Ellechel v. ROP, 7 ROP Intrm. 143 (1999)

GUSTAV ELLECHEL,
Appellant,

V.

REPUBLIC OF PALAU and ANDRES UCHERBELAU
in his official capacity as MINISTER OF STATE,
Appellees.

CIVIL APPEAL NO. 54-97
Civil Action No. 412-95

Supreme Court, Appellate Division
Republic of Palau

Argued: January 20, 1999
Decided: February 5, 1999

Counsel for Appellant: Clara Kalscheur

Counsel for Appellee: Scott Campbell, Assistant Attorney General

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; and R. BARRIE, MICHELSEN, Associate Justice

MICHELSEN, Justice:

INTRODUCTION

Gustav Ellechel brought suit in the Trial Division seeking reversal of his termination and reinstatement of his government employment after the National Civil Service Board [hereinafter, "the Board"][1] upheld the decision of the Minister of State to treat his unauthorized absences from work in May 1995 as a "resignation" pursuant to Sub -Part 18.5 of the Public Service System Regulations. [Hereinafter, "Sub-Part 18.5".]

The Trial Division entered summary judgment in favor of the Defendants. The Court held that Mr. Ellechel was absent without leave for more than fifteen consecutive days and had failed to demonstrate that the failure to obtain authorization for the absence was the result of a bona fide emergency. Defendants could therefore properly consider him as resigned pursuant to

[1] Effective October 1, 1997, the OEK repealed the provisions of the National Public Service System Act establishing the Board. *See* RPPL 5-7 Section 34(11)(e), p. 52. Therefore, although the Board was, at all material times, the agency charged with hearing employee appeals of adverse employment actions, it is no longer a proper party.

Sub-Part 18.5. This appeal followed. We affirm.

BACKGROUND

Appellant was an employee of the Bureau of Land and Surveys [hereinafter, "BLS"]. On May 1, 1995, he failed to appear for work, and this unexplained absence continued through May 10. According to Mr. Ellechel's wife, she went to the BLS office on that date and orally informed two secretaries "that Gustav would not be able to come to work because he had gone to Saipan." One of the secretaries said "okay." No permission for this unauthorized leave was requested or granted, and Appellant does not argue that the secretary's "okay" makes the leave authorized thereafter.

The May 12, 1995 edition of the Marianas Variety was the first public suggestion of the reason for Mr. Ellechel's ⊥144 absence. The newspaper reported that he had been arrested at the Saipan airport May 9, 1995 for attempting to smuggle 1,653 sticks of marijuana into the Commonwealth of the Northern Mariana Islands. Palau's Minister of State, Andres Uherbelau, [2] read the news article on May 13, 1995. He was also informed by BLS Director Fritz Koshiba that Mr. Ellechel had been absent without leave since May 1. Mr. Uherbelau took no immediate action.

Mr. Ellechel posted bail May 11, 1995, but a condition of bail was that he surrender all travel documents and not leave Saipan. Arraignment was set for May 24. During this period, he made no effort to contact BLS officials regarding his continued absence, or inform them what his plans were regarding work. The travel restriction imposed by the court was lifted at his arraignment May 24. He showed up for work May 29, having missed 19 consecutive workdays.

At that point, Mr. Uherbelau acted. By letter dated May 30, he informed Mr. Ellechel that he was suspended without pay pending investigation of the circumstances surrounding the absence. The Minister believed that suspension without pay was justified "pending our investigation into the criminal charges against you . . . . These charges are very serious and discredit not only your department, but all of Palau."

The Minster also stated the absence without leave for more than fifteen days would be treated as a resignation pursuant to Sub -Part 18.5. However, the Minister noted that the regulations provided that an unauthorized absence from work without prior approval may be justified because of an "emergency." He therefore gave Mr. Ellechel until June 9, 1995 to explain the basis for his absence. At the same time, he attached a copy of the newspaper article concerning the arrest, and stated that the substance of the article "suggests that your absence has not been due to a bona fide emergency."

The Appellant did not respond. On June 14, 1995, Mr. Ellechel was informed he was being terminated. Two reasons were given. The first reason was that the Department had "confirmed the allegations" regarding the Saipan arrest, justifying termination for cause. The

[2] The Minister of State is the management official responsible for employment decisions regarding BLS employees.

other reason cited by the Minister was that "during the period of May 01, 1995 through May 26, 1995, you were absent without official leave."

In a letter dated June 27, 1995, Mr. Ellechel belatedly informed the Minister that "the nature of the emergency that called on me to make the trip to Saipan, as related by your charge of AWOL, is an integral part of my defense, which I am not at liberty to discuss because of the pending criminal charges."

On May 6, 1996, Mr. Ellechel pled guilty to illegal possession of marijuana, and received a five year suspended sentence. The Board heard his appeal of the Minister's decision on August 2, 1996, and in December 1996, the Board upheld the termination.

ANALYSIS

A grant of summary judgment by the Trial Division is subject to de novo review on appeal. *Wolff v. Sugiyama*, 5 ROP Intrm. 105 (1995). The parties agree that in this case the ⊥145 Trial Division was to apply 33 PNC § 426(b)(2) of the National Public Service System Act, which provides:

> If the court finds that the reasons for the action are not substantiated in any material respect, or that the procedures required by law or regulation were not followed, the court shall order that the employee be reinstated in his position . . . . If the court finds that the reasons are substantiated or only partially substantiated, and that the proper procedures were followed, that court shall sustain the action of the management official.

Thus, this Court will affirm the Trial Division's decision if Appellant's termination was substantiated, in whole or in part, on the grounds of unauthorized absence.[3]

Sub-Part 18.5 of the Public Service System Regulations states that:

> Employees who are absent from duty without prior approval, except in bona fide emergencies, shall be charged AWOL. Employees on AWOL for more than fifteen (15) consecutive working days during any one six (6) month period, shall be automatically resigned as of the last date on which the employee worked. This section shall not be applicable for termination for cause.

As a threshold matter, Appellant contends that Sub-Part 18.5 cannot be applied to his case because he construes its last sentence to mean that "if an employee can be terminated for cause, then management must terminate the employee for cause." The argument is unpersuasive. An employee who is absent without leave is subject to adverse action, including termination for cause. Sub- Part 11.4(h), Public Service System Regulations. Appellant's position, if adopted, would mean that the provisions of Sub-Part 18.5 regarding automatic resignation would never

[3] The Trial Division's decision did not decide whether Ellechel could also have been terminated for cause as a result of the arrest. We therefore limit our review accordingly.

apply, because AWOL employees are always subject to termination for cause.

The Defendants suggest the sentence means that management cannot rely on the automatic resignation provisions of Sub-Part 18.5 when effecting a termination for cause, but that is only a statement of the self-evident. If management does not have the evidence to prove an automatic resignation, it obviously cannot rely on Sub-Part 18.5 when terminating for cause. Perhaps the last sentence of Sub- Part 18.5 was an inartful attempt at saying that an unauthorized absence long enough to be deemed a de facto resignation does not require management to follow the procedures for dismissal for cause found in Part II of the regulations, entitled "Dismissals, Demotions, and Suspensions." Whatever was meant by this last sentence, we agree with the Trial Division that it does not require "a management official to waive any right he may have to dismiss an employee for a cause independent from being absent from work in ⊥146 order to terminate the employee for being AWOL for more than fifteen days."

Since we reject Appellant's threshold argument that Sub-Part 18.5 does not apply, summary judgment was appropriate if the evidence of record demonstrated that: (1) Appellant had no approval for his absence, (2) the absence continued for more than fifteen consecutive working days, and (3) the failure to obtain approval for his absence was not pursuant to a bona fide emergency.

Appellant concedes he did not request prior approval for his absence. He does, however, contend that, as a matter of course, unauthorized leaves were routinely approved after-the-fact by BLS Director Fritz Koshiba. Mr. Koshiba's affidavit in this case stated that pursuant to Public Service System Regulations, he had sometimes approved leaves of less than three days, but had never given post-hoc approval to absences of 15 or more days. Appellant submitted nothing in reply to rebut Koshiba's testimony on this point. Based upon this evidence, the Trial Division correctly found it undisputed that Appellant failed to obtain prior approval for his leave. Appellant did not argue that past practice lulled him into believing that all cases of AWOL would be later approved.

Appellant concedes he was absent from at least May 8 to May 26, but contended he is "not certain which [other] days he was absent in May," and asserted that he would need to refer to BLS records.

It is known what those records show. An affidavit submitted in support of the Defendants' motion for summary judgment, signed by BLS Administrative Assistant Nellie Asanuma, stated that the BLS attendance records document that Appellant was indeed absent for all scheduled work days from May 1 through May 26. Appellant did not object to the admission of these records. The evidence therefore supports the Trial Division finding that the absence was more than 15 days.

Where, as here, the unauthorized leave reaches the fifteen-day level, the provisions of Sub-Part 18.5 are "automatic." The one exception is where the unapproved absence occurred because of a "bona fide emergency."

Appellant contends that his arrest in Saipan for marijuana smuggling constituted such a bona fide emergency. He points out that neither the terms "bona fide" nor "emergency" are defined by the Public Service System Regulations. He proposes that "bona fide" be defined as "actual" or "real," and contends that since his arrest was "real," not a fabricated event, he is excused from his absences. However, his unauthorized absence began eight days before his arrest. What was the emergency at that point? He was given an opportunity to explain the circumstances of the "emergency" before his termination. His only response, which was submitted after his termination, was to state that "an emergency . . . called on me to make the trip to Saipan," but that he was "not at liberty to discuss" it during the pendency of the criminal charges against him. These charges, we note, were no longer pending when the Board later heard the appeal. Nowhere in his submissions to the Board, the Trial Division, or this Court is the nature of this May 1 "emergency" explained.

An "emergency" is defined as "a sudden, unexpected happening." *Black's Law Dictionary*, 6th edition at 522 (emphasis added). Part and parcel of the illicit drug ⊥147 importation business is the risk of getting caught and arrested; a risk heightened when the effort is made at an international airport. While Appellant did not plan to get caught, the fact that he did is not an "emergency." A government employee who takes unapproved time off for his sideline business ventures should not claim an "emergency" when the foreseeable vicissitudes of that business extend an absence longer than originally planned. This would be true even if the sideline business happens to be drug smuggling. [4] The arrest may explain why Ellechel was not in contact with the BLS during the two days before he made bail, but it does not explain his failure to request leave after he was released. As the Trial Division pointed out: "there is no indication that plaintiff was prevented from calling his employer to explain the situation and request that he be granted leave from his employment until such time as he was able to obtain permission to leave Saipan."

Therefore, Appellant failed to demonstrate that a "bona fide emergency" excused his absence starting May 1, 1995, or that a "bona fide emergency" existed that prevented him from calling Mr. Koshiba after he made bail.

Appellant has a new argument. He suggests he cannot be deemed to have abandoned his job because the facts do not support a finding that he intended to permanently relinquish his employment. He argues that his return to work on May 29 demonstrates his intention to retain his job or at least creates a triable question of fact as to his intent to abandon it. However, the term, "job abandonment" does not appear in the regulations, is inconsistent with the "automatic" language of Sub-Part 18.5, and its significance was not addressed by the Trial Division. We can consider the argument as waived since the issue was not raised below. *Koror State v. Republic of Palau*, 3 ROP Intrm. 314 (1993). *Ngerketiit Lineage v. Ngerukebid Clan* , 7 ROP Intrm. 38 (1998).

Appellant has also appealed the Trial Division's grant of a stay of discovery during the

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[4] Because his unauthorized absence began eight days before his arrest, and Appellant has admitted his guilt, we need not decide when an unjustified arrest and detention may constitute an "emergency" under Sub-Part 18.5.

pendency of the Board's summary judgment motion. This Court reviews the Trial Court's issuance of a protective order under an "abuse of discretion" standard. *Tmetuchl v. Kohn*, 5 ROP Intrm. 81 (1995). This Court will affirm such rulings on civil discovery "unless, in the totality of the circumstances, the trial court's rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case." *Id.*, at 83.

Six weeks after briefing the summary judgment issue, Appellant submitted interrogatories and document requests to the Defendants, seeking a listing of all past and present employees of the Republic of Palau who have been accused or convicted of a crime, as well as information indicating whether such employees were terminated because of the accusation or conviction. The discovery request also sought a list of all employees who, at the time of hiring, had criminal records. The Defendants sought a protective order to stay of all discovery pending decision of the summary judgment motion, and such a stay was granted by the Trial Division on July 31, 1997. Appellant seeks vacatur of that order ⊥148 or, in the alternative, leave to revise and re - serve the interrogatories.

No remand is necessary. The Trial Division was not required to consider Appellant's late discovery submissions as the equivalent of a motion for additional time to conduct discovery pursuant to ROP R. Civ. Pro. 56(f). A party requesting time to conduct discovery under Rule 56(f) is required to first make a showing specifying the facts he intends to uncover via discovery, demonstrate how those facts could defeat a summary judgment motion, and must indicate what actions have already been taken to discover the information. *Wolff V. Sugiyama* , 5 ROP Intrm. 105, 108 (1995). Notably, this civil action was filed on February 11, 1997, but no discovery requests were served upon the Defendants until more than 4 months after the Defendant's motion for summary judgment had been filed and after it had been fully briefed. Appellant's discovery efforts were untimely, and irrelevant to any pertinent issue concerning resignation pursuant to Sub-Part 18.5. The granting of Defendant's motion for a protective order was appropriate on these facts.

CONCLUSION

Appellant was properly terminated before his criminal conviction, for an unexcused absence that began before his an-est. He has failed to show the existence of any material, disputed, issues that would affect the outcome of the action. Summary judgment was proper, and the judgment of the Trial Division is therefore affirmed.