THE ADVERSE EFFECTS ON EMPLOYEES OF THE UNBRIDLED EXERCISE OF CERTAIN MANAGEMENT PREROGATIVES*

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ABSTRACT

There are certain rights and prerogatives belonging to employers that are not found in the Labor Code or in any other laws but are well-recognized in jurisprudence. Their significance is highlighted by the fact that a constantly growing number of cases involving the issue of the validity of the exercise by employers of their management rights and prerogatives have reached the Supreme Court.

Not having any clear-cut legal anchor, cases in the multitudes keep piling up in courts because of the seemingly endless stream of complaints filed by workers involving the issue of validity of the exercise by management of such rights and prerogatives as hiring, work assignments, working methods, time, place and manner of work, supervision of workers, working regulations, promotion, demotion and transfer of employees, lay-off of workers, and the discipline, dismissal and recall of work, rules against marriage, post-employment bans or prohibitions such as the non-compete, confidentiality, non-disclosure, non-solicitation, non-recruitment and inventions assignment clauses.

This paper intends to closely examine such rights and prerogatives to ascertain and establish their intrinsic merits, their limitations, their legality and rationality and most importantly, their effects on such constitutionally and legally guaranteed fundamental rights of workers to full employment, security of tenure and social justice.

More importantly, this paper shall attempt at introducing a completely new amendatory provision in the Labor Code on management rights and prerogatives in order to effectively obviate further legal complications in the never-ending dramatic and

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dynamic interplay between the employer and the employee in the workplace.

I. INTRODUCTION

The subject matter of this paper would have an impact on the following constitutionally and legally guaranteed rights of workers:

a) Security of Tenure;[1]
b) Social Justice;[2] and
c) Due Process.[3]

A. Impact of security of tenure

Both the Constitution[4] and the Labor Code[5] guarantee security of tenure to all workers. As a consequence of and based on this principle, the law imposes many duties and obligations to the employer such as the grant of just and decent compensation to his workers, observance of due process in case of termination of employment, compliance with labor relations and labor standards laws and social welfare legislation, and the like. In return, jurisprudence recognizes the right of management to expect from its workers not only good performance, diligence, but also good conduct and loyalty.[6]

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[1] CONST. art. XIII, § 3.

CONST. art. XIII, § 3.

[3] CONST. art. III § 1.

[4] CONST. art. XIII, § 3. "The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all. [...] They shall be entitled to *security of tenure*, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law." (Emphasis supplied.)

[5] LAB. CODE, art. 3. "*Declaration of Basic Policy.* – "The State shall afford protection to labor, promote full employment, ensure equal work opportunities regardless of sex, race or creed and regulate the relations between workers and employers. The State shall assure the rights of workers to self-organization, collective bargaining, *security of tenure*, and just and humane conditions of work." (Emphasis supplied.); LAB. CODE, art. 294 [279]."*Security of Tenure.* – In cases of regular employment, the employer shall not terminate the services of an employee except for a just cause or when authorized by this Title. An employee who is unjustly dismissed from work 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."

[6] Coca-Cola Bottlers Philippines, Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 82580, 172 SCRA 751 (1989); Judy Philippines, Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 111934,

This can only be achieved, however, by granting certain rights and prerogatives to the employer which, as earlier pointed out, are not found in the Labor Code nor in any other laws, but purely recognized and granted in jurisprudence.

In a way though, Article XIII, Section 3 of the 1987 Constitution, often referred to as the "protection-to-labor clause," has obliquely recognized these management rights and prerogatives when it provides:

> The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and *the right of enterprises to reasonable returns to investments, and to expansion and growth.*

Needlessly, enterprises can only gain and earn *"reasonable returns to [their] investments, and to expansion and growth"*[7] if they are granted leeway and latitude in exercising their rights and prerogatives as employers, among other factors that are critical in the management and operation of their business.

Indeed, the Supreme Court has consistently recognized the employer's wide latitude of discretion in the enactment and promulgation of policies, rules, and regulations on work-related activities of its employees. Jurisprudence takes recognition of the fact that company policies, rules, and regulations, unless shown to be grossly oppressive or contrary to law, are considered valid and binding on the parties and must be complied with, either unilaterally by the employer or, through negotiation between the employer and its employees, or otherwise modified by competent authority. It is thus observed that it has always been the Supreme Court's general stance to uphold the exercise by the employer of its prerogatives so long as such exercise is made in good faith for the advancement of its interest and not for the purpose of defeating or circumventing the rights of the employees under special laws or valid agreements.[8]

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289 SCRA 755 (1998); Agabon v. Nat'l Lab. Rel. Comm'n, G.R. No. 158693, 442 SCRA 573 (2004).

[7] CONST. art. XIII, § 3. (Emphasis supplied.)

[8] Aparente v. Nat'l Lab. Rel. Comm'n, G.R. No. 117652, 331 SCRA 82, 93 (2000); Coca-Cola Bottlers, Phil., Inc. v. Kapisanan ng Malayang Manggagawa sa Coca-Cola-FFW, G.R. No. 148205, 452 SCRA 480 (2005).

B. Impact on social justice

The unbridled exercise of certain management rights and prerogatives also has an adverse impact on social justice. Undoubtedly, the State is mandated under the Constitution to promote social justice in all phases of national development.[9] According to the Supreme Court:

> Equality is one ideal which cries out for bold attention and action in the Constitution. The Preamble proclaims "equality" as an ideal precisely in protest against crushing inequities in Philippine society. The command to promote social justice in Article II, Section 10, in "all phases of national development," further expounded in Article XIII, are clear commands to the State to take affirmative action in the direction of greater equality. [. . .] There is thus in the Philippine Constitution no lack of doctrinal support for a more vigorous state effort towards achieving a reasonable measure of equality.
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> Under the policy of social justice, the law normally bends over backward to accommodate the interests of the working class on the humane justification that those with less privilege in life should have more in law. [. . .][10] Social justice calls for the humanization of laws and the equalization of social and economic forces by the State so that justice, in its rational and objectively secular conception, may at least be approximated.[11]

It is axiomatic that in interpreting social justice provisions of the Constitution and the labor laws or rules and regulations implementing the constitutional mandates, the liberal approach, which favors the exercise of labor rights, should always be adopted.[12] When conflicting interests of labor and capital are to be weighed on the scales of social justice, the heavier influence of the latter should be counter-balanced by the sympathy and compassion which the law must accord the underprivileged worker.[13]

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[9] CONST. art. II, § 10. "The State shall promote social justice in all phases of national development."

[10] Central Bank (now Bangko Sentral ng Pilipinas) Employees Ass'n, Inc. v. Bangko Sentral ng Pilipinas, G.R. No. 148208, 446 SCRA 299 (2004).

[11] *Id. citing* Calalang v. Williams, 70 Phil. 726, 734–35 (1940).

[12] Adamson & Adamson, Inc. v. Comm'r of Internal Revenue, G.R. No. 35120, 127 SCRA 268 (1984).

[13] Zurbano v. Nat'l Lab. Rel. Comm'n, G.R. No. 103679, 228 SCRA 556 (1993).

Obviously, the exercise of employers of certain management prerogatives which are without definite legal parameters, goes against the social justice provision of the 1987 Constitution.

As can be seen in a bevy of cases involving the exercise of management prerogatives, there are doctrines which tend to flip-flop throughout the years. This is due to the lack of well-defined laws, which would have given the courts definite legal parameters upon which they would base their decisions. As a result of the flip-flopping decisions in these cases, it is inevitable that the social justice provision would be violated.

C. Impact on due process

The Constitution, in Article III, Section 1 provides that "[n]o 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."

Within this constitutional concept, employment or labor is considered a property right falling within the Constitution's protection.[14] This means that a worker cannot be deprived of his job, a property right, without satisfying the requirements of due process.[15] Labor is property, and as such demands protection.[16]

Due to the lack of any definite legal mooring pertaining to the exercise of certain management prerogatives, the three stakeholders—the State, through the courts, the employer, and the employee—are not bound by a common legal standard upon which they shall gauge the validity of their respective actions as regards the exercise of certain management prerogatives.

Consequently, the employer would not be aware of the circumstances when the exercise of its management prerogatives would be declared by the courts to be illegal. In the same vein, the employee would be at a loss on whether his action would transgress the rules set by his employer in the latter's exercise of its prerogatives. The State, through the courts, would not have a stable foundation expressed and enshrined in its laws and statutes upon which it will base its rulings on the important issue of validity or invalidity of these prerogatives.

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[14] *See* Sagales v. Rustan's Comm'l Corp., G.R. No. 166554, 572 SCRA 89 (2008); Polsotin v. De Guia Enter., Inc., G.R. No. 172624, 661 SCRA 523 (2011).

[15] Polsotin v. De Guia Enter., Inc., G.R. No. 172624, 661 SCRA 523 (2011).

[16] Sagales v. Rustan's Comm'l Corp., G.R. No. 166554, 572 SCRA 89 (2008), *citing* Slaughter House Cases, 83 U.S. (16 Wall.) 36, 127 (1873).

As can be seen in a long line of cases that will be discussed in this paper, there are similar acts done by employers which are declared by the courts to be legal in certain situations but illegal in some other cases. As a result, the constitutional guarantees of security of tenure, social justice, and due process are violated.

Certainly, the lack of any well-defined legal standards referring to certain management prerogatives results in a chaotic and unpredictable environment, which entails unnecessary lawsuits and unwarranted expenses. This holds true even more on the part of the employees because they would not know when their conduct will result in their dismissal. The courts can liberally decide, without any solid and well-defined legal basis, that the action of an employee gives sufficient ground for his dismissal.

In order to protect the right to substantive due process, it is necessary that legal standards be created to regulate certain management prerogatives. It is only by doing so that the employer, the employee, and the State, acting through the judiciary, would have a level playing field that would delineate in clear terms as to which conduct would amount to a violation of the rights of the employers or the employees.

II. RIGHTS AND PREROGATIVES OF MANAGEMENT PROVIDED IN THE LAW

A. Legal provisions recognizing management rights and prerogatives

Under the Labor Code, only the following rights and prerogatives are given recognition:

a) To fix the terms and conditions of employment;
b) To outsource work or job or service through legitimate contracting arrangements;
c) To dismiss employees based on just or authorized cause;
d) To suspend business operations in good faith; and
e) To retire employees.

There are, however, a number of other rights and prerogatives that are not found in the Labor Code but are given judicial recognition by the Supreme Court. These rights and prerogatives are expounded in Chapter Three of this paper.

B. Prerogative to fix the terms and conditions of employment

The employer, as the owner of the establishment, is undoubtedly given the right and prerogative to prescribe the terms and conditions of the employment he will grant to his employees. He may thus prescribe, at his discretion, the number of hours he would require his employees to work each day, the time when the work will start and end daily, the number of working days in a week/month/year, the number of shifts per day, the necessary overtime and night work, including the rates thereof, the period of time within which his employees will take their meals and coffee breaks, the kinds of leaves to which the employees will be entitled, and the rest period his employees will enjoy.

However, such exercise of the prerogatives as described above has to contend with the pertinent provisions of the Labor Code. The employer has to harmonize his discretion with the following specific provisions that are not only considered as minimum "labor standards" but are meant to regulate, limit, and restrict it:

1. Article 84 – Normal Hours of Work[17]
2. Article 85 – Hours Worked[18]
3. Article 86 – Meal Periods[19]
4. Article 87 – Night Shift Differential[20]
5. Article 88 – Overtime Work[21]
6. Article 89 – Undertime not Offset by Overtime[22]
7. Article 90 – Emergency Overtime Work[23]
8. Article 91 – Computation of Additional Compensation[24]
9. Article 92 – Right to Weekly Rest Period[25]
10. Article 93 – When Employer May Require Work on a Rest Day[26]
11. Article 94 – Compensation for a Rest Day, Sunday, or Holiday Work[27]
12. Article 95 – Right to Service Incentive Leave[28]

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[17] LAB. CODE, art. 84.
[18] LAB. CODE, art. 85.
[19] LAB. CODE, art. 86.
[20] LAB. CODE, art. 87.
[21] LAB. CODE, art. 88.
[22] LAB. CODE, art. 89.
[23] LAB. CODE, art. 90.
[24] LAB. CODE, art. 91.
[25] LAB. CODE, art. 92.
[26] LAB. CODE, art. 93.
[27] LAB. CODE, art. 94.
[28] LAB. CODE, art. 95.

13. Article 96 – Service Charges[29]

Additionally, the employer has to contend with the exceptions found in Article 82 of the Labor Code which states:

> Article 82. *Coverage.* – The provisions of this Title shall apply to employees in all establishments and undertakings whether for profit or not, *but not to government employees, managerial employees, field personnel, members of the family of the employer who are dependent on him for support, domestic helpers, persons in the personal service of another, and workers who are paid by results as determined by the Secretary of Labor in appropriate regulations.*
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> As used herein, "*managerial employees*" refer to those whose primary duty consists of the management of the establishment in which they are employed or of a department or subdivision thereof, and to other officers or members of the managerial staff.
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> "*Field personnel*" shall refer to non-agricultural employees who regularly perform their duties away from the principal place of business or branch office of the employer and whose actual hours of work in the field cannot be determined with reasonable certainty.[30]

Although as a general rule, the labor standards provisions of the Labor Code[31] are applicable to all employees in all establishments and undertakings, whether operated for profit or not, the law[32] itself expressly excludes from its coverage certain employees, such as:

1. Government employees;
2. Managerial employees;
3. Other officers or members of a managerial staff;
4. Domestic workers or *kasambahays*[33] and persons in the personal service of another;
5. Workers paid by results;
6. Field personnel; and

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[29] LAB. CODE, art. 96.

[30] LAB. CODE, art. 82. (Emphasis supplied.)

[31] LAB. CODE, tit. I [Working Conditions and Rest Periods], bk. III [Conditions of Employment].

[32] LAB. CODE, art. 82.

[33] This is now the proper way of calling "domestic servants" or "househelpers", terms used in the Labor Code, under the recently enacted Rep. Act No. 10361, otherwise known as the "Domestic Workers Act" or "Batas Kasambahay", which was approved by President Benigno S. Aquino III on January 18, 2013.

7. Members of the family of the employee.

Even if the law recognizes the prerogative of the employer to fix the terms and conditions of employment of his workers, he is bound to respect what the law specifically excepts from its coverage.

On this point, there appears to be well-justified limitations on the exercise of management prerogatives imposed by the law on labor standards itself.

C. Prerogative to dismiss employees based on just or authorized causes

1. Just Causes

i. Provisions of law on just causes

The Labor Code grants to the employer, the prerogative to dismiss on the basis of just or authorized causes. Article 297 of the Labor Code enumerates these just causes:

> Article 297 [282]. *Termination by employer.* – An employer may terminate an employment for any of the following causes:
> (a) Serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work;
> (b) Gross and habitual neglect by the employee of his duties;
> (c) Fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative;
> (d) Commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representatives; and
> (e) Other causes analogous to the foregoing.[34]

There are, however, other just causes in the Labor Code besides and in addition to those mentioned above. They are as follows:

1. Union officers who knowingly participate in an illegal strike who are deemed to have lost their employment status;[35]

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[34] LAB. CODE, art. 297 [282] as renumbered pursuant to Section 5, R.A. No. 10151, June 21, 2011.

[35] LAB. CODE, art. 279(a) [264(a)].

2. Any employee, either a union officer or an ordinary member, who knowingly participates in the commission of illegal acts during a strike (irrespective of whether the strike is legal or illegal), is also deemed to have lost his employment status;[36]
3. Strikers, who violate orders, prohibitions and/or injunctions as are issued by the Department of Labor and Employment (DOLE) Secretary or the National Labor Relations Commission (NLRC), may be imposed immediate disciplinary action, including dismissal or loss of employment status; and[37]
4. Violation of the union security clause stipulated in the collective bargaining agreement ("CBA") which may result in termination of employment.[38]

ii. Conflict in jurisprudence

Insofar as termination due to violation of the union security clause in the CBA is concerned, latest decisions are to the effect that its violation is a just cause to terminate employment. *This holds true regardless of whether the union security clause expressly provides for such termination or not.*

The rationale behind this rule was expounded in the 2008 case of *Alabang Country Club, Inc. v. National Labor Relations Commission,*[39] thus:

> This practice strengthens the union and prevents disunity in the bargaining unit within the duration of the CBA. By preventing member disaffiliation with the threat of expulsion from the union and the consequent termination of employment, the authorized bargaining representative gains more numbers and strengthens its position as against other unions which may want to claim majority representation."

The 2010 case of *Picop Resources, Inc. v. Tañeca,*[40] however, provides:

> [I]n terminating the employment of an employee by enforcing the union security clause, the employer needs only to determine and prove that: (1) the union security clause is applicable; (2) the union

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[36] LAB. CODE, art. 279(a) [264(a)].

[37] LAB. CODE, art. 278(g) [263(g)]; No. 33, National Conciliation and Mediation Board (NCMB) Primer on Strike, Picketing and Lockout (2nd ed. Dec. 1995).

[38] LAB. CODE, art. 259(e) [248(e)].

[39] Alabang Country Club, Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 170287, 545 SCRA 351 (2008).

[40] G.R. No. 160828, 627 SCRA 56 (2010).

> is requesting for the enforcement of the union security provision in the CBA; and (3) there is sufficient evidence to support the union's decision to expel the employee from the union. These requisites constitute just cause for terminating an employee based on the CBA's union security provision.[41]

However, if one were to read and examine closely the provision of paragraph (e) of Article 259 [248] of the Labor Code upon which this principle is based, it is clear that there is no express grant to the employer to terminate employment based on this ground. Notwithstanding the above rulings and countless others made by the Supreme Court in the past on this issue, there is no definitive provision in the Labor Code which expressly recognizes the validity of termination of employment due to transgression of the union security clause. This article, the only provision on the union security clause, is quite hazy on this point, thus:

> Article 259 [248]. Unfair Labor Practices of Employers. – It shall be unlawful for an employer to commit any of the following unfair labor practices:
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> (e) To discriminate in regard to wages, hours of work and other terms and conditions of employment in order to encourage or discourage membership in any labor organization. *Nothing in this Code or in any other law shall stop the parties from requiring membership in a recognized collective bargaining agent as a condition for employment, except those employees who are already members of another union at the time of the signing of the collective bargaining agreement.* Employees of an appropriate bargaining unit who are not members of the recognized collective bargaining agent may be assessed a reasonable fee equivalent to the dues and other fees paid by members of the recognized collective bargaining agent, if such non-union members accept the benefits under the collective bargaining agreement: Provided, that the individual authorization required under Article 250 [241], paragraph (o) of this Code shall not apply to the non-members of the recognized collective bargaining agent[.][42]

It is obvious from a reading of the above-quoted three-sentence provision of paragraph (e) of Article 259 [248] that only the second sentence thereof pertains to the union security arrangement. To reiterate, this is the

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[41] *Id.* at 61, *citing* Alabang Country Club, Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 170287, 545 SCRA 351 (2008).

[42] LAB. CODE, art. 259(a) [248(a)]. (Emphasis supplied.)

only provision on union security in the Labor Code. There is nothing therein that authorizes the employer, upon the instigation or recommendation of the bargaining union, to terminate the employment of its violator—a member of the bargaining union who resigns or is expelled therefrom due to the commission of certain acts considered inimical to its interest.

In a catena of earlier cases, however, the Supreme Court has clearly declared that violation of the union security clause may *only* be considered a valid ground to dismiss if dismissal is *expressly* stated in the clause itself as the proper penalty to be imposed for its violation. Consequently, if the dismissal is based on the alleged violation of the union security clause, but the clause itself does not explicitly authorize such dismissal, the same shall be considered as an act of unfair labor practice.

In *Confederated Sons of Labor v. Anakan Lumber Co.*,[43] 45 members of respondent union joined petitioner union and were thus dismissed for violation of the following union security clause:

> That the UNION shall have the exclusive right, and privilege to supply the COMPANY with such laborers, employees and workers as are necessary in the logging, mechanical, sawmill, office, logponds, motor pools, security guards and all departments in its many phases of operations, excepting such positions which are highly technical and confidential in character and/or such positions which carry the exercise of authority in the interest of the COMPANY which exercise is not merely clerical or routinary within the contemplation of the law, and that the COMPANY agrees to employ or hire in any of its departments only such person or persons who are members of the UNION.[44]

The respondents contend that, because respondent union is given "the exclusive right and privilege to supply the company with such laborers, employees and workers are as necessary"[45] for the activities specified in the said provision and the company had agreed "to employ or hire in any of its departments only such persons who are members of the union,"[46] it follows that such laborers, employees and workers of the company as may cease to be members of the respondent union must be expelled from the company. Upon mature deliberation, the Supreme Court opined that respondents' pretense cannot be sustained, thus:

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[43] 107 Phil. 915 (1960).
[44] *Id.* at 917.
[45] *Id.* at 917-918.
[46] *Id.* at 918.

> *In order that an employer may be deemed bound, under a collective bargaining agreement, to dismiss employees for non-union membership, the stipulation to this effect must be so clear and unequivocal as to leave no room for doubt thereon. An undertaking of this nature is so harsh that it must be strictly construed, and doubts must be resolved against the existence of 'closed shop.'* Referring particularly to the above-quoted Article II, we note that the same establishes the exclusive right of respondent union to 'supply' laborers etc., and limits the authority of the company to 'employ or hire' them. In other words, it requires that the laborers, employees and workers hired or employed by the company be members of respondent union at the time of the commencement of the employer-employee relation. Membership in respondent union is not a condition for the continuation of said relation or for the retention of a laborer or employee engaged either before said agreement or while he was a member of said union.[47]

This ruling in *Confederated Sons of Labor* has been followed to in so many cases decided thereafter. In *San Carlos Milling Co., v. Commissioner of Internal Revenue*,[48] the union shop agreement reads in part:

> New employees and laborers hired who are not members of the Workers Association will be on temporary status and the employer agrees that before they will be considered regular employees and laborers, they have to become members of the ALLIED WORKERS ASSOCIATION OF THE PHILIPPINES or the ALLIED WORKERS ASSOCIATION ["AWA"] or [sic] THE PHILIPPINES, SAN CARLOS CHAPTER within 30 days from the date of employment and if they refuse to affiliate with the said labor organization within this time, they will be immediately dismissed by the EMPLOYER. After a laborer or employee is hired pursuant to this arrangement, and he resigns later from the WORKERS ASSOCIATION or is expelled from it due to acts committed by him contrary to the By-Laws, rules and regulations of the WORKERS ASSOCIATION, the management, upon advice of the WORKERS ASSOCIATION, shall dismiss the said laborer or employee.
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> Employees and laborers presently working in any department or section of the factory or mill of the EMPLOYER, including those who are working by piece jobs or "pakiao" system, who are not

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[47] *Id.* (Emphasis supplied.)

[48] G.R. No. 15453, 1 SCRA 734 (1961).

> members of the WORKERS ASSOCIATION shall hereby be declared as temporary employees and laborers and shall be given thirty (30) days' time from the date of this agreement within which to join or affiliate with the WORKERS ASSOCIATION, and if they refuse to do so, their positions will be declared vacant and will be filled in the manner provided for in this agreement. *However, employees and laborers who have rendered ten (10) years continuous service with the EMPLOYER may not be affected by this condition, provided they are not members of, and will not join or affiliate with other labor unions or associations, although they may join the WORKERS ASSOCIATION, if they so desire.*[49]

Based on the foregoing stipulation in the CBA, it was declared that the dismissal from work of respondent Sinforoso Kyamko, based on the recommendation of the union which earlier expelled him and other members for committing an act of disloyalty when he joined another union, was an unfair labor practice. In so ruling, the Court noted that:

> Carefully read, nothing in the above provisions authorizes the employer to dismiss old employees who, having joined the AWA, later ceased to be members of good standing herein. Quite explicit with respect to new employees, the contract in paragraph 4 provides that they should join the AWA within 30 days from employment, and that if, after joining, they should later resign or be expelled from the contracting union, the company shall immediately dismiss said employee. Paragraph 5, with respect to workers already employed but who are not members of the union, makes it obligatory for these workers to join within 30 days from the agreement, on pain of dismissal. Expressly exempted from the obligation to join or affiliate with the contracting union are those who have rendered 10 years continuous service. Conspicuously absent with respect to those already employed at the time of the agreement is any provision making it a condition of continued employment that an old worker should remain a member of good standing of the AWA. Union shop, as with close shop provisions, should be strictly construed against the existence of union shop. Sometimes harsh and onerous, such provisions should not be extended beyond the explicit coverage of their terms, and will not be deemed to authorize by implication the dismissal of employees already working before the agreement was made.[50]

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[49] *Id.* at 738–39. (Emphasis supplied.)

[50] Resolution dated March 29, 1962 on petitioners' Motions for Reconsideration in San Carlos Milling Co., v. Comm'r of Internal Revenue, G.R. No. 15453, 1 SCRA 734, 739 (1961).

The case of *Industrial-Commercial-Agricultural Workers Organization (ICAWO) v. Central Azucarera de Pilar*[51] follows *Confederated Sons of Labor* as well, where the union shop clause in the CBA subject of the case reads as follows:

> The EMPLOYER agrees that in hiring unskilled employees and laborers, the members of the WORKERS ASSOCIATION should be given preference and the Management should notify accordingly to the WORKERS ASSOCIATION of any vacancy existing in all Departments. *New employees and laborers* hired who are not members of the WORKERS ASSOCIATION will be on TEMPORARY STATUS and the EMPLOYER agrees that before they will be considered regular employees and laborers they have to become members of the CENTRAL AZUCARERA DE PILAR ALLIED WORKERS' ASSOCIATION within thirty (30) days from the date of employment and *if they refuse to affiliate with the said labor organization within this time they will be immediately dismissed by the EMPLOYER.*[52]

Petitioners, who were long-time employees of the respondent company, were dismissed for violation of the above-quoted provision when they created a new union, herein petitioner Industrial-Commercial-Agricultural Workers Organization ("ICAWO") while the CBA between respondent company Central Azucarera del Pilar ("CAP"), and respondent union, CAP Allied Workers' Association ("CAPAWA"), was still effective. In ordering petitioners' reinstatement upon the finding of illegality of their dismissal, the Supreme Court ratiocinated that there is absolutely nothing in the above-quoted stipulation to show that it was the intention of the parties that the non-membership of existing employees will cause their dismissal. Said clause, as may be seen, refers to future or new employees or laborers. Nothing, however, is provided with respect to old employees or laborers like petitioners already in the employ of respondent company, whether members of the CAPAWA or not. There is, likewise, no requirement whatsoever on union members to remain as such under pain of being dismissed. More importantly, in accordance with the ruling in *Confederated Sons of Labor*, it is required that there should be a clear and unequivocal statement that the loss of the status of a member of good standing in the union shall be a cause for dismissal.

In *Rizal Labor Union v. Rizal Cement Co.*,[53] the following closed-shop stipulation in the CBA was cited as basis for terminating 15 employees, who

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[51] G.R. No. 17422, 4 SCRA 605 (1962).

[52] *Id.* at 606. (Emphasis supplied.)

[53] G.R. No. 19779, 17 SCRA 858 (1966).

are co-petitioners herein, for organizing their own union, petitioner Rizal Labor Union, while they were still members of the Binangonan Labor Union Local 104, the bargaining union at that time:

> The EMPLOYER agrees to have in its employ and to employ only members in good standing of the UNION in all its branches, units, plants, quarries, warehouses, docks, etc. The UNION agrees to furnish at all time the laborers, employees and all technical helps (*sic*) that the EMPLOYER may require. EMPLOYER, however, reserves its right to accept or reject where they fail to meet its requirements (Article 1, Sec. 5).
>
> The EMPLOYER agrees not to have in its employ nor to hire any new employee or laborer unless he is a member of good standing of the UNION, and a bona fide holder of a UNION (NWB) card, provided such new employee or laborer meets the qualifications required by the EMPLOYER (Article VII, Sec. 1-d).[54]

In declaring petitioners' dismissal illegal as being constitutive of unfair labor practice, the Supreme Court cited as its justification the ruling in *Confederated Sons of Labor*—the stipulation to the effect that violation of the union security clause will result in dismissal must be so clear and unequivocal as to leave no room for doubt thereon. Thus, there being no substantial difference between the wording of the provision involved in this case and that construed in *Confederated Sons of Labor*, the Court found no reason for the adoption of a different ruling herein.

That the Labor Code should contain an express provision on this point needs no underscoring. The security of tenure of employees is constantly threatened by the mere existence of the union security provision in the CBA—notwithstanding the fact that there is no express stipulation therein that violation thereof would result in the dismissal of the employee. While there is a need to protect the interest of the union by assuring it of its continued existence, such interest should not prevail over the more important social justice principle of protecting the right to security of tenure of the employees. If rights were to be balanced in the scales of social justice, that is, the right to continued existence of the union on the one hand, and the right to continued employment of the employees on the other hand, there should be no doubt that it is the latter right that should prevail over the former. Hence, even if there is a union security provision in the CBA, the violation thereof should not be attended by so extreme and harsh a penalty as dismissal

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[54] *Id.* at 861.

from employment unless there is an express provision therein to that effect.

Hence, if it is the intention of the parties to a CBA to terminate employment as a consequence of such violation, there must be an express recognition in the union security provision itself to such effect. The law itself should unmistakably allow such termination. An amendatory provision to the Labor Code expressly recognizing termination by the employer due to violation of the union security clause in the CBA, thus, becomes imperative.

iii. Text of the amendatory provision of Article 259 [248]

In light of the foregoing discussion, Article 259 [248] of the Labor Code should read as follows, with the amendment proposed by the author, underlined and in bold letters:

> Article 259 [248]. *Unfair Labor Practices of Employers.* – It shall be unlawful for an employer to commit any of the following unfair labor practices:
>
> * * *
>
> (e) To discriminate in regard to wages, hours of work and other terms and conditions of employment in order to encourage or discourage membership in any labor organization. Nothing in this Code or in any other law shall stop the parties from requiring membership in a recognized collective bargaining agent as a condition for employment, except those employees who are already members of another union at the time of the signing of the collective bargaining agreement. Employees of an appropriate bargaining unit who are not members of the recognized collective bargaining agent may be assessed a reasonable fee equivalent to the dues and other fees paid by members of the recognized collective bargaining agent, if such non-union members accept the benefits under the collective bargaining agreement: Provided, that the individual authorization required under Article 250 [241], paragraph (o) of this Code shall not apply to the non-members of the recognized collective bargaining agent;
>
> **Violation of the union security clause stipulated in the collective bargaining agreement may result in termination of employment; provided, that there is express provision therein to that effect. For this purpose, the contracting union may demand from the employer the dismissal of an employee who commits a breach of union security arrangement, such as failure to join the union or to maintain his membership in**

> **good standing therein. The contracting union can also demand for the dismissal of a member who commits an act inimical to the interest of the union, such as when the member organizes a rival union.**

2. Authorized causes

i. Provisions of the Labor Code containing the authorized causes to terminate employment

As far as authorized causes are concerned, there are only two provisions in the Labor Code which contain them, to wit:

> Article 298 [283]. *Closure of Establishment and Reduction of Personnel.* – The employer may also terminate the employment of any employee due to the installation of labor-saving devices, redundancy, retrenchment to prevent losses or the closing or cessation of operation of the establishment or undertaking unless the closing is for the purpose of circumventing the provisions of this Title, by serving a written notice on the workers and the Ministry of Labor and Employment at least one (1) month before the intended date thereof. In case of termination due to the installation of labor-saving devices or redundancy, the worker affected thereby shall be entitled to a separation pay equivalent to at least his one (1) month pay or to at least one (1) month pay for every year of service, whichever is higher. In case of retrenchment to prevent losses and in cases of closures or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month pay or at least one-half (½) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year.[55]

> Article 299 [284]. *Disease as Ground for Termination.* – An employer may terminate the services of an employee who has been found to be suffering from any disease and whose continued employment is prohibited by law or is prejudicial to his health as well as to the health of his co-employees: *Provided*, That he is paid separation pay equivalent to at least one (1) month salary or to one-half (½) month salary for every year of service, whichever is greater, a fraction of at least six (6) months being considered as one (1) whole year.[56]

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[55] LAB. CODE, art. 298 [283]. As renumbered pursuant to Section 5, R.A. No. 10151, June 21, 2011.

[56] *Id.*

ii. Termination due to authorized causes recognizes the prerogative of the employer to terminate employees even without their fault

As distinguished from just cause termination, in authorized cause termination, the employee is terminated not because he has committed serious misconduct or similar blameworthy acts but because the law authorizes such termination—as when the employer (1) installs a labor-saving device; (2) finds the position redundant; (3) suffers losses; or (4) has decided to close its operations, irrespective of whether it is due to serious business losses or financial reverses. Additionally, the employer is authorized to dismiss an employee who suffers from a disease, as expressly provided in Article 299 (284).

iii. Exclusivity of grounds under the law

Notably, one chief stumbling block to the invocation of the aforementioned modern schemes is the exclusivity of the grounds enumerated as authorized causes under Article 298 [283]—no other grounds may be invoked in lieu or in substitution thereof.

When the law was amended by Batas Pambansa Bilang 130,[57] the phrase "*other similar causes*" was deleted. Hence, invocation of similar causes is not warranted.

Comparing Article 298 [283] with Article 297 [282], the latter, in paragraph (e), admits of *"other causes analogous"* to any of the first four grounds enumerated thereunder. This is not the case as far as the former provision is concerned. This only shows that the law restricts the grounds only to the authorized causes expressly mentioned therein.

iv. The requisites for the valid invocation of the law should be embodied in the law itself

In addition to the foregoing suggested inclusion of modern-day terminologies and schemes in Article 298 [283], it is equally imperative to

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[57] *See* Batas Pambansa Blg. 130 (1981) § 15. An Act Amending Articles 214, 217, 231, 232, 234, 249, 250, 251, 257, 262, 263, 264, 265, 278, 283, And 284 of Presidential Decree Numbered Four Hundred And Forty-Two, Otherwise Known As The Labor Code Of The Philippines, As Amended.

incorporate therein the requisites that should be complied with for the validity of said grounds.

The Supreme Court has enunciated certain requisites for each of the grounds mentioned in Article 298 [283]. However, there are certain requisites that may be generally applied to the authorized causes mentioned in Article 298 [283]. A reading of cases decided by the Supreme Court would give us the following common requisites:

1. There must be evidence of *good faith* in the termination and it must be made when there is no other option available to the employer after it has resorted to *cost-cutting* measures;

2. *Written notices* should be served on *both* the employees to be terminated and the Department of Labor and Employment *at least one (1) month prior* to the intended date of termination;

3. *Separation pay* should be paid to the affected employees, in accordance with the following:

    a. If the termination is based on *(1) installation of labor-saving device, or (2) redundancy*, the separation pay should be one (1) month salary or at least one (1) month pay for every year of service, whichever is higher, a fraction of at least six (6) months shall be considered as one (1) whole year.

    b. If it is based on *(1) retrenchment, or (2) closure NOT due serious business losses or financial reverses*, the separation pay should be one (1) month salary or at least one-half (½) month pay for every year of service, whichever is higher, a fraction of at least six (6) months shall be considered as one (1) whole year.

    c. If the closure of the establishment is due to serious business losses or financial reverses, no payment of separation pay shall be required.

    d. In the event that there is a provision in the CBA or company policy which grants higher separation pay, the amount therein shall be the ones granted and not any of the separation pay mentioned above.

4. The termination must be based on *fair and reasonable criteria* such as, but not limited to status of employment (casual, temporary,

> permanent or regular), efficiency, seniority, experience, dependability, flexibility, trainability, adaptability, job performance, work attitude, and discipline.[58]

On this fourth requisite, it is clear that the failure of the employer to follow fair and reasonable criteria in choosing who to terminate would render the termination invalid.

In addition to the foregoing, the requisites now found in the law for each of the authorized grounds should be complied with as well.

v. Conflict in jurisprudence

A survey of cases decided involving the issue of termination due to authorized causes indicates that there have been some conflicting decisions which would necessitate the inclusion of the requisites in the law itself if only to avoid violation of security of tenure of employees.

For instance, a question on whether or not the installation of a labor-saving device may be used as a stand-alone ground to terminate employment has been resolved in the affirmative in earlier cases.[59] However, it is clear that in reality, when an employee is terminated on this ground, it must amount to a termination based on redundancy. Simply put, the employee's position is declared as redundant, for the employee's job can be performed by a labor-saving device.

For example, it was declared that redundancy results with such installation of labor-saving device in *Soriano, Jr. v. National Labor Relations Commission.*[60] Thus, if the position supposedly replaced by the device does not amount to redundancy, the dismissal of the holder of the position will be declared illegal.[61]

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[58] Phil. Tuberculosis Soc'y, Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 115414, 294 SCRA 567 (1998); Culili v. E. Telecomm. Phil., Inc., G.R. No. 165381, 642 SCRA 338 (2011). (Emphasis supplied.)

[59] *See* Phil. Sheet Metal Workers Union v. Comm'r of Internal Revenue, 83 Phil. 453 (1949).

[60] G.R. No. 165594, 521 SCRA 526 (2007). PLDT's utilization of computers and digital switches resulted in reducing the demand for switchman helpers since computers and digital switches can perform the functions of several of them.

[61] San Miguel Corp. v. Teodosio, G.R. No. 163033, 602 SCRA 197 (2009).

Most significant in terms of conflict in jurisprudence are the requisites imposed in cases of retrenchment. In some cases,[62] only the following three requisites are mentioned:

1. The retrenchment is reasonably necessary and duly proved and likely to prevent business losses which, *if already incurred*, are not merely *de minimis* but substantial, serious, actual and real or, *if only expected*, are reasonably imminent as perceived in good faith by the employer;

2. The employer should serve a written notice both to the retrenched employees and to DOLE at least one (1) month prior to the intended date of retrenchment; and

3. The employer has paid the separation pay equivalent to one (1) month pay or at least one-half month pay for every year of service, whichever is higher.

But in some cases,[63] the following are added to those mentioned above:

4. The employer should exercise 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. The employer should use 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.

As far as closure is concerned, earlier cases are to the effect that separation pay should be paid regardless of whether the employer is suffering

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[62] *See* Sanoh Fulton Phil., Inc. v. Bernardo, G.R. No. 187214, 703 SCRA 565 (2013); *See also* Genuino Ice Co., Inc. v. Lava, G.R. No. 190001, 646 SCRA 385 (2011); Eastridge Golf Club, Inc. v. Eastridge Golf Club, Inc. Lab. Union–Super, G.R. No. 166760, 563 SCRA 93 (2008); TPI Phil. Cement Corp. v. Cajucom, G.R. No. 149138, 483 SCRA 494 (2006).

[63] *See* Flight Attendants and Stewards Ass'n of the Phil. (FASAP) v. Phil. Airlines, Inc., G.R. No. 178083, 668 SCRA 11 (2008). *See also* Pepsi-Cola Prod. Phil., Inc. v. Molon, G.R. No. 175002, 691 SCRA 113 (2013); Shimizu Phil. Contractors, Inc. v. Callanta, G.R. No. 165923, 631 SCRA 529 (2010); Lambert Pawnbrokers and Jewelry Corp. v. Binamira, G.R. No. 170464, 624 SCRA 705 (2010).

from serious business losses or financial reverses.[64] It was only in the 1996 case of *North Davao Mining Corp. v. National Labor Relations Commission*,[65] where it was ruled that no separation pay should be paid when the closure or cessation of operations is due to serious business losses or financial reverses.

No doubt, the inclusion of the above requisites in Article 298 [283] would not only prevent the unbridled exercise by the employer of his prerogatives but would, in fact, prevent the filing of cases in court. This ensures the security of tenure of employees and, necessarily, breathes life to the social justice principle enshrined in the Constitution and in the law. With the requisites already made part and parcel of the law, misunderstandings will be minimized, greater harmony, stability, and industrial peace in the workplace would be enhanced and most importantly, the filing of costly and deleterious cases would be greatly reduced.

vi. Text of Article 298 [283] as amended.

Once amended, the text of Article 298 [283] should read as follows with the author's suggested omissions stricken out, and the author's proposed amendments underlined and in bold letters:

> Article 298 [283]. *Closure of Establishment and Reduction of Personnel.*
> (a) The employer may also terminate the employment of any

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[64] *See* Banco Filipino Sav. and Mortgage Bank, v. Nat'l Lab. Rel. Comm'n, G.R. No. 82135, 188 SCRA 700 (1990). This is a case where separation pay was granted to an employee of petitioner bank which was placed under receivership and later ordered liquidated by the Monetary Board of the Central Bank despite the fact that it has suffered serious business losses.

[65] G.R. No. 112546, 254 SCRA 721, 727 (1996). Petitioner North Davao Mining Corporation (North Davao) completely ceased operations on May 31, 1992, due to serious business reverses. From 1988 until its closure in 1992, North Davao suffered net losses averaging P3 Billion per year, for each of the five years prior to its closure. All told, as of December 31, 1991, or five months prior to its closure, its total liabilities had exceeded its assets by 20.392 billion pesos, as shown by its financial statements audited by the Commission on Audit. When it ceased operations, its remaining employees were separated and given the equivalent of 12.5 days' pay for every year of service, computed on their basic monthly pay, in addition to the commutation to cash of their unused vacation and sick leaves. However, it appears that, during the life of the petitioner corporation, from the beginning of its operations in 1981 until its closure in 1992, it had been giving separation pay equivalent to thirty (30) days' pay for every year of service. Subsequently, a complaint was filed with the Labor Arbiter by respondent Wilfredo Guillema and 271 other separated employees for: (1) additional separation pay of 17.5 days for every year of service; (2) backwages equivalent to two days a month; (3) transportation allowance; (4) hazard pay; (5) housing allowance; (6) food allowance; (7) post-employment medical clearance; and (8) future medical allowance, all of which amounted to PHP 58,022,878.31 as computed by private respondent.

employee due to the installation of labor-saving devices, redundancy, retrenchment to prevent losses or the closing or cessation of operation of the establishment or undertaking unless the closing is for the purpose of circumventing the provisions of this Title, by ~~serving a written notice on the workers and the Ministry of Labor and Employment at least one (1) month before the intended date thereof. In case of termination due to the installation of labor saving devices or redundancy, the worker affected thereby shall be entitled to a separation pay equivalent to at least his one (1) month pay or to at least one (1) month pay for every year of service, whichever is higher. In case of retrenchment to prevent losses and in cases of closures or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month pay or at least one half (½) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year.~~ **complying with the following requisites:**

(1) There is good faith in effecting the termination;

(2) The termination is a matter of last resort, there being no other option available to the employer after resorting to cost-cutting measures;

(3) Separate written notices are served on both the affected employees and the department of labor and employment at least one (1) month prior to the intended date of termination;

(4) Separation pay is paid to the affected employees, to wit:

(a) If based on (1) installation of labor-saving device, or (2) redundancy. - 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 shall be considered as one (1) whole year.

(b) If based on (1) retrenchment, or (2) closure not due serious business losses or financial reverses. - One (1) month pay or at least one-half (½) month pay for every year of service, whichever is higher, a

fraction of at least six (6) months shall be considered as one (1) whole year.

(c) If closure is due to serious business losses or financial reverses, no separation pay is required to be paid.

(d) In case the collective bargaining agreement or company policy provides for a higher separation pay, the same must be followed instead of the one provided in this article.

(5) Fair and reasonable criteria in ascertaining what positions are to be affected by the termination, such as, but not limited to: nature of work; status of employment (whether casual, temporary or regular); experience; efficiency; seniority; dependability; adaptability; flexibility; trainability; job performance; discipline; and attitude towards work. Failure to follow fair and reasonable criteria in selecting who to terminate would render the termination invalid.

(b) In case of installation of labor-saving device, its purpose shall be to save on cost, enhance efficiency and other justifiable economic reasons.

(c) In case of redundancy, any of the following should be adequately shown:

(1) Where the services of employees are in excess of what is reasonably demanded by the actual requirements of the enterprise.

(2) Where the position is superfluous because of a number of factors, such as over-hiring of workers, decreased volume of business, dropping of a particular product line or service activity previously manufactured or undertaken by the enterprise or phasing out of service activity formerly undertaken by the business.

(3) Where there is duplication of work.

(d) In case of retrenchment, there must be proof of losses or possible imminent losses as shown by externally audited financial statements.

(e) In case of closure or cessation of business operations:

(1) When not due to serious business losses or financial reverses, separation pay shall be paid in accordance with the above; or

(2) When due to serious business losses or financial reverses, no separation pay is required to be paid by the employer.

D. The labor code expressly recognizes and provides only for the supreme penalty of dismissal as a penalty

It is worth noting that the Labor Code provides for only one form of penalty—the most supreme of all, that is, *dismissal*. This is clear from the provision of Article 297 [282]:

> Art. 297 [282]. *Termination by Employer* – An employer may terminate an employment for any of the following causes:
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> (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.

The Labor Code however does not embody any provision that may be cited as basis for the imposition of less harsh penalties, such as suspension which may last for one day, a few days, a week or more, or even a month or two, verbal or written reprimand, and verbal or written warning. Providing for only one form of penalty—the highest one at that—gives undue and excessive grant of prerogative to the employer which more often is open to abuse.

The management prerogative to dismiss should therefore be tempered with compassion and equity. It should follow certain norms as enunciated in some well-entrenched rules, such as:

1. Reasonable Proportionality Rule.

This rule requires that the penalty to be meted upon an erring employee should be commensurate to the gravity and severity of his offense. Consequently, infractions committed by an employee should only merit the corresponding sanction demanded by the circumstances and this does not necessarily mean the imposition of the extreme penalty of dismissal. It follows that dismissal should not be imposed if it is unduly harsh and grossly disproportionate to the offense committed and being charged.[66]

In the 2013 case of *Cavite Apparel, Inc. v. Marquez*,[67] the respondent employee's dismissal, grounded on gross and habitual neglect of duty because of four absences incurred in her six years of service, was declared illegal since it was manifestly disproportionate to the infraction committed.

The dismissal was also held illegal in the 2006 case of *Perez v. The Medical City General Hospital*,[68] where the petitioners were found to have pilfered some hospital-owned items, but the Court found that their dismissal was disproportionate to the gravity of their offenses. It was on record that petitioner Perez had been employed by the hospital for 19 consecutive years, while the other petitioner, Campos, had served for seven years. Their records were unblemished. They were rank-and-file employees. With that, it was held that the suspension imposed should already be sufficient rather than their dismissal.

In *Sagales v. Rustan's Commercial Corp.*,[69] the petitioner was a Chief Cook in Yum Yum Tree Coffee Shop of respondent Rustan's. His dismissal was triggered by his alleged stealing of 1.335 kilos of squid heads worth PHP 50.00. It was thus ruled that the penalty of dismissal imposed on him was too harsh in the light of the following circumstances:

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[66] Felix v. Nat'l Lab. Rel. Comm'n, G.R. No. 148256, 442 SCRA 465 (2004); Gutierrez v. Singer Sewing Mach. Co., G.R. No. 140982, 411 SCRA 512 (2003); Associated Lab. Unions–TUCP v. Nat'l Lab. Rel. Comm'n, G.R. No. 120450, 302 SCRA 708, 715–716 (1999); Dela Cruz v. Nat'l Lab. Rel. Comm'n, G.R. No. 119536, 268 SCRA 458, 471 (1997).

[67] G.R. No. 172044, 690 SCRA 48 (2013).

[68] G.R. No. 150198, 484 SCRA 138 (2006).

[69] G.R. No. 166554, 572 SCRA 89 (2008).

> (1) [P]etitioner has worked for respondent for almost 31 years; (2) his tireless and faithful service is attested by the numerous awards he has received from respondent; (3) the incident on June 18, 2001 was his first offense in his long years of service; (4) the value of the squid heads worth ₱50.00 is negligible; (5) respondent practically did not lose anything as the squid heads were considered scrap goods and usually thrown away in the wastebasket; (6) the ignominy and shame undergone by petitioner in being imprisoned, however momentary, is punishment in itself; and (7) petitioner was preventively suspended for one month, which is already a commensurate punishment for the infraction committed.[70]

It must be emphasized that the said rule applies even in cases where the company rules provides for the penalty of dismissal. In the 1995 case of *Caltex Refinery Employees Ass'n v. National Labor Relations Commission*,[71] the Court, finding that the penalty of dismissal imposed on petitioner was too harsh and unreasonable, ruled that:

> Even when there exist some rules agreed upon between the employer and employee on the subject of dismissal, we have ruled in *Gelmart Industries Phils., Inc. v. National Labor Relations Commission*, that the same cannot preclude the State from inquiring on whether its rigid application would work too harshly on the employee.
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> * * *
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> Indeed, considering that Clarete has no previous record in his eight years of service; that the value of the lighter fluid, placed at P8.00, is very minimal compared to his salary of P325.00 a day; that after his dismissal, he has undergone mental torture; that respondent Caltex did not lose anything as the bottle of lighter fluid was retrieved on time; and that there was no showing that Clarete's retention in the service would work undue prejudice to the viability of employer's operations or is patently inimical to its interest, we hold that the penalty of dismissal imposed on Clarete is unduly harsh and grossly disproportionate to the reason for terminating his employment. Hence, we find that the preventive suspension imposed upon private respondent is a sufficient penalty for the misdemeanor committed by petitioner.[72]

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[70] *Id.* at 105–106.

[71] G.R. No. 102993, 246 SCRA 271 (1995).

[72] *Id.* at 279, *citing* Gelmart Indus. Phil., Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 53824, 176 SCRA 295 (1989).

Again in the 2013 case of *Cavite Apparel, Inc.*,[73] it was declared that even if the company rules provide for dismissal as the imposable penalty and even if the employee is aware of it, the penalty of dismissal may be disregarded if it is "manifestly disproportionate to the infraction committed." It ratiocinated, thus:

> Although Michelle was fully aware of the company rules regarding leaves of absence, and her dismissal might have been in accordance with the rules, it is well to stress that we are not bound by such rules. In *Caltex Refinery Employees Association v. NLRC*, and in the subsequent case of *Gutierrez v. Singer Sewing Machine Company*, we held that '[e]ven when there exist some rules agreed upon between the employer and employee on the subject of dismissal, x x x the same cannot preclude the State from inquiring on whether [their] rigid application would work too harshly on the employee.' This Court will not hesitate to disregard a penalty that is manifestly disproportionate to the infraction committed.
>
> Michelle might have been guilty of violating company rules on leaves of absence and employee discipline, still we find the penalty of dismissal imposed on her unjustified under the circumstances. As earlier mentioned, Michelle had been in Cavite Apparel's employ for six years, with no derogatory record other than the four absences without official leave in question, not to mention that she had already been penalized for the first three absences, the most serious penalty being a six-day suspension for her third absence on April 27, 2000.
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> While previous infractions may be used to support an employee's dismissal from work in connection with a subsequent similar offense, we cautioned employers in an earlier case that although they enjoy a wide latitude of discretion in the formulation of work-related policies, rules and regulations, their directives and the implementation of their policies must be fair and reasonable; at the very least, penalties must be commensurate to the offense involved and to the degree of the infraction.[74]

Concededly, a heavier penalty than that prescribed in the company rules and regulations may be imposed by the employer if circumstances exist to warrant its imposition. The case in point is *Garcia v. Manila Times/La Vanguardia Publishing, Inc.*[75] The respondent employer had expressly made a

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[73] G.R. No. 172044, 690 SCRA 48 (2013).

[74] *Id.* at 58–59. (Citations omitted.)

[75] G.R. No. 99390, 224 SCRA 399 (1993).

reservation in its company rules in the following manner: "The management reserves the right to review cases of employees to alter or modify any of the proceeding disciplinary measures depending on the gravity of the violation."[76] Petitioner, who is a Special Editor of respondent Manila Times, was administratively investigated because of his frequent tardiness and refusal to follow the writing style prescribed by the editor. His dismissal was grounded on insubordination. Petitioner, for his part, filed a case for illegal dismissal arguing that he should have been merely suspended and not dismissed. However, the Supreme Court declared that:

> The petitioner's claim that under the company rules the maximum penalty that could be meted out to him is only suspension not dismissal, overlooks two things: (1) the fact that the company had reserved its right to modify the penalties provided in the company rules; and (2) the fact that his transgressions also constituted serious misconduct, which under Article 297 [282] of the Labor Code, is one of the grounds for the termination of employment.[77]

2. Totality of Conduct Doctrine

Under this doctrine, the historical record of offenses, malfeasance or misfeasance of an employee, remain relevant in the determination of the gravity and severity of his current offense for which he is administratively investigated.

In other words, due consideration must be given to the employees' length of service and the number of violations they committed during their employment.[78] It is thus well-settled that the numerous infractions of an employee in the past cannot be disregarded in ascertaining the proper penalty to be imposed for the current offense. As declared by the Supreme Court, it is the totality, not the compartmentalization, of such infractions that the employee had consistently committed which may justify the imposition of the penalty of dismissal.[79]

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[76] *Id.* at 402.

[77] *Id.*

[78] Agabon v. Nat'l Lab. Rel. Comm'n, G.R. No. 158693, 442 SCRA 573 (2004); Cosmos Bottling Corp. v. Nat'l Lab. Rel. Comm'n, G.R. No. 111155, 281 SCRA 146, 153–54 (1997).

[79] Nat'l Serv. Corp. v. Leogardo, G.R. No. 64296, 130 SCRA 502 (1984).

Under this doctrine, it is also settled that any past infractions for which an employee has already been penalized should still be considered and taken into account. In the 2008 case of *Merin v. National Labor Relations Commission*,[80] it was declared that while the employee was already penalized for his previous infractions, this does not mean that his employment record would be wiped clean for both an employee's past misconduct and present behavior must be taken together to determine the proper penalty, thus:

> The totality of infractions or the number of violations committed during the period of employment shall be considered in determining the penalty to be imposed upon an erring employee. The offenses committed by petitioner should not be taken singly and separately. Fitness for continued employment cannot be compartmentalized into tight little cubicles of aspects of character, conduct and ability separate and independent of each other. While it may be true that petitioner was penalized for his previous infractions, this does not and should not mean that his employment record would be wiped clean of his infractions. After all, the record of an employee is a relevant consideration in determining the penalty that should be meted out since an employee's past misconduct and present behavior must be taken together in determining the proper imposable penalty. Despite the sanctions imposed upon petitioner, he continued to commit misconduct and exhibit undesirable behavior on board. Indeed, the employer cannot be compelled to retain a misbehaving employee, or one who is guilty of acts inimical to its interests. It has the right to dismiss such an employee if only as a measure of self-protection. We find just cause in petitioner's termination.[81]

In the 2012 case of *Realda v. New Age Graphics, Inc.*,[82] the Court affirmed the *totality of conduct* doctrine when it sanctioned the act of the respondent company of considering the employee's previous tardiness and unauthorized absences—even if he was already suspended for such—in imposing a penalty for his subsequent tardiness, absences, and his refusal to render overtime work and conform to the prescribed work standards.

Also citing *Merin*, the Supreme Court declared in the 2013 case of *Alvarez v. Golden Tri Bloc, Inc.*[83] that the NLRC and the Court of Appeals were correct in applying the totality of conduct rule and in adjudging that the petitioner's dismissal was grounded on a just and valid cause. This was on the

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[80] G.R. No. 171790, 569 SCRA 576 (2008).
[81] *Id.* at 581–82. (Citations omitted.)
[82] G.R. No. 192190, 671 SCRA 410 (2012).
[83] G.R. No. 202158, 706 SCRA 406 (2013).

basis that besides petitioner's latest infraction of requesting another employee to punch-in his time card for which act he was terminated, the Court also considered his infractions in the past, as follows:

> [A]t least three (3) different offenses—ranging from tardiness, negligence in preparing inventory to dishonesty relating to his time card—repeatedly committed by the petitioner over the years and for which he has been constantly disciplined. On July 4, 2003, the petitioner was found guilty of asking an employee to punch-in his time card for him. He was suspended for 45 days with a warning that a recurrence of the same act will merit dismissal from service. He, however, disregarded this incident and the corrective intention of disciplinary action taken on him when he repeated the same act on May 27, 2009.
>
> *A repetition of the same offense for which one has been previously disciplined and cautioned evinces deliberateness and willful intent; it negates mere lapse or error in judgment.* While it may be assumed that the petitioner has become stubborn or has forgotten the 2003 episode, it should not work to his advantage, because either cause demonstrates his indifference to GTBI's policies on employees' conduct and discipline. Based on this consideration, taken together with his numerous other offenses, GTBI had compelling reasons to conclude that the petitioner has become unfit to remain in its employ.[84]

In the 1996 case of *Manila Electric Co. v. National Labor Relations Commission*,[85] the employee who incurred unauthorized absences and violated the employer's sick leave policy was deemed properly dismissed in light of the totality of conduct doctrine, thus:

> The penchant of private respondent to continually incur unauthorized absences and/or a violation of petitioner's sick leave policy finally rendered his dismissal as imminently proper. Private respondent cannot expect compassion from this Court by totally disregarding his numerous previous infractions and take into considerations only the period covering August 2, 1989 to September 19, 1989. As ruled by this Court in the cases of *Mendoza v. National Labor Relation Commissions*, and *National Service Corporation v. Leogardo*, it is the totality, not the compartmentalization, of such company infractions that private respondents had consistently committed which justified his penalty of dismissal.

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[84] *Id.* at 419–20. (Emphasis supplied.)

[85] G.R. No. 114129, 263 SCRA 531 (1996).

As correctly observed by the Labor Arbiter:

> In the case at bar, it was established that complainant violated respondent's Code on Employee Discipline, not only once, but ten (10) times. On the first occasion, complainant was simply warned. On the second time, he was suspended for 5 days. With the hope of reforming the complainant, respondent generously imposed penalties of suspension for his repeated unauthorized absences and violations of sick leave policy which constitute violations of the Code. On the ninth time, complainant was already warned that the penalty of dismissal will be imposed for similar or equally serious violation.
>
> In total disregard of respondent's warning, complainant, for the tenth time did not report for work without prior authority from respondent; hence, unauthorized. Worse, in total disregard of his duties as lineman, he did not report for work from August 1, 1989 to September 19, 1989; thus, seriously affected (*sic*) respondent's operations as a public utility. This constitute[s] a violation of respondent's Code and gross neglect of duty and serious misconduct under Article 283 of the labor Code.

Habitual absenteeism should not and cannot be tolerated by petitioner herein which is a public utility company engaged in the business of distributing and selling electric energy within its franchise areas and that the maintenance of Meralco's distribution facilities (electric lines) by responding to customer's complaints of power failure, interruptions, line trippings and other line troubles is of paramount importance to the consuming public.

Hence, an employee's habitual absenteeism without leave, which violated company rules and regulation is sufficient to justify termination from the service.[86]

In the earlier case of *Mendoza v. National Labor Relations Commission*,[87] the dismissal of petitioner employee who was found, on several occasions, to have committed a number of infractions of the company rules and regulations, was upheld by the Supreme Court based on the following ratiocination:

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[86] *Id.* at 539–40. (Citations omitted.)

[87] G.R. No. 94294, 195 SCRA 606 (1991).

> Petitioner also assails the severity of the penalty imposed upon him alleging that he should have merited a suspension only considering his past performance.
>
> Unfortunately, petitioner does not appear to be a first offender. Aside from the infractions he was found to have committed, it appears that petitioner falsified the truth when he made a false report about the incident to private respondent SMC to cover up for his misdeeds. Moreover[,] on previous occasions, petitioner committed violations of company rules and regulations concerning pricing as a salesman of the company in a way that is detrimental to his employer. On one occasion, he failed to remit collections, so that in 1986, he was suspended for thirty days. Thus, the totality of the infractions that petitioner has committed justifies the penalty of dismissal.[88]

i. Conflict in jurisprudence on the application of the totality of conduct doctrine

It must be stressed that the *totality of conduct doctrine* should be qualified in its application which means that *previous offenses may be cited as valid justification for dismissal from work only if they are related to the subsequent offense upon which the employee is terminated.*

Thus, in the 2010 case of *Century Canning Corp. v. Ramil*:[89]

> [P]etitioner's reliance on respondent's previous tardiness in reporting for work as a ground for his dismissal on the ground of forgery is likewise not meritorious. The correct rule has always been that such previous offense may be used as valid justification for dismissal from work only if the infractions are related to the subsequent offense upon which the basis of termination is decreed. His previous offenses were entirely separate and distinct from his latest alleged infraction of forgery. Hence, the same could no longer be utilized as an added justification for his dismissal.[90]

However, there are rulings that past infractions that do not have any bearing on or relation to the proximate cause of the current dismissal may be cited merely as supporting information to determine the work attitude and continued competence of the employee to remain in the company.

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[88] *Id.* at 613.

[89] G.R. No. 171630, 627 SCRA 192 (2010).

[90] *Id.* at 5.

Apropos to this is the 2009 case of *Gatus v. Quality House, Inc.*[91] The petitioner in this case cited the Court of Appeal's finding that her poor work attitude constitutes "an additional basis justifying her dismissal and a reason that militates against her retention in the company," as erroneous.[92] It is her position "that her previous infractions may be used as a ground for dismissal *only if they directly relate to the proximate cause of dismissal[.]*"[93] She thus argued that since there is no link established, her dismissal is illegal.

To this contention, the Supreme Court disagreed fully. It reasoned that while it is true that the Court of Appeals cited petitioner's previous infractions as justification for her dismissal, the appellate court, however, did not find the dismissal legal on the basis of these previous infractions. The Supreme Court held that:

> These were cited, more than anything else, as background and supporting information, regarding the petitioner's work attitude: she had low regard for her job and would not hesitate to disrupt the workplace and her co-employees, as she had manifested in the June 30, 1997 incident. That these infractions do not have direct bearing on the proximate cause for her dismissal—the incident of June 30, 1997—is not a valid argument, as they were not in fact cited as considerations directly related to the proximate cause; they merely served as gauges of her work attitude and her continued fitness to stay in the respondent company.[94]

But it must be borne in mind that any past infraction of the company rules and regulations *under which the employee has already sufficiently explained his side but the employer did not take any action on the same cannot be cited anymore as a ground to dismiss* for the current violation.

The case in point is *Felix v. National Labor Relations Commission.*[95] Here, respondent company complained about the petitioner's six absences without permission from May 29 to June 5, 1992. This complaint had earlier been the subject of a letter addressed to petitioner dated June 16, 1992 wherein the company advised him that communicating via phone call of a notice of leave of absence is inappropriate. While petitioner's written explanation for his absence discloses a conflict of interest between his employment with the

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[91] G.R. No. 156766, 585 SCRA 177 (2009).
[92] *Id.* at 184.
[93] *Id.* at 184–85. (Emphasis supplied).
[94] *Id.* at 192–93.
[95] G.R. No. 148256, 442 SCRA 465 (2004).

company and his operation of his rice plantation, he therein made a commitment to improve his overall performance and reporting habits, causing the company to conditionally approve his six days leave and charge the same to his vacation leave. The Court held as follows:

> The records do not disclose that petitioner incurred any further absences without leave. More importantly, except for that incident in 1992, the company failed to show that there were instances during the 14 years that petitioner had been employed that he incurred absences without leave.
>
> The propriety of petitioner's 6 days of absence having priorly [sic] been threshed out by the parties, the company may no longer ask petitioner to, more than two years later by letter of September 27, 1994, re-explain his absence and use the same to justify his dismissal.[96]

There are decisions as well that enunciate the rule that past infractions for which employee had already been penalized cannot be cited anymore for the current offense. According to the Supreme Court, such past infractions cannot be collectively taken as a justification for an employee's dismissal from service.[97] The reason for this rule is that if the past infractions were to be considered as justification for his dismissal, this would be penalizing the employee twice for the same offense.[98]

The best example of this rule is the 2006 case of *Ting v. Court of Appeals*,[99] where petitioner-spouses were unable to show that the incident of June 11, 1998 was not only gross but habitual. To prove that private respondent's neglect of duty was habitual, petitioner-spouses cited two prior incidents.

> According to petitioner-spouses, on 13 May 1997, private respondent, who was then assigned to unload fresh fish from "F/B Liza III," disembarked therefrom, notwithstanding instructions that he was to do so only after the unloading of ice and other supplies had been completed. On 30 March 1998, private respondent disembarked from "F/B Liza II," while the same was operating on fishing grounds, and contrary to instructions to wait

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[96] *Id.* at 478–79.

[97] Tower Indus. Sales v. Ct. of Appeals, G.R. No. 165727, 487 SCRA 556 (2006); Lopez v. Nat'l Lab. Rel. Comm'n, 358 Phil. 141, 150 (1998).

[98] Century Canning Corp. v. Ramil, G. R. No. 171630, 627 SCRA 192 (2010).

[99] G.R. No. 146174, 494 SCRA 610 (2006).

> after the catch was duly loaded and the fishing boat ready to depart for the port.[100]

The Supreme Court, however, stated that since he was already penalized for his prior offenses, to do so one more time would be to penalize the employee twice for the same infractions, *viz*:

> Private respondent had already been adequately penalized for his two prior acts of disembarkation. He was meted out appropriate punishments for the commission of the unwarranted disembarkations of 13 May 1997 and 30 March 1998. As can be gleaned from the records, on 15 to 30 May 1997, private respondent was meted out the penalty of suspension from employment. Likewise, as punishment for the 30 March 1998 incident, he was penalized with suspension for ten days from 30 March to 9 April 1998. *The fact that private respondent had been penalized for his two prior infractions cannot be considered in the determination of the habitual nature of neglect of duty under Article 297 [282] of the Labor Code because to do so would be to unduly penalize private respondent twice for his infraction.*[101]

Further, in the 2010 case of *Erector Advertising Sign Group, Inc. v. National Labor Relations Commission*,[102] petitioner company emphasized and cited the act of private respondent, a company driver, of terrorizing the staff and inciting a work stoppage as a ground for termination, among others. The Supreme Court, however, found the invocation of said act as improper because such has already been earlier penalized with suspension. Therefore, this act may no longer be considered as an additional ground to validly support the imposition of dismissal from service; it cannot also be used as an independent ground to that end.[103]

In another 2010 case of *Philippine Long Distance Telephone Co. (PLDT) v. Teves*,[104] the Supreme Court did not agree to the invocation of the principle that previous infractions may be used as supporting justification to a subsequent similar offense and that such would merit dismissal. The respondent has three incidents of absences within a three-year period which

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[100] *Id.* at 626.

[101] *Id.* at 626. (Emphasis supplied.)

[102] G.R. No. 167218, 622 SCRA 665 (2010).

[103] *See* Pepsi Cola Distrib. of the Phil., Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 106831, 272 SCRA 267 (1997).

[104] G.R. No. 143511, 634 SCRA 538 (2010).

PLDT alleges as a valid ground for termination. The first one was from August 23 to September 3, 1990 during which time his wife gave birth with complications. It was however established that these were made with prior notice; hence, his absences were justified and authorized. The second one, from May 29 to June 12, 1991 during which his eldest and youngest daughters were confined in a clinic though unauthorized for lack of prior notice, were still justified. Consequently, his absences from February 11 to 19, 1991 during which time he deliberately did not come to work to avoid paying due and demandable accounts in the office, were found to have been the only absences which were both unauthorized and unjustified. Hence, despite the invocation of his second unauthorized absence, the Court held that it would not amount to the penalty of dismissal.

In the 1999 case of *Pare v. National Labor Relations Commission.*,[105] petitioner was dismissed on the ground of abandonment. This ground, however, was not supported by evidence, as follows:

> As shown in the letter to petitioner by respondent Asia Rattan Manufacturing Co., Inc., he was made to explain only his absences on 29 October, and 3, 6, 7 and 9 November 1992; so he did in his explanation of 25 November 1992, which appeared satisfactory. On 9 November 1992, petitioner even reported for work only to be barred from the company premises by his employer.
>
> Quite understandably, petitioner could not be faulted for his previous absences allegedly for the entire months of August and September and half of October 1992. The letter sent to him only required him to explain his absences on 29 October, and 3, 6, 7 and 9 November 1992. As correctly observed and aptly rationalized by the Labor Arbiter:
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> *The imputed absences have correspondingly and undisputedly been penalized by suspensions and reprimands, hence, respondents cannot again use same ground for dismissing herein complainant without violating the principle of placing him in double jeopardy.*[106]

In *Salas v. Aboitiz One, Inc.*,[107] the Court of Appeals cited two previous infractions to further justify the petitioner's dismissal from work. The Supreme Court however found that not only where these two previous infractions unrelated to the infraction that led to the dismissal, the petitioner

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[105] G.R. No. 128957, 318 SCRA 179 (1999).
[106] *Id.* at 182. (Emphasis supplied.)
[107] G.R. No. 178236, 556 SCRA 374 (2008).

had already been penalized for them. Thus, it found that these infractions cannot be used as added justification for the dismissal, *viz.*:

> Aboitiz's reliance on the past offenses of Salas for his eventual dismissal is likewise unavailing. The correct rule has always been that such previous offenses may be used as valid justification for dismissal from work only if the infractions are related to the subsequent offense upon which the basis of termination is decreed. While it is true that Salas had been suspended on June 1, 2000 for failure to meet the security requirements of the company, and then on July 20, 2001 for his failure to assist in the loading at the fuel depot, these offenses are not related to Salas' latest infraction, hence, cannot be used as added justification for the dismissal.
>
> *Furthermore, Salas had already suffered the corresponding penalties for these prior infractions. Thus, to consider these offenses as justification for his dismissal would be penalizing Salas twice for the same offense.*[108]

In *Zagala v. Mikado Philippines Corp.*,[109] the management of respondent Mikado, in January of 1998, reviewed the employees' attendance records for the years 1995, 1996, and 1997, and found that petitioners Nelson Zagala and Feliciano Angeles were among those who exceeded the 30 absences allowed per year. Zagala incurred a total of 40 absences in 1995, 34.5 in 1996, and 59.5 in 1997; while Angeles incurred a total of 32.5 absences in 1995, 35 in 1996 and 40 in 1997. They were dismissed because of these past infractions. However, it was ruled that petitioners' dismissal was illegal, thus:

> In this case, the only basis of respondents in terminating the services of petitioners is that they incurred absences in 1997, in excess of the allowed number, despite a previous warning for their absences in 1996 and 1995. We find that in this case, termination is not a commensurate penalty. Even assuming that petitioners' absenteeism constitutes willful disobedience, such offense does not warrant their dismissal.
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> * * *
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> The Court notes the rules of the company [...] provide for a progression of disciplinary measures to be meted out on erring employees.
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> * * *

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[108] *Id.* at 390. (Emphasis supplied.)

[109] G. R. No. 160863, 503 SCRA 581 (2008).

> Respondent company failed to show that it imposed on petitioners the lesser penalties first, before imposing on them the extreme penalty of termination.
>
> As admitted by petitioners in their Reply filed before the LA and which became the basis of the LA in its Decision, petitioners received a memorandum with warning for their absences in 1995 and 1996. A close scrutiny of the records [also] reveals that petitioner Zagala served a 3-day suspension from November 3 to 5, 1997 for his unexcused absences.
>
> Taking each year, where petitioners failed to observe the allowed absences, as one offense each, respondent should have imposed on petitioners a verbal warning for their absences in 1995, a written warning in 1996, and 3-day suspension for their absences in 1997. As Zagala already served a 3-day suspension in 1997 for his excessive absences, only Angeles is left to answer for such penalty.[110]

There are also decisions *where past infractions for which the employee has not yet been penalized was held as proper basis* for administrative sanction.

The best example of this situation is the 2008 case of *R.B. Michael Press v. Galit.*[111] During his employment, Galit was tardy for a total of 190 times, totaling 6,117 minutes, and was absent without leave for a total of nine and a half days. He was dismissed on the basis of habitual tardiness and absences. The Labor Arbiter ruled that petitioners cannot raise Galit's habitual tardiness and unauthorized absences as grounds to justify his dismissal. After all, they already deducted the corresponding amounts from his salary. Further, the Labor Arbiter said that since respondent was not penalized for his tardiness, petitioners had essentially condoned the offense. The Court of Appeals affirmed the Labor Arbiter's ruling by ratiocinating that petitioners cannot draw on respondent's habitual tardiness in order to dismiss him considering there is no evidence showing that he had been warned or reprimanded because of said habitual tardiness.

The Supreme Court, however, disagreed. It ruled:

> The mere fact that the numerous infractions of respondent have not been immediately subjected to sanctions cannot be interpreted as condonation of the offenses or waiver of the company to enforce company rules. [...] It has been ruled that "a

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[110] *Id.* at 592–93. (Citations omitted.)

[111] G. R. No. 153510, 545 SCRA 23 (2008).

> waiver to be valid and effective must be couched in clear and unequivocal terms which leave no doubt as to the intention of a party to give up a right or benefit which legally pertains to him." Hence, the management prerogative to discipline employees and impose punishment is a legal right which cannot, as a general rule, be impliedly waived.
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> * * *
>
> In the case at bar, respondent did not adduce any evidence to show waiver or condonation on the part of petitioners. Thus[,] the finding of the CA that petitioners cannot use the previous absences and tardiness because respondent was not subjected to any penalty is bereft of legal basis. In the case of *Filipro v. The Honorable Minister Blas F. Ople*, the Court, quoting then Labor Minister Ople, ruled that past infractions for which the employee has suffered the corresponding penalty for each violation cannot be used as a justification for the employee's dismissal for that would penalize him twice for the same offense. At most, it was explained, "these collective infractions could be used as supporting justification to a subsequent similar offense." In contrast, the petitioners in the case at bar did not impose any punishment for the numerous absences and tardiness of respondent. Thus, said infractions can be used collectively by petitioners as a ground for dismissal.
>
> The CA however reasoned out that for respondent's absences, deductions from his salary were made and hence to allow petitioners to use said absences as ground for dismissal would amount to "double jeopardy."
>
> This postulation is incorrect.
>
> Respondent is admittedly a daily wage earner and hence is paid based on such arrangement. For said daily paid workers, the principle of 'a day's pay for a day's work' is squarely applicable. Hence, it cannot be construed in any wise that such nonpayment of the daily wage on the days he was absent constitutes a penalty.[112]

There are rulings, however, *where past infractions were declared as not sufficient to justify the application of the totality of conduct doctrine.*

Illustrative of this point is the 2013 case of *Cavite Apparel, Inc. v. Marquez*.[113] Here, respondent employee was dismissed on the ground of gross

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[112] *Id.* at 31–32. (Emphasis supplied, citations omitted.)

[113] G.R. No. 172044, 690 SCRA 48 (2013).

and habitual neglect of duty because of her four absences during her six years of service. It was asserted by petitioner company that the totality of the infractions of respondent justified her dismissal. However, the Supreme Court took a different stance on this issue. This was because based on what is reflected in the records:

> [T]here simply cannot be a case of gross and habitual neglect of duty against respondent. Even assuming that she failed to present a medical certificate for her sick leave on May 8, 2000, the records are bereft of any indication that apart from the 4 occasions when she did not report for work, respondent had been cited for any infraction since she started her employment with the company in 1994. Four absences in her 6 years of service [...] cannot be considered gross and habitual neglect of duty, especially so since the absences were spread out over a 6-month period.[114]

3. The amendment of the Labor Code becomes imperative to reflect the substance of the above disquisition

It is clear, based on the foregoing discussion of relevant cases, that the Labor Code should be amended by clearly delineating and prescribing:

1. The proper imposable penalties less harsh than dismissal; *and*
2. The application of the proportionality rule and the totality of conduct rule.

Once the Labor Code embodies the foregoing principles, the employer can no longer engage in the unbridled exercise of this prerogative of dismissal which, if not limited, would continue to deprive workers of their right to security of tenure and social justice.

4. Text of the proposed amendment to Article 297 [282] of the Labor Code

Article 297 [282], after its amendment, shall read as follows, with the amendments proposed by the author underlined and in bold letters:

> Article 297 [282]. *Termination by employer.* – An employer may terminate an employment for any of the following causes:
> (a) Serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work;
> (b) Gross and habitual neglect by the employee of his duties;

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[114] *Id.* at 57–58.

(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.

Nothing herein shall preclude the employer from imposing less harsh penalty than dismissal, such as suspension for reasonable period/s, and reprimand or warning, whether written or verbal, if the circumstances so warrant, fully taking into account the totality of conduct of the employee, his past infractions, and the proportion of his offense with the gravity thereof.

E. Prerogative to suspend business operations in good faith

The Labor Code grants to the employer the prerogative of suspending the operation of his business or undertaking for a period not exceeding six months.[115] The pertinent provision is Article 301 [286], which states:

> Article 301 [286]. *When Employment Not Deemed Terminated.* – The *bona-fide* suspension of the operation of a business or undertaking for a period not exceeding six (6) months, or the fulfillment by the employee of a military or civic duty shall not terminate employment. In all such cases, the employer shall reinstate the employee to his former position without loss of seniority rights if he indicates his desire to resume his work not later than one (1) month from the resumption of operations of his employer or from his relief from the military or civic duty.[116]

If one were to read the provision of Article 301 [286], it is clear that it applies solely to two situations, namely: (1) bona-fide suspension of operation for a period not exceeding six months; and (2) fulfillment of military or civic duty. The second situation is apparently clear-cut. However, the first situation has room for discretion on the part of management, which has allowed for questions on its application, such as:

1. What are the valid grounds that would justify the -month bona-fide suspension of operations?
2. Is this article applicable to temporary lay-off?

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[115] LAB. CODE, art. 301 [286].
[116] LAB. CODE, art. 301 [286].

3. Is this article the valid basis for the invocation of the doctrine of "floating status" or "off-detail status"?
4. What are the reliefs available to the employees in the event that the employer failed to resume operations after six months?

The term "bona-fide" or good faith is a question of fact. The burden to prove it lies with the employer.[117] The 2013 case of *SKM Art Craft Corp. v. Bauca*[118] squarely addresses this point. In ruling that the suspension of operation was made in good faith, the Supreme Court relied on the admission of the parties that petitioner's premises were burned on April 18, 2000. Petitioner also submitted pictures of its premises after the fire, the certification by the barangay chairman that petitioner's factory was burned, and the fire investigation report of the Bureau of Fire Protection. To prove the damages, petitioner submitted a list of burned machines, its inventory for April 2000 and the fire investigation report which stated that the estimated damage is 22 million pesos. Thus:

> We therefore agree with the NLRC that petitioner's suspension of operations is valid because the fire caused substantial losses to petitioner and damaged its factory. On this point, we disagree with the CA that petitioner failed to prove that its suspension of operations is bona fide. The list of materials burned was not the only evidence submitted by petitioner. It was corroborated by pictures and the fire investigation report, and they constitute substantial evidence of petitioner's losses.[119]

More to the point is 2004 case of *J.A.T. General Services v. National Labor Relations Commission*,[120] where it was held that:

> [T]he closure of business operation by petitioners, in our view, is not tainted with bad faith or other circumstance that arouses undue suspicion of malicious intent. The decision to permanently close business operations was arrived at after a suspension of operation

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[117] J.A.T. Gen. Serv. v. Nat'l Lab. Rel. Comm'n, G.R. No. 148340, 421 SCRA 78 (2004), *citing* Indus. Timber Corp. v. Nat'l Lab. Rel. Comm'n, G.R. No. 107302, 273 SCRA 200 (1997).

[118] G.R. No. 171282, 710 SCRA 652 (2013). Petitioner SKM Art Craft Corporation is engaged in the handicraft business. On April 18, 2000, around 1:12 a.m., a fire occurred at the inspection and receiving/repair/packing area of petitioner's premises in Intramuros, Manila. The fire investigation report4 stated that the structure and the beach rubber building were totally damaged. Also burned were four container vans and a trailer truck. The estimated damage was 22 million pesos.

[119] *Id.* at 663.

[120] G.R. No. 148340, 421 SCRA 78 (2004).

> for several months precipitated by a slowdown in sales without any prospects of improving. There were no indications that an impending strike or any labor-related union activities precipitated the sudden closure of business. Further, contrary to the findings of the Labor Arbiter, petitioners had notified private respondent and all other workers through written letters dated November 25, 1998 of its decision to permanently close its business and had submitted a termination report to the DOLE.[121]

1. Valid grounds

A close dissection of this article would show that it does not clearly define what specific grounds may be invoked to justify the suspension of operations. This ambiguity is one of the significant problems with this article. However, per jurisprudence, there are grounds that have been cited but the rulings still vary from case to case. The following discussion would thus be informative.

i. When retrenchment is cited as a valid ground

In some cases, it is sufferance of losses that is considered a valid ground for the suspension of operations. The 2012 case of *Mindanao Terminal & Brokerage Service, Inc. v. Nagkahiusang Mamumuo Saminterbro–Southern Philippines Federation of Labor*[122] clearly stated that lay-off is essentially retrenchment under Article 298 [283] of the Labor Code, *viz*:

> A lay-off, used interchangeably with "retrenchment," is a recognized prerogative of management. It is the termination of employment resorted to by the employer, through no fault of nor with prejudice to the employees, during periods of business recession, industrial depression, seasonal fluctuations, or during lulls occasioned by lack of orders, shortage of materials, conversion of the plant for a new production program, or the introduction of new methods or more efficient machinery, or of automation. Simply put, it is an act of the employer of dismissing employees because of losses in operation of a business, lack of work, and considerable reduction on the volume of his business, a right consistently recognized and affirmed by this Court.[123]

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[121] *Id.* at 90.

[122] G.R. No. 174300, 687 SCRA 28 (2012).

[123] *Id.* at 46–47. (Citations omitted.)

This was also the ruling in the earlier 2010 case of *Manila Mining Corp. Employees Association–FFW Chapter v. Manila Mining Corp.*[124] Here, however, the suspension of the business operation was for the purpose of averting *possible* financial losses. It was established by evidence in this case that respondent company resorted to temporary shutdown of its mining operations and temporary lay-off of more than 400 employees in the mine site due to its failure to secure an Environmental Compliance Certificate (ECC) from the Department of Environment and Natural Resources–Environmental Management Bureau (DENR-EMB). The ECC is required in order to obtain a permanent permit to operate the mine site. Consequently, respondent company was forced by the circumstances to temporarily suspend its mining and milling operations. Thus, it was held:

> We observe that MMC was forced by the circumstances, hence, it resorted to a temporary suspension of its mining and milling operations. It is clear that MMC had no choice. It would be well to reiterate at this juncture that the reason for such suspension cannot be attributed to DENR-EMB. It is thus, evident, that the MMC declared temporary suspension of operations to avert further losses.
>
> The decision to suspend operation ultimately lies with the employer which, in its desire to avert possible financial losses, is constrained to declare, as here, suspension of operations.[125]

ii. When redundancy is cited as a valid ground

The ground cited in the 2011 case of *Nippon Housing Philippines Inc. v. Leynes*,[126] to justify the dismissal of respondent employee[127] after the lapse of her six-month floating status was redundancy. In this case, the respondent, a property manager of petitioner company, threatened to resign because of an incident[128] but later on retracted it. In the meantime, the petitioner hired her

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[124] G.R. No. 178222–23, 631 SCRA 553 (2010).

[125] *Id.* at 564–65.

[126] G.R. No. 177816, 655 SCRA 77 (2011).

[127] Respondent Maiah Angela Leynes (Leynes) was hired on 26 March 2001 for the position of Property Manager, with a salary of PHP 40,000.00 per month.

[128] Respondent Leynes had a misunderstanding with Engr. Honesto Cantuba (Cantuba), the Building Engineer assigned at the Project, regarding the extension of the latter's working hours. Aside from instructing the security guards to bar Engr. Cantuba from entry into the Project and to tell him to report to the NHPI's main office in Makati, Leynes accused Cantuba of insubordination and disrespectful conduct. Petitioner, however, allowed Engr. Cantuba to report back for work to the consternation of respondent.

replacement and, because of this act, respondent was placed on a floating status for a period of six months "until such time that another project could be secured" for her.[129] This did not, however, materialize because there was no other available project to which respondent may be assigned as Property Manager.[130] The Supreme Court thus held that with no other client to which she may be assigned, petitioner company was acting well within its prerogatives when it eventually terminated Leynes' services on the ground of redundancy.

iii. When there was confusion as to what proper ground/s to invoke

In the 1995 case of *Sebuguero v. National Labor Relations Commission*,[131] there was confusion as to the proper ground to invoke in support of the suspension of operations that resulted in the subsequent termination of employees. Petitioners first contend that the NLRC acted without or in excess of jurisdiction or with grave abuse of discretion when it ruled that there was a valid and legal reduction of business, and in sustaining the theory of redundancy in justifying their dismissal. However, this argument was held to have been "based on a wrong premise or on a miscomprehension of the statement of the NLRC."[132] What the NLRC sustained and affirmed is not *redundancy*, but *retrenchment* as a ground for termination of employment. They are not synonymous but distinct and separate grounds under Article 298 [283] of the Labor Code, as amended."[133]

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[129] *See supra* note 117, at 86–87.

[130] Petitioner had only belatedly ventured into building management and the Bay Gardens Condominium Project of the Bay Gardens Condominium Corporation (BGCC) to which respondent was assigned as Property Manager, was its first and only building maintenance client.

[131] G.R. No. 115394, 248 SCRA 532 (1995). Private respondent GTI here denied petitioners' claim of illegal dismissal and asserted that it was its prerogative to lay-off its employees temporarily for a period not exceeding six months to prevent losses due to lack of work or job orders from abroad, and that the lay-off affected both union and non-union members. It justified its failure to recall the 38 laid-off employees after the lapse of six months because of the subsequent cancellations of job orders made by its foreign principals, a fact which was communicated to the petitioners and the other complainants who were all offered severance pay. Twenty-two (22) of the 38 complainants accepted the separation pay. The petitioners herein did not.

[132] *Id.* at 542.

[133] *Id.* Redundancy exists where the services of an employee are in excess of what is reasonably demanded by the actual requirements of the enterprise. A position is redundant where it is superfluous, and superfluity of a position or positions may be the outcome of a number of factors, such as overhiring of workers, decreased volume of business, or dropping of a particular product line or service activity previously manufactured or undertaken by the enterprise. Retrenchment, on the other hand, is used interchangeably with the term "lay-off."

2. Despite its clear inapplicability, Article 301 [286] has been used as basis for the application of the temporary lay-off doctrine

A close examination of Article 301 [286] of the Labor Code would readily show that it does not provide for *temporary* lay-off of employees. The other provision, Article 298 [283], applies only to *permanent* lay-off. There is, in fact, no law which applies to *temporary* lay-off. This, again, is a void in the law. However, in the same case of *Sebuguero*,[134] it was ruled that since employees cannot forever be temporarily laid-off, there must be a remedy to fill the *hiatus*. Article 301 [286] is the only provision in Philippine statute books that is closer to temporary lay-off. Hence, this provision was applied but only *by analogy* to set a specific period that employees may remain temporarily laid-off or on floating status.

The ruling of the Supreme Court to this effect is instructive, thus:

> This provision, however, 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. These employees cannot forever be temporarily laid-off. *To remedy this situation or fill the hiatus, Article 286 may be applied but only by analogy to set a specific period that employees may remain temporarily laid-off or in floating status.* Six months is the period set by law that the operation of a business or undertaking may be suspended thereby suspending the employment of the employees concerned. The temporary lay-off wherein the employees likewise cease to work should also not last longer than six months. After six months, the employees should either be recalled to work or permanently retrenched following the requirements of the law, and that failing to comply with this would be tantamount to dismissing the employees and the employer would thus be liable for such dismissal.

It is the termination of employment initiated by the employer through no fault of the employee's and without prejudice to the latter, resorted to by management during periods of business recession, industrial depression, or seasonal fluctuations, or during lulls occasioned by lack of orders, shortage of materials, conversion of the plant for a new production program or the introduction of new methods or more efficient machinery, or of automation. Simply put, it is an act of the employer of dismissing employees because of losses in the operation of a business, lack of work, and considerable reduction on the volume of his business, a right consistently recognized and affirmed by this Court.

[134] G.R. No. 115394, 248 SCRA 532 (1995).

> To determine, therefore, whether the petitioners were validly retrenched or were illegally dismissed, we must determine whether there was compliance with the law regarding a valid retrenchment at anytime within the six month-period that they were temporarily laid-off.[135]

Although quite remote, the doctrine of "floating status" or "off-detail status" is based on Article 301 [286]. However, even a cursory reading of this law would indicate that it is not on all fours thereon. The relevance of this article to this doctrine is only on the six (6) months as a defining cut-off period when an employee may be placed under "floating status" or "off-detail status."[136]

As the bulk of jurisprudence on this issue would readily show, this doctrine is often applied to cases involving the "floating" or "off-detail" of security guards,[137] although, it has also been applied to some other sectors, such as, among others, merchandisers, [138] bus driver, [139] and property manager.[140]

As far as security guards are concerned, the usual situation is when termination or non-renewal of the security services contract with the security agency's principal would result in the lack of positions from other clients of the security agency to which the displaced security guards may be re-assigned. It is for this reason that the guards may be placed on temporary "*off-detail*" or "*floating status*" for a period not exceeding six months.[141] Within this period, the security agency is not liable to pay the wages and benefits of the security guards nor are they allowed to file a suit for illegal dismissal. Should a complaint for illegal dismissal be filed before the lapse of the six-month period, it will be dismissed on the ground of prematurity. The 2013 case of *Cañedo v. Kampilan Security & Detective Agency, Inc.*,[142] is proper to be cited in this regard. Petitioner security guard in this case filed the complaint for illegal

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[135] *Id.* at 543–44. (Emphasis supplied.)

[136] Valdez v. Nat'l Lab. Rel. Comm'n, G.R. No. 125028, 286 SCRA 87, 92 (1998).

[137] *See* Leopard Sec. and Investigation Agency v. Quitoy, G.R. No. 186344, 691 SCRA 440 (2013); Mobile Protective & Detective Agency v. Ompad, G.R. No. 159195, 458 SCRA 308 (2005).

[138] JPL Mkt'g Promotions v. Ct. of Appeals, G.R. No. 151966, 463 SCRA 136 (2005).

[139] Valdez v. Nat'l Lab. Rel. Comm'n, G.R. No. 125028, 286 SCRA 87 (1998).

[140] Nippon Hous. Phil., Inc. v. Leynes, G.R. No. 177816, 655 SCRA 77 (2011).

[141] Philippine Indus. Sec. Agency Corp. v. Dapiton, G.R. No. 127421, 320 SCRA 124 (1999), *citing* Sentinel Sec. Agency v. Nat'l Lab. Rel. Comm'n, G.R. No. 122468, 295 SCRA 123 (1998).

[142] G.R. No. 179326, 702 SCRA 647 (2013).

dismissal before the lapse of his floating status. The Supreme Court pronounced that his claim of illegal dismissal lacks basis.[143]

This is not the first time when such ruling was made. As early as 1990, the same issue was raised in the case of *Superstar Security Agency, Inc. v. National Labor Relations Commission.*[144] The Supreme Court pronounced:

> 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. 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.[145]

In 2002, the same ruling was made in the case of *Soliman Security Services, Inc. v. Court of Appeals.*[146] The security guard in this case filed a complaint for constructive dismissal against petitioner security agency 29 days after being placed on floating status. In justifying the dismissal of the case on the ground of prematurity, the Supreme Court, cited the ruling in *Superstar Security Agency, Inc.* as stated above.[147]

i. Reliefs available to the employees in the event that the employer failed to resume operations after six months

In the event that the employer failed to resume its operations after the lapse of six months, a question may thus be raised: what are the reliefs available to the employees? Clearly, a reading of Article 301 [286] of the Labor Code would readily indicate that it does not provide the answer to this essential question. While it expressly provides for a specific period of six

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[143] *Id.* at 659.

[144] G.R. No. 81493, 184 SCRA 74 (1990).

[145] *Id.* at 77. *See also* Valdez v. Nat'l Lab. Rel. Comm'n, G.R. No. 125028, 286 SCRA 87 (1998). (Citations omitted).

[146] G.R. No. 143215, 384 SCRA 514 (2002).

[147] *Id.* at 518.

months, it fails to provide the appropriate relief in the event that after its lapse, the employer does not resume operations for whatever reason.

A survey of jurisprudence shows that there is no uniform rule on the reliefs that should be granted to employees who are deemed constructively dismissed after the lapse of the six-month period.

In some cases, relief in the form of separation pay was granted based on retrenchment or closure of business. In the 2012 case of *Mindanao Terminal & Brokerage Service, Inc. v. Nagkahiusang Mamumuo Saminterbro–Southern Philippines Federation of Labor*,[148] the *retrenchment doctrine* was applied; hence, the retrenched employee was awarded separation pay based on Article 298 [283] of the Labor Code.;[149]

The 2010 case of *Manila Mining Corp. Employees Associationn–FFW Chapter v. Manila Mining Corp.*[150] found the application of the *closure doctrine* proper; hence, the separation pay provided for closure or cessation of business operation under Article 298 [283] of the Labor Code was awarded to the employees. This is equivalent to one month pay or at least one-half month pay for every year of service, whichever is higher.[151]

In other cases, the reliefs under Article 294 [279][152] were granted. In the 2010 case of *Malig-on v. Equitable General Services, Inc.*[153] the petitioner Malig-on was a janitress in respondent Company. She was considered constructively dismissed on August 16, 2002 which was the expiration date of her six-month floating status. The Court found that the grant of separation pay instead of reinstatement was proper, *viz.:*

> *An illegally dismissed employee is entitled to two reliefs: backwages and reinstatement. Still, the Court has held that the grant of separation pay, rather than reinstatement, may be proper especially when the latter is no longer practical or will be for the best interest of the parties, as in this case.* Here, after her

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148 G.R. No. 174300, 687 SCRA 28 (2012).

149 *Id.* at 49.

150 G.R. No. 178222, 631 SCRA 553 (2010).

151 *Id.* at 565.

152 LAB. CODE, art. 294 [279], as amended by R.A. No. 6715 (1989) § 34. "*Security of Tenure.*–In cases of regular employment, the employer shall not terminate the services of an employee except for a just cause or when authorized by this Title. An employee who is unjustly dismissed from work 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."

153 G.R. No. 185269, 622 SCRA 326 (2010). (Citations omitted.)

> last work, Malig-on did not appear persistent in getting rehired. Indeed, she did not file any action for constructive dismissal after being placed in a floating status for more than six months. If she were to be believed, it was only eight months later that she showed keen interest in being taken back by following an advice that she first tender her resignation in order to clear up her record prior to being rehired.
>
> After just three days from tendering her resignation, Malig-on hastened to the NLRC and accused her employer of illegal dismissal. Under the circumstances, her reinstatement to her former position would only result in a highly hostile work environment for the parties and might further worsen their relations which are already scarred by the present case. The NLRC should have just awarded Malig-on separation pay instead of ordering the company to reinstate her.[154]

Similarly, in the 1998 case of *Valdez v. National Labor Relations Commission*,[155] the petitioner was found constructively dismissed where after six months as an employee with a floating status, the petitioner was not rehired. Thus, he was awarded separation pay in lieu of reinstatement and full backwages.

But if there is no proof of termination, the award should be reinstatement without backwages. This was the ruling in the 2013 case of *Leopard Security and Investigation Agency ("LSIA") v. Quitoy*,[156] where there was no evidence presented that respondents, former security guards of petitioner security agency, were terminated, thus:

> Applying Article 286 [now 301] of the Labor Code of the Philippines by analogy, this Court has repeatedly recognized that 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.
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> * * *
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> In the case at bench, respondents were informed on 29 April 2005 that they were going to be relieved from duty as a consequence of the 30 April 2005 expiration of the security service contract between Union Bank and LSIA. While respondents lost

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[154] *Id.* at 331–32. (Emphasis supplied.)

[155] G.R. No. 125028, 286 SCRA 87, 95 (1998).

[156] G.R. No. 186344, 691 SCRA 440 (2013). *See also* Opinaldo v. Ravina, G.R. No. 196573, 707 SCRA 545 (2013).

> no time in immediately filing their complaint on 3 May 2005, the record equally shows that they were directed by LSIA to report for work at its Mandaluyong City office on 10 May 2005 or a mere ten days from the time the former were effectively sidelined. Considering that a security guard is only considered illegally dismissed from service when he is sidelined from duty for a period exceeding six months, Parenthetically, said ruling is binding on respondents who did not appeal either the decision rendered by the NLRC or the CA in line with the entrenched procedural rule in this jurisdiction that a party who did not appeal cannot assign such errors as are designed to have the judgment modified.
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> * * *
>
> *As a relief granted in lieu of reinstatement, however, it consequently goes without saying that an award of separation pay is inconsistent with a finding that there was no illegal dismissal.* Standing alone, the doctrine of strained relations will not justify an award of separation pay, a relief granted in instances where the common denominator is the fact that the employee *was dismissed* by the employer. Even in cases of illegal dismissal, the doctrine of strained relations is not applied indiscriminately as to bar reinstatement, especially when the employee has not indicated an aversion to returning to work or does not occupy a position of trust and confidence in or has no say in the operation of the employer's business. Although litigation may also engender a certain degree of hostility, it has likewise been ruled that the understandable strain in the parties' relations would not necessarily rule out reinstatement which would, otherwise, become the rule rather than the exception in illegal dismissal cases.
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> * * *
>
> Absent illegal dismissal on the part of LSIA and abandonment of employment on the part of respondents, we find that the latter's reinstatement without backwages is, instead, in order. In addition to respondent's alternative prayer therefor in their position paper,
>
> reinstatement is justified by LSIA's directive for them to report for work at its Mandaluyong City office as early of 10 May 2005.[157]

3. *Article 301 [286] should be amended*

In light of the above disquisitions, the need to amend Article 301 [286] is well emphasized and, therefore, does not require further underscoring.

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[157] *Id.* at 449–51. (Emphasis supplied.)

The aforementioned requisites and jurisprudential precepts need to be reflected in the provision to forestall the unbridled exercise of this employer's prerogative.

The text of the proposed provision of said article after its amendment shall read as follows, with the changes proposed underlined and in bold letters, and those to be removed stricken out:

> Article 301 [286]. *When Employment Not Deemed Terminated.* – The *bona-fide* suspension of the operation of **the entire business or undertaking or a specific branch, department, section or division thereof or the placing of an employee under "off-detail" or "floating" status** for a period not exceeding six (6) months, ~~or the fulfillment by the employee of a military or civic duty~~ shall not terminate employment**[;] Provided, that:**
>
> (1) **The employer should resume operations on or before the lapse of said six-month period;**
>
> (2) **Upon resumption of operations, the employer should reinstate the employees to their former positions without loss of seniority rights, if the employees indicate their desire to resume their work not later than one (1) month from the said resumption of operations;**
>
> (3) **In the event that the employer, instead of resuming its operations, decides to retrench or close or cease its business before the lapse of the six (6)-month period, it shall fully comply with the requirements for retrenchment or closure or cessation of business operations, as the case may be, as provided under Article 298 [283], to wit:**
>
> (a) **Service of written notice of termination on the employees and the department of labor and employment at least one (1) month before the intended date thereof; and**
>
> (b) **Payment to the affected employees of separation pay equivalent to one (1) month pay or at least one-half (½) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year.**
>
> **The fulfillment by the employees of a military or civic duty shall not likewise result in their termination of employment and** the employer shall reinstate **them to their**

former positions without loss of seniority rights if **they** indicate **their** desire to resume work not later than one month from **their** relief from the military or civic duty.

~~In all such cases, the employer shall reinstate the employee to his former position without loss of seniority rights if he indicates his desire to resume his work not later than one (1) month from the resumption of operations of his employer or from his relief from the military or civic duty.~~

F. Employer's prerogative to retire employees

The employer's prerogative to retire its employees is recognized under Article 302 [287] of the Labor Code which states:

> Article 302 [287]. *Retirement.* – Any employee may be retired upon reaching the retirement age established in the collective bargaining agreement or other applicable employment contract.
>
> In case of retirement, the employee shall be entitled to receive such retirement benefits as he may have earned under existing laws and any collective bargaining agreement and other agreements: *Provided, however*, that an employee's retirement benefits under any collective bargaining and other agreements shall not be less than those provided herein.
>
> In the absence of a retirement plan or agreement providing for retirement benefits of employees in the establishment, an employee upon reaching the age of sixty (60) years or more, but not beyond sixty-five (65) years which is hereby declared the compulsory retirement age, who has served at least five (5) years in the said establishment, may retire and 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 whole year.
>
> Unless the parties provide for broader inclusions, the term "one-half (1/2) month salary" shall mean fifteen (15) days plus one-twelfth (1/12) of the 13th month pay and the cash equivalent of not more than five (5) days of service incentive leaves.
>
> An underground mining employee upon reaching the age of fifty (50) years or more, but not beyond sixty (60) years which is hereby declared the compulsory retirement age for underground mine workers, who has served at least five (5) years as underground

> mine worker, may retire and shall be entitled to all the retirement benefits provided for in this Article.
>
> Retail, service and agricultural establishments or operations employing not more than ten (10) employees or workers are exempted from the coverage of this provision.
>
> Violation of this provision is hereby declared unlawful and subject to the penal provisions provided under Article 303 [288] of this Code.
>
> Nothing in this Article shall deprive any employee of benefits to which he may be entitled under existing laws or company policies or practices.[158]

1. *The law does not recognize the grant to the employer of the option to retire employees at an earlier age or after rendering certain period of service.*

Although not expressly provided for in the Labor Code, there are certain instances where the employer, by virtue of mutual agreement with the employees, either individually, in the employment contract, or collectively, in the CBA, is granted the option to retire an employee at a younger age or after rendering a certain number of years of service, whichever comes first.

While Article 302 [287] states that "*[a]ny employee may be retired upon reaching the retirement age established in the collective bargaining agreement or other applicable employment contract[,]*" there are quite a number of cases involving the issue of the validity of the grant of the option to retire to the employer. The lack of any definitive provision in the law recognizing the validity of this option is the principal source of conflict in this area.

2. *Per jurisprudence, it is only by mutual agreement that employers may be granted the sole and exclusive prerogative to retire employees at an earlier age or after rendering a certain period of service*

It is only when the parties—the employer and employees—mutually agree that the prerogative to retire employees at an earlier age or after

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158 LAB. CODE art. 302 [287]. As amended by Rep. Act No. 7641 (1993) and Rep. Act No. 8558 (1998); as renumbered pursuant to Rep Act No. 10151 (2011), § 5.

rendering a certain period will the exercise of the employer's management prerogative be deemed as valid.

Raised as the principal issue in the 1996 case of *Pantranco North Express, Inc. v. National Labor Relations Commission*[159] is whether a CBA provision allowing compulsory retirement before age 60 but after 25 years of service is legal and enforceable or not. It appears in this case that private respondent was retired at the age of 52 after having rendered 25 years of service pursuant to the compulsory retirement provision of the CBA.[160] The Supreme Court affirmed the validity of this retirement scheme. It held:

> The aforequoted provision [in the CBA] 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. Providing in a CBA for compulsory retirement of employees after twenty-five (25) years of service is legal and enforceable so long as the parties agree to be governed by such CBA. The 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.[161]

Subsequently, in the 2000 case of *Progressive Development Corp. v. National Labor Relations Commission*[162] the CBA provided that an employee "with [20] years of service, regardless of age, may be retired at his option or at the option of the company." Two employees with more than 20 years of service, at the ages of 45 and 38, were compulsorily retired under this scheme. On the basis of the same ratiocination in *Pantranco*, the Supreme Court upheld its validity.[163]

In a more recent case decided in 2006, *Cainta Catholic School v. Cainta Catholic School Employees Union*,[164] the principal issue presented for resolution involves the validity of a stipulation in the CBA that allows the employer, at its option, to retire an employee for a predetermined length of time but who has not yet reached the minimum compulsory retirement age provided in the Labor Code. Citing earlier similar decisions on this issue, it was pronounced by the Supreme Court that "[j]urisprudence has answered the question in the

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[159] G.R. No. 95940, 259 SCRA 161 (1996).
[160] *Id.* at 164.
[161] *Id.* at 173.
[162] G.R. No. 138826, 344 SCRA 512, 514 (2000).
[163] *Id.* at 518.
[164] G.R. No. 151021, 489 SCRA 468, 473 (2006).

affirmative a number of times and our duty calls for the application of the principle of *stare decisis*."[165] It thus affirmed the validity of the sole option granted to petitioner school to retire employees pursuant to the existing CBA which expressly granted to the school, the option to retire an employee upon reaching the age limit of 60 or after having rendered at least 20 years of service to the school, the last three years of which must be continuous. It thus was held:

> We affirm the continued validity of *Pantranco* and its kindred cases, and thus reiterate that under Article 302 [287] of the Labor Code, a CBA may validly accord management the prerogative to optionally retire an employee under the terms and conditions mutually agreed upon by management and the bargaining union, even if such agreement allows for retirement at an age lower than the optional retirement age or the compulsory retirement age.
>
> * * *
>
> On the other hand, the exercise by management of its retirement prerogative is less susceptible to dubitability as to the question whether an employee could be validly retired. The only factual matter to consider then is whether the employee concerned had attained the requisite age or number of years in service pursuant to the CBA or employment agreement, or if none, pursuant to Article 287 of the Labor Code. In fact, the question of the amount of retirement benefits is more likely to be questioned than the retirement itself. Evidently, it more clearly emerges in the case of retirement that management would anyway have the right to retire an employee, no matter the degree of involvement of said employee in union activities.[166]

In another 2006 case, *Eastern Shipping Lines, Inc. v. Sedan*,[167] the grant of exclusive prerogative and sole option to petitioner company was declared valid in the matter of the optional retirement of respondent employees who are under the optional retirement age of 60 years, but have rendered at least 3,650 days or ten years on board a ship or 15 years of service for land-based employees.

Another case involving the same issue of early retirement under the retirement gratuity plan of Eastern Shipping Lines, Inc. was decided in the

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[165] *Id.*

[166] *Id.* at 486–88.

[167] G.R. No. 159354, 486 SCRA 565, 573 (2006).

2009 case of *Eastern Shipping Lines, Inc. v. Antonio*.[168] The respondent in this case was only 41 years old when he applied for optional retirement, which was 19 years short of the required eligibility age. Due to this deficiency, it was pronounced that he cannot claim optional retirement benefits as a matter of right. This is the case because the option to retire was exclusively lodged in the employer. Although respondent may have rendered at least 3,650 days of service on board a vessel which would have qualified him for optional retirement, he cannot, however, demand the same as a matter of right. Consequently, it was declared that "[i]f an employee upon rendering at least 3,650 days of service would automatically be entitled to the benefits of the gratuity plan, then it would not have been termed as optional, as the foregoing scenario would make the retirement mandatory and compulsory."[169]

The 2010 case of *Obusan v. Philippine National Bank*[170] is the latest of the cases decided by the Supreme Court which affirmed the validity of the same ruling. Way back in 1979, respondent Philippine National Bank ("PNB") hired petitioner Amelia Obusan, who eventually became the manager of the PNB Medical Office. At that time, PNB was a government-owned or controlled corporation, which was eventually privatized. As a result of its privatization, all PNB employees, including Obusan, were deemed retired from the government service.[171] The Government Service Insurance System (GSIS) confirmed Obusan's retirement from the government service, and accordingly paid her retirement gratuity in the net amount of PHP 390,633.76. After this retirement, Obusan continued with her employment with PNB, now a privatized bank.[172]

Later, the Board of Directors of PNB approved, through a resolution, the PNB Regular Retirement Plan ("PNB-RRP"). It is provided in its Section 1, Article VI as follows:

> *Normal Retirement.* The normal retirement date of a Member shall be the day he attains sixty (60) years of age, regardless of length of service or has rendered thirty (30) years of service, regardless of age, *whichever of the said conditions comes first.* A Member who has reached the normal retirement date shall have to compulsor[il]y retire and shall be entitled to receive the retirement benefits under the Plan.[173]

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[168] G.R. No. 171587, 603 SCRA 590 (2009).
[169] *Id.* at 598–99.
[170] G.R. No. 181178, 625 SCRA 542 (2010).
[171] *Id.* at 544.
[172] *Id.* at 545.
[173] *Id.* (Emphasis supplied.)

Later, in a Memorandum dated February 21, 2001, PNB informed its officers and employees of the terms and conditions of the PNB-RRP, along with its implementing guidelines. The PNB-RRP was subsequently registered with the Bureau of Internal Revenue (BIR), per PNB's letter dated June 27, 2001. The Philnabank Employees Association, the union of PNB rank-and-file employees, has given its recognition to the PNB-RRP in the CBA it entered into with PNB.[174]

Upon reaching the mandatory retirement age of 60 years, petitioner Obusan was retired by respondent PNB under the said provision of the PNB-RRP. Because of this, she filed a complaint for illegal dismissal and unfair labor practice in the form of union-busting. She argued that she was illegally terminated as President of the PNB Supervisors and Officers Association.[175] She posited that the PNB-RRP, which compulsorily retired her at the age of 60 years without her consent, runs afoul of her right to security of tenure as guaranteed by the Constitution. She further asserted that since PNB-RRP cannot be made to apply to her, Article 302 [287] of the Labor Code should prevail, giving her the right to compulsorily retire at the age of 65 years.[176]

The Supreme Court disagreed with this postulation of Obusan and thus ruled in favor of PNB, in this wise:

> Retirement plans allowing employers to retire employees who have not yet reached the compulsory retirement age of 65 years are not *per se* repugnant to the constitutional guaranty of security of tenure. By its express language, the Labor Code permits employers and employees to fix the applicable retirement age at 60 years or below, provided that the employees' retirement benefits under any CBA and other agreements shall not be less than those provided therein. By this yardstick, the PNB-RRP complies.
>
> However, company retirement plans must not only comply with the standards set by existing labor laws, *but they should also be accepted by the employees to be commensurate to their faithful service to the employer within the requisite period.*
>
> To our mind, Obusan's invocation of *Jaculbe* on account of her lack of consent to the PNB-RRP, particularly as regards the provision on compulsory retirement age, is rather misplaced.

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[174] *Id.*
[175] *Id.* at 546.
[176] *Id.* at 550.

It is true that her membership in the PNB-RRP was made automatic, to wit—

> Section 1. Membership. Membership in the Plan shall be automatic for all full-time regular and permanent officers and employees of the Bank as of the effectivity date of the Plan. For employees hired after the effectivity of this Plan, their membership shall be effective on "Date Entered Bank."

The records show that the PNB Board of Directors approved the PNB-RRP on December 22, 2000. On Feb. 21, 2001, PNB informed all of its officers and employees about it, complete with its terms and conditions and the guidelines for its implementation. Then, the PNB-RRP was registered with the BIR and, later, was recognized by the Philnabank Employees Association in the CBA it entered with PNB.

With the information properly disseminated to all of PNB's officers and employees, the PNB-RRP was then opened for scrutiny. The employees had every opportunity to question the plan if, indeed, it would not be beneficial to the employees, as compared to what was mandated by Article 302 [287] of the Labor Code. Consequently, the union of PNB's rank-and-file employees recognized it as a legally-compliant and reasonable retirement plan by the act of incorporating it in their CBA with PNB.

With respect to Obusan and the PNB Supervisors and Officers Association, of which she was the President when she was compulsorily retired, there is nothing on record to show that they expressed their dissent to the PNB-RRP. This deafening silence eloquently speaks of their lack of disagreement with its provisions. It was only at the time that she was to be compulsorily retired that Obusan questioned the PNB-RRP's provision on compulsory retirement age.

Besides, we already had the occasion to strike down the added requirement that an employer must first consult its employee prior to retiring him, *as this requirement unduly constricts the exercise by management of its option to retire the said employee*. Due process only requires that notice of the employer's decision to retire an employee be given to the employee.

Finally, it is also worthy to mention that, unlike in *Jaculbe*, the PNB-RRP is solely and exclusively funded by PNB, and no financial burden is imposed on the employees for their retirement benefits.

> All told, we hold that the PNB-RRP is a valid exercise of PNB's prerogative to provide a retirement plan for all its employees.[177]

Notwithstanding the consistent rulings above, *employers continue to retire their employees at an age earlier than what is provided in the law despite no mutual agreement to that effect. This unbridled exercise of management prerogative to retire by employers is openly being done in complete disregard of the rule that if the employee does not give his consent, retirement at an earlier age is not valid.* If this goes unchecked, such acts of employers would certainly violate the employee's right to security of tenure and would constitute a transgression of the social justice principle enshrined in the Constitution and enunciated in our laws.

To illustrate this fact, the cases of *Jaculbe v. Silliman University*[178] and *Cercado v. Uniprom*,[179] both involving the validity of unilaterally imposed policy of retirement at an earlier age, would be illuminating.

In the 2007 case of *Jaculbe*, retirement at an earlier age was provided in respondent school's retirement plan. When Jaculbe was approaching her 35th year of service with the university she was informed that she was due for automatic retirement. She would be 57 years old. This was pursuant to the university's retirement plan for its employees which provided that its members could be automatically retired "*upon reaching the age of 65 or after 35 years of uninterrupted service to the university.*" Respondent required certain documents in connection with petitioner's impending retirement.[180]

In a brief exchange of letters, Jaculbe insisted that the compulsory retirement amounted to a dismissal and pleaded with the university to be allowed to work until the age of 60 because this was the minimum age at which she could qualify for SSS pension. But the university was firm on their decision to retire her, citing "company policy."[181]

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[177] *Id.* at 553–55, *citing* Phil. Airlines, Inc. v. Airline Pilots Ass'n of the Phil., G.R. No. 143686, 373 SCRA 302 (2002); Jaculbe v. Silliman Univ., G.R. No. 156934, 518 SCRA 445 (2007). (Emphasis supplied, citations omitted.)

[178] G.R. No. 156934, 518 SCRA 445 (2007).

[179] G.R. No. 188154, 633 SCRA 281 (2010).

[180] Jaculbe v. Silliman Univ., G.R. No. 156934, 518 SCRA 445, 447 (2007).

[181] *Id.*

Jaculbe thus filed a complaint in the NLRC for "termination of service with preliminary injunction and/or restraining order." Nonetheless, the university compulsorily retired her.[182]

The Supreme Court, after reviewing the assailed decision together with the rules and regulations of respondent's retirement plan, found that "*the plan runs afoul of the constitutional guaranty of security of tenure contained in Article XIII, also known as the provision on Social Justice and Human Rights.*"[183]

The Court of Appeals, in ruling against petitioner Jaculbe, premised its decision to uphold the retirement plan on her voluntary participation through her regular contributions. In reversing the appellate court's ruling, the Supreme Court argued:

> The problem with this line of reasoning is that a perusal of the rules and regulations of the plan shows that participation therein was not voluntary at all.
>
> Rule III of the plan, on membership, stated:
>
> > SECTION 1 - MEMBERSHIP
> > *All full-time Filipino employees of the University will automatically become members of the Plan*, provided, however, that those who have retired from the University, even if rehired, are no longer eligible for membership in the Plan. A member who continues to serve the University cannot withdraw from the Plan.
> >
> > * * *
> >
> > SECTION 2 - EFFECTIVITY OF MEMBERSHIP
> > Membership in the Plan starts on the day a person is hired on a full-time basis by the University.
> >
> > SECTION 3 - TERMINATION OF MEMBERSHIP
> > Termination of membership in the Plan shall be upon the death of the member, resignation or termination of employee's contract by the University, or retirement from the University.

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[182] *Id.*

[183] *Id.* at 448.

Rule IV, on contributions, stated:

> The Plan is contributory. The University shall set aside an amount equivalent to 3 % of the basic salaries of the faculty and staff. To this shall be added a 5% deduction from the basic salaries of the faculty and staff.
>
> A member on leave with the University approval shall continue paying, based on his pay while on leave, his leave without pay should pay his contributions to the Plan. However, a member, who has been on leave without pay should pay his contributions based on his salary plus the University's contributions while on leave or the full amount within one month immediately after the date of his reinstatement. Provided[,] further that if a member has no sufficient source of income while on leave may pay within six months after his reinstatement.

From the language of the foregoing retirement plan rules, the compulsory nature of both membership in and contribution to the plan debunked the CA's theory that petitioner's "voluntary contributions" were evidence of her willing participation therein. It was through no voluntary act of her own that petitioner became a member of the plan. In fact, the only way she could have ceased to be a member thereof was if she stopped working for respondent altogether. Furthermore, in the rule on contributions, the repeated use of the word "shall" ineluctably pointed to the conclusion that employees had no choice but to contribute to the plan (even when they were on leave).

According to the assailed decision, respondent's retirement plan "ha[d] been in effect for more than 30 years." What was not pointed out, however, was that the retirement plan came into being in 1970 or 12 years after petitioner started working for respondent. In short, it was not part of the terms of employment to which petitioner agreed when she started working for respondent. Neither did it become part of those terms shortly thereafter, as the CA would have us believe.[184]

The Supreme Court laid emphasis on the nature of retirement—that it is a bilateral act, an agreement between the employer and the employee, *viz:*

> Retirement is the result of a bilateral act of the parties, a voluntary agreement between the employer and the employee

[184] *Id.* at 449-51.

> whereby the latter, after reaching a certain age agrees to sever his or her employment with the former. In *Pantranco North Express, Inc. v. NLRC*, to which both the CA and respondent refer, the imposition of a retirement age below the compulsory age of 65 was deemed acceptable because this was part of the CBA between the employer and the employees. The consent of the employees, as represented by their bargaining unit, to be retired even before the statutory retirement age of 65 was laid out clearly in black and white and was therefore in accord with Article 287.
>
> In this case, neither the CA nor the respondent cited any agreement, collective or otherwise, to justify the latter's imposition of the early retirement age in its retirement plan, opting instead to harp on petitioner's alleged 'voluntary' contributions to the plan, which was simply untrue. The truth was that petitioner had no choice but to participate in the plan, given that the only way she could refrain from doing so was to resign or lose her job. It is axiomatic that employer and employee do not stand on equal footing, a situation which often causes an employee to act out of need instead of any genuine acquiescence to the employer. This was clearly just such an instance.
>
> Not only was petitioner still a good eight years away from the compulsory retirement age but she was also still fully capable of discharging her duties as shown by the fact that respondent's board of trustees seriously considered rehiring her after the effectivity of her "compulsory retirement."[185]

The second case of relevance is the 2010 case of *Cercado v. Uniprom, Inc.*[186] In accordance with *Jaculbe*, the retirement of petitioner at the age of 47, after having served respondent company for 22 years, pursuant to its Employees' Non-Contributory Retirement Plan, was declared illegal. This Plan provides that employees who have rendered at least 20 years of service may be retired at the option of the company. The reason for so holding is that "[n]ot even an iota of voluntary acquiescence to respondent's early retirement age option is attributable to petitioner,"[187] thus:

> The assailed retirement plan of UNIPROM is not embodied in a CBA or in any employment contract or agreement assented to by petitioner and her co-employees. *On the contrary, UNIPROM's Employees' Non-Contributory Retirement Plan was unilaterally and compulsorily imposed on them.* This is evident in the following

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[185] *Id.* at 451–52.

[186] G.R. No. 188154, 633 SCRA 281 (2010).

[187] *Id.* at 288–89.

> provisions of the 1980 retirement plan and its amended version in 2000[.]
>
> * * *
>
> Verily, petitioner was forced to participate in the plan, and the only way she could have rejected the same was to resign or lose her job. [188]

It is clear from the foregoing that for the employer to exercise its prerogative to retire its employees at an earlier age will result in illegal dismissal if employees did not give their consent thereto. As *Jaculbe* instructs: "th[is] [kind of retirement] plan runs afoul of the constitutional guaranty of security of tenure contained in Article XIII, also known as the provision on Social Justice and Human Rights."[189]

> Indeed, as stressed in *Jaculbe*:
>
> [A]n employer is free to impose a retirement age less than 65 for as long as it has the employees' consent. Stated conversely, employees are free to accept the employer's offer to lower the retirement age if they feel they can get a better deal with the retirement plan presented by the employer. Thus, having terminated petitioner solely on the basis of a provision of a retirement plan which was not freely assented to by her, respondent was guilty of illegal dismissal.[190]
>
> This was also the ruling in *Cercado v. Uniprom, Inc, viz:*
>
> [C]onsistent with the Court's ruling in *Jaculbe*, having terminated petitioner merely on the basis of a provision in the retirement plan which was not freely assented to by her, UNIPROM is guilty of illegal dismissal. Petitioner is thus entitled to reinstatement without loss of seniority rights and to full backwages computed from the time of her illegal dismissal in February 16, 2001 until the actual date of her reinstatement. If reinstatement is no longer possible because the position that petitioner held no longer exists, UNIPROM shall pay backwages as computed above, plus, in lieu of reinstatement, separation pay equivalent to one-month pay for every year of service. This is consistent with the preponderance of jurisprudence relative to the award of separation pay in case reinstatement is no longer feasible.[191]

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[188] *Id.* at 289. (Emphasis supplied.)
[189] Jaculbe v. Silliman Univ., G.R. No. 156934, 518 SCRA 445, 448 (2007).
[190] *Id.* at 452.
[191] *Id.* at 291. (Citations omitted.)

3. Article 302 [287] should be amended to reflect the principles enunciated in jurisprudence

Article 302 [287] should expressly embody the standard that should be followed when the employer is granted the option to retire an employee at an earlier age or after rendering a certain number of years of service, whichever comes first. Without this express grant in the law, the employer's exercise of this prerogative would remain under a cloud of doubt and would always be subject to a legal question that may result in the filing of needless and cumbersome suits in court which would have been avoided if there is a clear statement on the standard in the very law itself.

Accordingly, said article should read as follows, with the author's proposed changes underlined and in bold letters:

> Article 302 [287]. *Retirement.* – Any employee may be retired upon reaching the retirement age established in the collective bargaining agreement or other applicable employment contract; **Provided, that the employer, by mutual agreement, may be granted the option to retire an employee at an earlier age or after rendering a certain number of years of service, whichever comes first**.
>
> In case of retirement, the employee shall be entitled to receive such retirement benefits as he may have earned under existing laws and any collective bargaining agreement and other agreements: Provided, however, that an employee's retirement benefits under any collective bargaining and other agreements shall not be less than those provided herein.
>
> In the absence of a retirement plan or agreement providing for retirement benefits of employees in the establishment, an employee upon reaching the age of sixty (60) years or more, but not beyond sixty-five (65) years which is hereby declared the compulsory retirement age, who has served at least five (5) years in the said establishment, may retire and 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 whole year.
>
> Unless the parties provide for broader inclusions, the term "one-half (1/2) month salary" shall mean fifteen (15) days plus one-twelfth (1/12) of the 13th month pay and the cash equivalent of not more than five (5) days of service incentive leaves.

> An underground mining employee upon reaching the age of fifty (50) years or more, but not beyond sixty (60) years which is hereby declared the compulsory retirement age for underground mine workers, who has served at least five (5) years as underground mine worker, may retire and shall be entitled to all the retirement benefits provided for in this Article.
>
> Retail, service and agricultural establishments or operations employing not more than ten (10) employees or workers are exempted from the coverage of this provision.
>
> Violation of this provision is hereby declared unlawful and subject to the penal provisions provided under Article 303 [288] of this Code.
>
> Nothing in this Article shall deprive any employee of benefits to which he may be entitled under existing laws or company policies or practices.

III. RIGHTS AND PREROGATIVES OF MANAGEMENT RECOGNIZED ONLY IN JURISPRUDENCE

A. Jurisprudential recognition of certain management prerogatives

Over the years, jurisprudence has enunciated a number of doctrines that recognize the exercise by the employer of certain rights and prerogatives. The following may be cited:

1. Transfer or reassignment of employees;
2. Promotion;
3. Demotion; and
4. Imposition of post-employment bans or prohibitions such as non-compete, confidentiality and non-disclosure, non-solicitation, non-recruitment and inventions assignment clauses, among others.

B. Prerogative to transfer or re-assign employees

1. Concept of transfer

According to the 2010 case of *Coca-Cola Bottlers Philippines, Inc. v. Del Villar*,[192] "[a] transfer is a movement *from one position to another* which is of equivalent rank, level or salary, without break in service."[193]

The concept of transfer, however, is not confined solely to transfer in positions. As held in the 2007 case of *Tinio v. Court of Appeals*,[194] this may also involve transfer of workplace. Thus:

> This Court has consistently 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 a diminution of salary, benefits and other privileges. As a rule, the Court will not interfere with an employer's prerogative to regulate all aspects of employment which include, among others, work assignment, working methods and place and manner of work. Labor laws discourage interference with an employer's judgment in the conduct of his business.
>
> The doctrine is well-settled that it is the employer's prerogative, based on its assessment and perception of its employees' qualifications, aptitudes and competence, to move them around in the various areas of its business operations in order to ascertain where they will function with maximum benefit to the company. This is a privilege inherent in the employer's right to control and manage his enterprise effectively. The freedom of management to conduct its business operations to achieve its purpose cannot be denied.
>
> An employee's right to security of tenure does not give him a vested right to his position as would deprive the company of its prerogative to change his assignment or transfer him where he will be most useful. When his transfer is not unreasonable, or inconvenient, or prejudicial to him, and it does not involve a

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[192] G.R. No. 163091, 632 SCRA 293, 315 (2010); *See also* Bank of the Phil. Islands Emp. Union–ALU v. Nat'l Lab. Rel. Comm'n, G.R. No. 69746-47, 171 SCRA 556 (1989).

[193] Coca-Cola Bottlers Phil., Inc. v. Del Villar, G.R. No. 163091, 632 SCRA 293, 315 (2010); *See also* Bank of the Phil. Islands Emp. Union–ALU v. Nat'l Lab. Rel. Comm'n, G.R. Nos. 69746-47, 171 SCRA 556 (1989).

[194] Tinio v. Ct. of Appeals, G.R. No. 171764, 524 SCRA 533 (2007). (Citations omitted.)

> demotion in rank or a diminution of his salaries, benefits and other privileges, the employee may not complain that it amounts to a constructive dismissal.[195]

Jurisprudence thus clearly recognizes the validity of an employer's exercise of management prerogative to transfer or re-assign employees from one office or area of operation to another, 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.[196]

This is a privilege inherent in the employer's right to control and manage its enterprise effectively. This prerogative is based on its assessment and perception of its employee's qualifications, aptitudes and competence. Thus, the employer may move him around in the various areas of its business operations in order to ascertain where the employee will function with utmost efficiency and maximum productivity or benefit to the company. Certainly, an employee cannot substitute his judgment to that of his employer in the operation and management of the latter's business affairs.[197]

For sure, the validity of the exercise of this prerogative is well recognized. It is axiomatic that the constitutional policy of providing full protection to labor is not intended to oppress or destroy 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 rights which are entitled to respect and enforcement in the interest of simple fair play. Thus, where management prerogative to transfer employees is validly exercised, courts will decline to interfere.[198]

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[195] *Id.* at 539–40. (Emphasis supplied.) *See also* Blue Dairy Corp. v. Nat'l Lab. Rel. Comm'n, G.R. No. 129843, 301 SCRA 401 (1999); Sentinel Sec. Agency, Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 122468, 296 SCRA 123 (1998).

[196] Pharmacia & Upjohn, Inc. v. Albayda, G.R. No. 172724, 628 SCRA 544, 558 (2010).

[197] Mendoza v. Rural Bank of Lucban, G.R. No. 155421, 433 SCRA 756, 767 (2004); *See also* Duldulao v. Ct. of Appeals, G.R. No. 164893, 517 SCRA 191 (2007); Benguet Elec. Coop. v. Fianza, G.R. No. 158606, 425 SCRA 41 (2004).

[198] Best Wear Garments v. De Lemos, G.R. No. 117378, 270 SCRA 489, 495 (1997), *citing* Capili v. Nat'l Lab. Rel. Comm'n, G.R. No. 117378, 270 SCRA 489, 495 (1997); Javier v. Fly Ace Corp., G.R. No. 192558, 666 SCRA 382, 399–400 (2012).

Thus, the Supreme Court, in the 2010 case of *Pharmacia & Upjohn, Inc. (now Pfizer Philippines, Inc.) v. Albayda*,[199] found objectionable the decision of the Court of Appeals where it declared that the reassignment of respondent from Bacolod City as District Sales Manager for the Western Visayas area to Cagayan de Oro City as District Sales Manager for the Northern Mindanao and later to Makati City in Metro Manila, all of which reassignments he refused, was arbitrary and unreasonable since it had, in effect, imposed on petitioners its own opinion on what should have been a purely business decision. The Court further held:

> In the absence of arbitrariness, the CA should not have looked into the wisdom of a management prerogative. It is the employer's prerogative, based on its assessment and perception of its employee's qualifications, aptitudes, and competence, to move them around in the various areas of its business operations in order to ascertain where they will function with maximum benefit to the company.
>
> As a matter of fact, while the CA's observations may be acceptable to some quarters, it is nevertheless not universal so as to foreclose another view on what may be a better business decision. While it would be profitable to keep respondent in an area where he has established contacts and therefore the probability of him reaching and even surpassing his sales quota is high, on the one hand, one can also make a case that since respondent is one of petitioners' best district managers, he is the right person to turn around and improve the sales numbers in Cagayan de Oro City, an area which in the past had been dismally performing. After all, improving and developing a new market may even be more profitable than having respondent stay and serve his old market. In addition, one can even make a case and say that the transfer of respondent is also for his professional growth. Since respondent has been already assigned in the Western Visayas area for 22 years, it may mean that his market knowledge is very limited. In another territory, there will be new and more challenges for respondent to face. In addition, one can even argue that for purposes of future promotions, it would be better to promote a district manager who has experience in different markets.
>
> The foregoing illustrates why it is dangerous for the Court and even the CA to look into the wisdom of a management prerogative. Certainly, one can argue for or against the pros and cons of transferring respondent to another territory. Absent a definite

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[199] Pharmacia & Upjohn, Inc v. Albayda, G.R. No. 172724, 628 SCRA 544, 561 (2010).

> finding that such exercise of prerogative was tainted with arbitrariness and unreasonableness, the CA should have left the same to petitioners' better judgment. The rule is well settled that labor laws discourage interference with an employer's judgment in the conduct of his business. Even as the law is solicitous of the welfare of employees, it must also protect the right of an employer to exercise what are clearly management prerogatives. As long as the company's exercise of the same is in good faith to advance its interest and not for the purpose of defeating or circumventing the rights of employees under the laws or valid agreements, such exercise will be upheld.[200]

2. Distinguished from promotion and demotion.

"Transfer," as a term, is obviously so broad that it could include such personnel movements as "promotion" and "demotion." In the same 2010 case of *Coca-Cola Bottlers Philippines, Inc. v. Del Villar*,[201] the Supreme Court drew a distinction between promotion and demotion, *viz*:

> *Promotion*, [...] is the advancement from one position to another with an increase in duties and responsibilities as authorized by law, and usually accompanied by an increase in salary. Conversely, *demotion* involves a situation where an employee is relegated to a subordinate or less important position constituting a reduction to a lower grade or rank, with a corresponding decrease in duties and responsibilities, and usually accompanied by a decrease in salary.[203]

3. Commitment to be reassigned in the employment contract, binding

In support of this principle, *Pharmacia & Upjohn*,[204] cited the 1987 case of *Abbott Laboratories (Phil.), Inc. v. National Labor Relations Commission*,[205] which involved a complaint filed by a medical representative against his employer drug company for illegal dismissal for allegedly terminating his employment when he refused to accept his reassignment to a new area. The Court in this case upheld the right of the drug company to transfer or reassign the employee in accordance with its operational demands and requirements. Thus:

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[200] *Id.* at 562–63.
[201] G.R. No. 163091, 632 SCRA 293, 315 (2010).
[203] *Id.*
[204] G.R. No. 172724, 628 SCRA 544, 564 (2010).
[205] G.R. No. 76959, 154 SCRA 713 (1987).

> By the very nature of his employment, a drug salesman or medical representative is expected to travel. He should anticipate reassignment according to the demands of their business. *It would be a poor drug corporation which cannot even assign its representatives or detail men to new markets calling for opening or expansion or to areas where the need for pushing its products is great. More so if such reassignments are part of the employment contract.*[206]

Similarly, in finding that the transfer of respondent employee who was a District Sales Manager is reasonable, the Supreme Court noted that the very nature of the work of a salesman is that it is mobile and ambulant. The fact that respondent signed two documents signifying his assent to be assigned anywhere in the Philippines: *firstly*, in respondent's Employment Application where he checked the box which asked: "Are you willing to be relocated anywhere in the Philippines?"[207] and, *secondly*, in his Contract of Employment, item (8) of which reads: "You agree, during the period of your employment, to be assigned to any work or workplace for such period as may be determined by the company and whenever the operations thereof require such assignment[,]" was highlighted by the Court.[208]

4. Excellent performance of the employee in his current assignment will not bar the employer from exercising its prerogative to transfer him to another assignment

The same case of *Pharmacia & Upjohn* clearly describes the application of the principle:

> Even if respondent has been performing his duties well, it does not mean that petitioners' hands are tied up that they can no longer reassign respondent to another territory. And it is precisely because of respondent's good performance that petitioners want him to be reassigned to Cagayan de Oro City so that he could improve their business there.[209]

In *Abbot Laboratories*, the Supreme Court similarly ratiocinated that the transfer of the respondent employee who was a professional medical representative ("PMR") was actually due to his consistent work of over 22 years in his current assignment.

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[206] Pharmacia & Upjohn v. Albayda, G.R. No. 172724, 628 SCRA 544, 565 (2010). (Emphasis supplied.)

[207] *Id.* at 563–64.

[208] *Id.* at 564.

[209] *Id.*

> That complainant is a veteran and seasoned PMR is admitted. In fact, it is even conceded by respondents that complainant was the leader of his peers in PED, as indicated in the letter dated 20 December 1982 of Jaime Victa to complainant. That the Cagayan Region is relatively inaccessible cannot he debated. *That the territory needed a responsible PMR who could work under the least supervision is a judgment of respondents.*[210]

Clearly, excellent performance of the employee in his current assignment will not bar his transfer to another assignment. In fact, the employee's excellence was considered as a reason for his transfer and is viewed as a proper exercise of management prerogative.

5. Valid reasons for transfer

The Supreme Court recognized the validity of certain reasons or justifications cited by employers in transferring their employees.

For instance, an employee may be validly transferred in order to avoid conflict of interest and to protect trade secrets. This was what happened in the 2004 case of *Duncan Association of Detailman–PTGWO v. Glaxo Welcome Philippines, Inc.* [211] where Pedro Tecson, petitioner, was hired by Glaxo Welcome (hereinafter "Glaxo") as a medical representative.

> Tecson was initially assigned to market Glaxo's products in the Camarines Sur-Camarines Norte sales area.
>
> Subsequently, Tecson entered into a romantic relationship with Bettsy, an employee of Astra Pharmaceuticals (Astra), a competitor of Glaxo. Bettsy was Astra's Branch Coordinator in Albay. She supervised the district managers and medical representatives of her company and prepared marketing strategies for Astra in that area.
>
> Even before they got married, Tecson received several reminders from his District Manager regarding the conflict of interest which his relationship with Bettsy might engender. Still, Tecson married Bettsy in September 1998.

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[210] Abbot Lab. v. Nat'l. Lab. Rel. Comm'n, G.R. No. 76959, 154 SCRA 713, 718 (1987).

[211] Duncan Ass'n of Detailman–PTGWO v. Glaxo Welcome Phil., Inc., G.R. No. 162994, 438 SCRA 343 (2004).

> In January 1999, Tecson's superiors informed him that his marriage to Bettsy gave rise to a conflict of interest. Tecson's superiors reminded him that he and Bettsy should decide which one of them would resign from their jobs, although they told him that they wanted to retain him as much as possible because he was performing his job well.
>
> * * *
>
> In September 1999, Tecson applied for a transfer in Glaxo's milk division, thinking that since Astra did not have a milk division, the potential conflict of interest would be eliminated. His application was denied in view of Glaxo's "least-movement-possible" policy.
>
> In November 1999, Glaxo transferred Tecson to the Butuan City-Surigao City-Agusan del Sur sales area. Tecson asked Glaxo to reconsider its decision, but his request was denied.
>
> * * *
>
> Tecson defied the transfer order and continued acting as medical representative in the Camarines Sur-Camarines Norte sales area. He was thus dismissed based on his refusal to be transferred to his new assignment.[212]

Considering that Tecson "signed a contract of employment which stipulates, among others, that he agrees to study and abide by existing company rules,"[213] and that Code of Conduct of Glaxo provides that "if management perceives a conflict of interest or a potential conflict between such relationship and the employee's employment with the company, the management and the employee will explore the possibility of 'a transfer to another department in a non-counterchecking position,'"[214] his refusal to be transferred was a valid ground for his dismissal.

On the validity of the policy against marriage with an employee of a competitor company, the Supreme Court had this to say:

> No reversible error can be ascribed to the Court of Appeals when it ruled that Glaxo's policy prohibiting an employee from having a relationship with an employee of a competitor company is a valid exercise of management prerogative.

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[212] *Id.* at 345–47.
[213] *Id.*
[214] *Id.*

> Glaxo has a right to guard its trade secrets, manufacturing formulas, marketing strategies and other confidential programs and information from competitors, especially so that it and Astra are rival companies in the highly competitive pharmaceutical industry.
>
> The prohibition against personal or marital relationships with employees of competitor companies upon Glaxo's 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, Glaxo only aims to protect its interests against the possibility that a competitor company will gain access to its secrets and procedures.
>
> That Glaxo possesses the right to protect its economic interests cannot be denied. No less than the Constitution recognizes the right of enterprises to adopt and enforce such a policy to protect its right to reasonable returns on investments and to expansion and growth.[215]

In affirming the validity of his transfer, the Supreme Court pronounced as follows:

> The Court finds no merit in petitioners' contention that Tecson was constructively dismissed when he was transferred from the Camarines Norte-Camarines Sur sales area to the Butuan City-Surigao City-Agusan del Sur sales area, and when he was excluded from attending the company's seminar on new products which were directly competing with similar products manufactured by Astra. [...] As found by the appellate court, Glaxo properly exercised its management prerogative in reassigning Tecson to the Butuan City sales area:
>
> > [I]n this case, petitioner's transfer to another place of assignment was merely in keeping with the policy of the company in avoidance of conflict of interest, and thus valid...Note that [Tecson's] wife holds a sensitive supervisory position as Branch Coordinator in her employer-company which requires her to work in close coordination with District Managers and Medical Representatives. Her duties include monitoring sales of Astra products, conducting sales drives, establishing and furthering relationship with customers, collection, monitoring and managing Astra's inventory...she therefore takes an active participation in the market war characterized as it is by stiff competition among

[215] *Id.* at 352–53.

> pharmaceutical companies. Moreover, and this is significant, petitioner's sales territory covers Camarines Sur and Camarines Norte while his wife is supervising a branch of her employer in Albay. The proximity of their areas of responsibility, all in the same Bicol Region, renders the conflict of interest not only possible, but actual, as learning by one spouse of the other's market strategies in the region would be inevitable. *[Management's] appreciation of a conflict of interest is therefore not merely illusory and wanting in factual basis*[.][216]

Another example of a reasonable and valid transfer is when the position being held and occupied by the employee has already been abolished. According to *Benguet Electric Cooperative v. Fianza*,[217] the abolition of a position deemed no longer necessary is a management prerogative. Where there is no malice and arbitrariness on the part of management, the exercise of said prerogative will not be changed by the Supreme Court. Thus:

> The abolition of a position deemed no longer necessary is a management prerogative, and this Court, 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.
>
> As found by the Labor Arbiter and affirmed by the NLRC, there had been a proposed restructuring of the organization of respondent BENECO, which process began before 1999. The Labor Arbiter and the NLRC affirmed that the restructured Table of Organization of BENECO was prepared after a thorough review by management of the indispensable and unessential positions in the old plantilla. It was undertaken to address the requirements of an automated system and to streamline BENECO's operations. Under the re-vamped organization, the position of Property Custodian under the Office of the General Manager had already been abolished.
>
> The position of Property Custodian was deemed a superfluity, since, even as early as 1997, many functions of the said office had been absorbed by other offices. Certainly, the position was not abolished because Fianza was the occupant thereof; rather, the position was abolished because the functions of the position had become redundant and unnecessary. There is no showing that the position of Property Custodian was abolished in order to single out Fianza, or that malice and ill-will attended the phasing out of the

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[216] *Id.* at 356–57. (Emphasis supplied, citations omitted.)

[217] Benguet Electric Coop. v. Fianza, G.R. No. 158606, 425 SCRA 41, 52 (2004).

> position. As such, the deletion of Fianza's position should be accepted and validated as a sound exercise of management prerogative, which this Court should not interfere with.
>
> *In cases when an employee's position is abolished due to corporate restructuring, the law, in general, permits the severance of the employer-employee relationship, provided that certain requirements are met. In the instant case, Fianza was not terminated from employment, but was transferred to another department.*
>
> *Management's prerogative of transferring and reassigning employees from one area of operation to another in order to meet the requirements of the business is generally not constitutive of constructive dismissal.*[218]

6. When refusal to transfer justified

Employees may validly refuse transfer of assignment if there is no justification and cogent reason behind it. The employer cannot expect the Court to sustain its stance that the transfer was validly made by the simple expedient of invoking its "management prerogative."

Thus, in the 2005 case of *Norkis Trading Co., Inc. v. National Labor Relations Commission,*[219] petitioners argue that the decision to transfer or reassign private respondent to the head office in Manila from Naga City was a legitimate exercise of the petitioner corporation's management prerogative. The private respondent's refusal to report for work in Manila, together with her insistence that she be allowed to stay in Naga City, constitutes insubordination and willful disobedience which according to the petitioner, justifies her termination.

The Supreme Court, however, disagreed with this argument of petitioners:

> Concededly, employers are allowed, under the broad concept of management prerogative, to regulate all aspects of personnel administration including 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 dismissal and recall of workers.
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> * * *

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[218] *Id.* at 52–53. (Emphasis supplied, citations omitted.)
[219] G.R. No. 168159, 467 SCRA 461, 470 (2005).

> The management's right to transfer or re-assign its personnel, however, is not absolute as it is subject to limitations imposed by law, collective bargaining agreements, and general principles of fair play and justice. The employer must, therefore, muster the test for determining the validity of the transfer of employees. [...] In particular, the employer must be able to show that the transfer is not unreasonable, inconvenient or prejudicial to the employee; nor does it involve a demotion in rank or a diminution of his salaries, privileges and other benefits.[220]

The petitioners failed to show such. The Supreme Court, citing the appellate court, found that there was no valid and legitimate reason for the verbal transfer order:

> [I]n fact private respondent was not given work to do [in the Manila head office], only occasionally and constantly [sic] avoided by her superiors. Her meek and desperate plea to be allowed to return to her former post in Naga City Branch was met with total silence on management's end. Such insensitivity and disdain pervading her work environment became more intense when her travel allowances were withdrawn and management demanded for refund of those amounts received by her on the ground that she is not entitled thereto while posted in the main office, which realized such erroneous grant only at a late stage after all the vouchers underwent routine approval by the concerned officers of the company. No other conclusion is discernible from the attendant circumstances except to confirm private respondent's sentiment gleaned from what she had been hearing all along, that top management indeed wanted to "ease her out of the company," as a consequence of her husband's filing of a similar illegal dismissal suit before the NLRC.[221]

In effect, the Supreme Court held:

> Surely, petitioners cannot expect the Court to sustain its stance by the simple expedient of invoking its "management prerogative." In the end, it is still up to them, as employers, to discharge the burden of proving the validity of private respondent's transfer to the head office. Having failed in this regard, we are constrained to

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[220] *Id.* at 470–71.

[221] *Id.* at 472.

> sustain the findings of the Court of Appeals as well as those of the NLRC.[222]

In another case, *Yuco Chemical Industries, Inc. v. Ministry of Labor and Employment*,[223] the transfer of respondent employees Halili and Magno were made at the height of their union's concerted activities. In declaring the illegality of the transfer, the Supreme Court ruled:

> The reassignment of Halili and Magno to Manila is legally indefensible on several grounds. Firstly, it was grossly inconvenient to private respondents. They are working students. When they received the transfer memorandum directing their relocation to Manila within seven days from notice, classes had already started. The move from Tarlac to Manila at such time would mean a disruption of their studies. Secondly, there appears to be no genuine business urgency that necessitated their transfer. As well pointed out by private respondents' counsel, the fabrication of aluminum handles for ice boxes does not require special dexterity. Many workers could be contracted right in Manila to perform that particular line of work.
>
> Altogether, there is a strong basis for public respondent's conclusion that the controversial transfer was not prompted by legitimate reasons. Petitioner company had indeed discriminated against Magno and Halili when the duo was selected for reassignment to Manila. The transfer was timed at the height of union concerted activities in the firm, deliberately calculated to demoralize the other union members. Under such questionable circumstances, private respondents had a valid reason to refuse the Manila re-assignment. Public respondent did not err or abuse his discretion in upholding the employees' cause.[224]

7. Conflict in jurisprudence

One area of conflict is when the employee invokes a personal reason for refusing to be transferred. Most noteworthy is the Supreme Court's flip-flopping decisions in upholding this invocation to justify an employee's refusal to transfer.

In the 2000 case of *Damasco v. National Labor Relations Commission*,[225] petitioner's refusal to be transferred from Olongapo City to Metro Manila was

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[222] *Id.* at 473.
[223] G.R. No. 75656, 185 SCRA 727 (1990).
[224] *Id.* at 713.
[225] G.R. No. 115755, 346 SCRA 714 (2000).

declared not constitutive of serious misconduct or willful disobedience of a lawful order where the reason behind her refusal was the fact that separation from family would entail additional expenses on her part. Instead the Supreme Court found the employer's act as unjustified, thus:

> As to Sia's allegation that Ms. Damasco committed serious misconduct or willful disobedience of lawful order in connection with her work, we find no tenable support. Even if Sia 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 a willful or intentional disobedience of her employer's order. It was Sia's order that appears to us whimsical if not vindictive. *Reassignment to Metro Manila is prejudicial to Ms. Damasco, 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. Damasco's reassignment order was unreasonable, considering the attendant circumstances.*[226]

Two years later in *Zafra v. Court of Appeals*,[227] respondent PLDT averred that petitioners agreed to accept any assignment within PLDT in their application for employment and also in the undertaking they executed prior to their training in Germany:

> [B]oth [petitioners] were regular rank-and-file employees assigned at the Regional Operations and Maintenance Control Center ("ROMCC") of PLDT's Cebu Provincial Division. [...] In March 1995, petitioners were chosen for the OMC Specialist and System Software Acceptance Training Program in Germany in preparation for "ALCATEL 1000 S12," a World Bank-financed PLDT project in line with its Zero Backlog Program. ALCATEL, the foreign supplier, shouldered the cost of their training and travel expenses.
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> * * *
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> On July 12, 1995, while petitioners were in Germany, a certain Mr. R. Relucio, SwitchNet Division Manager, requested advice, through an inter-office memorandum, from the Cebu and Davao Provincial Managers, if any of the training participants were interested to transfer to the Sampaloc ROMCC to address the operational requirements therein.
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> * * *

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[226] *Id.* at 724. (Emphasis supplied.)

[227] G.R. No. 139013, 389 SCRA 200, 202 (2002).

> Upon petitioners' return from Germany, a certain Mr. W.P. Acantillado, Senior Manager of the PLDT Cebu Plant, informed them about the memorandum. They balked at the idea, but PLDT, through an inter-office memorandum dated December 21, 1995, proceeded to transfer petitioners to the Sampaloc ROMCC effective January 3, 1996.[228]

Petitioners were subsequently dismissed for their refusal to be transferred Cebu to Sampaloc. The Supreme Court ruled in favor of the petitioners. In upholding the validity of their refusal to be transferred, the Court held:

> Despite their knowledge that the lone operations and maintenance center of the 33 ALCATEL 1000 S12 Exchanges would be "homed" in Sampaloc, 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 [sic], that appeared too oppressive for those concerned.
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> * * *
>
> 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.
>
> We are not unaware that the 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,*

[228] *Id.* at 201.

> *inconvenient, and prejudicial, but to our mind, also in defiance of basic due process and fair play in employment relations.*[229]

However, in later cases, the refusal to be transferred due to personal reasons, such as parental obligations, additional expenses, inconvenience and anguish, were not considered as valid justification.

In the 2003 case of *Allied Banking Corp. v. Court of Appeals*,[230] it was declared that parental obligations, additional expenses, and the anguish that respondent employee Galanida would suffer if assigned away from his family are not valid justifications for refusal to be transferred. Citing the case of *Homeowners Savings & Loan Association, Inc. v. National Labor Relations Commission*,[231] the Court ruled:

> The acceptability of the proposition that transfer made by an employer for an illicit or underhanded purpose–i.e., to defeat an employee's right to self-organization, to rid himself of an undesirable worker, or to penalize an employee for union activities–cannot be upheld is self-evident and cannot be gainsaid. *The difficulty lies in the situation where no such illicit, improper or underhanded purpose can be ascribed to the employer, the objection to the transfer being grounded solely upon the personal inconvenience or hardship that will be caused to the employee by reason of the transfer.* What then?
>
> 'This was the very same situation we faced in *Phil. Telegraph and Telephone Corp. v. Laplana.* In that case, the employee, Alicia Laplana, 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 Court upheld the transfer from one city to another within the country as valid as long as there is no bad faith on the part of the employer.* We held then:
>
> > "Certainly the Court cannot accept the proposition that when an employee opposes his employer's decision to transfer him to another work place, 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.*"[232]

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[229] *Id.* at 210–11. (Emphasis supplied.)
[230] G.R. No. 144412, 416 SCRA 65 (2003).
[231] G.R. No. 97067, 262 SCRA 406 (1996).
[232] *Id.* at 421. (Emphasis supplied, citation omitted.)

While employees may object to their rules or orders of their employers which they regard as unjust or illegal, the Court held that until these rules or orders are declared illegal or improper by competent authority, the employees ignore or disobey them at their peril. For Galanida's continued refusal to obey Allied Bank's transfer orders, his dismissal was found proper.

Again, in the 2010 case of *Pharmacia & Upjohn, Inc. v. Albayda*,[233] it was held that the dismissal for insubordination of respondent District Sales Manager was valid when he refused to be transferred from Bacolod City to Cagayan de Oro City and subsequently to Manila for the reason that he will be separated from his family; that his wife runs an established business in Bacolod City; that his eleven-year-old daughter is studying in Bacolod City; and that his two-year-old son is under his and his wife's direct care. The Supreme Court held:

> This Court has long stated that *the objection to the transfer being grounded solely upon the personal inconvenience or hardship that will be caused to the employee by reason of the transfer is not a valid reason to disobey an order of transfer.* Such being the case, respondent cannot adamantly refuse to abide by the order of transfer without exposing himself to the risk of being dismissed. Hence, his dismissal was for just cause in accordance with Article 282(a) of the Labor Code.
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> * * *
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> Lastly, while it is understandable that respondent does not want to relocate his family, this Court agrees with the NLRC when it observed that such inconvenience is considered an "employment" or "professional" hazard which forms part of the concessions an employee is deemed to have offered or sacrificed in the view of his acceptance of a position in sales.[234]

In the 2012 case of *Best Wear Garments v. De Lemos*,[235] the Supreme Court declared that respondents' transfer to new work assignments was a valid exercise of management prerogative. Respondents here are both sewers being paid on piece-rate basis. They were transferred to new assignments which they said amounted to constructive dismissal as it resulted in fewer earnings for them. The Supreme Court, however, did not find merit in respondents' argument. This is so because the records are "bereft of any showing of clear discrimination, insensibility, or disdain on the part of petitioners in

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[233] Pharmacia & Upjohn, Inc. v. Albayda, G.R. No. 172724, 628 SCRA 544 (2010).
[234] *Id.* at 567–68. (Emphasis supplied, citations omitted.)
[235] G.R. No. 191281, 687 SCRA 355 (2012).

transferring respondents to perform a different type of sewing job."[236] The Supreme Court stated:

> *We have long stated that "the objection to the transfer being grounded on solely upon the personal inconvenience or hardship that will be caused to the employee by reason of the transfer is not a valid reason to disobey an order of transfer."* That respondents eventually discontinued reporting for work after their plea to be returned to their former work assignments was their personal decision, for which the petitioners should not be held liable particularly as the latter did not, in fact, dismiss them.[237]

8. An employee who refuses a valid transfer is guilty of insubordination

Insubordination, under Article 297 [282] of the Labor Code[238] is a ground for the dismissal of an employee who unjustifiably refuses a valid order of transfer.[239]

For instance, the termination of the medical representative in the 1987 case of *Abbott Laboratories*,[240] was declared valid because he agreed, in his employment application, that he is willing to be assigned anywhere in the Philippines. His refusal to be transferred from Manila to a provincial assignment was declared constitutive of insubordination. By so agreeing in his employment application to be assigned anywhere in the Philippines, he, in effect, agreed to the standing policy of petitioner company regarding such reassignment. It was the same justification cited by the Supreme Court in the 2010 case of *Pharmacia & Upjohn*,[241] in ruling that the refusal to be transferred by respondent District Sales Manager from Bacolod City to Cagayan de Oro City and subsequently to Manila constituted insubordination.

Petitioner in the 2007 case of *Tinio v. Court of Appeals*,[242] also refused to be transferred from Cebu to Smart Communication's head office in Makati City. The Supreme Court considered such refusal as insubordination and thus pronounced:

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[236] *Id.* at 365–66.

[237] *Id.* at 366. (Emphasis supplied.)

[238] LAB. CODE. art. 297 [282]. Under this article, insubordination means willful disobedience of the lawful order of his employer or representative.

[239] Pharmacia & Upjohn, Inc. v. Albayda, G.R. No. 172724, 628 SCRA 544 (2010); *See also* San Miguel Corp. v. Pontillas, G.R. No. 155178, 554 SCRA 50 (2008); Philippine-Japan Active Carbon Corp. v. Nat'l Lab. Rel. Comm'n, G.R. No. 83239, 171 SCRA 164 (1989).

[240] G.R. No. 76959, 154 SCRA 713 (1987).

[241] G.R. No. 172724, 628 SCRA 544 (2010).

[242] G.R. No. 171764, 524 SCRA 533 (2007).

> In the instant case, the transfer from Cebu to Makati was not unreasonable, inconvenient or prejudicial to the petitioner considering that it was a transfer from the provincial office to the main office of SMART. The position would entail greater responsibilities because it would involve corporate accounts of top establishments in Makati which are significantly greater in value than the individual accounts in Visayas and Mindanao. In terms of career advancement, the transfer was even beneficial and advantageous since he was being assigned the corporate accounts of the choice clients of SMART. Moreover, the transfer was not economically inconvenient because all expenses relative thereto were to be borne by SMART.
>
> Also, the transfer from Cebu to Makati does not represent a demotion in rank or diminution of salaries, benefits and other privileges. It was a lateral transfer with the same salaries, benefits and privileges. The title of Corporate Sales Manager, as correctly pointed out by the appellate court, is not derogatory to the petitioner considering that he will still receive the same benefits and salary he received as Senior Manager. The position is deemed in the level of Senior Manager considering that the skills and competencies required involve handling the accounts of top corporate clients of the company, representing some of the largest corporations in the Philippines.[243]

9. A new article should be added in the Labor Code on transfer

In view of the importance of the principle on transfer, it is a wonder that no provision in the Labor Code or in any other law. This, notwithstanding the fact, that a significant number of cases reached the Supreme Court involving the issue of validity of transfers or reassignments effected by employers. As is shown in the discussion above, the exercise of this prerogative by the employer, if not clearly defined and delineated in the law itself, may be taken by a reckless and abusive employer as a license to terminate employment. Its unlimited and unbridled exercise, in the absence of a provision thereon in the law, would certainly result in the deprivation of workers of their right to security of tenure and due process.

Thus, there is an extreme need to add a new article in the Labor Code specifically enunciating the transfer doctrine.

The following new provision, to be added subsequent to Article 302 [287] on *Retirement*, is therefore suggested:

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[243] *Id.* at 542.

> **Article 303. *Transfer of employee in good faith.* – any employee may be transferred from one position to another of equivalent rank, level or salary, without a break in the service or from one office to another within the same business establishment; *Provided*, that such transfer is made in good faith and is not unreasonable, inconvenient or prejudicial to the employee; *Provided, further,* that it does not involve a demotion in rank or a diminution of his salaries, privileges and other benefits; and, *Provided, finally,* that it is not an act of clear discrimination, insensibility or disdain by the employer which leaves the employee with no other option but to forego with his continued employment.**
>
> **An employee who refuses without justification to comply with a lawful transfer may be terminated on the ground of insubordination.**

C. Prerogative to promote

1. Concept

As earlier pointed out, promotion falls within the same genus as transfer, but it certainly has its own distinct characterization from the latter. The Supreme Court has already defined promotion in the 2010 case of *Coca-Cola Bottlers Philippines, Inc. v. Del Villar*[244] and in the 2007 case of *Tinio v. Court of Appeals*.[245] The term "*promotion*" is defined as the advancement from one position to another involving increase in duties and responsibilities as authorized by law, and usually accompanied by an increase in compensation and benefits.[246]

Indeed, according to the 2003 case of *Philippine Telegraph & Telephone Corp. v. Court of Appeals*:[247]

> [T]he increase in the respondents' responsibility can be ascertained from the scalar ascent of their job grades. With or without a corresponding increase in salary, the respective transfer of the private respondents was [sic] in fact promotions, following the ruling enunciated in *Homeowners Savings and Loan Association, Inc. v. NLRC*:

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[244] G.R. No. 163091, 632 SCRA 293, 315 (2010).
[245] G.R. No. 171764, 524 SCRA 533, 541 (2007).
[246] *See also* Millares v. Subido, 127 Phil. 370, 378 (1967).
[247] G.R. No. 152057, 412 SCRA 263 (2003).

> [P]romotion, as we defined in *Millares v, Subido,* is "the advancement from one position to another with an increase in duties and responsibilities as authorized by law, and usually accompanied by an increase in salary." 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 the, the concomitant elevation to the higher positions.

The admissions of the petitioner are conclusive on it. An employee 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 the employees' consent.[248]

2. Legal effect of refusal to be promoted

There is no law that compels an employee to accept a promotion for the reason that a promotion is in the nature of a gift or reward, which a person has a right to refuse.[249] Hence, the exercise by employees of their right cannot be considered in law as insubordination, or willful disobedience of a lawful order of the employer. As such, there can be no valid cause for the employees' dismissal.[250]

An employee therefore cannot be promoted without his consent even if merely as a result of a transfer. 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.[251] Consequently, 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. Thus, employees cannot be dismissed on this basis.[252]

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[248] *Id.* at 273–74. (Citations omitted.)

[249] Erasmo v. Home Ins. & Guar. Corp., G.R. No. 139251, 388 SCRA 112, 119 (2002).

[250] Phil. Telegraph & Telephone Corp. v. Ct. of Appeals, G.R. No. 152057, 412 SCRA 263, 274 (2003).

[251] *Id.*

[252] *Id.*

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

The right to determine whether promotion should be extended to an employee or not requires the exercise of management prerogative. A good example of this postulation is the 2006 case of *Nagkahiusang Namumuo sa Dasudeco–National Federation of Labor (NAMADA–NFL) v. Davao Sugar Central Co., Inc.*[253] It is stipulated in the CBA between petitioner union and respondent company that:

> SECTION 4. FILLING OF VACANCIES
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> Where a vacancy arises, resulting from the creation of new positions or any other causes, preference shall be given to employees who, in the judgment of the COMPANY, possess the necessary qualifications for the position. The COMPANY shall first determine who would be the best suited or qualified for the position through the use of the established criteria of ability, efficiency, qualifications and experience in handling the job. When, in the judgment of the COMPANY, all such factors or criteria are equal, the employees whose job level is nearest to the position vacant will be given preference in filling up the same. In case of equal job levels between two or more employees, seniority shall be the deciding factor. Seniority shall be determined on the basis of the employees' length of continuous service with the COMPANY, counted from probationary employment.[254]

The supervisor of petitioner Eborda recommended him for the position of Shift Warehouseman but the Personnel Officer did not act thereon. Citing the Labor Code which defines a "*supervisory employee*" as one "who, in the interest of the employer, effectively recommends such managerial actions," [255] petitioners argue that the phrase "effectively recommends such managerial actions" in the said provision of the Labor Code should not be construed as an ordinary recommendation. The phrase should be construed, they suggest, to mean that "the management has to really act based on the recommendation of its supervisors who after all knows [sic] more about the conduct, demeanor, and work attitude of the concerned worker."[256] In debunking this claim, the Supreme Court ruled:

> Since petitioner does not even meet the above-quoted educational qualification for the position of shift warehouseman as

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[253] G.R. No. 145848, 498 SCRA 271 (2006).
[254] *Id.* at 272–73.
[255] LAB. CODE art. 219(m) [212(m)].
[256] *Id.* at 276.

> he merely finished high school, not to mention that, as noted by the appellate court, his medical records showed that he was suffering from acute anxiety disorder and brief reactive psychosis which are likely to affect his efficiency and ability to get along with his fellow workers, the decision of DASUCECO, which does not appear to have been actuated by bad faith, not to promote Eborda was *a management prerogative which must be respected.*[257]

4. Need to add a new provision in the Labor Code on promotion

This principle on promotion has yet to see its light in the pages of the Labor Code. This, despite the fact that the doctrine of promotion has been immemorially honored in our jurisdiction as a valid form of upward movement of an employee in the structural ladder of an establishment. A new provision thereon would certainly be welcomed by both the employer and labor sectors as this will unequivocally clear up any legal cobwebs involving the application of this principle.

The following new provision, to be added subsequent to Article 303 [288] on *Transfer of Employee in Good Faith*, is proposed. The changes proposed by the author are underlined and in bold letters:

> **Article 304. *Promotion.* – Any employee may be promoted from one position to another higher position, involving increase in duties and responsibilities as authorized by law; *Provided,* that it is accompanied by an increase in compensation and benefits; *Provided, further,* that the employee cannot be promoted without his consent; and *provided, finally,* that he/she has the right to refuse it without being penalized therefor.**

D. Prerogative to demote

1. Concept

Another labor law principle that has not been enshrined in the Labor Code nor in any other law is the doctrine of demotion. This term is not defined by law; its definition finds its mooring only in jurisprudence. Thus, according to the 2010 case of *Coca-Cola Bottlers Philippines, Inc. v. Del Villar*,[258]

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[257] *Id.* at 277–78. (Emphasis supplied.)

[258] G.R. No. 163091, 632 SCRA 293, 315 (2010).

and the 2007 case of *Tinio v. Court of Appeals*,[259] the term "*demotion*" involves a situation where an employee is relegated to a subordinate or less important position constituting a reduction to a lower grade or rank, with a corresponding decrease in duties and responsibilities, and usually accompanied by a decrease in salary.[260]

2. When transfer is tantamount to demotion

Transfer may result in demotion if the personnel movement is accompanied by reduction in position and diminution in rank or salary.[261]

The 2013 case of *The Orchard Golf & Country Club v. Francisco*,[262] best illustrates this situation. Respondent Francisco, after being suspended, was made to take a forced leave for alleged violations, and was ultimately transferred from the position of Club Accountant in which she headed petitioner Club's General Accounting Division and four divisions under it, to the position of Cost Controller/Accountant, a lower ranked position. The Supreme Court held that the transfer constitutes demotion which amounted to constructive dismissal, thus:

> As for her October 12, 2000 permanent transfer, the same is null and void for lack of just cause. Also, the transfer is a penalty imposed on a charge that has not yet been resolved. Definitely, to punish one for an offense that has not been proved is truly unfair; this is deprivation without due process. Finally, the Court sees no necessity for Francisco's transfer; on the contrary, such transfer is outweighed by the need to secure her office and documents from Famy's possible intervention on account of the complaint she filed against him.
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> We also agree with the findings of the NLRC, as affirmed by the CA, that Francisco's transfer constituted a demotion, *viz.*:
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> > We however, hold that Complainant's transfer resulted to a demotion in her level/rank. The level of Club Accountant is not 'Supervisor V' but 'Managerial-3' as indicated in the Notice of Personnel

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[259] G.R. No. 171764, 524 SCRA 533, 541 (2007).

[260] Coca-Cola Bottlers Phil., Inc. v. Del Villar, G.R. No. 163091, 632 SCRA 293, 315 (2010); Tinio v. Ct. of Appeals, G.R. No. 171764, 524 SCRA 533, 541 (2007).

[261] Phil. Wireless, Inc. (Pocketbell) v. Nat'l Lab. Rel. Comm'n, G.R. No. 112963, 310 SCRA 653 (1999); Brillantes v. Guevarra, G.R. No. 22586, 27 SCRA 138 (1969); Fernando v. Sto. Tomas, G.R. No. 112309, 234 SCRA 546 (1994).

[262] The Orchard Golf & Country Club v. Francisco, G.R. No. 178125, 693 SCRA 497 (2013).

> Action[.] [...] [T]he alleged August 15, 1998 Company's Organizational Chart showing the Club Accountant and the Cost Controller occupying the same job grade level, which was attached to Respondent's Feb. 21, 2001 Reply [...] was never implemented[.] [...] Clearly, Complainant was a manager when she occupied the position of Club Accountant. However, when management transferred her to the position of Cost Controller/Accountant, she was demoted to a mere supervisor.
>
> Moreover, in Complainant's December 3, 1997 Job Description as Club Accountant prepared by Jose Ernilo P. Famy and approved by Ian Paul Gardner and Atty. Stellamar C. Flores of HR, it is specifically indicated therein that as Club Accountant, Complainant directly supervises the Cost Controller [...]. Notably, Complainant was never issued any amendment to her December 3, 1997 Job Description, which would have removed from her supervision the Cost Controller. In fact, Respondents do not refute Complainant's allegation that as Club Accountant, she was responsible for the rating of the Cost Controller's performance for the years 1998 to 2000. It becomes clearer now that the alleged August 15, 1998 Company's Organizational Chart showing the Club Accountant and the Cost Controller occupying the same job grade level, which was attached to Respondent's Feb. 22, 2001 Reply xxx was, indeed, never implemented, otherwise, management would have issued Complainant an amendment to her December 3, 1997 Job Description effectively removing from her supervision the position of Cost Controller/Accountant and management would not have let Complainant rate the performance of the Cost Controller/Accountant for the years 1998 to 2000. It is obvious therefore that Complainant's position of Club Accountant is higher in level/rank than that of Cost Controller/Accountant. Patently, Complainant's transfer from the position of Club Accountant to the position of Cost Accountant resulted to her demotion in level/rank. Complainant's transfer resulting to her demotion is therefore tantamount to constructive dismissal.[263]

Another illustrative case on this is the same 2010 case of *Coca-Cola Bottlers Philippines, Inc. v. Del Villar*[264] where the petitioner transferred

[263] *Id.* at 514–19.

[264] G.R. No. 163091, 632 SCRA 293 (2010).

respondent from his position of Transportation Services Manager to the position of Staff Assistant to the Corporate Purchasing and Materials Control Manager on the basis of his unsatisfactory performance as Transportation Services Manager.[265] It was shown by evidence, however, that contrary to this assertion of petitioner, the dismal performance evaluations of respondent were prepared by his two superiors after he implicated them in his Report dated January 4, 1996 as having committed a fraudulent scheme against petitioner.[266] As found by the Court, the following instances indicate that respondent was not merely *transferred* from the said position but was actually *demoted*:

> *First*, as the Court of Appeals observed, Del Villar's demotion is readily apparent in his new designation. Formerly, he was the *Transportation Services Manager*; then he was made a *Staff Assistant* – a subordinate – to another manager, particularly, the Corporate Purchasing and Materials Control Manager.
>
> *Second*, the two posts are not of the same weight in terms of duties and responsibilities. Del Villar's position as Transportation Services Manager involved a high degree of responsibility, he being in charge of preparing the budget for all of the vehicles of the Company nationwide. As Staff Assistant of the Corporate Purchasing and Materials Control Manager, Del Villar contended that he was not assigned any meaningful work at all. The Company utterly failed to rebut Del Villar's contention. It did not even present, at the very least, the job description of such a Staff Assistant. The change in the nature of work resulted in a degrading work condition and reduction of duties and responsibility constitute a demotion in rank. In *Globe Telecom, Inc. v. Florendo-Flores*, we found that there was a demotion in rank even when the respondent therein continued to enjoy the rank of a supervisor, but her function was reduced to a mere house-to-house or direct sales agent.
>
> *Third*, while Del Villar's transfer did not result in the reduction of his salary, there was a diminution in his benefits. The Company admits that as Staff Assistant of the Corporate Purchasing and Materials Control Manager, Del Villar could no longer enjoy the use of a company car, gasoline allowance, and annual foreign travel, which Del Villar previously enjoyed as Transportation Services Manager.

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[265] *Id.* at 313.

[266] *Id.* at 315.

> *Fourth*, it was not bad enough that Del Villar was demoted, but he was even placed by the Company under the control and supervision of Pineda as the latter's Staff Assistant. To recall, Pineda was one of the Company officials who Del Villar accused of defrauding the Company in his Report dated January 4, 1996. It is not too difficult to imagine that the working relations between Del Villar, the accuser, and Pineda, the accused, had been strained and hostile. The situation would be more oppressive for Del Villar because of his subordinate position *vis-à-vis* Pineda.
>
> *Fifth*, all the foregoing caused Del Villar inconvenience and prejudice, so unbearable for him that he was constrained to seek remedy from the NLRC. The Labor Arbiter was correct in his observation that had Del Villar resigned immediately after his "transfer," he could be said to have been constructively dismissed. There is constructive dismissal when there is a demotion in rank and/or diminution in pay; or when a clear discrimination, insensibility or disdain by an employer becomes unbearable to the employee.[267]

3. Other circumstances constituting demotion

Per well-established jurisprudence, there are other circumstances which may result in demotion.

i. Transfer in workplace

The transfer of an employee from one workplace to another within the same establishment may result in demotion. The 1999 case of *Blue Dairy Corp. v. National Labor Relations Commission*,[268] presents a unique study of this situation. Petitioners here admitted in their Answer to respondent Recalde's Complaint that petitioner's:

> [L]aboratory is the most expensive area, on a per-square-meter basis, in the company's premises. It is here where the quality of the company's products is tested and assured. Since these products are food items ingested by the consuming public, this Laboratory becomes several folds critical. Hence, only highly trusted authorized personnel are allowed access to this place.[269]

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[267] *Id.* 315–17. (Emphasis supplied, citations omitted.)
[268] G.R. No. 129843, 314 SCRA 401 (1999).
[269] *Id.* at 411.

The Supreme Court thus said:

> In other words, the laboratory is the place where the quality of the totality of petitioners' products such as dairy, juices, chocolates and vegetables is tested. On the other hand, the vegetable processing section, as the name implies, involves processing of vegetables alone. Definitely, a transfer from a workplace where only highly trusted authorized personnel are allowed access to a workplace that is not as critical[,] is another reason enough for Recalde to howl a protest.[270]

ii. Transfer in position

When an employee is transferred from a highly technical position to one requiring mechanical work, he is deemed to have been demoted. This is according to the same case of *Blue Dairy Corp.*,[271] where respondent Recalde, a food technologist assigned in petitioner's laboratory, was transferred from the laboratory to the vegetable processing section where she cored lettuce, minced and repacked garlic and performed similar work, and was restricted from entering the laboratory. The Supreme Court ruled:

> We find insignificant the submission of petitioners that 'the coring of lettuce together with the other production jobs connected therewith is one of the most important aspects of the corporation's existence' and that "those assigned to the vegetable processing section are mostly professionals like teachers, computer secretaries and forestry graduates." Rather, the focus should be on the comparison between the nature of Recalde's work in the laboratory and in the vegetable processing section. As food technologist in the laboratory, she occupied a highly technical position requiring use of her mental faculty. As a worker in the vegetable processing section, she performed mere mechanical work. It was virtually a transfer from a position of dignity to a servile or menial job. We agree with the observation of the Office of the Solicitor General that the radical change in Recalde's nature of work unquestionably resulted in, as rightly perceived by her, a demeaning and humiliating work condition. The transfer was a demotion in rank, beyond doubt.[272]

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[270] *Id.*

[271] *Id.*

[272] *Id.* at 410–11. (Citations omitted.)

4. When demotion considered valid

Demotion due to absences and tardiness may be considered valid. According to *Petrophil Corp. v. National Labor Relations Commission, Encarnacion*:[273]

> [R]espondent Encarnacion was not dismissed but was only demoted and transferred to Caltex Phil. Inc. because of his failure to observe proper diligence in his work, and also because of his indolence, habitual tardiness and absences. But following his demotion and transfer, Encarnacion refused to report for work anymore. As aptly ruled by the Labor Arbiter this regard[:]
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> * * *
>
> Time and again, this Office has sustained the view that it is management prerogative to transfer, demote, discipline and even to dismiss an employee to protect its business, provided it is not tainted with unfair labor practice.
>
> The record, however, is bereft of any evidence to show that the demotion and transfer of Encarnacion was due to unfair labor practice acts [...] hence the act of Gersher Engineering Works in transferring and demoting complainant Encarnacion is anchored on just and valid grounds.[274]

5. New provision on demotion should be added in the Labor Code

The absence of any provision in the Labor Code on the principle of demotion has spawned countless cases—all of which could have been prevented if there was a clear-cut provision thereon. Worse, this void in the law presents to the employer the opportunity of terminating the employment of an erring employee when what is proper is merely to demote him. Clearly, the right to security of tenure is seriously impaired because of the absence of the doctrine of demotion in the pages of Philippine statute books.

In the face of the well-established principle on demotion as discussed above, this paper recommends that a new article on demotion be added in the Labor Code. Thus, the following new provision is suggested, with the changes proposed by the author, underlined and in bold letters:

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[273] G.R. No. 64048, 143 SCRA 700, (1986).

[274] *Id.* at 704.

> **Article 305. *Demotion.* – As an alternative to dismissal, an employee may be demoted in rank or his/her salaries, privileges and other benefits diminished if, after due process, it is established that he/she has failed to observe proper diligence in his/her work or failed to comply with productivity standards; *Provided,* that such demotion shall not constitute constructive dismissal.**

E. Prerogative to impose post-employment bans or prohibitions like the non-competition or non-compete clause

1. The Non-Competition Clause

One glaring deficiency in the Labor Code is the absence of so-called "Post-Employment Bans or Prohibitions" meant to control the employees after their employment is terminated for whatever cause with their current employers. Among the frequently cited post-employment prohibitions are: (1) Non-Competition, also known as a Non-Compete Clause; (2) Confidentiality and Non-Disclosure Clause; (3) Non-Solicitation Clause; and (4) Non-Recruitment or Anti-Piracy Clause.

The most significant of these prohibitions is the first one, the non-competition clause. This is usually stipulated in employment contracts involving managerial employees and those who, although not managerial in nature, hold fiduciary positions reposed with trust and confidence.

The validity or invalidity of non-competition provisions in employment contracts has been the subject of a significant number of cases in the Philippines. In fact, cases on this subject have reached the Supreme Court. A survey of Supreme Court decisions indicates that the main bulk of jurisprudence on conflicts involving non-competition clauses occurred at the early part of the 20th century, when the Philippines was still under the colonial rule of the United States of America.

Undoubtedly, the concept of a non-competition clause has been transported to our shores from United States laws and jurisprudence. After the Americans left the Philippines, there has been a marked dearth in cases filed in courts involving the issue of its validity or invalidity. However, this does not mean that the practice of imposing this kind of post-employment prohibition was discontinued. Most recently, a number of cases have reached the Supreme Court on this same issue.

2. Cases on the Non-Competition Clause Decided by the Philippine Supreme Court

A survey of Philippine jurisprudence shows that as early as 1910, a case has already been decided by the Supreme Court involving the issue of validity of the non-competition clause. This is the case of *Gsell v. Koch*.[275] The employment contract in this case contains the following relevant stipulation:

> [T]he said Pedro Koch binds himself to pay in cash to Mr. Gsell the sum of ten thousand pesos if, after leaving the firm of C. Gsell, and against the latter's will, he shall engage directly or indirectly in carrying on any business in which the said Carlos Gsell is at present engaged, or within the two and one-half years fixed for the duration of the present contract in these Islands, either as an employee or member of a firm or company, on or his own account; and he furthermore binds himself to pay in cash to Mr. Gsell an equal sum of ten thousand pesos for each violation of any secret of the business entrusted to him[.][276]

The Supreme Court ruled that the afore-quoted non-competition clause is valid and may be enforced by appropriate action. It rationalized in this wise:

> [C]onsidering the terms of the clause referred to[,] [i]t does not prohibit the defendant from conducting any industry or business, even the kind of business in which the plaintiff is engaged. [. . .] At least, no obligation whatever of that kind appears to have been assumed in the contract. On the contrary, the latter allows the presumption that the said defendant may engage in the same industries or businesses in which the plaintiff is engaged, and the sole obligation that he was contracted with regard to this feature is that he shall pay to the latter P10,000 in case he should engage in them. Consequently[,] the question which arises is that as to whether a person can lawfully bind himself to pay certain sum of money to another in case the former shall conduct a specified business or industry. And we certainly do not see why such an obligation should be considered null and void, supposing that it is a question of a lawful industry or business. Within the liberty to make contracts, sanctioned by our laws, everyone is free to execute the contracts he may consider suitable, provided they are not contrary to law, morality, and good customs, and, in our opinion, there is nothing in the obligation referred to that it is opposed to any of these three conceptions. Apparently, the obligation essentially rests on a just desire on the part of the plaintiff to

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[275] 16 Phil. 1 (1910).

[276] *Id.* at 2.

> protect himself by means of an indemnity in advance against the effects of the competition which the defendant might make, after he had duly qualified the defendant to enable him to do so, by defraying the expenses of his industrial apprenticeship and initiating him into a knowledge of his own procedure and formulas, the acquisition of which, as he states, has cost him more than P20,000, and this is to be accepted as true under the demurrer to the written complaint.[277]

The next case of significance is the 1916 case of *Ferrazzini v. Gsell*.[278] Here, the employment contract contains the following non-competion clause, to wit:

> That during the term of this contract, and for the period of five years after the termination of the employment of the said party of the second part, whether this contract continue in force for the period of one, two, three or more years, or be sooner terminated, *the said party of the second part shall not engage or interest himself in any business enterprises similar to or in competition with those conducted, maintained or operated by the said party of the first part in the Philippines, and shall not assist, aid or encourage any such enterprise* by the furnishing of information, advice or suggestions of any kind, and shall not enter into the employ of any enterprises in the Philippine Islands, whatever, save and except after obtaining special written permission therefor from the said party of the first part. It is further stipulated and agreed that the said party of the second part is hereby obligated and bound to pay unto the party of the first part the sum of ten thousand pesos, Philippine currency, (P10,000) as liquidated damages for each and every breach of the present clause of this contract, whether such breach occurred during the employment of the said party of the second part or at any time during the period of five years from and after the termination of said employment, and without regard to the cause of the termination of said employment.[279]

Unlike the earlier case of *Gsell v. Koch*, the Supreme Court in this case pronounced that the afore-quoted clause is one in undue or unreasonable restraint of trade and therefore void as against public policy. To underscore this point, the Supreme Court made a comparative analysis and presentation between this case and that of *Gsell v. Koch*, thus:

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[277] *Id.* at 6–7.

[278] 34 Phil. 697 (1916).

[279] *Id.* at 706–707. (Emphasis supplied.)

> The plaintiff in that case was engaged solely and exclusively in the manufacture of umbrellas, matches, and hats. The secrets [sic] process for making straw hats had costs [sic] the plaintiff some P20,000 and the defendant Koch, after having entered having learned the secret process employed by the plaintiff, left the plaintiff's service and engaged in the manufacture of straw hats in violation of the above-quoted provisions of the contract, using the trade secrets which he had thus learned. The provisions in the contract against the engaging in the manufacturing of straw hats in the Philippine Islands were held to be reasonably necessary for the protection of the plaintiff and not oppressive in so far as the defendant was concerned. In the case under consideration the contract goes far beyond that which formed the basis of the action in the case just cited. Here the plaintiff Ferrazzini was prohibited from engaging in any business or occupation whatever [sic] in the Philippine Islands for a period of five years after the termination of this contract of employment without special written permission from the defendant. This plaintiff became engaged, as we have said, as a foreman in a cement factory, while the defendant in the other case became engaged in identically the same business which his employer was carrying on, that is, the manufacture of straw hats. Consequently, the reasons which support the validity of the contract in the one case are not applicable to the other.
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> * * *
>
> The contract under consideration, tested by the law, rules and principles above set forth, is clearly one in undue or unreasonable restraint of trade and therefore against public policy. It is limited as to time and space but not as to trade. It is not necessary for the protection of the defendant, as this is provided for in another part of the clause. It would force the plaintiff to leave the Philippine Islands in order to obtain a livelihood in case the defendant declined to give him the written permission to work elsewhere in this country.[280]

Two years after, the case of *Ollendorff v. Abrahamson*[281] was resolved by the Supreme Court *en banc*. The controverted non-competition clause in this case states as follows:

> The said party of the second part hereby further binds and obligates himself, his heirs, successors and assigns, *that he will not*

[280] *Id.* at 708, 714.
[281] 38 Phil. 585 (1918).

> *enter into or engage himself directly or indirectly, nor permit any other person under his control to enter in or engage in a similar or competitive business to that of the said party of the first part anywhere within the Philippine Islands* for a period of five years from this date.[282]

Evidence presented in this case shows that the business in which defendant is engaged is not only "very similar" to that of plaintiff's, but it is conducted in open competition with the business of the plaintiff. On cross-examination, defendant himself expressly admitted that the company in which he is now employed "puts out the same class of goods" as that which plaintiff is engaged in producing. When two entities operate in the same field, produce the same class of goods and dispose them in the same market, their businesses are competitive. Thus, the defendant engaged in a business directly competitive with that of plaintiff in the Philippines, within five years from the date of his contract of employment by plaintiff, under the terms of which he expressly agreed that he would refrain from doing such business. Defendant's conduct herein was clearly a breach of the non-competition clause in the employment contract.[283]

The Supreme Court, in ruling that the said non-competition clause was not void as being in restraint of trade, pronounced as follows:

> The rule in this jurisdiction is that the obligations created by contracts have the force of law between the contracting parties and must be enforced in accordance with their tenor. The only limitation upon the freedom of contractual agreement is that the pacts established shall not be contrary to "law, morals or public order." The industry of counsel has failed to discover any direct expression of the legislative will which prohibits such a contract as that before us. It certainly is not contrary to any recognized moral precept, and it therefore only remains to consider whether it is contrary to "public order."
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> * * *
>
> [O]riginally, the English courts adopted the view that any agreement which imposed restrictions upon a man's right to exercise his trade or calling was void as against public policy. In the course of time this opinion was abandoned and the American and English courts adopted the doctrine that where the restraint was unlimited as to both time and space it was void, but that agreements limited as to time but unlimited as to space, or limited

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[282] *Id.* at 587. (Emphasis supplied.)
[283] *Id.* at 589.

> as to space but unlimited as to time were valid. In recent years there has been a tendency on the part of the courts of England and America to discard these fixed rules and to decide each case according to its peculiar circumstances, and make the validity of the restraint depend upon its reasonableness. If the restraint is no greater than is reasonably necessary for the protection of the party in whose favor it is imposed it is upheld, but if it goes beyond this it is declared void.
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> * * *
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> Following this opinion, *we adopt the modern rule that the validity of restraints upon trade or employment is to be determined by the intrinsic reasonableness of the restriction in each case, rather than by any fixed rule*, and that such restrictions may be upheld when not contrary to the public welfare and not greater than is necessary to afford a fair and reasonable protection to the party in whose favor it is imposed.
>
> Examining the contract here in question from this standpoint, it does not seem to us to be obnoxious to the rule of reasonableness. While such a restraint, if imposed as a condition of the employment of a day laborer, would at once be rejected as merely arbitrary and wholly unnecessary to the protection of the employer, it does not seem so with respect to an employee whose duties are such as of necessity to give him an insight into the general scope and details of his employer's business.[284]

In another 1918 case, *G. Martini, Ltd. v. Glaiserman*,[285] which was also decided *en banc* by the Supreme Court, the non-competition clause provides as follows:

> When the three years are over, the second party agreed that in case he should not find it convenient to renew the connection with the first party for another term, he shall not engage in any business either for himself or others similar to the business carried on by his present employer, or in which his employer may be engaged at that time, for 1 (one) year at least, or without first having secured the consent of the first party in writing, and in case of breach of this condition by him, he agrees to pay to the first party the sum of £400 (four hundred pounds sterling) as liquidated damages, to be recovered from him by the first party in any court having jurisdiction, and he thus waives any defense in law or in equity to

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[284] *Id.* at 590–92. (Emphasis supplied, citations omitted.)
[285] G.R. No. 13699, 39 Phil., 120 (1918).

> any suit to recover said amount as liquidated damages, and likewise to any suit or proceeding to restrain himself, or to both such proceedings.[286]

In resolving the issue of validity of the aforequoted non-competition clause, the Supreme Court followed and applied the doctrine enunciated in the earlier case of *Ollendorf,* to the effect that the test to determine the validity of an agreement in a contract of employment restraining the employee from engaging in similar employment after the expiration of the term of his employment, is the necessity of such restraint to afford a fair and reasonable protection to the employer. The Supreme Court thus resolved the issue by holding that the said clause was void as constituting an unreasonable restraint of trade, thus:

> It appears from the evidence that plaintiff is engaged in a great many branches of business, one of which is the purchase and exportation of *abaca [hemp.]* When defendant entered the employ of plaintiff[,] he had no previous experience whatever in the *abaca* business. While he was working for plaintiff, defendant was employed in the hemp department of plaintiff's business[.] [...] It also appears that plaintiff was fully aware at the time defendant was employed by him that he had no previous experience in the hemp business. Upon leaving the service of plaintiff and entering the service of Dyogi & Co., the defendant was employed by the latter in connection with the purchase by it of *abaca* for exportation.
>
> The evidence further discloses that the plaintiff corporation is engaged in the great many branches of commercial activity, the purchase and exportation of *abaca* being only one of its many enterprises. *By the terms of the second clause of the contract of employment the prohibition laid upon defendant is not limited to any particular branch of plaintiff's business—it is not even limited to the particular branch or branches of that business in which he might be employed.* For a year after the cessation of his employment by defendant, whether such cessation be due to the expiration of the time for which the contract was made or because of defendant's availing himself of the privilege of resigning under clause six, because of the misconduct of his employer, he is forbidden to "engage in any business either for himself or others similar to the business carried on by his present employer, or in which his employer may be engaged at that time."
>
> Can it be said that such a limitation upon the future activities of the employee was reasonably necessary to the protection of the

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[286] *Id.* at 121.

> employer? We think not. Under its express terms plaintiff, after treating defendant in such a way that his self-respect would compel him to resign under the sixth clause of the contract, is nevertheless empowered to prevent defendant, for a year, from engaging in any business similar to that of plaintiff, although defendant's experience in plaintiff's employ may have been limited to only one well-defined branch of its multifarious commercial activities. The scope of this prohibition is clearly shown by the testimony of plaintiff's witness Buck, who states that the plaintiff corporation is engaged in the business of "importing a great many different lines [. . .] and the export of Philippine products in general."
>
> Plaintiff argues that as it is only seeking to enjoin defendant from engaging in the hemp business, which was the particular branch of plaintiff's business in connection with which he rendered his services, the generality of the prohibition is not to be regarded as an obstacle to its enforcement. But the contract is to be construed as it stands, not as it *might* have been written. The question is not whether a contract requiring defendant to refrain for a given time from engaging in the particular line of work in which he was employed by plaintiff would have been valid, *but whether this particular contract, under which he is forbidden to engage in any business in which plaintiff was engaged during the term of his employment, can be upheld.*
>
> It is true that an illegal and void pact which is severable from the rest will not affect those parts of the contract which are lawful. Thus[,] in this particular contract the agreement for the letting and hiring of services is valid and is not affected by the addition of an unlawful pact which is void as constituting an unreasonable restraint of trade. But the objectionable agreement is not in itself severable. The undertaking is a unit, although it may affect many particular forms of activity.
>
> We are therefore of the opinion that the agreement contained in paragraph two of the contract of employment is void as constituting an unreasonable restraint of trade, and that the decision of the lower court should be and is hereby affirmed.[287]

Subsequent to the foregoing cases, the Supreme Court decided the 1924 case of *Del Castillo v. Richmond*[288] involving the following non-competition clause in the employment contract:

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[287] *Id.* at 124–26. (Emphasis supplied.)

[288] 45 Phil. 679 (1924).

> That in consideration of the fact that the said Alfonso del Castillo has just graduated as a pharmacist and up to the present time has not been employed in the capacity of a pharmacist and in consideration of this employment and the monthly salary mentioned in this contract, the said Alfonso del Castillo also agrees not to open, nor own nor have any interest directly or indirectly in any other drugstore either in his own name or in the name of another; nor have any connection with or be employed by any other drugstore situated within a radius of our miles from the district of Legaspi, municipality and Province of Albay, while the said Shannon Richmond or his heirs may own or have open a drugstore, or have an interest in any other one within the limits of the districts of Legaspi, Albay, and Daraga of the municipality of Albay, Province of Albay.[289]

The Supreme Court found the limitation in the above-quoted clause as legal, reasonable and not contrary to public policy. It ratiocinated as follows:

> From a reading of Paragraph 3 of the contract above quoted, it will be seen that the only restriction placed upon the right of the plaintiff is, that he shall "not open, nor own, nor have any interest directly or indirectly in any other drugstore either in his own name or in the name of another; nor have any connection with or be employed by any other drugstore as pharmacist or in any capacity in any drugstore situated within as a radius of *four miles* from the district of Legaspi, municipality and Province of Albay, while the said Shannon Richmond or his heirs may own or have open a drugstore, or have an interest in any other one within the limits of the districts of Legaspi, Albay, and Daraga of the municipality of Albay, Province of Albay." It will be noted that the restrictions placed upon the plaintiff are strictly limited (a) to a limited district or districts, and (b) during the time while the defendant or his heirs may own or have open a drugstore, or have an interest in any other one within said limited district.
>
> The law concerning contracts which tend to restrain business or trade has gone through a long series of changes from time to time with the changing conditions of trade and commerce. With trifling exceptions, said changes have been a continuous development of a general rule. The early cases show plainly a disposition to avoid and annul all contract which prohibited or restrained any one from using lawful trade "at any time or at any place," as being against the benefit of the state. Later, however, the

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[289] *Id.* at 680–81.

> rule became well established that if the restraint was limited to 'a certain time' and within "a certain place," such contracts were valid and not 'against the benefit of the state.' Later cases, and we think the rule is now well established, have held that contract in restraint of trade is valid providing there is a limitation upon either time or place. A contract, however, which restrains a man entering into a business or trade without either a limitation as to time or place, will be held invalid.
>
> The public welfare of course must always be considered, and if it be not involved and the restraint upon one party is not greater than protection to the other requires, contracts like the one we are discussing will be sustained. The general tendency, we believe, of modern authority, is to make the test whether the restraint is reasonably necessary for the protection of the contracting parties. If the contract is reasonably necessary to protect the interest of the parties, it will be upheld.
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> * * *
>
> In all cases like the present, the question is whether, under the particular circumstances of the case and the nature of the particular contract is, or is not, unreasonable. Of course[,] in establishing whether the contract is a reasonable or unreasonable one, the nature of the business must also be considered. What would be a reasonable restriction as to time and place upon the manufacture of railway locomotive engines might be a very unreasonable restriction when imposed upon the employment of a day laborer.
>
> Considering the nature of the business in which the defendant is engaged, in relation with the limitation placed upon the plaintiff both as to time and place, we are of the opinion, and so decide, that such limitation is legal and reasonable and not contrary to public policy.[290]

3. *Latest jurisprudence on non-compete clause comprehensively discussed the requisites for its validity*

In 2007, the Supreme Court had the occasion to make a very comprehensive discussion about the requisites for the validity of the non-compete clause in the case of *Tiu v. Platinum Plans Philippines, Inc.*[291] The non-competition clause, also called "Non-Involvement Provision" in this case, provides as follows:

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[290] *Id.* at 682–84. (Citation omitted.)

[291] G.R. No. 163512, 517 SCRA 101 (2007).

> NON INVOLVEMENT PROVISION – The EMPLOYEE further undertakes that during his/her engagement with EMPLOYER and in case of separation from the Company, whether voluntary or for cause, he/she shall not, for the next TWO (2) years thereafter, engage in or be involved with any corporation, association or entity, whether directly or indirectly, engaged in the same business or belonging to the same pre-need industry as the EMPLOYER. Any breach of the foregoing provision shall render the EMPLOYEE liable to the EMPLOYER in the amount of One Hundred Thousand Pesos (P100,000.00) for and as liquidated damages.[292]

The facts of this case provide for a perfect showcase of how a non-competition clause should be treated as a legal principle in the present times. The Supreme Court herein revisited its earlier rulings in the early 1900s to enable it to make a definitive ruling on what requisites should be complied with in order for a non-completion clause to be considered valid, legal and binding on the parties.[293]

In this case, beginning on January 1, 1993, petitioner worked for respondent Platinum Plans as Senior Assistant Vice-President and Territorial Operations Head in charge of its Hongkong and ASEAN operations under a five-year contract of employment containing the afore-quoted non-competition clause. After a little over two years, however, petitioner Tiu stopped reporting for work in respondent Platinum Plans. Barely two months after, petitioner assumed the position of Vice-President for Sales of another entity, Professional Pension Plans, Inc., a corporation also engaged in the pre-need industry. As a result of this development, respondent Platinum Plans sued petitioner for damages before the Regional Trial Court of Pasig City. Respondent averred that petitioner's employment with Professional Pension Plans, Inc. violated the above-quoted non-involvement clause in her contract of employment. Respondent thus prayed for PHP 100,000 as compensatory damages; PHP 200,000 as moral damages; PHP 100,000 as exemplary damages; and 25% of the total amount due plus PHP 1,000 per counsel's court appearance, as attorney's fees.[294]

For her part, petitioner countered that the non-involvement clause was unenforceable for being against public order or public policy. *First*, the petitioner argued that the restraint imposed was much greater than what was

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[292] *Id.* at 103.

[293] Tiu v. Platinum Plans Phil., Inc., G.R. No. 163512, 517 SCRA 101 (2007).

[294] *Id.* at 102–03.

necessary to afford respondent a fair and reasonable protection. She further argued that the transfer to a rival company was an accepted practice in the pre-need industry. Since the products sold by the companies were more or less the same, there was nothing peculiar or unique to protect. *Second*, the respondent did not invest in petitioner's training or improvement. At the time petitioner was recruited, she already possessed the knowledge and expertise required in the pre-need industry and respondent benefited tremendously from it. *Third*, a strict application of the non-involvement clause would amount to a deprivation of petitioner's right to engage in the only work she knew.[295]

The Regional Trial Court upheld the validity of the non-involvement clause. It ruled that a contract in restraint of trade is valid provided that there is a limitation upon either time or place. In the case of the pre-need industry, the trial court found the two-year restriction to be valid and reasonable.[296]

The Court of Appeals affirmed the trial court's decision. It ruled that petitioner entered into the contract on her own will and volition. Consequently, petitioner has taken it upon herself to fulfill not only what was expressly stipulated in the contract, but also all its consequences that were not against good faith, usage, and law. The Court of Appeals further held that the stipulation prohibiting non-employment for two years was valid and enforceable considering the nature of respondent's business.[297]

The Supreme Court affirmed the validity of the non-involvement clause. In so affirming, it cited its early 1900s rulings on the same subject matter, and concluded:

> Conformably then with the aforementioned pronouncements, *a non-involvement clause is not necessarily void for being in restraint of trade as long as there are reasonable limitations as to time, trade, and place.*
>
> In this case, the non-involvement clause has a time limit: two years from the time petitioner's employment with respondent ends. It is also limited as to trade, since it only prohibits petitioner from engaging in any pre-need business akin to respondent's.
>
> More significantly, since petitioner was the Senior Assistant Vice-President and Territorial Operations Head in charge of respondent's Hongkong and Asean operations, she had been privy

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[295] *Id.* at 103–04.
[296] *Id.* at 104.
[297] *Id.*

> to confidential and highly sensitive marketing strategies of respondent's business. To allow her to engage in a rival business soon after she leaves would make respondent's trade secrets vulnerable especially in a highly competitive marketing environment. In sum, we find the non-involvement clause not contrary to public welfare and not greater than is necessary to afford a fair and reasonable protection to respondent.
>
> In any event, Article 1306 of the Civil Code provides that parties to a contract may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy.
>
> Article 1159 of the same Code also provides that obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith. Courts cannot stipulate for the parties nor amend their agreement where the same does not contravene law, morals, good customs, public order or public policy, for to do so would be to alter the real intent of the parties, and would run contrary to the function of the courts to give force and effect thereto. Not being contrary to public policy, the non-involvement clause, which petitioner and respondent freely agreed upon, has the force of law between them, and thus, should be complied with in good faith.[298]

4. Jurisdiction over issues involving the enforcement of the non-competition clause

There have been cases decided by the Supreme Court that dwelt on which court or tribunal has jurisdiction over the enforcement of the non-competition clause, in the event that there is a breach or violation thereof.

The first case worth discussing is the 1994 case of *Dai-Chi Electronics Manufacturing Corp. v. Villarama*,[299] where the following non-competition clause was provided in the employment contract:

> That for a period of two (2) years after termination of service from EMPLOYER, EMPLOYEE shall not in any manner be connected, and/or employed, be a consultant and/or be an informative body directly or indirectly, with any business firm, entity or undertaking engaged in a business similar to or in competition with that of the EMPLOYER.[300]

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[298] *Id.* at 107–09. (Emphasis supplied.)
[299] G.R. No. 112940, 238 SCRA 267 (1994).
[300] *Id.* at 268.

It was asserted by petitioner Dai-Chi Electronics in this case that private respondent Adonis Limjuco became an employee of Angel Sound Philippines Corp., a corporation in the same line of business as that of petitioner, within two years from January 30, 1992, the date of Limjuco's resignation from their employ. As an employee of Angel Sound, Limjuco held the same position he was in while in the employ of Dai-Chi Electronics. Petitioner further sought to recover liquidated damages in the amount of PHP 100,000, as provided in the contract:

> That a violation of the conditions set forth in provisions Nos. (2) and (5) of this contract shall entitle the EMPLOYER to collect from the EMPLOYEE the sum of ONE HUNDRED THOUSAND PESOS (PHP 100,000.00) by way of liquidated damages and likewise to adopt appropriate legal measures to prevent the EMPLOYEE from accepting employment and/or engaging, directly or indirectly, in a business similar to or in competition with that of the EMPLOYER, before the lapse of the aforesaid period of TWO (2) YEARS from date of termination of service from EMPLOYER.[301]

The Regional Trial Court ruled that per Article 217(4) of the Labor Code, the court had no jurisdiction over the subject matter of the controversy because the complaint was for damages arising from employer-employee relations. Thus, it is the Labor Arbiter which had jurisdiction over the subject matter of the case.[302]

Before the Supreme Court, Dai-Chi Electronics argued that the cause of action did not arise from employer-employee relations, even though the claim is based on a provision in the employment contract. In ruling that the claim for damages does not arise from the employer-employee relationship and that the jurisdiction thereover belongs to the regular court, the Supreme Court ratiocinated as follows:[303]

> Petitioner does not ask for any relief under the Labor Code of the Philippines. It seeks to recover damages agreed upon in the contract as redress for private respondent's breach of his contractual obligation to its "damage and prejudice." Such cause of action is within the realm of Civil Law, and jurisdiction over the controversy belongs to the regular courts. More so when we

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[301] *Id.* at 269.

[302] *Id.*

[303] *Id.*

> consider that the stipulation refers to the *post-employment relations* of the parties.[304]

About a decade later, or in 2005, the Supreme Court had occasion to resolve the same issue in the case of *Consulta v. Court of Appeals*.[305] The non-competition clause, denominated in this case as an "Exclusivity Provision" in the employment contract between respondent Pamana Philippines, Inc. and petitioner Consulta, its Managing Associate, stipulates as follows:

> By your acceptance of this appointment, it is understood that you must represent the Company on an exclusive basis, and must not engage directly or indirectly in activities, nor become affiliated in official or unofficial capacity with companies or organizations which compete or have the same business as Pamana. It is further understood that his [sic] self-inhibition shall be effective for a period of one year from date of official termination with the Company arising from any cause whatsoever.[306]

Before the Supreme Court, the principal issue presented for resolution is whether petitioner Consulta was an employee of Pamana or not and whether the Labor Arbiter has jurisdiction over her claim for unpaid commission or not.[307]

On this issue, it was ruled that petitioner Consulta, as a commission agent, was not an employee of respondent company and, therefore, she should have litigated her claim for unpaid commission in an ordinary civil action. It was further ruled that the Exclusivity Provision is valid, thus:

> There being no employer-employee relationship between Pamana and Consulta, the Labor Arbiter and the NLRC had no jurisdiction to entertain and rule on Consulta's money claim.
>
> * * *
>
> Consulta filed her action under Article 217(a)(6) of the Labor Code. However, since there was no employer-employee relationship between Pamana and Consulta, the Labor Arbiter should have dismissed Consulta's claim for unpaid commission.

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[304] *Id.* at 270. (Emphasis supplied.)
[305] G.R. No. 145443, 453 SCRA 732 (2005).
[306] *Id.* at 737.
[307] *Id.* at 739.

> Consulta's remedy is to file an ordinary civil action to litigate her claim.[308]

A few months after *Consulta*, another decision on non-competition clause was issued in *Yusen Air and Sea Service , Inc. v. Villamor*.[309] The said clause in this case states as follows:

> No employee may engage in any business or undertaking that is directly or indirectly in competition with that of the company and its affiliates or engage directly or indirectly in any undertaking or activity prejudicial to the interests of the company or to the performance of his/her job or work assignments. *The same provision will be implemented for a period of two (2) years from the date of an employee's resignation, termination or separation from the company.*[310]

Petitioner Yusen is a corporation engaged in the business of freight forwarding. On August 16, 1993, petitioner hired respondent Villamor as branch manager in its Cebu Office. Later, petitioner reclassified his position to that of Division Manager, which position respondent held until he resigned. Upon his resignation, Villamor began working for a corporation in the same line of business as that of petitioner—Aspac International.

On February 11, 2002, the petitioner filed a complaint against Villamor, praying for a judgment enjoining respondent from pursuing his work at Aspac International in violation of the non-competition clause in the contract.[311] Villamor filed a Motion to Dismiss, arguing that the Regional Trial Court has no jurisdiction over the subject matter of said case because an employer-employee relationship is involved.[312] The trial court issued an order dismissing petitioner's complaint for lack of jurisdiction over the subject matter for the action was for damages arising from employer-employee relations. Citing Article 217 of the Labor Code, the trial court ruled that it is the Labor Arbiter which had jurisdiction over petitioner's complaint.[313]

Petitioner went up to the Supreme Court maintaining that its cause of action did not arise from employer-employee relations even if the claim therein is based on a provision in its handbook and praying that the civil case be remanded to the court *a quo* for further proceedings.[314]

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[308] *Id.* at 744–46.
[309] G.R. No. 154060, 467 SCRA 167 (2005).
[310] *Id.* at 169. (Emphasis supplied.)
[311] *Id.* at 170.
[312] *Id.*
[313] *Id.*
[314] *Id.* at 171.

The Supreme Court found the petition impressed with merit. On the issue of injunction, the Supreme Court ruled that it had become moot, for the two-year prohibition had already passed, *viz.*:

> At the outset, we take note of the fact that the 2-year prohibition against employment in a competing company which petitioner seeks to enforce thru injunction, had already expired sometime in February 2004. Necessarily, upon the expiration of said period, a suit seeking the issuance of a writ of injunction becomes *functus oficio* and therefore moot. As things go, however, it was not possible for us, due to the great number of cases awaiting disposition, to have decided the instant case earlier.[315]

On the issue of the claim for damages, the Supreme Court declared that the two-year prohibition did not render moot the damages aspect. Accordingly, the court ruled on the damages, finding that it did not arise from an employer-employee relationship, and properly, the regular courts had jurisdiction over the case:

> Actually, the present case is not one of first impression. In a kindred case, *Dai-Chi Electronics Manufacturing vs. Villarama*, with a substantially similar factual backdrop, we held that an action for breach of contractual obligation is intrinsically a civil dispute.
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> * * *
>
> Indeed, jurisprudence has evolved the rule that claims for damages under paragraph 4 of Article 217, to be cognizable by the Labor Arbiter, must have a reasonable causal connection with any of the claims provided for in that article. Only if there is such a connection with the other claims can a claim for damages be considered as arising from employer-employee relations.
>
> * * *
>
> *When, as here, the cause of action is based on a quasi-delict or tort, which has no reasonable causal connection with any of the claims provided for in Article 217, jurisdiction over the action is with the regular courts.*
>
> As it is, petitioner does not ask for any relief under the Labor Code. It merely seeks to recover damages based on the parties' contract of employment as redress for respondent's breach thereof. Such cause of action is within the realm of Civil Law, and jurisdiction over the controversy belongs to the regular courts.

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[315] *Id.*

> More so must this be in the present case, what with the reality that the stipulation refers to the post-employment relations of the parties.
>
> For sure, a plain and cursory reading of the complaint will readily reveal that the subject matter is one of claim for damages arising from a breach of contract, which is within the ambit of the regular court's jurisdiction.[316]

Later on, the same issue was resolved in the 2012 case of *Portillo v. Rudolf Lietz, Inc.*,[317] where the issue was whether petitioner Portillo's money claims for unpaid salaries from respondent Lietz Inc. may be offset against respondents' claim for liquidated damages for the violation of the Goodwill Clause which they agreed on when Portillo was promoted to Sales Representative or not. Said clause provides:

> It remains understood and you agreed that, on the termination of your employment by act of either you or [Lietz Inc.], and for a period of three (3) years thereafter, you shall not engage directly or indirectly as employee, manager, proprietor, or solicitor for yourself or others in a similar or competitive business or the same character of work which you were employed by [Lietz Inc.] to do and perform. Should you breach this good will clause of this Contract, you shall pay [Lietz Inc.] as liquidated damages the amount of 100% of your gross compensation over the last 12 months, it being agreed that this sum is reasonable and just.[318]

Three years later, Portillo resigned from respondent Lietz, Inc. and declared that she intended to engage in a rice dealership, selling rice in wholesale after she left Lietz Inc. Not being a direct competitor, Lietz Inc. allowed her to resign. Not long after, Lietz Inc. learned that Portillo had been hired by Ed Keller Philippines, Ltd. to head its Pharma Raw Material Department. Ed Keller Philippines was said to be a direct competitor of Lietz Inc.

After this discovery, Portillo continued making demands from respondent for the payment of her remaining salaries and commissions, which were left unheeded. Thus, Portillo filed a complaint with the NLRC for non-payment of her salary.

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316 *Id.* at 171–75. (Emphasis supplied.)

317 Portillo v. Rudolf Lietz, Inc., G.R. No. 196539, 683 SCRA 568 (2012).

318 *Id.* at 571.

While respondent Lietz admitted liability of Portillo's money claims, they raised the defense of legal compensation: "Portillo's money claims should be offset against her liability to Lietz Inc. for liquidated damages in the amount of PHP 869,633.097 for Portillo's alleged breach of the 'Goodwill Clause' in the employment contract when she became employed with Ed Keller Philippines, Limited."

The Supreme Court ruled that the defense made by the respondent is not proper, for the jurisdiction over the unpaid salary belongs to the NLRC, while jurisdiction over violation of the Goodwill Clause belongs to the regular courts, *viz.*:

> There is no causal connection between the petitioner employees' claim for unpaid wages and the respondent employers' claim for damages for the alleged "Goodwill Clause" violation. Portillo's claim for unpaid salaries did not have anything to do with her alleged violation of the employment contract as, in fact, her separation from employment is not "rooted" in the alleged contractual violation. She resigned from her employment. She was not dismissed. Portillo's entitlement to the unpaid salaries is not even contested. Indeed, Lietz Inc.'s argument about legal compensation necessarily admits that it owes the money claimed by Portillo.
>
> The alleged contractual violation did not arise during the existence of the employer-employee relationship. *It was a post-employment matter, a post-employment violation.*
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> * * *
>
> As it is, petitioner does not ask for any relief under the Labor Code. It merely seeks to recover damages based on the parties' contract of employment as redress for respondent's breach thereof. Such cause of action is within the realm of Civil Law, and jurisdiction over the controversy belongs to the regular courts. More so must this be in the present case, what with the reality that the stipulation refers to the postemployment relations of the parties.
>
> For sure, a plain and cursory reading of the complaint will readily reveal that the subject matter is one of claim for damages arising from a breach of contract, which is within the ambit of the regular court's jurisdiction.[319]

[319] *Id.* at 585–86. (Emphasis supplied.)

5. Necessity to provide for non-competition prohibition in the Labor Code

A reading of the various cases delving on the issue of non-competition clause that in order for it to be valid, there must be *reasonable limitations as to time, trade, and place.*

As shown in said cases, this standard has not been well-settled; thus the issue of validity of the non-competition clause continues to hound employers and employees alike to this day. For sure, there are countless workers and individuals who are made to sign and execute employment contracts containing a stipulation on non-competition. Almost always, after the termination of their employments, they are asked by their employers to abide fully with the non-competition clause in their employment contracts. They certainly experience the agony and anguish of having to cope with the adverse consequences of such post-employment prohibition even if, in reality, they are not bound by it as the non-competition clause suffers from defects on the requirement of *reasonable limitations as to time, trade, and place.*

If the exercise of this management prerogative to impose such clause as a pre-condition for employment goes unbridled and undefined, the constitutional and legal right to full employment and security of employment, not to mention social justice, would be seriously impaired and abused. For what is at stake here is the right to survive by the workers. They should not, as a matter of general proposition, be deprived of employment as soon as they leave their current employers, for whatever reason. The non-competition clause should be so regulated and limited in order to protect their interest and welfare.

In light of the above discussion, a new provision in the Labor Code is in order to forestall the seeming unbridled exercise by the employer of its prerogative to so impose said non-competition clause in the contract of employment.

The following new provision is therefore suggested to be introduced into the Labor Code:

> **Article 306. *Non-compete prohibition.* – The employer and the employee who is occupying a position of responsibility, trust and confidence or who has access to sensitive and confidential information, trade secrets, marketing plans, business practices, upcoming products, intellectual property, and the like, may mutually agree on a non-compete clause in their employment contract to take**

effect after the termination, for whatever reason, of their employment relationship; *Provided*, that such clause shall not be in restraint of trade and there are reasonable limitations as to place and time of its coverage and effectivity.

IV. LIMITATIONS ON THE EXERCISE OF MANAGEMENT RIGHTS AND PREROGATIVES

A. Management prerogatives are subject to limitations

The exercise of management prerogative is not unlimited. It is subject to the limitations imposed by any of the following:

1. Law
2. Collective Bargaining Agreement (CBA)
3. Employment contract
4. Employer policy or practice
5. General principles of fair play and justice.[320]

Jurisprudence recognizes the exercise of management prerogative. 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.[321]

In the words of *Opinaldo v. Ravina*:[322]

> Jurisprudence is replete with cases recognizing the right of the employer to have free reign and enjoy sufficient discretion to regulate all aspects of employment, including 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. Even labor laws discourage interference with the exercise of such prerogative and the Court often declines to interfere in legitimate business decisions of employers. However, the exercise of management prerogative is not unlimited. Managerial prerogatives are subject to limitations

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[320] Coca-Cola Bottlers Phil., Inc. v. Del Villar, G.R. No. 163091, 632 SCRA 293, 312 (2010); Supreme Steel Corp. v. Nagkakaisang Manggagawa ng Supreme Indep. Union (NMS-IND-APL), G.R. No. 185556, 646 SCRA 501, 525 (2011).

[321] Philippine Ind. Sec. Agency Corp. v. Aquinaldo, 499 Phil. 215, 225 (2005).

[322] G.R. No. 196573, 707 SCRA 545 (2013).

> provided by law, collective bargaining agreements, and general principles of fair play and justice. Hence, in the exercise of its management prerogative, an employer must ensure 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.[323]

In the case of *Blue Dairy Corp. v. National Labor Relations Commission*,[324] the Supreme Court described in more detail the limitations on the right of management to transfer employees, a right whose exercise has been the subject of countless suits reaching the Supreme Court, thus:

> Indeed, it is the prerogative of management to transfer an employee from one office to another within the business establishment based on its assessment and perception of the employee's qualifications, aptitudes and competence, and in order to ascertain where he can function with maximum benefit to the company. This is a privilege inherent in the employer's right to control and manage his enterprise effectively. The freedom of management to conduct its business operations to achieve its purpose cannot be denied.[325]

However, the Supreme Court qualified, thus:

> But, like other rights, there are limits thereto. The managerial prerogative to transfer personnel must be exercised without grave abuse of discretion, bearing in mind the basic elements of justice and fair play. Having the right should not be confused with the manner in which 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; nor does it involve a demotion in rank or a diminution of his salaries, privileges and other benefits. Should the employer fail to overcome this burden of proof, the employee's transfer shall be tantamount to constructive dismissal, which has been defined as a quitting because continued employment is rendered impossible, unreasonable or unlikely; as an offer involving a demotion in rank and diminution in pay. Likewise, constructive dismissal exists when an act of clear discrimination, insensibility or disdain by an

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[323] *Id.* at 562–63.

[324] G.R. No. 129843, 314 SCRA 401 (1999).

[325] *Id.* at 408.

> employer has become so unbearable to the employee leaving him with no option but to forego with his continued employment.[326]

B. An act may fall within the concept of management prerogative but may not necessarily be considered a valid exercise thereof

To emphasize, declaring that a particular act falls within the concept of management prerogative is significantly different from acknowledging that such act is a valid *exercise* thereof.

This principle is best exemplified in the 2013 case of *Goya, Inc. v. Goya, Inc. Employees Union–FFW.*[327] Petitioner contends that its engagement of contractual workers supplied by an independent contractor, PESO Resources Development Corporation, to perform temporary and occasional services in its factory in Parang, Marikina City does not violate the provision of the CBA on the hiring of probationary and casual workers whom it subsequently engaged to become regular workers when urgently necessary to employ them for more than a year. With the hiring of contractual employees from PESO, the respondent union contended that it would no longer have probationary and casual employees from which it could obtain additional union members. The Voluntary Arbitrator ("VA") who heard the case and the Court of Appeals both ruled that while petitioner has the prerogative of engaging contractual workers from PESO, its exercise is, however, limited by the said CBA provision. The Supreme Court ruled:

> Lastly, the Company kept on harping that both the VA and the CA conceded that its engagement of contractual workers from PESO was a valid exercise of management prerogative. It is confused. *To emphasize, declaring that a particular act falls within the concept of management prerogative is significantly different from acknowledging that such act is a valid exercise thereof.* What the VA and the CA correctly ruled was that the Company's act of contracting out/outsourcing is within the purview of management prerogative. Both did not say, however, that such act is a valid exercise thereof. Obviously, this is due to the recognition that the CBA provisions agreed upon by the Company and the Union delimit the free exercise of management prerogative pertaining to the hiring of contractual employees. Indeed, the VA opined that 'the right of the management to outsource parts of its operations is not totally eliminated but is

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[326] *Id.* at 408–09.

[327] G.R. No. 170054, 689 SCRA 1 (2013).

> merely limited by the CBA,' while the CA held that "[t]his management prerogative of contracting out services, however, is not without limitation. [...] [These] categories of employees particularly with respect to casual employees [serve] as limitation to [the Company's] prerogative to outsource parts of its operations especially when hiring contractual employees."
>
> A collective bargaining agreement is the law between the parties:
>
> * * *
>
> In this case, Section 4, Article I (on categories of employees) of the CBA between the Company and the Union must be read in conjunction with its Section 1, Article III (on union security). Both are interconnected and must be given full force and effect. Also, these provisions are clear and unambiguous. The terms are explicit and the language of the CBA is not susceptible to any other interpretation. Hence, the literal meaning should prevail. As repeatedly held, the exercise of management prerogative is not unlimited; it is subject to the limitations found in law, collective bargaining agreement or the general principles of fair play and justice. Evidently, this case has one of the restrictions - the presence of specific CBA provisions - unlike in *San Miguel Corporation Employees Union-PTGWO v. Bersamira, De Ocampo* v. *NLRC, Asian Alcohol Corporation v. NLRC,* and *Serrano* v. *NLRC,* cited by the Company. To reiterate, the CBA is the norm of conduct between the parties and compliance therewith is mandated by the express policy of the law.[328]

V. AREAS OF CONFLICT

A. Lack of definitive provisions on management rights and prerogatives

If one were to examine the provisions of the Labor Code, one major noticeable deficiency thereof is the utter lack of provisions with respect to recognition of certain rights and prerogatives of the employer. This is to be expected since the Labor Code is not intended to protect the interest of the employer but of the laborers, workers, or employees who, generally, do not stand on equal footing with the employer in almost all aspects of their relationship. As between the two parties, the laborers have weaker economic

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[328] *Id.* at 15–17 (Emphasis supplied.)

power and resources, whereas the employer enjoys not only superior finances but also has access to advice of eminent counsel.[329] Thus, having less in life, they deserve to have more in law.

The Labor Code is possibly the only law in Philippine statute books which expressly mandates how its provisions as well as those of its implementing rules should be interpreted and construed in the event that there exists a doubt thereon.[330] Huge limitations upon huge limitations are imposed on every possible exercise by the employer of his rights and prerogatives. The inadequacy of protection to employers is not only attendant in the Labor Code. In fact, equally lacking in protection is evident in the provisions of the Philippine Constitution itself. The only provision therein which recognizes the right of the employer is found in the last paragraph of its protection-to-labor clause, which states:

> The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and *the right of enterprises to reasonable returns on investments, and to expansion and growth.*[331]

This recognition, however, does not have anything to do with the exercise by the employer of its rights and prerogatives.

B. The Labor Code should recognize not only the rights of workers but also of employers

The Labor Code sparsely recognizes only very few management rights and prerogatives as extensively cited and discussed above. There are other equally important rights and prerogatives which, however, do not find any legal roots in the Labor Code but are generally recognized as valid by the Supreme Court in a long line of cases spanning decades. However, for lack of legal mooring in any existing statute, the sole justification cited by the Supreme Court is that these rights and prerogatives are *inherent* in the right of employers to control and manage their enterprise effectively.[332]

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[329] This was pronounced in the Resolution dated March 29, 1962 on petitioners' Motions for Reconsideration in San Carlos Milling Co., v. Comm'r of Internal Revenue, G.R. No. 15453, 4 SCRA 641 (1962).

[330] LAB. CODE, art. 4.

[331] CONST. art. XIII, § 3. (Emphasis supplied.)

[332] Mendoza v. Rural Bank of Lucban, G.R. No. 155421, 433 SCRA 756 (2004); Tierra Intl. Const. Corp. v. Nat'l Lab. Rel. Comm'n, G.R. No. 101825, 256 SCRA 36 (1996).

While it is the duty of the courts to prevent the exploitation of employees, it also behooves the courts to protect the sanctity of contracts that do not contravene the law. 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 presumed 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 fewer privileges in life, the Court has inclined more often than not toward the worker and upheld his cause in his conflicts with the employer. Such inclination, however, has not blinded the Court to the rule that justice is in every case for the deserving, to be dispensed in light of the established facts and applicable law and doctrine.[333]

This is so because the law imposes many obligations to the employer such as the grant of just compensation to his workers, observance of due process in case of termination of employment, compliance with labor standards laws and social legislations, and the like. In return, the law recognizes the right of management to expect from its workers not only good performance, adequate work and diligence, but also good conduct and loyalty.[334] The employer may not be compelled to continue to employ such persons whose continuance in the service will patently be inimical to its interests.[335]

VI. CONCLUSION AND RECOMMENDATION

The deficiency in the Labor Code can only be remedied by the passage of a comprehensive amendatory law which would introduce the important rights and prerogatives of the employer, including the limitations in their exercise.

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[333] Vigilla v. Phil. Coll. of Criminology, Inc., G.R. No. 200094, 698 SCRA 247 (2013); Philippine Long Distance and Tel. Co. v. Honrado, G.R. No. 189366, 637 SCRA 778 (2010), *citing* Mercury Drug Corp. v. Nat'l Lab. Rel. Comm'n, G.R. No. 75662, 177 SCRA 580 (1989).

[334] Villanueva v. Nat'l Lab. Rel. Comm'n, G.R. No. 176893, 672 SCRA 243 (2012); Agabon v. Nat'l Lab. Rel. Comm'n, G.R. No. 158693, 450 SCRA 535 (2004); Judy Phil., Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 111934, 289 SCRA 755 (1998); Coca-Cola Bottlers Phil., Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 82580, 172 SCRA 751 (1989).

[335] Sugue v. Triumph Intl (Phil.), Inc., G.R. No. 164804, 577 SCRA 323 (2009); Philippine-Singapore Transport Serv., Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 95449, 277 SCRA 506 (1997).

Once incorporated into the Labor Code, the employers can no longer exercise their rights and prerogatives wantonly, whimsically, and abusively to the extent that such exercise would result in the deprivation of the right of workers to security of tenure, full employment, and due process. This is so because the conditions, restrictions, and limitations of such exercise would already form part of the law, and not just based on jurisprudence whose chances of being changed or overturned through time cannot be altogether disregarded. By enshrining all the principles and doctrines enunciated by the Supreme Court on the rights and prerogatives discussed above, both employers and employees will cross swords on issues based on legal provisions. Simply put, the proposed provisions of the amendatory law set forth in this paper would promote the much desired and hoped for level playing field between employers and employees. Consequently, industrial peace and harmony in the workplace would be greatly enhanced and promoted.

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