

## Use of Previous Infractions in Justifying Termination

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In 1992, XYJ Manufacturing Corporation hired Edwin Gallego as a Planning Engineer. He was promoted in 2000 as the head of his department. Although he was notorious for being short-tempered and abrasive, Gallego became the Operations Manager of the plant in 2006.

On October 25, 2007, an incident report was filed by Assistant Operations Manager Lester Buenaventura. He claimed that during the senior management meeting earlier that day, Gallego attempted to punch him while hurling threats and insults. The managers who witnessed the incident reported that Gallego and Buenaventura had a heated argument and that Gallego suddenly stood up to hit Buenaventura. An investigation was conducted and Gallego was subsequently dismissed on the ground of Serious Misconduct. In coming up with this decision, other incidents of misconduct were cited:

- In November 1997, Gallego was charged with insubordination and disrespect, after refusing to follow the instructions given by his manager and to finish some assignments. A written warning was issued.
- In January 1998, the department's administrative assistant filed three incident reports for rudeness and utterance of profanity against Gallego
- In March 1998, two engineers filed separate incident reports for rowdy and disruptive behavior, rudeness and utterance of profanity. A written warning was also issued.
- In July 1998, administrative action was undertaken for provoking fights or challenging employees to a fight while on duty and within company premises.
- In April 1999, administrative action was instituted against him for contributing to a public disturbance

during the company's summer outing.

- In January 2001, a final warning was issued for disrespect and utterance of derogatory language when Gallego discussed his performance appraisal with his manager.
- In March 2003, Gallego's secretary filed a complaint regarding Gallego's use of insulting, profane and derogatory language.
- In April 2006, Buenaventura filed a complaint for "acts that constitute blatant disregard of moral and professional conduct" after being scolded in front of guests and visitors.
- In March 2007, Gallego's secretary of three (3) months resigned after filing an incident report for rudeness and indocent language against Gallego.

Gallego insisted that the dismissal was illegal because the incident immediately prior to his dismissal should not be considered as a Serious Misconduct. He also said that the previous incidents have been sanctioned or condoned, and should not have a contributory effect to his case.

Is he correct? When can past infractions be used as bases for termination?

There are conflicting Supreme Court decisions on this issue. In a number of cases, the Court ruled that the employee's disciplinary record is highly relevant and should be considered in totality. In some decisions, it was ruled that only previous offenses that were connected to a subsequent similar offense may be used. Interestingly, the Court reversed itself in another case by declaring that past offenses cannot be cited as a justification for termination.

In *Challenge Socks Corporation v. Court of Appeals*<sup>1</sup>, the Court opined that the totality of the employee's record for corrective or disciplinary action is a critical consideration in the sanction that will be imposed:

The record of an employee is a relevant consideration in determining the penalty that should be meted out. Buguat committed several infractions in the past and despite the warnings and suspension, she continued to display a neglectful attitude towards her work. An employee's past misconduct and present behavior must be taken together in determining the proper imposable penalty.

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**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 him should not be taken singly and separately but in their totality. Fitness for continued employment cannot be compartmentalized into tight little cubicles of aspects of character, conduct, and ability separate and independent of each other. It is the totality, not the compartmentalization, of such company infractions that Bugual had consistently committed which justified her dismissal. (emphasis supplied)

In the earlier case of *National Service Corporation v. Leogardo*, the Court had the opportunity to apply the same principle for the following reason, to wit:

**We should consider the different acts of misconduct committed by the private respondent in their totality and not independent from each other. Fitness for continued employment cannot be compartmentalized into tight little cubicles of aspects of character, conduct, and ability separate and independent of each other.** A series of irregularities when put together may constitute serious misconduct, which under Article 283 of the Labor Code, is a just cause for termination. (emphasis supplied)

However, the Court applied a different ruling in the recent case of *Philippine Long Distance and Telephone Company, Inc. v. Balbastro* and *Stellar Industrial Services, Inc. v. National Labor Relations Commission* by limiting the category of previous offenses that may be cited to only those that are connected to a subsequent similar offense:

Petitioner's reliance on Pepito's past infractions as sufficient grounds for his eventual dismissal, in addition to his prolonged absences, is likewise unavailing. The correct rule is that previous infractions may be used as justification for an employee's dismissal from work in connection with a subsequent similar offense.

The Court also admonished employers from wantonly citing all offenses in justifying the termination of an employee in the case of *Radio Communication of the Philippines, Inc. v. National Labor Relations Commission*:

However, if petitioner Villaflores were indeed as inept as pictured by Braga, the company **should have terminated his employment early on.** By its failure to take seasonable steps for its "self-preservation," the company may not now

claim all previous infractions allegedly committed by Villaflores as contributory reasons for dismissing him. After all, the immediate cause of his dismissal was the incident with Mattus, obviously a Braga protégé. (emphasis supplied)

In *De Guzman v. National Labor Relations Commission*, the Court explained that a previous offense may be an entirely separate and distinct violation of company rules and as such, the correct rule is that previous infractions may be used as justification for an employee's dismissal from work in connection with a subsequent similar offense. In *Coca Cola Bottlers Philippines, Inc. v. Daniel*, the Court added that the employer bears the burden of proving this fact with substantial evidence. Both rulings by the Court are in consonance with the policy of the State, as embodied in the Constitution, to resolve doubts in favor of labor:

While an employer has the inherent right to discipline its employees, we have always held that this right must always be exercised humanely, and the penalty it must impose should be commensurate to the offense involved and to the degree of its infraction.

The Court used an altogether different principle in a string of labor cases but with the same conclusion: past infractions cannot be collectively taken as a justification for termination. In the recent case of *Tower Industrial Sales v. Court of Appeals* which cited the principle in the earlier case of *Lopez v. National Labor Relations Commission*:

Rightly so, we give the stamp of approval to the following factual findings of the NLR that the acts committed by private respondent that were characterized by the petitioners as gross misconduct, i.e., his absences from work on 19 February 2002 and 4 March 2002 without prior permission from the petitioners, as well as his past absences in the month of July 2001 and damage to the company car when he bumped it against a tree on 11 August 2002, **are past infractions that the latter had already been duly penalized** for the commissions thereof. Past infractions cannot be collectively taken as a justification for his dismissal from the service.

We hasten to add that aent the damage to petitioners' Toyota Camry car, private respondent had been paying half of the damage of which P250.00 was being deducted to his pay, as the records show. Thus, this issue is now water under the bridge and must not be revived anew to rationalize private respondent's dismissal from his work - his bread and butter for the past 15 years prior to his termination. (emphasis supplied)

The Court considered the "particular circumstances" in *Del Monte Philippines, Inc. v. Velasco* in reaching the same ruling:

Petitioner's reliance on the jurisprudential rule that the totality of the infractions of an employee may be taken into account to justify

the dismissal, is tenuous considering the particular circumstances obtaining in the present case. Petitioner puts much emphasis on respondent's "long history" of unauthorized absences committed several years beforehand. However, petitioner cannot use these previous infractions to lay down a pattern of absenteeism or habitual disregard of company rules to justify the dismissal of respondent. The undeniable fact is that during her complained absences in 1994, respondent was pregnant and suffered related illnesses. Again, it must be stressed that respondent's discharge by reason of absences caused by her pregnancy is covered by the prohibition under the Labor Code. **Since her last string of absences is justifiable and had been subsequently explained**, the petitioner had no legal basis in considering these absences together with her prior infractions as gross and habitual neglect. (emphasis supplied)

The same conclusion was reached in *Supreme Steel Pipe Corporation v. Berdaje* whereby the infractions were reportedly condoned by the employer for humanitarian reasons and as such, cannot be utilized to justify the dismissal.

In determining whether past infractions can be used as bases for termination, it appears that the Supreme Court will decide on a case-to-case basis. The Court will evaluate whether the previous infraction has a bearing to the proximate offense warranting dismissal. It will also review whether management's prerogative to discipline the employee was exercised in good faith to protect or advance the employer's interests. Finally, the Court will ascertain whether the penalty is commensurate to the offense. Not every case of serious misconduct, excessive tardiness, dishonesty, or willful disobedience warrants the imposition of dismissal. The decision to terminate must be based on informed judgment after a careful consideration of all the merits of the case.

1. G.R. No. 165256, 8 November 2005, 474 SCRA 356 citing *Coames Bottling Corp. v. NLR*, 346 Phil. 127, 134-135 [1997]; *Vallao v. Court of Appeals*, G.R. No. 146621, July 30, 2004, 435 SCRA 543, 551; and *Meralco v. NLR*, 331 Phil. 838, 847 [1998].
2. G.R. No. L-64296, July 20, 1984, 130 SCRA 502
3. G.R. No. 157202, March 28, 2007, 519 SCRA 233
4. G.R. No. 117418, January 24, 1996, 252 SCRA 233
5. G.R. No. 113178, July 5, 1996 and G.R. No. 114777, July 5, 1996, 258 SCRA 211
6. G.R. No. 130617, August 11, 1999, 312 SCRA 266
7. G.R. No. 156893, June 21, 2005 citing *De Guzman v. NLR*, 371 Phil. 192, 204, August 11, 1999; *Filpro, Inc. v. Ople*, 182 SCRA 1, 4, February 7, 1990; and *Philippine Rabbit Bus Lines, Inc. v. NLR*, 344 Phil. 522, 529 & 531, September 15, 1997.
8. *Pioneer Texturing Corp., et al. v. NLR*, 260 SCRA 806, 816 [1997], citing *Solmac Marketing, Inc., et al. v. NLR*, G.R. No. 116574, Feb. 12, 1996.
9. G.R. No. 165727, April 19, 2006, 487 SCRA 556
10. G.R. No. 124548, 358 Phil. 141, 150, October 8, 1998, 297 SCRA 509
11. G.R. No. 163477, March 06, 2007, 517 SCRA 511
12. G.R. No. 170811, April 24, 2007, 512 SCRA 155



## Unfair Collection Practices of Credit Card Companies and Collection Agencies



There have been reports and complaints about the insolent manner of persuasion and the methodologies utilized by some credit card companies and collection agencies in giving notices for delinquent accounts and in collecting payment. Many people received insults and threats while speaking with the collecting agent. Some experienced various forms of bullying and other tactics. Bangko Sentral ng Pilipinas (BSP) Circular No. 454 states that banks, subsidiary/affiliate credit card companies, collection agencies, counsels, and other agents may resort to all reasonable and legally permissible means to collect amounts

due them under the credit card agreement. However, in the exercise of their rights and performance of duties, banks, subsidiary/affiliate credit card companies, collection agencies, counsels and other agents are instructed to observe good faith and reasonable conduct, and refrain from engaging in unscrupulous or untoward acts.

The following are considered as unfair collection practices:

- a) using or threatening the use of violence or other criminal means to harm the physical person, reputation, or property of any person;
- b) using obscenities, insults, or profane language which amounts to a criminal act or offense under applicable laws;
- c) disclosing the names of credit cardholders who allegedly refuse to pay the debt;
- d) threatening to take any action that cannot legally be taken;
- e) communicating or threatening to communicate credit information to any person which is known to be false, including failure to communicate that a debt is being disputed;
- f) making any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a cardholder; or
- g) making contact at unreasonable/inconvenient times or hours which shall be defined as contact before 6:00 a.m. or after 10:00 p.m., unless the account is past due for more than sixty (60) days or the cardholder has given express permission or said times are the only reasonable or convenient opportunities for contact.

The BSP Circular No. 398 states that such practices may result to disqualification of the bank concerned from the credit facilities of the BSP except as may be allowed under Section 84 of R.A. No. 7653; prohibition of the bank concerned from the extension of additional credit accommodation against personal security; and penalties and sanctions provided under Sections 36 and 37 of R.A. No. 7653. Under Section 36, the person or persons responsible for such violation may be punished by a fine of not less than Fifty Thousand Pesos (P50,000) nor more than Two Hundred Thousand Pesos (P200,000) or by imprisonment of not less than two (2) years nor more than ten (10) years, or both, at the discretion of the Court. Administrative sanctions, under Section 37, may also be imposed to the erring bank or quasi-bank, their directors and/or officers including:

- (a) fines in amounts as may be determined by the Monetary Board to be appropriate, but in no case to exceed Thirty Thousand Pesos (P30,000) a day for each violation, taking into consideration the attendant circumstances, such as the nature and gravity of the violation or irregularity and the size of the bank or quasi-bank;
- (b) suspension of rediscounting privileges or access to Bangko Sentral credit facilities;
- (c) suspension of lending or foreign exchange operations or authority to accept new deposits or make new investments;
- (d) suspension of interbank clearing privileges; and/or
- (e) revocation of quasi-banking license.

The same provision states that resignation or termination from office shall not exempt such director or officer from administrative or criminal sanctions. As such, people are not defenseless against these forms of harassment and coercion, and may actively bring about the cessation of any abusive collection practices.

## 117 Green Courts Created

The Supreme Court recently designated 117 trial courts as special courts to hear, try, and decide environmental cases involving the Revised Forestry Code (PD 705), Marine Pollution (PD 979), Toxic Substances and Hazardous Waste Act (RA 6969), People's Small-Scale Mining Act (RA 7076), National Integrated Protected Areas System Act (RA 7586), Philippine Mining Act (RA 7942), Indigenous People's Rights Act (RA 8371), Philippine Fisheries Code (RA 8550), Clean Air Act (RA 8749), Ecological Solid Waste Management Act (RA 9003), National Caves & Cave Resources Management Act (RA 9072), Wildlife Conservation & Protection Act (RA 9147), Chainsaw Act (RA 9175), and Clean Water Act (RA 9275). Prosecutors and judges will undergo specialized training that will make them more adept in resolving these cases.

The Court also issued the following guidelines for the effective implementation of these "green court" jurisdiction:

- In multi-sala stations where no branches of the first and second level courts were designated as environmental courts, the cases shall be raffled among the branches which shall try and decide such cases according to existing issuances.
- All single-sala first and second level courts are considered special courts for the purpose of hearing and deciding the cases.
- The designated Special Courts shall continue to be included in the raffle of cases, criminal, civil, and other cases.



In 2006, DENR records showed that 1,529 cases were filed in court for violation of forestry laws alone. Of this number, 962 were still under litigation, 10 for arraignment and pretrial, 75 cases dismissed, four for provisional dismissal, eight subjected to inquest at the Regional Trial Court (RTC), 83 filed at the Provincial Prosecutor's Office, 18 archived, and 172 still pending in court. The green courts are expected to help speed up the resolution and adjudication of these cases as well as impose the corresponding penalties. It is also a definitive and clear contribution of the courts in protecting the environment.



## TRADEMARKS Frequently Asked Questions (Last Part)

### 11. What are the differences between trademarks, copyrights, and patents?

A trademark is any visible sign capable of distinguishing the goods (trademark) or services (service mark) of an enterprise and shall include a stamped or marked container of goods. In relation thereto, a trade name means the name or designation identifying or distinguishing an enterprise.

Meanwhile, the scope of a copyright is confined to literary and artistic works which are original intellectual creations in the literary and artistic domain protected from the moment of their creation. Patentable inventions, on the other hand, refer to any technical solution of a problem in any field of human activity which is new, involves an inventive step and is industrially applicable.

### 12. How do I protect my rights in a trademark?

Once your mark is issued a Certificate of Registration, you should display the mark with the words "Registered Mark" or the letter "R" within a circle. Knowledge that the imitation of a mark is likely to cause confusion, or to cause mistake, or to deceive is presumed if a registered mark is displayed with such notation, giving rise to your entitlement as owner of the registered mark to recover profits or damages from the infringer. As owner of the registered mark, you should also serve a formal notice to the infringing entity about the unlawful use by the latter of the registered mark.

You should also endeavor to periodically check the publications of the IPO or its website to determine whether a colorable imitation of the registered mark had been applied for by another entity. If one had indeed been filed, you as the owner of the registered mark should immediately secure legal counsel to file an opposition to the application or a petition for cancellation if the subsequently registered mark would cause confusion in commerce.

### 13. What are the remedies available for infringement?

The owner of the registered mark has the option to file a civil action, a criminal complaint or an administrative suit against the infringer, with a prayer for injunction and damages in all remedies.

The amount of damages may range from reasonable profit which the owner would have made had not the infringer violate the owner's rights or the actual profit which the infringer made from the use of the owner's mark up to double the amount of the profits in cases where actual intent to mislead the public or defraud the owner is shown.

### 14. Does any of this change on the Internet?

No, it doesn't. The extent of protection against infringing marks covers the internet when the unlawful use could be downloaded within the Philippines.

### 15. What is trademark dilution and what is a "well known" mark?

Trademark dilution is the lessening of the capacity of a famous or well-known mark to identify and distinguish goods or services, regardless of the presence or absence of: (1) competition between the owner of the famous or well-known mark and other parties; or (2) likelihood of confusion, mistake or deception. Subject to the principles of equity, the owner of a famous or well-known mark is entitled to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark. This is intended to protect famous or well-known marks from subsequent uses that blur distinctiveness of the mark or tarnish or disparage it.

A well-known mark is a mark considered by competent authority in the Philippines to be well-known internationally and in the Philippines, whether or not the IPO has issued a Certificate of Registration for it. In determining whether a mark is well-known, the knowledge of the relevant sector of the public shall be taken into account.

### 16. How can I protect my mark outside the Philippines?

At present, there is no protection available unless you, as the owner of the mark, register nationally with each state in accordance with the local trademark law. The Philippines is still considering whether it will join the Madrid Protocol to expand protective coverage to include all signatory states therein.

### 17. Further information

Should you find that your registered mark has been infringed by another person, you may consider legal counsel in order to enforce your rights therein to the full extent possible. In the same vein, it may be proper for a legitimate owner of a mark faced with a cease and desist letter from another entity to secure expert legal advice in order to put a veritable defense against unscrupulous claimants.

### 18. Useful trademark links

- (a) Fortun Narvasa & Salazar Law Offices: [www.fnslaw.com.ph](http://www.fnslaw.com.ph)
- (b) Intellectual Property Office of the Philippines: [www.ipophil.gov.ph](http://www.ipophil.gov.ph)
- (c) Intellectual Property Association of the Philippines: [ippha@info.com.ph](mailto:ippha@info.com.ph)
- (d) The World Intellectual Property Organization: [www.wipo.org](http://www.wipo.org)
- (e) International Trademark Association:

## PISTANG PASKO SA FNS

The Fortun Narvasa & Salazar family celebrated its annual Christmas party on December 14, 2007 at the residence of Senior Partner Atty. Sig Fortun in Dasmariñas Village, Makati City. Atty. Fortun and his gracious wife Dolly, welcomed the entire FNS family to their beautifully-decorated home. This year's theme was "Pistang Pasko sa FNS."



Everyone had their fill of sumptuous Filipino food, good entertainment, and all-night merry-making. Senior Partner Ogie Narvasa gave an inspiring message to the staff. Managing Partner Atty. Dicky Salazar brought the house down with his mirthful rendition of the poem "The Night Before Christmas" in Igelese. Employees also participated in traditional Filipino games such as Pabilin and Paluan ng Palayok. As is customary during this annual affair, the three FNS branches (Makati, Cavite, and Baguio) gave marvelous performances. The new hires performed a riveting dance number. One of the highlights of the evening was when FNS Baguio performed an Igorot dance proudly wearing colourful indigenous regalia and costumes. In line with the fiesta theme, drinks and pica pica during the entire evening. It was another fun-filled celebration that everyone will surely remember.

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