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ARE YOUNGER EMPLOYEES THE VICTIMS OF AGE DISCRIMINATION BECAUSE OF THE AGE THRESHOLD SET FORTH IN THE COMPANY PENSION IMPROVEMENT ACT?

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In our most recent issue of *German Labor and Employment News*, we discussed whether age discrimination was an issue in connection with statutory termination notice periods. A recent decision from a Cologne labor court of appeals adds some food for thought along similar lines: *i.e.*, whether age discrimination should be an issue under Germany's Company Pension Improvement Act, which holds that employees must reach a minimum age before their company pensions vest.

FACTS OF THE CASE

In the above-referenced case, an employer had worked for a particular company from 1959 through 1977 and had participated in that company's pension plan. He left the company when he was 34 years old.

Unfortunately for the employee, the company filed for bankruptcy in 1989. This caused the former employee to file for his pension against the Pension Insurance Fund (which, like the Pension Benefit Guaranty Corporation in the United States, is responsible for pension payments for companies that file for bankruptcy). The

The Cologne court of appeals' decision did not contradict *Mangold*, a European Court of Justice decision in which the court held that prohibiting age discrimination is a general principle of the European Union.

Pension Insurance Fund, however, refuted the employee's claim, arguing that in 1977 (the year the employee left the company), Germany's Company Pension Improvement Act required employees to be at least 35 years old in order to be vested. The employee claimed that the 35-year age threshold constituted age discrimination (against younger employees), but the Pension Insurance Fund prevailed.

THE COURT'S RATIONALE

The court applied the 35-year threshold rather than the current 30-year threshold because the 35-year threshold was on the German books when the employee left his employer in 1977. This threshold was not reduced to 30 until January 1, 2001. The threshold at the time an employee leaves his employment is determinative in terms of whether a company pension is vested.

Applying the same rationale, the court did not conclude that this constituted age discrimination, and thus, the employer

was not deemed to be in violation of the General Equal Treatment Act. Since the employee's claim simply never existed, according to the age threshold then in effect, one could not conclude that it became unvested, in a discriminatory manner, by virtue of the enactment of the General Equal Treatment Act.

The Cologne court of appeals' decision did not contradict *Mangold*, a European Court of Justice decision in which the court held that prohibiting age discrimination is a general principle of the European Union. (This general principle was already in place prior to Directive 2000/78, meaning age discrimination that took place prior to Directive 2000/78 was subject to judicial review.)

Nor did the Cologne decision contradict the European Court of Justice's opinion that the EU's general principle prohibiting age discrimination is not more extensive than that set forth in Directive 2000/78. Even taking the language of the Directive into consideration, the Cologne labor court of appeals concluded that both the former and current versions of Germany's Company Pension Improvement Act passed muster when reviewed within the context of age discrimination.

The Federal Labor Court had already decided in 2005 that age thresholds in the Company Pension Improvement Act violated neither the principle of equal treatment as set forth in Article 3 of Germany's Constitution nor the principle of equal pay as set forth in Article 141 of the EU Treaty. The goal of each of these principles is to protect employees against direct and indirect discrimination or unequal treatment.

Neither the former (35-year threshold) nor the current (30-year threshold) version of Germany's Company Pension Improvement Act constitutes direct unequal treatment, because all employees are actually treated equally.

Simultaneously, the Federal Labor Court held that this does not constitute indirect unequal treatment, because in order to determine whether a particular action constitutes indirect unequal treatment, large comparative groups would need to be established that would include all individuals who might be impacted by the action that is the subject of review. In the case decided by the Federal Labor Court, however, the evidence that was submitted concerned only particular age groups or industries; *i.e.*, they were not broad enough to prove indirect unequal treatment. According to the Federal Labor Court, it is going to be rather difficult to argue successfully that Germany's Company Pension Improvement Act results in indirect unequal treatment.

WHAT IMPACT WILL THIS HAVE?

Though the Cologne labor court of appeals' decision is no longer subject to appeal, it was not issued by Germany's highest labor court, the Federal Labor Court. Further, the court did not review the Company Pension Improvement Act specifically within the context of the General Equal Treatment Act. Such a review will be possible only for employees who left their employers after August 18, 2006, the date on which the General Equal Treatment Act entered into effect.

Regardless, applying *Mangold*, the court of appeals concluded that the employer's action did not constitute unequal treatment. It does not seem likely that a court will reach a different decision when reviewing an action specifically with respect to the General Equal Treatment Act. As a result, at this time employers should not worry that a company pension plan will be struck down on the basis of age discrimination merely because an employee who had not yet reached a certain age did not become vested.

BULLYING IN THE WORKPLACE—WHO IS RESPONSIBLE?

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"I was mobbed!"

Not exactly an uncommon phrase in Germany. But what is meant when people say they were "mobbed"? It does *not* mean that they were run over by a large crowd, nor does it mean that they had anything to do with organized crime. Instead, it means they were harassed or bullied in the workplace to the extent that they were no longer able to work effectively, and possibly even needed to take time off to recover from the harassment. Though there is no statutory provision in Germany specifically covering bullying in the

Can an employer be held liable for the bullying of one employee by another employee? The answer here is also yes.

workplace, the enactment of the General Equal Treatment Act in 2006 (covering workplace discrimination) provided additional guidance as to (i) what constitutes bullying, and (ii) the consequences of bullying.

BULLYING VS. DISCRIMINATION

A 2007 case before the Federal Labor Court added some clarity to the various issues concerning bullying. In that case a physician claimed he had been bullied by his direct superior over a period of a couple of years, which caused the physician not only to take time off from work to recuperate, but also to seek counseling. This alleged bullying took several forms. For example, the supervisor approved the physician's vacation in advance, but shortly before the physician was to take his vacation, the supervisor forced him to cancel it. The supervisor also spoke to the physician in an overly aggressive manner in front of colleagues or patients, spread rumors about the physician, did not inform the physician of a prosecutor's investigation of a death at the hospital for which the physician was being blamed until the investigation was already underway, and refused to participate in mediation despite the physician's requests.

In many respects, bullying can be compared to harassment. Bullying, however, is not harassment based on a person's age, sex, religious beliefs, or disability, or on any other protected class. As we have discussed in previous issues of *German Labor and Employment News*, harassment based on any of these characteristics constitutes unlawful discrimination under the General Equal Treatment Act. "Bullying," however, is not a legal term, and the concept of bullying has not been codified in Germany's statutes.

In 1997, the Federal Labor Court defined "bullying" as "systematic hostility, harassment, or discrimination by employees against one another or by a supervisor." This is similar to language found in the General Treatment Act, which defines "discrimination" as "objectionable treatment based on one of the protected-class categories that offends an individual's dignity, resulting in a hostile work environment." According to the Federal Labor Court, the legislature actually refined the definition of "bullying" when it defined "harassment" in the General Equal Treatment Act.

AN EMPLOYER'S OBLIGATION WHEN BULLYING OCCURS

Must an employer take action if an employee is the victim of another employee's bullying? The short answer is yes. Under the General Equal Treatment Act, employers are required to take action if an employee is being discriminated against in the workplace; this requisite action may range from warning the employee who is engaged in the discrimination to terminating that individual.

In 1994, prior to enacting the General Equal Treatment Act, Germany passed the Act to Protect Employees Against Sexual Harassment in the Workplace. For a variety of reasons, however, this statute never had any real impact (and was subsequently repealed by the General Equal Treatment Act). Regardless, it was under this statute that the courts held that employers must act in "good faith" (*i.e.*, take action to protect employees from discrimination) when they learn that an employee is the victim of sexual discrimination in the workplace. To put it in a different—but similar—light, if a person is being bullied in the workplace, the employer must act in "good faith" to protect that employee as well.

VICARIOUS LIABILITY OF EMPLOYERS

Can an employer be held liable for the bullying of one employee by another employee? The answer here is also yes. A third party (the employer) may be held liable for an employee's harassment of another employee. As long as the harasser was under the employer's general supervision, the employer may be held vicariously liable. In the above-referenced case before the Federal Labor Court, it was clear that the hospital, as the employer, was over the harassing supervisor.

BULLYING IN THE WORKPLACE IN THE UNITED STATES

A number of U.S. states are also grappling with bullying in the workplace. Of course, the United States has prohibited discrimination in the workplace based on a number of protected classes for decades. What about those instances of harassment, however, that are not based on one of these categories? According to a number of commentators, this void needs to be filled. Currently at least 13 U.S. states have "Healthy Workplace Acts" in the works. The gist of these bills is that bullied employees may hold employers vicariously liable in the form of money damages if management or colleagues harass these employees. Not surprisingly, many employers fear this will open the floodgates for another type of claim against employers. As one employment lawyer eloquently put it when discussing the proposed Healthy Workplace Acts, "You're talking about a lifetime annuity of work for employment lawyers."

Whether employers are based in the United States or in Germany, they need to take action when they learn that an employee is the victim of bullying in the workplace. As discussed before, German law already calls for vicarious liability, while in the United States it seems it is only a matter of time before similar legislation will be on the books in a number of states.

NEW CASE LAW ON GENERAL TERMS AND CONDITIONS WITHIN THE EMPLOYMENT RELATIONSHIP

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According to the Federal Labor Court, German employment agreements may be categorized as "general terms and conditions" (or just "terms") rather than individually negotiated agreements if the wording comes from the employer and is to be used for several cases. Under such agreements, employees are considered "consumers," and as a result, any disadvantages stemming from the interpretation of unclear or excessive clauses will affect the employer rather than the employee. It is not just employment agreements that are affected by this. Recently, a few important (but questionable) opinions were rendered. In each of the two cases presented below, a major role was played by Section 307, par. 1, of the Civil Code, which provides that terms are invalid if they put a consumer (*i.e.*, an employee) at an improper disadvantage.

WAIVER OF AN ACTION AND COMPENSATING CONSIDERATION

On September 6, 2007, the Federal Labor Court ruled on a case in which an employee who had been terminated for cause subsequently signed a waiver of her right to contest the termination in court. The employee, a cashier, was one of three possible suspects in an act of theft. Not surprisingly, the Federal Labor Court did not recognize the validity of the termination; although the court generally recognizes terminations for cause that are based on substantiated suspicions of violations of law, it deemed the one-in-three probability that the plaintiff was guilty to be too low. Considering the waiver, what is surprising is that there was a lawsuit at all.

The lawsuit was possible because the waiver was held to be invalid. First, it was clear that the waiver qualified as terms rather than as individual negotiation, which would have required actual negotiations to take place and the employer to put up the terms for discussion, neither of which occurred. And second, while the Federal Labor Court did not question the possibility of an employee's waiving a right of action or the fact that the written form requirement for termination of an employment agreement was observed, it concluded that this particular waiver put the employee at an inappropriate disadvantage under Section 307, par. 1, of the Civil Code. To be valid, a waiver must offer a "compensating consideration," but because the employee in this case received nothing for the waiver, the court deemed it inappropriate that the employee lost the right to file a lawsuit within three weeks, as Germany's Termination Protection Act normally provides.

The decision did not reveal what would have been an appropriate compensation. In this instance it might have been a waiver of the employer's right to file a criminal complaint; in other cases, monetary payment might be appropriate. But beware: Monetary payments are typically interpreted as severance payments. A severance payment may cause a waiver agreement to qualify as a severance agreement, which in turn can present the employee with serious disadvantages regarding unemployment benefits—the employment office

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is quick to assume that an employee who voluntarily gives up his job by way of a severance agreement is temporarily not entitled to unemployment benefits. After all, why should a person be paid unemployment benefits if he could have earned his living by keeping the job? In addition, the employer is obliged to inform the employee about such a social security risk.

Clearly, this decision did not make the employer's life (or his lawyer's) any easier.

THE QUALIFIED WRITTEN FORM REQUIREMENT—QUALIFIED LEGAL UNCERTAINTY?

By its decision of May 20, 2008, the Federal Labor Court may have achieved justice in an individual situation, but it also made it harder for employers to achieve legal certainty.

This case was brought by a German employee working in China whose German employer had routinely reimbursed the employee's costs for private rent until one of the parties gave notice. The employer refused to reimburse the employee for rent during the notice period, claiming that there was no written agreement concerning such reimbursement and that any change or amendment of the employment agreement, *including the form requirement clause itself*, would have to have been in writing; in other words, the employment agreement provided for a "*qualified* written form requirement." However, because company practice under German law is more or less considered a form of oral agreement, and because under statutory law *individual* agreements prevail against terms, the Federal Labor Court in the end confirmed the employee's claim.

WRITTEN FORM REQUIREMENTS OVER TIME

The case reveals the employer's dilemma. Hitherto, it was understood that a "simple" written form requirement would not protect the employer against unwanted amendments to the employment agreement; labor courts would merely argue that when an employer and employee wanted to grant a certain favor or advantage not provided in the employment agreement, the oral agreement overrode the written form requirement because the parties allegedly also orally amended the written form requirement. Thus, the so-called "simple" written form requirement offered no protection against oral amendment of the written form clause itself. The response of labor lawyers and HR practitioners to this labor-court approach was the "qualified" written form requirement, which even the Federal Labor Court believed worked as intended, preventing nonwritten amendments. But no longer.

The Federal Labor Court held in its new decision that the qualified written form requirement, if considered as terms, is invalid. The reason is that Section 305 b of the Civil Code provides that *individual* agreements prevail against stipulations in the form of terms. Since individual agreements can be made orally, a qualified written form clause stating that all amendments must be in writing, even the amendment of the written form itself, was considered misleading (because it sounds as if *individual oral* agreements are no longer possible) and thus an inappropriate disadvantage to the employee, according to Section 307 of the Civil Code.

The new decision does not leave qualified written form clauses with much effect. Since it is only in rare instances that employers will be able to negotiate employment agreements that do not qualify as terms, there is practically no way to escape this new case law on terms. This decision substantially limits the use of the classic "qualified" written form requirement. If the employer—in an effort to escape the allegation that the clause is excessive—explicitly provided that oral amendments remain possible, it would take him back to square one—exactly where he would have been without any written form agreement. One can only hope that the courts find a way to limit the effect of this unfortunate decision. Otherwise, the future may bring exactly what the written form requirement was intended to avoid: a lot of disputes about alleged oral amendments to the employment agreement.

WORKING WHILE ON SICK LEAVE

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It happens over and over again: an employer learns that an employee is working another job while on sick leave. What alternatives, in terms of taking action against such an employee, are available to the employer?

The Federal Labor Court recently opined on whether an employer may terminate such an employee. The gist of the Federal Labor Court's holding was that an employer may terminate the employee on either of two grounds:

- First, termination may be warranted when working another job while on sick leave is evidence that the employee was not truly ill (*i.e.*, the employee feigned his illness and may be engaging in fraud).

- Second, working another job while on sick leave may be a breach of the employee's obligation to pursue a quick recuperation.

The Federal Labor Court concluded that either of the above scenarios could be grounds for an ordinary termination or even a termination for cause.

In the above-referenced Federal Labor Court case, the plaintiff-employee had been on sick leave for several weeks after injuring himself in a fall. The employer learned from a private detective that the employee had actually been operating a cafe during his sick leave, serving customers, emptying the dishwasher, and engaging in other physical activities. However, in itself, this fact was not sufficient for the Federal Labor Court to conclude that the employer could terminate the employee for cause. Instead, the Federal Labor Court remanded the case to the labor court of appeals to gather additional facts.

The following is a list of points a court may consider when determining whether termination is warranted:

- Each employee on sick leave has an implicit duty to act in a manner that will promote a rapid recuperation. This means that an employee on sick leave may not engage in activities that could hamper the recovery process.

An employee who performs the same job duties for a third-party employer while on sick leave from his actual employer has grossly breached his duty of good faith, and his actual employer may terminate the employee for cause.

- One-time activities, such as serving as a volunteer security guard at an event, will generally not constitute a material breach of good faith by the employee and thus will generally not be grounds for termination unless the employee has been issued a formal warning.

- An employer may not terminate an employee merely because the employee *may* have adversely impacted his recovery process; for the employer to issue a termination, there must have been a definite breach of the employer's interests.

- The type and intensity of the employee's engagement in a secondary activity may justify an employer's suspicion that the employee is feigning an illness.

- An employee who performs the same job duties for a third-party employer while on sick leave from his actual employer has grossly breached his duty of good faith, and his actual employer may terminate the employee for cause (this particular case involved a musician on sick leave who played in a different orchestra during the period in question).

- Working a full shift with another employer during sick leave can call into question a physician's certificate stating that the employee is unable to work.

The actions an employer may take against an employee who is not making every effort to recuperate quickly or who is fraudulently on sick leave—*e.g.*, issuing a notice of termination or disciplining the employee—can be determined only after all of the circumstances have been taken into consideration.

Experience has shown that courts often conclude that termination was not justified because the employer failed to put forth sufficient evidence that the employee breached his duty vis-à-vis the employer. They also conclude that disciplining the employee in some other form (*e.g.*, placing a warning in the employee's personnel file) is actually superfluous. Accordingly, employers should gather compelling evidence before taking any action against an employee who is engaged in other activities while on sick leave.

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