extended leave from July 10 to August 10, 1997 because when petitioner reported for work on July 10, 1997, after more than six months of sick leave, respondent Oripaypay noticed that petitioner’s left arm down to his left limb was paralyzed, thus Oripaypay could readily see that petitioner was not yet ready and physically well to perform his usual assignment as master fisherman. However, after petitioner’s extended leave expired, he did not return to work which prompted private respondent Oripaypay to send him a letter dated August 16, 1997 requiring him to explain why no disciplinary action should be taken against him for his absence without official leave. The said letter clearly shows that respondent Oripaypay was waiting for the return of petitioner unlike in *Ranara*, wherein petitioner Ranara, a driver, upon reporting for work, was surprised to find some other person who replaced him in handling the vehicle previously assigned to him, thus confirming his dismissal without proper notice.

Subcontracting for another company indicates abandonment.

In **Agabon vs. NLRC**, [G.R. No. 158693, November 17, 2004], the Supreme Court held that the act of the petitioners who were frequently absent to engage in subcontracting work for another company clearly shows the intention to sever the employer-employee relationship with their employer. Hence, they are guilty of abandonment.

71. What constitutes the ground of fraud?

Commission of fraud by an employee against the employer will necessarily result in the latter's loss of trust and confidence in the former. Proof of loss is **not** required under this ground.

Commission of fraud or deceit leading to loss of trust and confidence.

In the 2003 case of **De la Cruz, Jr. vs. NLRC**, *G. R. No. 145417*, [December 11, 2003], the petitioner was holding a managerial position in which he was tasked to perform key functions in accordance with an exacting work ethic. His position required the full trust and confidence of his employer. While petitioner could exercise some discretion, this obviously did not cover acts for his own personal benefit. As found by the court *quo*, he committed a transgression that betrayed the trust and confidence of his employer - reimbursing his family’s personal travel expenses out of company funds. Petitioner failed to present any persuasive evidence or argument to prove otherwise. His act amounted to fraud or deceit which led to the loss of trust and confidence of his employer.

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 vs. NLRC*, G. R. No. 129413, July 27, 1998).

In **Diamond Motors Corporation vs. CA**, [G. R. No. 151981, Dec. 1, 2003] and in the earlier case of **Philippine Airlines, Inc. vs. 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 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 warrants dismissal from the service.

Restitution does not have absolutory effect.

In **Gonzales vs. 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 vs. 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 the services of an employee of the company for loss of trust and confidence. (*See also San Miguel Corporation vs. Deputy Minister of Labor and Employment*, 145 SCRA 196, 203-204 [1986]).

Lack of misappropriation or shortage, immaterial.

Where there was a series of unauthorized encashments of personal checks, the Supreme Court in **Central Pangasinan Electric Cooperative, Inc. vs. 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 offence for which an employee is penalized. The respondents here 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 a considerable amount of cash. Respondent de Vera accepted payments from petitioner's consumers while respondent Macaraeg received remittances for deposit at petitioner's bank. They did not live up to their duties and obligations.

72. What are the requisites for the ground of willful breach of trust?

In the 2004 case of **Charles Joseph U. Ramos vs. The Honorable Court of Appeals and Union Bank of the Philippines**, [G.R. No. 145405, June 29, 2004], the Supreme Court held that, in order to validly dismiss an employee on the ground of loss of trust and confidence under Article 282, the following guidelines must be followed:

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. (*Tolentino vs. PLDT*, G. R. No. 160404, June 8, 2005).

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. vs. Gulde*, G. R. No. 149930, Feb. 22, 2002).

For instance, in the 2005 case of **Philippine National Construction Corporation vs. Matias**, [G. R. No. 156283, May 6, 2005], undeniably, the position of project controller - the position of respondent at the time of his dismissal - required trust and confidence, for it related to the handling of business expenditures or finances. However, his act allegedly constituting breach of trust and confidence (referring to the unlawful scheme by PNCC of using its employees as ‘dummies’ for the acquisition of vast tract of land in Bukidnon and thereafter compelling them to assign all rights over same properties in favor of PNCC – a scheme by PNCC 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) was not in any way related to his official functions and responsibilities as controller. In fact, the questioned act pertained to an unlawful scheme deliberately engaged in by petitioner in order to evade a constitutional and legal mandate.

Breach must be willful and without justifiable excuse.

Loss of trust and confidence must be based on a willful breach and founded on clearly established facts. (*Asia Pacific Chartering [Phils.], Inc. vs. Farolan*, G. R. No. 151370, Dec. 4, 2002).

It must rest on substantial grounds and not on the employer’s arbitrariness, whims, caprices or suspicion; otherwise, the employee would eternally remain at the mercy of the employer. It should be genuine and not simulated; nor should it appear as a mere afterthought to justify earlier action taken in bad faith or a subterfuge for causes which are improper, illegal or unjustified. It has never been intended to afford an occasion for abuse because of its subjective nature. (*Atlas Consolidated Mining & Development Corporation vs. NLRC*, G. R. No. 122033, May 21, 1998).

Employee’s position must be reposed with trust and confidence.

As firmly entrenched in our jurisprudence, loss of trust and confidence as a just cause for termination of employment is premised on the fact that an employee concerned holds a position where greater trust is placed by management and from whom greater fidelity to duty is correspondingly expected. This includes managerial personnel entrusted with confidence on delicate matters, such as the custody, handling, or care and protection of the employer’s property. (*Caingat vs. NLRC*, G. R. No. 154308, March 10, 2005).

This situation also holds in the case of supervisory personnel occupying positions of responsibility. (*Cruz vs. Coca-Cola Bottlers Phils., Inc.*, G. R. No. 165586, June 15, 2005).

The betrayal of this trust is the essence of the offense for which an employee is penalized. (*Santos vs. San Miguel Corporation*, G. R. No. 149416, March 14, 2003).

There must be “some basis” for the loss of trust and confidence.

While it is true that loss of trust and confidence is one of the just causes for termination, such loss of trust and confidence must, however, 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. (*Central Pangasinan Electric Cooperative, Inc. vs. Macaraeg*, G. R. No. 145800, Jan. 22, 2003).

In **Limketkai Sons Milling, Inc. vs. Llamera**, [G. R. No. 152514, July 12, 2005], petitioners simply allege that respondent’s failure to report to the quality control head the batch that did not meet the minimum standard showed connivance to sabotage petitioners’ business. The Supreme Court ruled that not only is petitioners’ logic flawed, it is an instance of arguing *non sequitur*. Said allegation alone, without proven facts to back it up, could not and did not suffice as a basis for a finding of willful breach of trust. Petitioners failed to prove the existence of a

valid cause for the dismissal of respondent. Therefore, the dismissal must be deemed contrary to the provisions of the Labor Code, hence illegal.

Prolonged practice, not an excuse for wrongful act.

In **Santos vs. San Miguel Corporation**, [G. R. No. 149416, March 14, 2003], it was held that prolonged practice of encashing personal checks among payroll personnel does not excuse or justify petitioner's misdeeds. Petitioner's willful and deliberate acts were in gross violation of respondent company's policy against encashment of personal checks of its personnel. She, as Finance Director, cannot feign ignorance of such policy as she is duty-bound to keep abreast of company policies related to financial matters within the corporation.

Grant of promotions and bonuses negates loss of trust and confidence.

In **Norkis Distributors, Inc. vs. NLRC**, [G. R. No. 112230, July 17, 1995], where the employer alleged inefficiency and loss of trust and confidence as grounds for termination of employment, the High Tribunal said that these are negated by the fact that the evidence shows that the employee received several promotions since his employment in 1986 and was given bonuses for his collection efforts and a compensation adjustment for his excellent performance.

Long years of service, absence of derogatory record and small amount involved, when deemed inconsequential.

I

In **Etcuban, Jr. vs. Sulpicio Lines, Inc.**, [G. R. No. 148410, January 17, 2005], the petitioner theorizes that even assuming that there was evidence to support the charges against him, his dismissal from the service is unwarranted, harsh and is not commensurate to his misdeeds, considering the following: first, his 16 long years of service with the company; second, no loss or damages was suffered by the company since the tickets were unissued; third, he had no previous derogatory record; and, lastly, the amount involved is miniscule. Citing jurisprudence, he appeals for compassion and requests that he be merely suspended, or at the very least, given separation pay for his length of service. The Supreme Court, however, found no merit in the petitioner's contention:

“We are not unmindful of the foregoing doctrine, but after a careful scrutiny of the cited cases, the Court is convinced that the petitioner's reliance thereon is misplaced. It must be stressed that in all of the cases cited, the employees involved were all rank-and-file or ordinary workers. As pointed out earlier, the rules on termination of employment, penalties for infractions, insofar as fiduciary employees are concerned, are not necessarily the same as those applicable to the termination of employment of ordinary employees. Employers, generally, are allowed a wider latitude of discretion in terminating the employment of managerial personnel or those of similar rank performing functions which by their nature require the employer's trust and confidence, than in the case of ordinary rank-and-file employees. (*Citing Gonzales vs. NLRC, 355 SCRA 195 [2001]*).

“The fact that the petitioner has worked with the respondent for more than 16 years, if it is to be considered at all, should be taken against him. The infraction that he committed, *vis-à-vis* his long years of service with the company, reflects a regrettable lack of loyalty. Loyalty that he should have strengthened instead of betrayed. If an employee's length of service is to be regarded as a justification for moderating the penalty of dismissal, it will actually become a prize for disloyalty, perverting the meaning of social justice and undermining the efforts of labor to cleanse its ranks of all undesirables. (*Citing Flores vs. NLRC, 219 SCRA 350 [1993]*).

“xxx

“It cannot be over-emphasized that there is no substitute for honesty for sensitive positions which call for utmost trust. Fairness dictates that the respondent should not be allowed to continue with the employment of the petitioner who has breached the confidence reposed on him. Unlike other just causes for dismissal, trust in an employee, once lost, is difficult, if not impossible, to regain. (*Citing Salvador vs. Philippine Mining Service Corporation, 395 SCRA 729 [2003]*). There can be no doubt that the petitioner's

continuance in the extremely sensitive fiduciary position of Chief Purser would be patently inimical to the respondent's interests. It would be oppressive and unjust to order the respondent to take him back, for the law, in protecting the rights of the employee, authorizes neither oppression nor self-destruction of the employer." (*San Miguel Corporation vs. NLRC*, 115 SCRA 329 [1982]).

In another case, **Central Pangasinan Electric Cooperative, Inc. vs. Macaraeg**, [G. R. No. 145800, January 22, 2003], the teller and cashier (who were charged and dismissed for unauthorized encashments of checks) have been employed with the petitioner-electric cooperative for 22 and 19 years of continuous service, respectively, and this is the first time that either of them has been administratively charged. Nonetheless, their dismissal was held justified considering the breach of trust they have committed. Well to emphasize, the longer an employee stays in the service of the company, the greater is his responsibility for knowledge and compliance with the norms of conduct and the code of discipline in the company. Considering that they have mishandled the funds of the cooperative and the danger they have posed to its members, their reinstatement is neither sound in reason nor just in principle. It is irreconcilable with trust and confidence that has been irretrievably lost.

In **Salvador vs. Philippine Mining Service Corporation**, [G. R. No. 148766, January 22, 2003], petitioner argues that assuming there was evidence to support the charges against him, his dismissal from service is unwarranted, harsh and grossly disproportionate to his act, considering his long years of service with the company. The Supreme Court, however, disagreed, thusly:

"To be sure, length of service is taken into consideration in imposing the penalty to be meted an erring employee. However, the case at bar involves dishonesty and pilferage by petitioner which resulted in respondent's loss of confidence in him. Unlike other just causes for dismissal, trust in an employee, once lost is difficult, if not impossible, to regain. Moreover, petitioner was not an ordinary rank-and-file employee. He occupied a high position of responsibility. As foreman and shift boss, he had over-all control of the care, supervision and operations of respondent's entire plant. It cannot be over-emphasized that there is no substitute for honesty for sensitive positions which call for utmost trust. Fairness dictates that respondent should not be allowed to continue with the employment of petitioner who has breached the confidence reposed on him. (*Citing Galsim vs. Philippine National Bank*, 29 SCRA 293 [1969]). As a general rule, employers are allowed wider latitude of discretion in terminating the employment of managerial employees as they perform functions which require the employer's full trust and confidence. (*Citing Gonzales vs. NLRC*, 355 SCRA 195 [2001]).

"In the case at bar, respondent has every right to dismiss petitioner, a managerial employee, for breach of trust and loss of confidence as a measure of self-preservation against acts patently inimical to its interests. Indeed, in cases of this nature, the fact that petitioner has been employed with the respondent for a long time, if to be considered at all, should be taken against him, (*Citing Flores vs. NLRC*, 219 SCRA 350 [1993]). as his act of pilferage reflects a regrettable lack of loyalty which he should have strengthened, instead of betrayed."

In **Cruz vs. Coca-Cola Bottlers Phils., Inc.**, [G. R. No. 165586, June 15, 2005], involving the spiriting out of thirty (30) cases of canned soft drinks loaded on petitioner's truck without the required documentation, the Supreme Court took his long years of service as militating against his claim of good faith. Petitioner's length of service (as driver/helper), which spans almost fifteen (15) years, works against his favor in this case. The reason is, it has long been held that the longer an employee stays in the service of the company, the greater is his responsibility for knowledge and compliance with the norms of conduct and the code of discipline in the company.

Rules on termination of managerial employee, different from rank-and-file.

The rules on termination of managerial employees are different from those applicable to rank-and-file employees. Obviously, a managerial employee is tasked to perform key and

sensitive functions, and thus he is bound by more exacting work ethics. (*Gonzales vs. NLRC and Pepsi-Cola Products, Phils., Inc.*, G. R. No. 131653, March 26, 2001).

This distinction has been underscored by the Supreme Court in recent decisions involving the application of the doctrine of loss of trust and confidence. Thus, with respect to rank-and-file personnel, loss of trust and confidence as 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 is 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. (*Etcuban, Jr. vs. Sulpicio Lines, Inc.*, G. R. No. 148410, Jan. 17, 2005).

It is thus important that in termination based on this ground, it must be shown that the employee is a managerial employee since the term “*trust and confidence*” is restricted to said class of employees. As a managerial employee, any transgression on her part gives the employer a wider latitude of discretion in terminating her services. (*Deles, Jr. vs. NLRC*, G. R. No. 121348, March 9, 2000).

If what is involved in a case is a rank-and-file employee, the doctrine of loss of trust and confidence may not be appropriately applied. For instance, the task of a janitor, said the Supreme Court, does not fall squarely under this category. (*De los Santos vs. NLRC*, G. R. No. 121327, Dec. 20, 2001).

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, as held in **Coca-Cola Bottlers Philippines, Inc. vs. NLRC**, [172 SCRA 751 (1989)], route salesmen are rank-and-file employees but they are highly individualistic personnel who roam around selling products, deal with customers and are entrusted with large assets and funds and property of the employer. There is a high degree of trust and confidence reposed on them, and when such confidence is breached, the employer may take proper disciplinary action on them.

In holding that the dismissal of the food attendant was valid, the Supreme Court, in **Philippine Pizza, Inc. vs. Bungabong**, [G. R. No. 154315, May 9, 2005], ruled that where the employee has access to the employer’s property in the form of merchandise and articles for sale, the relationship of the employer and the employee necessarily involves trust and confidence. Hence, when respondent drank stolen beer from the dispenser of Pizza Hut-Ermita on December 6, 1997, he gave cause for his termination and his termination was within the ambit of Article 282 of the Labor Code.

Examples of cases where rank-and-file employees may not be dismissed based on loss of trust and confidence.

But in another case involving the same company, **Coca-Cola Bottlers, Phils., Inc. vs. Kapisanan ng Malayang Manggagawa sa Coca-Cola-FFW**, [G. R. No. 148205, Feb. 28, 2005], it was pronounced that the temporary assignment as route salesman for a period of three (3) days of an employee who was employed as driver-helper does not automatically make him an employee on whom his employer reposed trust and confidence, for breach of which he shall be meted the penalty of dismissal. The assumption by said employee, for only three days, of some of the duties of a route salesman on orders of his employer, did not automatically make him an employee holding a position of trust and confidence. Despite his additional duties, said employee

remained a driver-helper of the petitioner. Thus, he cannot be dismissed based on loss of trust and confidence.

In **Vallacar Transit, Inc. vs. NLRC**, [G. R. No. 109809, July 17, 1995], it was held that a non-managerial position such as a bus driver does not hold a position of trust and confidence. That he figured in several accidents prejudicial to petitioner cannot serve as basis for the loss of trust and confidence.

73. What constitutes the ground of commission of crime or offense?

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.

74. What are other analogous causes under Article 282 of the Labor Code?

Instances considered analogous causes.

1. The ground of inefficiency.
2. Violation of safety rules.
3. Ban on one's employees imposed by another company.
4. Violation of the company code of conduct or company rules and regulations.

AUTHORIZED CAUSES FOR TERMINATION OF EMPLOYMENT.

75. What are the authorized causes for termination of employment?

Grounds.- The grounds cited in Articles 283 and 284 are technically called the *authorized causes* for termination of employment. They are:

1. installation of labor-saving devices;
2. redundancy;
1. retrenchment;
2. closure or cessation of business; *and*
3. disease.

76. What are the requisites for the ground of installation of labor-saving devices?

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 than the introduction of the machinery, equipment or device and the consequent termination of employment of those affected thereby;
4. the 30-day 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 employee (whether casual, temporary or regular), experience, efficiency rating and seniority, among other considerations; and
6. separation pay under the law or company policy or Collective Bargaining Agreement or similar contract, when appropriate, must be paid to the affected employees.

Modernization program through introduction of machines.

In the 2004 case of **Abapo vs. CA**, [G. R. No. 142405, Sept. 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.

Installation of machines for more economy and efficiency.

In **Philippine Sheet Metal Workers Union vs. CIR**, [83 Phil. 433], the termination of employment of the affected employees due to the introduction of machinery in the manufacture of its products for purposes of effecting more economy and efficiency, was declared valid.

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.

77. What are the requisites for the ground of redundancy?

For redundancy to be a valid ground to terminate employment, the following requisites must be present:

1. written notice 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;
2. payment of separation pay equivalent to at least one (1) month pay or to at least one (1) month pay for every year of service, whichever is higher;
3. good faith in abolishing the redundant positions; and
4. fair and reasonable criteria in ascertaining what positions are to be declared redundant and accordingly abolished [such as less preferred status [*e. g.*, temporary employee]; (b) efficiency; and (c) seniority].

Elimination of undesirables, abusers and worst performers through redundancy, not an indication of bad faith.

In **Dole Philippines, Inc. vs. NLRC**, [G. R. No. 120009, Sept. 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.

Characterization of service as redundant by employer, not subject to review; exception.

As a general rule, the characterization of the services of the employee who was terminated for redundancy is an exercise of business judgment of the employer. The wisdom or soundness of such characterization or decision is not subject to discretionary review by the Labor Arbiter or the NLRC and the Court of Appeals. The only exception is when there is a showing that the same was done in violation of law or attended with arbitrary and malicious action.

It is not enough, therefore, for a company to merely declare that it has become overmanned. It must produce adequate proof that such is the actual situation in order to justify the dismissal of the affected employees for redundancy.

In the 2001 case of **Santos vs. CA, Pepsi-Cola Products Phils., Inc.**, [G. R. No. 141947, July 5, 2001], respondent Pepsi, based on the fact that its Metro Manila Sales Operations were not meeting its sales targets, and on the fact that new positions were subsequently created, wanted to restructure its organization in order to include more complex positions that would either absorb or render completely unnecessary the positions it had previously declared redundant. The soundness of this business judgment of Pepsi has been assailed by petitioners, arguing that it is more logical to implement new procedures in physical distribution, sales quotas, and other policies aimed at improving the performance of the division rather than to reduce the number of employees and create new positions. The Supreme Court, however, said that this argument cannot be accepted.

While it is true that management may not, under the guise of invoking its prerogative, ease out employees and defeat their constitutional right to security of tenure, the same must be respected if clearly undertaken in good faith and if no arbitrary or malicious action is shown.

Similarly, in **Wiltshire File Co., Inc. vs. NLRC**, [G.R. No. 82249, February 7, 1991, 193 SCRA 665], petitioner company effected some changes in its organization by abolishing the position of Sales Manager and simply adding the duties previously discharged by it to the duties of the General Manager to whom the Sales Manager used to report. In that case, it was held that the characterization of private respondent's services as no longer necessary or sustainable and, therefore, properly terminable, was an exercise of business judgment on the part of petitioner company.

But the above rule was not applied in the 2001 case of **University of the Immaculate Conception, vs. U.I.C. Teaching and Non-Teaching Personnel and Employees Union**, [G. R. No. 144702, July 31, 2001]. Petitioners do not claim that the position of school electrician has become useless or redundant such that it had to be abolished. That there is need for an electrician is shown by the fact that his work is being performed by the student-scholar. There is no showing that there were two (2) positions for school electricians, and that in order to achieve a reduction in personnel, one position for electrician was abolished resulting in one position for school electrician and the consequent termination of the employment of the person occupying the position. Rather, the facts show that there was only one position for electrician which was occupied by respondent. When the time came that the student-trainee became capable of performing his functions, the latter's employment was terminated and the student-trainee took the vacated position. Clearly there was here no abolition of position to achieve a reduction in the number of electricians employed by the UIC. In other words, the student-trainee merely replaced respondent as school electrician because petitioners found it to their advantage to let the work be done by the student for free.

Burden of proof in redundancy rests on the employer.

It is the burden of the employer to prove the factual and legal basis for the dismissal of its employees on the ground of redundancy.

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. (*Dole Philippines, Inc. vs. NLRC, supra*).

Redundancy and retrenchment, distinguished.

Redundancy and retrenchment are not synonymous but distinct and separate grounds under Article 283.

"Redundancy" exists when the services of an employee are in excess of what is required by an enterprise. "Retrenchment," on the other hand, is one of the economic grounds for dismissing employees and is resorted to primarily to avoid or minimize business losses. "Redundancy Program," while denominated as such, is more precisely termed "retrenchment" if it was primarily intended to prevent serious business losses. (*Atlantic Gulf and Pacific Company of Manila, Inc. [AG & P], vs. NLRC, G. R. No. 127516, May 28, 1999*).

Abolition of position or department.

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 vs. NLRC, G. R. No. 99266, March 2, 1999*).

In valid abolition of positions, the Supreme Court cannot erase that initiative simply to protect the person holding the position. (*Cosico, Jr. vs. NLRC, G. R. No. 118432, May 23, 1997*).

Reorganization through redundancy, 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. vs. IAC*, 149 SCRA 641 [1987]).

Contracting out of abolished position to independent contractors held valid.

In **Serrano vs. NLRC**, [G. R. No. 117040, January 27, 2000], the act of the employer of phasing-out its security section and the hiring of an independent security agency to perform its task constitutes a legitimate business decision. Consequently, absent proof that management acted in a malicious or arbitrary manner, the Supreme Court will not interfere with the exercise of judgment by an employer.

In **Asian Alcohol Corporation vs. NLRC**, [G. R. No. 131108, March 25, 1999], the Supreme Court upheld the termination of employment of water pump tenders and their replacement by independent contractors. It ruled that an employer's good faith in implementing a redundancy program is not necessarily put in doubt by the availment of the services of an independent contractor to replace the services of the terminated employees to promote economy and efficiency.

In **De Ocampo vs. NLRC**, [213 SCRA 652 (1992)], the Supreme Court upheld the termination of employment of three mechanics in a transportation company and their replacement by a company rendering maintenance and repair services.

Indeed, the management of a company cannot be denied the faculty of promoting efficiency and attaining economy by a study of what units are essential for its operation. To it belongs the ultimate determination of whether services should be performed by its personnel or contracted to outside agencies. While there should be mutual consultation, eventually deference is to be made to what management decides. (*Serrano vs. NLRC, supra*).

Hiring of casuals after redundancy, held valid.

Private respondent-employees in **Dole Philippines, Inc. vs. NLRC**, [G. R. No. 120009, September 13, 2001] submit that the subsequent hiring of casual employees to replace the dismissed regular employees on the ground of redundancy is an indication of bad faith. Petitioner company does not deny that they hired casual employees after the implementation of the redundancy program. Petitioner explains, however, that it has always hired casuals to augment the company's manpower requirements in accordance with the demands of the industry. Petitioner further asserts that the number of casuals remained relatively constant after the implementation of the redundancy program, as shown by the graph appended as Annex "J" of its supplement to the motion for reconsideration before the NLRC. The Court finds the foregoing explanation sufficient to negate the allegations of bad faith by its former employees.

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. vs. NLRC, supra*).

"Last In, First Out" [LIFO] rule.

In the case of **Maya Farms Employees Organization vs. NLRC**, [G. R. No. 106256, December 28, 1994], involving termination due to redundancy, one of the issues raised was the validity of application of the "*Last In, First Out [LIFO]*" rule embodied in the CBA which states:

“Section 2. *LIFO RULE*. - In all cases of lay-off or retrenchment resulting in termination of employment in the line of work, the Last-In-First-Out (LIFO) Rule must always be strictly observed.” (*Section 2, Article III, CBA*).

In holding that the employer did not violate said rule, the Supreme Court declared:

“It is not disputed that the LIFO rule applies to *termination of employment in the line of work*. Verily, what is contemplated in the LIFO rule is that when there are two or more employees occupying the same position in the company affected by the retrenchment program, the last one employed will necessarily be the first to go.

“Moreover, the reason why there was no violation of the LIFO rule was amply explained by public respondent in this wise:

‘xxx. The LIFO rule under the CBA is explicit. It is ordained that in cases of retrenchment resulting in termination of employment in line of work, the employee who was employed on the latest date must be the first one to go. The provision speaks of termination in the line of work. This contemplates a situation where employees occupying the same position in the company are to be affected by the retrenchment program. Since there ought to be a reduction in the number of personnel in such positions, the length of service of each employee is the determining factor, such that the employee who has a longer period of employment will be retained.’”

LIFO rule, exception.

In the same case of *Maya Farms* [supra], the petitioners contended that the *LIFO rule* was violated by management in the case of two (2) employees, the Asst. Superintendent for packing and Asst. Superintendent for meat processing, respectively. The union pointed out that the employee who was retained by management was employed on a much later date than the other employee, and both were Assistant Superintendents.

The Supreme Court affirmed the ruling of the NLRC which declared that despite the *LIFO rule*, the nature of work and experience were correctly taken into account by management, thus:

“We cannot sustain the union’s argument. It is indeed true that Roberta Cabrera was employed earlier (January 28, 1961) and [sic] Lydia Bandong (July 9, 1966). However, it is maintained that in the meat processing department, there were 3 Asst. Superintendents assigned as head of the 3 sections thereat. The reason advanced by the company in retaining Bandong was that as Asst. Superintendent for meat processing, she could ‘already take care of the operations of the other sections.’ The nature of work of each assistant superintendent as well as experience were taken into account by management. Such criteria was not shown to be whimsical nor capricious.” (*Maya Farms Employees Organization vs. NLRC, G. R. No. 106256, Dec. 28, 1994*).

LIFO or FILO rule, 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 vs. NLRC, supra*).

LIFO rule, not controlling, as employer has prerogative to choose who to terminate.

In the 2000 case of *De la Salle University vs. 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 insists 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' (Art. 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), 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. 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 vs. 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)

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 the 2004 case of **Asufrin, Jr. vs. 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.*

78. What are the requisites for the ground of retrenchment?

Under Article 283, the following are the requisites for a valid retrenchment which must be proved by clear and convincing evidence:

- (1) that the retrenchment is reasonably necessary 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 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 (1/2) month's 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.

Standards to be observed in 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. (*F. F. Marine Corporation vs. The Honorable Second Division NLRC, G. R. No. 152039, April 8, 2005; See also Clarion Printing House, Inc. vs. NLRC, G. R. No. 148372, June 27, 2005*).

Failure to follow fair criteria in selection, effect.

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 the case of **Philippine Tuberculosis Society, Inc. vs. NLRC**, [G. R. No. 115414, Aug. 25, 1998], the Supreme Court invalidated the retrenchment program for its improper implementation despite proof of financial losses. Petitioner claims that the retrenchment was based on a number of criteria, to wit: (1) whether the positions of the employees are to be retained or abolished; (2) the qualifications required by the positions to be retained, modified, or created; and (3) the attitude, discipline, efficiency, flexibility, and trainability of the employees. Petitioner has not shown, however, that certain employees were selected for retrenchment because they did not meet these criteria. It has not explained why said employees had to be laid off without considering their many years of service. The fact that these employees had accumulated seniority credits indicates that they had been retained in the employ of the employer because of loyal and efficient service. The burden of proving the contrary is on petitioner.

In the 2005 case of **Ariola vs. Philex Mining Corporation**, [G. R. No. 147756, August 9, 2005], while respondent Philex had complied with some of the requisites for retrenchment, what it failed to do was to implement its retrenchment program in a just and proper manner. Its failure to use a reasonable and fair standard in the computation of the supervisors' demerits points is not merely a procedural but a substantive defect which invalidates petitioners' dismissal. Here, one of the criteria for retrenchment in the supervisors' MOA was held inconsistent with Article XVIII of the CBA. The system in the supervisors' MOA for computing demerits points, based on the formula provided in the rank-and-file's MOA, evaluates the employee's disciplinary record over a three-year period, regardless of the penalty involved. This contravenes Article XVIII of the CBA which provides that offenses punishable by "reprimands and warnings of separation" will be stricken-off the record every February 1st of each year. Since the supervisors' union did not ratify the MOA, the MOA cannot prevail over the CBA. The inconsistency between the

supervisors' MOA and the CBA is a substantive defect because what the CBA removes from petitioners' record the supervisors' MOA treats as a factor in evaluating petitioners' demerits points. Under Article XVIII of the CBA, petitioners and their co-supervisors will not get demerits points for sanctions of reprimands and warnings of separation. This is not true under the supervisors' MOA. In short, if the CBA governs instead of the MOA, petitioners may not fall under those to be retrenched. Thus, the use of the MOA instead of the CBA becomes a substantive defect.

Cost reduction measures prior to retrenchment, necessary.

Retrenchment is only a measure of last resort when other less drastic means have been tried and found to be wanting, inadequate or insufficient. Cost reduction measures should first be taken prior to retrenchment. (*Polymart Paper Industries, Inc. vs. NLRC, G. R. No. 118973, Aug. 12, 1998*).

In a 2005 case, it was held that 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 vs. The Honorable Second Division NLRC, G. R. No. 152039, April 8, 2005*).

In the 2004 case of **Emco Plywood Corporation vs. Abelgas**, [G. R. No. 148532, April 14, 2004], where the only less drastic measure that the company undertook was the rotation work scheme: 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 other such measures seriously belies its claim that retrenchment was done in good faith to avoid losses.

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 losses are actually sustained. The Supreme Court, however, has interpreted the law 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. (*Asian Alcohol Corporation vs. NLRC, G. R. No. 131108, March 25, 1999, 305 SCRA 416*).

Best evidence of losses - audited financial statements.

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. (*F. F. Marine Corporation vs. The Hon. Second Division NLRC, supra*).

Unless duly audited by independent auditors, the financial statements can be assailed as self-serving documents. (*Danzas Intercontinental, Inc. vs. Daguman, G. R. No. 154368, April 15, 2005*).

Best evidence of losses in a government-controlled corporation - financial statements audited by COA.

In the 2001 case of **NDC-Guthrie Plantations, Inc., vs. NLRC**, [G. R. No. 110740, August 9, 2001], involving the retrenchment of workers in government-controlled corporations,

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, the Court 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.

Rehabilitation receivership presupposes existence of losses.

In the 2005 case of **Clarion Printing House, Inc. vs. 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 the Securities Regulation Code, R. A. No. 8799) 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 of other properties or paralyzation of business operations.”

That the SEC appointed *an interim* receiver for the EYCO Group of Companies 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 *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.

Evidence of losses in a retrenchment case may be presented for the first time on appeal with the NLRC.

In the 2003 case of **Tanjuan vs. Philippine Postal Savings Bank, Inc.**, [G. R. No. 155278, September 16, 2003], it was declared that pursuant to the policy that technical rules of procedure are not strictly applied in labor cases, employers may, on cogent grounds, be allowed to present, even on appeal, evidence of business losses to justify the retrenchment of workers. However, delay in the submission of evidence should be clearly explained and should adequately prove the employer's allegation of the cause for termination. However, delay in the submission of evidence should be clearly explained and should adequately prove the employer's allegation of the cause for termination. (*See also Clarion Printing House, Inc. vs. NLRC, G. R. No. 148372, June 27, 2005*).

Audited financial statements belatedly filed in the CA, effect.

In the 2005 case of **F. F. Marine Corporation vs. The Honorable Second Division NLRC**, [G. R. No. 152039, April 8, 2005], petitioners seek to justify the retrenchment on the ground of serious business losses brought about by the Asian economic crisis. To prove their claim, petitioners adduced before the Labor Arbiter the 1994 and 1995 *Financial Statements*. Said *Financial Statements*, however, were prepared only by petitioners' accountant and approved by the manager. They were not audited by an independent external auditor. The financial statements show that in 1994 and 1995, petitioner corporation earned an income of only ₱77,609.79 and ₱155,339.96, respectively. In contrast, the 1996 and 1997 *Financial Statements* showed losses of ₱18,005,918.08, and ₱21,316,072.89, respectively.

It was only before the Court of Appeals that the financial statements for the years 1996 and 1997 as audited by an independent external auditor were introduced. They were not presented before the Labor Arbiter and the NLRC although they were executed on 30 March 1998, several months prior to the filing of the complaint for illegal dismissal on 12 January 1999. The Supreme Court ruled:

“Petitioners' failure to adduce financial statements duly audited by independent external auditor casts doubt on their claim of losses for financial statements are easy prey to manipulation and concoction. This Court has ruled that financial statements audited by independent external auditors constitute the normal method of proof of the profit and loss performance of a company. Even this, however, is not a hard and fast rule as the norm does not compel this Court

to accept the contents of the said documents blindly and without thinking. A careful examination of financial statements may be resorted to especially if on their face relevant facts appear to have been ignored that will warrant a contrary conclusion.”

Evidence of losses may be allowed to be presented for the first time on appeal with NLRC but not with CA.

In **Cañete vs. NLRC**, [320 Phil. 313 (1995)] as in **Tanjuan vs. Philippine Postal Savings Bank, Inc.**, [G. R. No. 155278, September 16, 2003 (supra)], the Supreme Court allowed the presentation of documentary evidence for the first time on appeal with the NLRC. But in *F. F. Marine* [supra], the Supreme Court did not allow the presentation of evidence of losses for the first time before the Court of Appeals. Distinguishing the *Cañete* from the *F. F. Marine* cases, the Supreme Court ruled in the latter case:

“Petitioners cite *Cañete vs. NLRC*, [320 Phil. 313 (1995)] where the Court upheld the NLRC’s consideration of documents submitted to it by the respondent therein for the first time on appeal. The holding is clearly not *apropos* since the documents were presented to the NLRC, unlike in this case where the new financial statements were submitted for the first time before the Court of Appeals. That was why this Court in *Cañete* ratiocinated that the petitioner therein had the opportunity to rebut the truth of the additional documents. The same cannot be said of the private respondent in this case.”

Retrenchment effected long after business losses.

In **Taggat Industries, Inc. vs. NLRC**, [G. R. No. 120971, March 10, 1999], while sufficient evidence of the company’s business losses was submitted by the petitioner company, per its financial statements for the period 1986 to December 31, 1987, the same is belied by the fact that the private respondent-employees remained employed by petitioner company until October 15, 1991, more than four (4) years since the company declared losses in 1987. Indeed, if there was any truth that the company was reeling from business reverses, it should have retrenched the private respondent-employees as soon as the business losses became evident.

Re-hiring of retrenched employees, effect.

In **Atlantic Gulf and Pacific Company of Manila, Inc. [AG & P], vs. NLRC**, [G. R. No. 127516, May 28, 1999], it was contended that the “redundancy program” was actually a union-busting scheme of management, aimed at removing union officers who had declared a strike. This contention, however, cannot stand in the fact of evidence of substantial losses suffered by the company. Moreover, while it is true that the company re-hired or re-employed some of the dismissed workers, it has been shown that such action was made only as company projects became available and that it was done in pursuance of the company’s policy of giving preference to its former workers in the rehiring of project employees. The rehiring or re-employment does not negate the imminence of losses, which prompted private respondents to retrench.

79. What are the requisites for the ground of closure or cessation of business operations?

The requisites for the valid invocation of this statutory ground 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 of Book Six of the Labor Code;
[NOTE: *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, if such is the cause invoked. If not due to serious business losses, this requisite becomes relevant.*]
3. there is no other option available to the employer except to close or cease operations;
4. the notice requirement under Article 283 should be complied with, whether or not the closure or cessation of operations is due to serious business losses or financial reverses; and

5. separation pay under the law (when *not* due to serious business losses) or company policy or Collective Bargaining Agreement or similar contract, when appropriate, must be paid to the affected employees.

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 operation as a valid and authorized ground of terminating employment is not limited to those resulting from business losses or reverses. Said provision, in fact, provides for the payment of separation pay to employees terminated because of closure of business not due to losses, thus implying that termination of employees other than closure of business due to losses may be valid. (*J.A.T. General Services vs. NLRC, G. R. No. 148340, Jan. 26, 2004*).

In **Industrial Timber Corporation vs. NLRC**, [339 Phil. 395, 405 (1997)], the Supreme Court held more emphatically that:

“In any case, Article 283 of the Labor Code is clear that an employer may close or cease his business operations or undertaking even if he is not suffering from serious business losses or financial reverses, as long as he pays his employees their termination pay in the amount corresponding to their length of service. It would, indeed, be stretching the intent and spirit of the law if we were to unjustly interfere in management’s prerogative to close or cease its business operations just because said business operation or undertaking is not suffering from any loss.”

Principle of closure under Article 283 applies in cases of both complete and partial cessation of business operation.

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. vs. NLRC**, [G. R. No. 125887, March 11, 1998], that 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 operation.***

In **Dangan vs. NLRC**, [127 SCRA 706], the Supreme Court had occasion to reiterate management’s prerogative to close or abolish a department or section of the employer’s establishment for economic reasons. We reasoned out, said the Supreme Court, that since the greater right to close the entire establishment and cease operations due to adverse economic conditions is granted an employer, the closure of a part thereof to minimize expenses and reduce capitalization should similarly be recognized.

Closure of outlets, branches, departments or sections.

In the 2004 case of **Cama vs. Joni’s Food Services, Inc.**, [G. R. No. 153021, March 10, 2004], the Supreme Court ruled as valid the closure of outlets or branches, not necessarily the entire business operations. Moreover, it held that since the closure was due to serious losses duly proven by clear evidence, the employees affected were not entitled to separation pay.

It is worth noting in this regard that the employer’s prerogative to close or abolish a department or section of his establishment for economic reasons such as to minimize expenses and reduce capitalization is as much recognized as management’s prerogative to close the entire establishment and cease operations due to adverse economic conditions. (*Danzas Intercontinental, Inc. vs. Daguman, G. R. No. 154368, April 15, 2005*).

Relocation of business amounts to cessation of operations.

In a 2000 case, **Cheniver Deco Print Technics Corporation vs. 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, thus:

“Broadly speaking, there appears no complete dissolution of petitioner’s business undertaking but the relocation of petitioner’s plant to Batangas, in our view, 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.” (*Citing Coca-Cola Bottlers [Phils.] Inc. vs. NLRC, 194 SCRA 592, 599 [1991]*).

Burden of proof in case closure is due to losses.

It is well settled that the burden of proving that the closure is *bona-fide* falls upon the employer. (*J.A.T. General Services vs. NLRC, G. R. No. 148340, Jan. 26, 2004*).

Audited financial statements necessary in closure due to losses.

The condition of business losses is normally shown by financial documents duly audited by independent auditors. According to the 2005 case of **Danzas Intercontinental, Inc. vs. 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 his business is obligated to pay his employees their separation pay.

Evidence of losses in a closure case should not be presented for the first time on appeal with the Court of Appeals or Supreme Court.

In the 2005 case of **Me-Shurn Corporation vs. Me-Shurn Workers Union - FSM**, [G. R. No. 156292, January 11, 2005] and **Danzas Intercontinental** [supra], the High Tribunal held that as the employer-petitioners have the burden of proving the existence of an authorized cause, they should have presented the company’s audited financial statements before the Labor Arbiter or, under justifiable circumstances, even on appeal with the NLRC, who are in the position to evaluate evidence. That they failed to do so and only presented these documents to the Court of Appeals on *certiorari* is lamentable considering that the admission of evidence is outside the sphere of the appellate court’s *certiorari* jurisdiction. Matters regarding the financial condition of a company - those that justify the closing of its business and show the losses in its operations - are questions of fact that must be proven below.

Closure due to CARP.

Article 283 does not contemplate a situation where the closure of the business establishment is forced upon the employer and ultimately for the benefit of the employees as in the case of closure of the employer’s business because a large portion of its estate was acquired by the Department of Agrarian Reform pursuant to the Comprehensive Agrarian Reform Program under Republic Act No. 6657. The Supreme Court thus said in **National Federation of Labor vs. NLRC**, [G. R. No. 127718, March 2, 2000]: “(S)ince the closure was due to the act of the government to benefit the petitioners as members of the Patalon Estate Agrarian Reform Association by making them agrarian lot beneficiaries of said estate, the petitioners are not entitled to separation pay. The termination of their employment was not caused by the private respondents. The blame, if any, for the termination of petitioners’ employment can even be laid upon the petitioner-employees themselves inasmuch as they formed themselves into a cooperative, PEARA, ultimately to take over, as agrarian lot beneficiaries, private respondents’ landed estate pursuant to R. A. 6657. The resulting closure of the business establishment, Patalon Coconut Estate, when it was placed under CARP, occurred through no fault of the private respondents.”

In 2005, the Supreme Court had occasion to re-affirm the ruling in the above 2000 case of *National Federation of Labor* [supra], in the case of **Manaban vs. Sarphil Corporation**, [G. R. No. 150915, April 11, 2005]. Quoting the Court of Appeals' decision affirming the ruling of the NLRC, the Supreme Court said:

“Anent the legality of the Labor Arbiter's award of separation pay in favor of petitioners, respondent NLRC correctly ruled that the termination of employer-employee relationship as a result of the implementation of the Comprehensive Agrarian Reform Law does not make out a case for illegal dismissal or termination due to authorized cause under Article 283 of the Labor Code as to warrant the payment of separation pay. The closure of business operations contemplated under Article 283 refers to a voluntary act or decision on the part of the employer, not one forced upon it, as in this case, by an act of the Law or State to benefit petitioners by making them agrarian lot beneficiaries. Thus, We quote with approval the following disquisitions of public respondent which We have found to be substantiated by the evidence, viz:

‘x x x The resulting severance of employment relation between the parties does not make out a case of illegal dismissal nor of termination due to cessation of business operation or undertaking under Article 283 of the Labor Code warranting payment of separation pay, primarily because dismissal presupposes a unilateral act by the employer in terminating the employment of its workers. The resulting severance of employment relationship between the parties came about INVOLUNTARILY. If the landowners ceased their operation, it was not because they wanted to. Rather, it was something forced upon them by an act of law or the State. It would be the height of injustice and inequity if the workers who benefited from the takeover of the lands and becoming new owners in the process would still be allowed to exact payment from their former employer-landowner in the form of separation pay benefit. Such would be tantamount to dealing a DOUBLE WHAMMY against the landowner who was forced to relinquish or part with the ownership of his land by an act of the State.’ (Emphasis supplied)

“The ruling in the parallel case of *National Federation of Labor vs. NLRC*, is *apropos*. There, the Supreme Court categorically held that former employees who became beneficiaries of the Comprehensive Agrarian Reform Program are not entitled to separation pay because the closure of the business of their employer is compelled by law and not by the decision of its management. xxx.”

Retrenchment and closure of business, distinguished.

The 2004 case of **J.A.T. General Services vs. NLRC**, [G. R. No. 148340, January 26, 2004] discusses in clear terms the distinction 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 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 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. The foregoing distinction was reiterated in the 2005 case of **Alabang Country Club, Inc. vs. NLRC**, [G. R. No. 157611, August 9, 2005]. In this case, 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.

80. Notices required under Article 283, 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. (*Fuentes vs. NLRC*, 266 SCRA 24, 32, Jan. 2, 1997; *Pulp and Paper, Inc. vs. NLRC*, G. R. No. 116593, Sept. 24, 1997).

While an employer may have a valid ground for implementing a retrenchment program, it is not excused from complying with the required written notice served both to the employee concerned and the DOLE at least one month prior to the intended date of retrenchment. (*PT & T vs. NLRC*, G. R. No. 147002, April 15, 2005).

Rationale for the notice requirement.

The notice requirement is a substitute for the prior-clearance requirement in case of termination of employment. (*Explanatory Note, Cabinet Bill No. 45 which was later enacted into law as Batas Pambansa Bilang 130*).

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. (*Emco Plywood Corporation vs. Abelas*, G. R. No. 148532, April 14, 2004).

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. In addition, this notice requirement gives employees some time to prepare for the eventual loss of their jobs and their corresponding income. (*PT & T vs. NLRC*, G. R. No. 147002, April 15, 2005)

Absence of notice does not render the dismissal ineffectual, defective or illegal.

In **Agabon, vs. NLRC**, [G. R. No. 158693 November 17, 2004], the Supreme Court ruled that dismissal for authorized cause but without complying with the notice requirement does not make the dismissal illegal or ineffectual. The dismissal remains valid and legal but the employer is made to pay an indemnity in the form of nominal damages for non-compliance with the procedural requirements of due process.

Failure to observe 30-day prior notice rule, effect per Agabon case.

In the 2005 case of **Cajucom VII vs. TPI Philippine Cement Corporation**, [G. R. No. 149090, February 11, 2005], it was ruled that a notice served on the employee to be retrenched and to the DOLE three (3) days short of the 30 days required by law is procedurally defective. However, while this infirmity cannot be cured, it should not invalidate the dismissal. Consequently, the employer should be held liable in the amount of ₱20,000.00 as nominal damages for non-compliance with the procedural requirements of due process.

In another 2005 case, **Philippine Telegraph & Telephone Corporation vs. NLRC**, [G. R. No. 147002, April 15, 2005], the Supreme Court held that while the employer's failure to comply with the one-month notice requirement prior to retrenchment does not render the termination illegal, it, however, renders the same defective, entitling the dismissed employee to

payment of indemnity in the form of nominal damages. Based on prevailing jurisprudence, the amount of indemnity is pegged at ₱30,000.00.

Notice should be served to employees themselves.

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 vs. Abelgas, supra*).

Notice to DOLE should state correct number of workers to be terminated.

The notice required to be sent to the DOLE should state clearly the correct number of workers to be terminated based on the grounds cited in Article 283. Such notice is defective if it stated that the company would terminate the services of 104 of its workers but had actually dismissed 250. (*Ibid.*).

Notice to DOLE need not be complied with in case of voluntary personnel reduction program.

Well-settled is the rule that notice to the Department of Labor and Employment need not be complied with if the termination of employment under Article 283 was made voluntarily by the employees pursuant to a valid personnel reduction program.

In **International Hardware, Inc. vs. NLRC**, [176 SCRA 256 (1989)], 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 Department of Labor and Employment is not necessary as the employee thereby acknowledged the existence of a valid cause for termination of his employment.

In a subsequent 2001 case, the lack of notice to the DOLE, according to the Supreme Court in **Dole Philippines, Inc., vs. NLRC**, [G. R. No. 120009, September 13, 2001], does not render the voluntary redundancy program void. Petitioner accurately invoked the case of *International Hardware* [supra]. Here, most of the private respondents even filled up application forms to be considered for the redundancy program and thus acknowledged the existence that their services were redundant.

In another 2001 case, **Santos vs. CA, Pepsi-Cola Products Phils., Inc.**, [G. R. No. 141947, July 5, 2001], the same ruling in *International Hardware* [supra] that the mandated one (1) month notice prior to termination given to the worker and the DOLE is rendered unnecessary by the consent of the worker himself, was cited. Petitioners assail the voluntariness of their consent by stating that had they known of PEPSI's bad faith, they would not have agreed to their termination, nor would they have signed the corresponding releases and quitclaims. Having established private respondent's good faith in undertaking the assailed redundancy program, there is no need to rule on this contention.

Advance payment of one month salary, not a substitute for written notice requirement.

The law requires that the notice to the employee who will be terminated for authorized causes and notice to the Department of Labor and Employment (DOLE) must be served at least one (1) month before the intended date of effectivity thereof.

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 employees affected 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 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 month prior to the intended effectivity of the termination.

The case in point is the 2000 *en banc* case of *Serrano vs. 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 substitutions for a right that a worker is legally entitled to.

Indeed, continues the High Court, a job is more than the salary that it carries. Payment of thirty (30) days salary cannot compensate for the psychological effect or the stigma of immediately finding one's self laid off from work. It cannot be a fully effective substitute for the thirty (30) days written notice required by law especially when, as in this case, the fact is that no notice was given to the Department of Labor and Employment (DOLE). Besides, the purpose of such previous notice is to give the employee some time to prepare for the eventual loss of his job as well as the DOLE the opportunity to ascertain the verity of the alleged authorized cause of termination. Such purpose would not be served by the simple expedient of paying thirty (30) days salary *in lieu* of notice of an employee's impending dismissal, as by then the loss of employment would have been a *fait accompli*.

One-month notice requirement, applies to both permanent and temporary-lay off.

It must be stressed that 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).

This is the conclusion of the Supreme Court in the 2005 case of **Philippine Telegraph & Telephone Corporation vs. NLRC**, [G. R. No. 147002, April 15, 2005], which involves the temporary retrenchment of some employees dubbed as Temporary Staff Reduction Program (TSRP) lasting for not more than five and a half (5½) months, to commence from September 1, 1998 to February 15, 1999.

The petitioners insist that the one-month notice requirement does not apply in this situation, as the retrenchment involved was merely temporary and not permanent. They aver that this has been recognized by the Supreme Court, and they quote *Sebuguero vs. NLRC*, [G.R. No. 115394, September 27, 1995, 248 SCRA 532], in this manner:

“Article 283 speaks of a permanent retrenchment as opposed to a temporary lay-off as is the case here. There is no specific provision of law which treats of a temporary retrenchment or lay-off and provides for the requisites in effecting it or a period or duration therefor.”

The petitioners' adherence to the above pronouncement of the Court is misplaced. The particular issue involved in the said decision was the duration of the period of temporary lay-off, and not the compliance with the one-month notice requirement.

Nowhere can it be found in *Sebuguero* that the one-month notice may be dispensed with. On the contrary, the Supreme Court, speaking through Chief Justice Hilario G. Davide, Jr., emphasized the mandatory nature of the said notice.

Further, in the case at bar, the memorandum of Del Rosario, the vice-president of the COG, to respondents Bayao and Castillo informing the latter that they were included in the TSRP to be implemented effective September 1, 1998 was dated August 21, 1998. The said memorandum was received by Castillo on August 24, 1998 and Bayao on August 26, 1998. The respondents had barely two weeks' notice of the intended retrenchment program. Clearly then, the one-month

notice rule was not complied with. At the same time, the petitioners never showed that any notice of the retrenchment was sent to the DOLE.

81. Hearing is not required in termination for authorized causes under Article 283 (and Article 284).

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 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 private respondent would have had a right to be present, on the business and financial circumstances compelling retrenchment and resulting in redundancy, would be to impose upon the employer an unnecessary and inutile hearing as a condition for legality of termination.

82. Separation pay under Article 283.

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 operations *not* due to serious business losses or financial reverses are also separately grouped as one.

Separation pay in cases of installation of labor-saving devices or redundancy.

An employee is entitled to termination pay equivalent to at least his one (1) month pay or at least one (1) 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, in case his termination is due to the installation of labor-saving devices or redundancy. (*See also Section 9 [a], Rule I, Book VI, Rules to Implement the Labor Code*).

Separation pay in cases of retrenchment or closure not due to serious business losses or disease.

The employee is entitled to separation pay equivalent to one (1) month pay or at least one-half ($\frac{1}{2}$) 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:

- a. retrenchment to prevent losses; or
- b. closure or cessation of operations of establishment or undertaking *not* due to serious business losses or financial reverses; or
- c. disease under Article 284. (*See also Section 9 [b], Rule I, Book VI, Rules to Implement the Labor Code*).

“One month” pay, the minimum amount of separation pay under Article 283.

(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.

By way of illustration, in *Clarion Printing House, Inc. vs. NLRC*, [G. R. No. 148372, June 27, 2005], the respondent-employee who had rendered service from April 21, 1997 to October 22, 1997 was held to be entitled to a separation pay equivalent to one (1) month salary.

(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 device 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 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 device 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.

By way of illustration, if an employee has served for 1 year and 5 months, his period of service shall only be considered one (1) year. If he has served for 1 year and 6 months, his period of service shall be deemed at least two (2) years for purposes of computing his separation pay.

Closure or cessation of operations; requisite for entitlement to separation pay.

In the leading case of **North Davao Mining Corporation vs. NLRC**, [G. R. No. 112546, March 13, 1996], the Supreme Court *en banc* 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. Payment of separation pay under Article 283 is justified only if the “*closure or cessation of operations*” is **not** due to serious business losses or financial reverses. Indeed, one cannot squeeze blood out of a dry stone. Nor water out of parched land.

This ruling was reiterated in the 2004 case of **Cama vs. Joni’s Food Services, Inc.**, [G. R. No. 153021, March 10, 2004], where it was pronounced that since the closure was due to serious losses duly proven by clear evidence, the employees affected were not entitled to separation pay. In this case, the Supreme Court, to determine the veracity of the claim of the company that it has suffered extreme losses, scrutinized the balance sheets and income statements by using such basic accounting tools as the working capital ratio, debt-equity ratio, gross profit ratio and net profit (loss) ratio. Accordingly, it concluded that indeed, the company was suffering from serious losses and, therefore, the employer is not obligated to pay separation benefits.

Separation pay not subject to deduction for attorney’s fees or negotiation fees.

In a 2004 case, it was held that the separation pay mandated to be paid under Article 283 cannot be reduced by any deductions for attorney’s fees that may have accrued as a result of the renegotiations for a new CBA. The Labor Code prohibits such arrangement under Article 222 of the Labor Code. The obligation to pay attorney’s fees belongs to the union and cannot be shunted to the individual workers as their direct responsibility. The law has made clear that any agreement to the contrary shall be null and void *ab initio*. (*Emco Plywood Corporation vs. Abelgas*, G. R. No. 148532, April 14, 2004).

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. vs. NLRC*, G. R. No. 97846, Sept. 25, 1998).

In the 2004 case of **Emco Plywood Corporation vs. Abelgas**, [G. R. No. 148532, April 14, 2004], and in the earlier cases of **Trendline Employees Association-Southern Philippines Federation of Labor (TEA-SPFL) vs. NLRC**, [338 Phil. 681, May 5, 1997] and **Philippine Carpet Employees' Association vs. Philippine Carpet Manufacturing Corporation**, [340 SCRA 383, 394, September 14, 2000], where the retrenchments were found to be illegal as the employers had failed to prove that they were actually suffering from poor financial conditions, the quitclaims were deemed illegal as the employees' consent had been vitiated by mistake or fraud.

The same holding was made by the Supreme Court in the 2005 case of **F. F. Marine Corporation vs. The Honorable Second Division NLRC**, [G. R. No. 152039, April 8, 2005]. Considering that the ground for retrenchment availed of by petitioners was not sufficiently and convincingly established, the retrenchment was declared illegal and of no effect. The quitclaims executed by retrenched employees in favor of petitioners were, therefore, not voluntarily entered into by them. Their consent was similarly vitiated by mistake or fraud. The law looks with disfavor upon quitclaims and releases by employees pressured into signing by unscrupulous employers minded to evade legal responsibilities. As a rule, deeds of release or quitclaim cannot bar employees from demanding benefits to which they are legally entitled or from contesting the legality of their dismissal. The acceptance of those benefits would not amount to estoppel. The amounts already received by the retrenched employees as consideration for signing the quitclaims should, however, be deducted from their respective monetary awards.

83. What are the legal principles that may be invoked in cases of sale, transfer or spin-off of business?

- Change of ownership of business, not an authorized cause to terminate employment.
- Liability of buyer or transferee of business in good faith - Not obligated to absorb employees except when this is specifically stipulated.
- Sale or transfer of business in bad faith - Liable to the employees.
- Generous termination pay package indicates good faith.
- Appointment of same directors and employees, not indicative of bad faith.
- New owner is not assignee of CBA in sale in good faith.
- Transfer of business due to death - obligations of deceased not enforceable against the transferee. 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 vs. NLRC, et al.*, G. R. No. 117495, May 29, 1997, 272 SCRA 793).

84. What is the legal consequence of 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.

85. 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
 6. 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.
- 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.

Medical certificate issued by company doctor, not acceptable.

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]*).

“*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.

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)

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*).

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 require 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 ($\frac{1}{2}$) 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. (*Article 284, Labor Code; Baby Bus, Inc. vs. Minister of Labor, G. R. No. 54223, Feb. 26, 1988*).

TERMINATION OF EMPLOYMENT BY EMPLOYEE. (RESIGNATION)

86. 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. (*Interrod 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*).

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*).

87. 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.

88. 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.

89. 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.

90. 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.

91. 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.

92. 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.

93. Some principles on resignation.

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.

"In *Callanta vs. National Labor Relations Commission*, [G.R. No. 105083, 20 August 1993, 225 SCRA 526], a national-promoter salesman of Distilleria Limtuaco Co., Inc., assigned in Iligan City, Lanao del Sur and Lanao Del Norte, resigned after he was found to have a shortage of ₱49,005.49 in a 'spot audit' conducted by the company. He later filed an illegal dismissal case claiming that his consent to the resignation was vitiated as he signed the company's ready made resignation letter because the latter threatened to file a estafa case against him. In rejecting his contention, the Court ruled that a salesman-promoter could

not have been confused, coerced or intimidated into signing the resignation letter. Instead of defending himself against the adverse audit report, he voluntarily signed the resignation letter though there is no urgency in signing the same. The Court concluded that he affixed his signature in the said letter of his own free will with full knowledge of the consequences thereof.”

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.

Employee who alleges that she was coerced into resigning should prove such claim.

In the same case of *Willi Hahn* [supra], the resigning employee's unsubstantiated and self-serving claim that she was coerced into signing the resignation letter was not given any credence. It is a basic rule in evidence that the burden of proof is on the part of the party who makes the allegations. She failed to discharge this burden. Moreover, the Court of Appeals' finding that respondent had no motive to resign because the charges of dishonesty were not fully substantiated has no basis. Had the separation of respondent been for dismissal due to loss of trust and confidence, substantial evidence of the shortages and non-remittances would have been indispensable. Such, is not the case here considering her voluntary resignation.

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).

<p>TEMPORARY SUSPENSION OF OPERATION FOR SIX MONTHS UNDER ARTICLE 286</p>

94. 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.

95. 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.

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.

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. (See also *Cheniver Deco Print Technics Corporation v. NLRC*, G.R. No. 122876, Feb. 17, 2000, 325 SCRA 758).

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.

96. 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 thus far confined to security guards, it is opined that it may also be made applicable to employees of contractors/subcontractors under a valid independent contracting/ subcontracting arrangement under Article 106 of the Labor Code. The same form of dislocation and displacement also affects their employees everytime contracts of service are terminated by their

clients (principals). In the meantime that the dislocated employees are waiting for their next assignment, they may be placed on “*off detail*” or “*floating status*” following the same concept applicable to security guards.

For instance, in the earlier cited case of *JPL Marketing Promotions vs. 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 re-assignment 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 thereto.

Legal consequence if off-detailed security guards are not re-assigned after six months.

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. (*Mobile Protective & Detective Agency vs. Ompad*, G. R. No. 159195, May 9, 2005).

Off-detail status for 29 days, not constructive dismissal.

In the 2002 case of *Soliman Security Services, Inc. vs. 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 29 days was answered in the negative. This question posed is not new. In the case of *Superstar Security Agency, Inc., vs. NLRC*, [184 SCRA 74], the Supreme Court, addressing a similar issue, has said:

“xxx The charge of illegal dismissal was prematurely filed. The records show that a month after Hermosa was placed on a temporary ‘off-detail,’ she readily filed a complaint against the petitioners on the presumption that her services were already terminated. Temporary ‘off-detail’ is not equivalent to dismissal. In security parlance, it means waiting to be posted. It is a recognized fact that security guards employed in a security agency may be temporarily sidelined as their assignments primarily depend on the contracts entered into by the agency with third parties (*Agro Commercial Security Agencies, Inc. vs. NLRC*, G.R. Nos. 82823-24, 31 July 1989). However, it must be emphasized that such temporary inactivity should continue only for six months. Otherwise, the security agency concerned could be liable for constructive dismissal.” (*See also Valdez vs. NLRC*, 286 SCRA 87).

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*.

98. Who are the employees not covered by the Retirement Pay Law?

The *Retirement Pay Law* 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 in this sub-section:
 - “*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.
 - “*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.
 - “*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.

99. May an employee retire under the CBA or employment contract?

Any employee may retire or be retired by his employer upon reaching the retirement age established in the CBA or other applicable employment contract and he shall be entitled to the benefits thereunder. If the amount is less than those provided under the law, the employer shall pay the difference.

100. What is the distinction between optional and compulsory retirement?

Article 287 of the Labor Code, as amended by Republic Act No. 7641, provides for two (2) types of retirement: (a) *optional*; and (b) *compulsory*.

1. Optional retirement. - In the absence of a retirement plan or other applicable agreement providing for retirement benefits of employees in an establishment, an employee may retire upon reaching the age of sixty (60) years or more if he has served for at least five (5) years in said establishment.
2. Compulsory retirement. - Where there is no such retirement plan or other applicable agreement providing for retirement benefits of employees in an establishment, an employee shall be retired upon reaching the age of sixty-five (65) years.

101. Is the option granted to the employer to retire an employee valid?

Yes. The decision of the Supreme Court in the case of **PAL vs. ALPAP**. (G.R. No.143686, January 15, 2002), is instructive:

“Finally, on the issue of whether petitioner should consult the pilot concerned before exercising its option to retire pilots, we rule that this added requirement, in effect, amended the terms of Article VII, Section 2 of the 1976 PAL-ALPAP Retirement Plan. The option of an employer to retire its employees is recognized as valid.

“Surely, the requirement to consult the pilots prior to their retirement defeats the exercise by management of its option to retire the said employees. It gives the pilot concerned an undue prerogative to assail the decision of management. Due process only requires that notice be given to the pilot of petitioner's decision to retire him. Hence, the Secretary of Labor overstepped the boundaries of reason and fairness when he imposed on petitioner the additional requirement of consulting each pilot prior to retiring him.

“Furthermore, when the Secretary of Labor and Employment imposed the added requirement that petitioner should consult its pilots prior to retirement, he resolved a question which was outside of the issues raised, thereby depriving petitioner an opportunity to be heard on this point.

102. May an employee retire at an earlier or older age?

The law recognizes as valid any retirement plan, agreement or management policy regarding retirement at an earlier or older age.

103. What are included in the minimum 5-year service requirement?

The minimum 5-year service requirement includes the following.

1. Authorized absences, vacations, regular holidays, included.
2. Only *actual* service included.

104. What are included in the retirement benefits under the Retirement Pay Law?

Retirement benefits.

1. One-half (1/2) month salary.

In the absence of an applicable employment contract, an employee who retires shall be entitled to retirement pay equivalent to at least one-half (1/2) month salary for every year of service, a fraction of at least six (6) months being considered as one (1) whole year.

2. One-half (1/2) month salary, components. - For the purpose of determining the minimum retirement pay due an employee, the term “*one-half month salary*” shall include all the following:

- (a) fifteen (15) days salary of the employee based on his latest salary rate.
- (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.

3. One-half monthly salary of employees who are paid by results. - For covered workers who are paid by results and do not have a fixed monthly rate, the basis for determination of the salary for fifteen (15) days shall be their average daily salary (ADS).

105. Does the Retirement Pay Law have any retroactive effect?

Yes. R. A. 7641 (Retirement Pay Law) is applicable to services rendered prior to January 7, 1993. Consequently, in reckoning the length of service, the period of employment with the same employer before the effectivity date of the law (Republic Act No. 7641) shall be included.

106. May Pag-IBIG be considered as substitute retirement plan?

As provided in R. A. No. 7742, 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 such option does not in any way contravene an existing collective bargaining agreement 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.

107. What is the latest amendment to the Retirement Pay Law (Article 287 of the Labor Code)?

The latest amendment to Article 287 of the Labor Code was introduced by Republic Act No. 8558 [*An Act Amending Article 287 of Presidential Decree No. 442, as Amended, Otherwise Known as the Labor Code of the Philippines by Reducing the Retirement Age of Underground Mine Workers from Sixty (60) to Fifty (50)*] which was approved on February 26, 1998.

108. Who is an underground mine employee?

An *underground mine employee* is a 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.

109. What is the 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. (*Gamogamo vs. PNOC Shipping and Transport Corp.*, G. R. No. 141707, May 7, 2002).

Dismissal for cause, effect 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. vs. 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 the 2002 case of **San Miguel Corporation vs. 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* from *San Miguel*, the Supreme Court ruled 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.

110. What is the distinction between retirement pay and separation pay?

1. 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.
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. 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.

As a general rule, retiring employees are entitled only to retirement benefits. But there are instances when separation pay and retirement pay must both be paid to the employee. The reason is, the separation pay is mandated by law; while retirement pay is required by contract.

Cases where both separation pay and retirement pay must be paid.

In the case of **University of the East vs. Hon. Minister of Labor**, [G. R. No. 74007, July 31, 1987], the school claimed 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 vs. NLRC**, [G. R. No. 87653, February 11, 1992; *See also* BLTB vs. CA, 71 SCRA 470 (1976)], the Supreme Court ordered the payment 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 month pay instead of the one-half month pay per year of service) was not favorably taken into account 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.” (*See also Batangas Laguna Tayabas Bus Co. vs. Court of Appeals, G.R. No L-38482, June 18, 1976, 71 SCRA 470*).

In **Bongar vs. NLRC**, [G. R. No. 107234, August 24, 1998], the Supreme Court ordered the payment not only of separation pay and backwages to an illegally dismissed teacher but additionally, of the retirement benefits “pursuant to any collective bargaining agreement in the workplace or, in the absence thereof, as provided in Section 14 [Retirement Benefits], Book VI of the Implementing Rules of the Labor Code.”

Case where separation pay was charged to retirement pay.

In **Ford Philippines Salaried Employees Association vs. NLRC**, [G. R. No. 75347, Dec. 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.

Cases where employees are entitled only to one form of benefit.

In **Cipriano vs. 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 said Retirement Plan 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, *which ever is the greater amount.*’

In the 2004 case of **Cruz vs. Philippine Global Communications, Inc.**, [G. R. No. 141868, May 28, 2004], the Supreme Court reiterated the said rule in *Cipriano* [supra] under the following provision in the Retirement Plan which states:

“b) Adjustment of Benefits Payments.- x x x, 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**, x x x.” (*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, are entitled only to *either* the separation pay provided under Article 283 of the Labor Code, as amended, *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.

In the 2005 case of **Salomon vs. Association of International Shipping Lines, Inc.**, [G. R. No. 156317, April 26, 2005], petitioners who were duly paid separation pay when they were retrenched, claimed that they are, in addition, entitled to retirement benefits under the CBA citing the *Aquino* case [supra] as basis. Said CBA provides, thus:

“*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.

x x x

x x x

x x x

“*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. Here, 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.

The provisions of the retirement plan are controlling.

As held in *Cipriano* [supra] and *Aquino* [supra], 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. (*Cruz vs. Philippine Global Communications, Inc., supra*).

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 Retirement Plan, then, they shall be so paid. Otherwise, if the Retirement Plan says 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. (*Ibid.*).

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 vs. NLRC, 100 SCRA 691 [1980]*).

In **San Miguel Corporation vs. 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.

In **Villena vs. NLRC**, [G. R. No. 90664, Feb. 7, 1991], an employee whose age was 57 when he was illegally singled out for retirement, after serving the bus company since he was 25 years old, was declared to be entitled to his full backwages, allowances and other benefits for a period of three (3) years after his illegal dismissal from the service until he reached the compulsory retirement age, plus his retirement benefits equivalent to his gross monthly pay, allowances and other benefits for every year of service up to age sixty (60) which is the normal retirement age for him.

Case of non-entitlement to retirement pay due to termination for cause.

In the 2004 case of **Piñero vs. NLRC**, [G. R. NO. 149610, August 20, 2004], the petitioner employee who turned 60 years old and retired on March 1, 1996 after 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.

111. Is the retirement pay under the SSS similar to or may be a substitute for the 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 Collective Bargaining Agreement, is separate and distinct from the retirement benefits granted under Republic Act No. 8282, otherwise known as the *Social Security Act of 1997*.

112. Other latest cases on retirement.

Concept of retirement under Article 287.

The opening paragraph of Article 287 clearly enunciates the intent and application of the law. It conveys in clear and unmistakable terms that once an employee retires, it is not Article 287 that is controlling but the retirement plan under the CBA or other applicable employment contract. Article 287 becomes relevant only in the matter of ensuring that the retirement benefits are not less than those provided therein.

This explains why, in the third paragraph of Article 287, it is further underscored that the retirement package provided therein is made applicable only “in the absence of a retirement plan or agreement providing for retirement benefits of employees in the establishment.”

In case of retirement under the CBA or other applicable employment contract, the employee is entitled to receive such retirement benefits as he may have earned under existing laws, the CBA and other agreements; provided that such retirement benefits under the CBA or other agreements should not, in any way, be less than those provided under the law. In the event that such benefits are less, the employer is obligated to pay the difference between the amount due the employee under the law and that provided under the CBA or other applicable employment contract. (*Sections 3.1 and 3.2, Rule II, Ibid.*)

This is best illustrated in the 2001 case of **Manuel L. Quezon University vs. NLRC**, [G. R. No. 141673, October 17, 2001]. the issue raised is whether respondent-teachers are entitled to the retirement benefits provided for under Republic Act No. 7641, even if the petitioner has an existing valid retirement plan. The Supreme Court ruled that they are so entitled. Republic Act No. 7641 intends to give the minimum retirement benefits to employees not entitled thereto under collective bargaining and other agreements. Its coverage applies to establishments with existing collective bargaining or other agreements or voluntary retirement plans whose benefits are less than those prescribed under the proviso in question. Consequently, petitioner University was ordered to pay the teachers their retirement differential pay (*i.e.*, the difference between the retirement pay under R. A. No. 7641 and the MLQU Retirement Plan) plus legal interest of six percent (6%) per annum from the date of filing of their complaints on March 27, 1997 up to actual payment.

If after applying Article 287, however, it is clear that the retirement plan under the CBA or other agreements, company policy or practice provides for retirement benefits which are equal or superior to that which is provided in said law, then, such retirement plan and not Article 287, should prevail and thus govern the computation of the benefits to be awarded. (*Labor Advisory on Retirement Pay Law dated Oct. 24, 1996, issued by Secretary Leonardo A. Quisumbing*).

The best case to exemplify this point is the 2002 case of **Philippine Airlines, Inc. vs. Airline Pilots Association of the Philippines**, [G. R. No. 143686, January 15, 2002], where the Supreme Court had occasion to comment on the following pertinent provision of the 1967 PAL-ALPAP Retirement Plan:

“SECTION 1. Normal Retirement. (a) Any member who completed twenty (20) years of service as a pilot for PAL or has flown 20,000 hours for PAL shall be eligible for normal retirement. The normal retirement date is the date on which he completes twenty (20) years of service, or on which he logs his 20,000 hours as a pilot for PAL. The member who retires on his normal retirement shall be entitled to either (a) a lump sum payment of ₱100,000.00 or (b) to such termination pay benefits to which he may be entitled to under existing laws, whichever is the greater amount.”

A pilot who retires after twenty years of service or after flying 20,000 hours would still be in the prime of his life and at the peak of his career, compared to one who retires at the age of 60 years old. Based on this peculiar circumstance that PAL pilots are in, the parties provided for a special scheme of retirement different from that contemplated in the Labor Code. Conversely, the provisions of Article 287 of the Labor Code could not have contemplated the situation of PAL’s pilots. Rather, it was intended for those who have no more plans of employment after retirement, and are thus in need of financial assistance and reward for the years that they have rendered service.

In any event, petitioner contends that its pilots who retire below the retirement age of 60 years not only receive the benefits under the 1967 PAL-ALPAP Retirement Plan but also an equity of the retirement fund under the PAL Pilots' Retirement Benefit Plan, entered into between petitioner and respondent on May 30, 1972.

The PAL Pilots' Retirement Benefit Plan is a retirement fund raised from contributions exclusively from petitioner of amounts equivalent to 20% of each pilot's gross monthly pay. Upon retirement, each pilot stands to receive the full amount of the contribution. In sum, therefore, the pilot gets an amount equivalent to 240% of his gross monthly income for every year of service he rendered to petitioner. This is in addition to the amount of not less than ₱100,000.00 that he shall receive under the 1967 Retirement Plan. In short, the retirement benefits that a pilot would get under the provisions of Article 287 of the Labor Code are less than those that he would get under the applicable retirement plans of petitioner. (*Ibid.*).

Indeed, Article 287 makes clear the intention and spirit of the law to give employers and employees a free hand to determine and agree upon the terms and conditions of retirement. The law presumes that employees know what they want and what is good for them absent any showing that fraud or intimidation was employed to secure their consent thereto. (*Pantranco North Express, Inc. vs. NLRC, G. R. No. 95940, July 24, 1996, 259 SCRA 161*).

Who should exercise the option to retire?

Compulsory retirement takes place at age 65, while *optional* retirement is primarily determined by the CBA or other employment contract or employer's retirement plan. In the absence of any provision on optional retirement in a CBA, other employment contract, or employer's retirement plan, an employee may *optionally* retire upon reaching the age of 60 years or more, but not beyond 65 years, provided he has served at least five (5) years in the establishment concerned. That prerogative is *exclusively* lodged in the employee.

Thus, in **Capili vs. NLRC**, [G. R. No. 120802, June 17, 1997, 273 SCRA 576], it was held that the act of accepting the retirement benefits is deemed an exercise of the option to retire under the third paragraph of Article 287, as amended by Republic Act No. 7641. Thereunder, he could choose to retire upon reaching the age of 60 years, provided it is before reaching 65 years which is the compulsory age of retirement. (*Capili vs. NLRC, G. R. No. 120802, June 17, 1997, 273 SCRA 576*).

May employers exercise the option to retire?

The answer to this query is, of course, in the affirmative. If there is a provision on retirement in a CBA or any other agreement or if the employer has a retirement plan, the option may be exercised by the employer in accordance therewith. Article 287 is clear: "*(a)ny employee may be retired upon reaching the retirement age established in the collective bargaining agreement or other applicable employment contract.*"

In **Philippine Airlines, Inc. vs. Airline Pilots Association of the Philippines**, [G. R. No. 143686, January 15, 2002], an issue was raised on whether petitioner should consult the pilot concerned before exercising its option to retire pilots. The Supreme Court ruled in the negative. It held that this constitutes an added requirement which, in effect, amended the terms of Article VII, Section 2 of the 1976 PAL-ALPAP Retirement Plan which states:

"SECTION 2. Late Retirement. Any member who remains in the service of the Company after his normal retirement date may retire either at his option or at the option of the Company and when so retired he shall be entitled either (a) to a lump sum payment of ₱5,000.00 for each completed year of service rendered as a pilot, or (b) to such termination pay benefits to which he may be entitled under existing laws, whichever is the greater amount."

Surely, the requirement to consult the pilots prior to their retirement defeats the exercise by management of its option to retire the said employees. It gives the pilot concerned an undue prerogative to assail the decision of management. Due process only requires that notice be given to the pilot of petitioner's decision to retire him.

In the 2000 case of **Progressive Development Corporation vs. NLRC**, [G. R. No. 138826, October 30, 2000], the *optional retirement* provision of the Employees' Non-Contributory Retirement Plan states:

“Section 3. Optional Retirement. - Any participant with twenty (20) years of service, regardless of age, may be retired at his option or at the option of the Company and shall be entitled to the following benefits x x x.”

In upholding the validity of the decision of management to retire employees in accordance with the afore-quoted provision, the Supreme Court ruled that the said retirement plan is valid for it forms part of the employment contract of petitioner company. The following pronouncement made by no less than the DOLE was given substantial weight, to wit:

“Considering therefore the fact that your client’s retirement plan now forms part of the employment contract since it is made known to the employees and accepted by them, and such plan has an express provision that the company has the choice to retire an employee regardless of age, with twenty (20) years of service, said policy is within the bounds contemplated by the Labor Code. Moreover, the manner of computation of retirement benefits depends on the stipulation provided in the company retirement plan.” (Opinion of Director Augusto G. Sanchez of the Bureau of Working Conditions, Department of Labor and Employment, Oct. 8, 1990, confirming the validity of The Plan, particularly its provision on optional retirement).

Moreover, the undisputed fact that a number of employees of petitioner company had availed of *The Plan* since its effectivity only confirms that *The Plan* has already been part of the employment contract of petitioner company for a long time. (*Ibid.*).

In **Pantranco North Express, Inc. vs. NLRC**, [G. R. No. 95940, July 24, 1996, 259 SCRA 161], it was ruled that an employee who was compulsorily retired after rendering 25 years of service in accordance with the provision of the CBA cannot claim that he was illegally dismissed. Providing in a CBA for compulsory retirement of employees after 25 years of service is legal and enforceable so long as the parties agree to be governed by such CBA.

In the earlier case of **Bulletin Publishing Corp. vs. Sanchez**, [144 SCRA 628 (1986)], the Supreme Court held:

*“The aforesaid sections explicitly declare, in no uncertain terms, that retirement of an employee may be done upon initiative and option of the management. And where there are cases of voluntary retirement, the same is effective only upon the approval of management. The fact that there are some supervisory employees who have not yet been retired after 25 years with the company or have reached the age of sixty merely confirms that it is the singular prerogative of management, *at its option*, to retire supervisors or rank-and-file members when it deems fit. There should be no unfair labor practice committed by management if the retirement of private respondents were made in accord with the agreed option. That there were numerous instances wherein management exercised its option to retire employees pursuant to the aforementioned provisions, appears to be a fact which private respondents have not controverted. It seems only now when the question of the legality of a supervisors union has arisen that private respondents attempt to inject the dubious theory that the private respondents are entitled to form a union or go on strike because there is allegedly no retirement policy provided for their benefit. As above noted, this assertion does not appear to have any factual basis.”*

Interruption in the service, effect.

The decision of the Supreme Court in the 2003 case of **Sta. Catalina College vs. 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. 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 re-applying in 1982, her retirement benefits should thus be computed only on the basis of her years of service from 1982 to 1997.

Service in another firm, excluded in the computation of retirement benefits.

In the 2002 case of **Gamogamo vs. PNOC Shipping and Transport Corp.**, [G. R. No. 141707, May 7, 2002], it was held that since the retirement pay solely comes from respondent company's funds, it is but natural that respondent should disregard petitioner-employee's length of service in another company for the computation of his retirement benefits.

Petitioner in *Gamogamo* was first employed with the Department of Health (DOH) and remained employed as dentist at the DOH for fourteen (14) years until he resigned on November 2, 1977. On November 9, 1977, petitioner was hired as company dentist by Luzon Stevedoring Corporation (LUSTEVECO), a private domestic corporation. Subsequently, respondent PNOC Shipping and Transport Corporation (hereafter respondent) acquired and took over the shipping business of LUSTEVECO, and on August 1, 1979, petitioner was among those who opted to be absorbed by the respondent. Thus, he continued to work as company dentist. Ordinarily, his creditable service should be reckoned from such date. However, since respondent took over the shipping business of LUSTEVECO and agreed to assume without interruption all the service credits of petitioner with LUSTEVECO, petitioner's creditable service must start from November 9, 1977 when he started working with LUSTEVECO until his day of retirement on April 1, 1995. Thus, petitioner's creditable service is 17.3333 years.

Petitioner's contention cannot be upheld that his fourteen (14) years of service with the DOH should be considered because his last two employers were government-owned and controlled corporations, and fall under the Civil Service Law.

It is not at all disputed that while respondent and LUSTEVECO are government-owned and controlled corporations, they have no original charters; hence they are not under the Civil Service Law. In any case, petitioner's fourteen years of service with the DOH may not remain uncompensated because it may be recognized by the GSIS pursuant to Section 12 of Presidential Decree No. 1146, as amended, otherwise known as the Government Service Insurance Act of 1977, as may be determined by the GSIS.

“One-half (½) month salary” means 22.5 days.

To dispel any further confusion on the meaning of “one-half [½] month salary” in the law, the Supreme Court, in the case of **Capitol Wireless, Inc. vs. 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.

Should 1/12 of 13th month pay and 5 days of service incentive leave be included if the employees are not entitled thereto?

A question may be posed. 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 2004 case of **R & E Transport, Inc. vs. Latag**, [G. R. No. 155214, February 13, 2004]. The Supreme Court 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 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 pronounced:

“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. 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 (P500) per day. We thus compute his retirement pay as follows: P500 x 15 days x 14 years of service equals P105,000. Compared with this amount, the P38,850 he received, which represented just over one third of what was legally due him, was unconscionable.” (Underscoring supplied)

Liberal interpretation of retirement laws; exception.

It is axiomatic that retirement laws are liberally construed and administered in favor of the persons intended to be benefited. All doubts as to the intent of the law should be resolved in favor of the retiree to achieve its humanitarian purposes. The intention is to provide for the retiree’s sustenance and hopefully even comfort, when he no longer has the stamina to continue earning his livelihood.

While it is axiomatic that retirement laws are liberally construed in favor of the persons intended to be benefited, however, such interpretation cannot be made in the event there is clear lack of consensual and statutory basis of the grant of retirement benefits to the claimant-employee..

For instance, in the 2004 case of **Lopez vs. National Steel Corporation**, [G. R. No. 149674, February 16, 2004], the Labor Arbiter, the NLRC and the Court of Appeals were one in saying that there is no provision in the parties’ CBA authorizing the payment to petitioner-employee of retirement benefits in addition to her retrenchment pay; and that there is no indication that she was forced or “duped” by respondent-employer to sign the Release and Quitclaim. The Court of Appeals also ruled that petitioner, not having reached the retirement age, is not entitled to retirement benefits under Article 287 of the Labor Code. In justifying her claim for retirement benefits, petitioner contends that respondent’s September 20, 1994 termination letter declares in unequivocal terms that “(Y)ou will receive a separation package in accordance with the program and existing policies, including benefits you may be entitled to, if any, under the Company’s Retirement Plan.” According to her, the quoted statement expressly guarantees

the grant of retirement benefits. Suffice it to reiterate that the respondent's retirement plan precludes employees whose services were terminated for cause, from availing retirement benefits.

PRESCRIPTIVE PERIOD

113. 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.

114. 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.

“The above construal of Art. 291, *vis-à-vis* the rules on service incentive leave, is in keeping with the rudimentary principle that in the implementation and interpretation of the provisions of the Labor Code and its implementing regulations, the workingman's welfare should be the primordial and paramount consideration. The policy is to extend the applicability of the decree to a greater number of employees who can avail of the benefits under the law, which is in consonance with the avowed policy of the State to give maximum aid and protection to labor.

“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.”

115. What is the prescriptive period for illegal dismissal?

An action for illegal dismissal prescribes in 4 years from accrual of cause of action.

116. 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.

117. 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.

118. 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*).

119. What is the prescriptive period for employees' compensation claims?

Three (3) years from accrual of cause of action.

-END OF PART THREE-