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GERMAN EMPLOYMENT LAW: BALANCING FREEDOM OF EXPRESSION AND WORKPLACE CIVILITY

Insights
Nov 13, 2024

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It's not uncommon in today's environment for individual expression to clash with workplace norms. Indeed, employee statements — both public and private — can have a major impact on workplace civility. Under German employment law, employers must strike a balance between respecting employees' freedom of speech and maintaining professionalism in the workplace, while also considering the criminal ramifications of hate speech and the nuances of digital privacy. This Insight explores the tension between Article 5(1) of the German Constitution and the legal obligations of employees. We'll also share recent case studies and help you understand the pivotal role of works councils in employment decisions. Read on for key takeaways on how to comply with German employment law when it comes to balancing free speech and workplace civility.

7 Concepts to Keep in Mind

1. Freedom of Speech vs. Employment Obligations: Article 5(1) of the German Constitution (Grundgesetz, GG) guarantees free speech, but it does not protect employees from consequences for statements violating workplace norms or legal standards.

2. Behavioral Context Matters: An employee's private conduct can impact their employment, particularly if it contradicts company values or disrupts workplace harmony.

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3. Criminal Implications Are Significant: Statements that constitute criminal offenses, such as hate speech or defamation, can lead to immediate disciplinary actions, including termination.

4. Privacy in Digital Communication: Recent rulings clarify that private communications, such as WhatsApp chats, may lack a reasonable expectation of confidentiality if they involve harmful statements about colleagues.

5. Interests of Works Councils: Employers must consult works councils before dismissing employees, emphasizing the need for transparency and due process in termination cases.

6. Public Perception is Key: The public nature of an employee's statements can amplify consequences, especially in sensitive contexts involving race, ethnicity, or politics.

7. Complex Interest Balancing: Employers must strike a balance between upholding freedom of speech and maintaining a respectful, inclusive workplace.

The German Constitution

In contemporary Germany, the tension between individual expression and collective workplace values has become increasingly pronounced. As employees engage more actively in public discourse — particularly on contentious social and political issues — the potential for conflict between personal beliefs and professional obligations intensifies.

Article 5(1) of the German Constitution (Grundgesetz, GG) enshrines the right to free speech and expression, empowering individuals to voice their opinions openly. However, this freedom has specific legal boundaries. Article 5(2) sets limits imposed by general laws, youth protection, and personal dignity. Therefore, while expression is generally protected, there may be consequences when speech crosses boundaries.

Key Points of Article 5(1) GG:

- **Scope of Protection:** This article safeguards various forms of expression regardless of the medium or the content.

- **Value Judgments vs. Facts:** The distinction between opinion and defamatory statements is crucial. While subjective evaluations are permitted, they must be grounded in reason and facts.
- **Public Interest:** The employer's duty to maintain workplace decorum and employee dignity can supersede an employee's right to express offensive opinions.

Differentiating Between Opinion and Defamation

The Federal Constitutional Court (BVerfG) has established that critical commentary about workplace dynamics does not automatically equate to defamation. For example, characterizing a manager as "exploiting" employees could be acceptable as it pertains to workplace conditions and is not necessarily defamation.

The boundary between opinion and defamation was further clarified in a 2020 ruling, which emphasized that a statement is only considered defamation if it primarily seeks to malign a person rather than engage in substantive debate. Overly harsh or exaggerated criticism, however, does not automatically equate to defamation, as criticism is allowed to be pointed and sharp.

The European Court of Human Rights

The European Court of Human Rights (ECtHR) has delivered significant rulings highlighting the complexities of managing freedom of expression in employment relationships, particularly under Article 10 of the European Convention on Human Rights (ECHR). This article protects the right to freedom of expression while allowing for certain restrictions.

1. *Melike v. Turkey* (2021)

In the case of *Melike v. Turkey*, the court examined the dismissal of an employee who expressed her opinions on social media. The employee was fired for "liking" posts that addressed public interest issues. The ECtHR ruled that her dismissal constituted a disproportionate interference with her freedom of expression:

- The court emphasized that the expectations of loyalty and discretion in private-sector employment are not as stringent as in public sector roles.

- The dismissal was deemed excessive since it failed to consider the employee's role and the context of her actions, which did not disrupt workplace harmony.
- The ruling underscored the importance of context, noting that the nature of the posts and the employee's limited public profile should have been taken into account.

2. Danilet v. Romania (2024)

In *Danilet v. Romania*, a judge faced disciplinary action for social media posts suggesting political interference in the judiciary. The ECtHR found that the posts fell under the protection of Article 10, as they concerned issues of public interest, namely the integrity of the judicial system:

- The court reiterated that public employees, particularly those in positions of authority, have a higher degree of responsibility in their expressions but are still entitled to freedom of expression.
- The ruling highlighted that criticism of state institutions, even if perceived as controversial, does not justify disciplinary actions unless it incites hatred or violence.
- The court stressed the need for proportionality in any sanctions imposed, reinforcing that individuals should be able to discuss matters of public concern without fear of reprisal.

3. General Observations on the ECtHR's Approach

The ECtHR consistently emphasizes a few key principles when adjudicating cases related to freedom of expression in employment:

- **Proportionality:** Any limitation on the right to free speech must be necessary and proportionate to the aim pursued. Disciplinary measures should align with the severity of the employee's actions.
- **Public Interest:** Statements that concern matters of public interest, such as government accountability or workplace practices, enjoy a higher level of protection. The court often differentiates between personal insults and constructive criticism.
- **Context Matters:** The ECHR takes into account the specific context of the statements made, including the

employee's role, the content of their expression, and the potential impact on workplace relations.

- **Discretion in Private vs. Public Employment:** The court acknowledges that the nature of employment (public vs. private) affects the expectations of employee conduct, with public servants held to higher standards of discretion.

These decisions collectively underscore the delicate balance between safeguarding freedom of expression and maintaining the integrity and functionality of the workplace. As employees increasingly utilize social media and public platforms, the implications of their statements continue to be a significant focus of legal scrutiny, shaping the evolving landscape of employment law in Europe.

Distinguishing Between Private Conduct and Workplace Behavior

Private vs. Occupational Conduct

The principle that personal conduct should not impact an employee's job stands, but exceptions exist.

Relevant Case Law:

- **German Federal Labor Court (BAG):** The court ruled in 2011 that personal activities can justify termination if they adversely affect job performance or workplace reputation.

When Does Private Conduct Affect Employment?

Several factors can influence this determination, including:

- **Public Image:** Employees in prominent positions are held to higher standards.
- **Behavioral Impact:** Conduct that undermines workplace relationships can lead to disciplinary actions.

Warnings and Dismissals for Misconduct and Mitigating Circumstances

Framework for Behavioral Dismissals

- **Infringement:** The behavior must justify a dismissal.
- **Prior Warning:** Typically, an employer must issue a warning, except in severe cases.

- **Interest Balancing:** The interests of the employer must be weighed against the employee's rights.

Essential Questions:

- What specific behavior is being challenged?
- Was the expression a personal opinion, a shared post, or a simple "like"?
- What was the context and audience of the statement?
- Which contractual obligations or workplace norms were violated?

Codes of Conduct and Social Norms

Employers frequently establish guidelines that dictate acceptable behavior, particularly concerning inclusivity and respect. For example, employees of media companies generally commit to certain ethical standards.

A notable case involved an athlete whose online remarks prompted severe disciplinary actions, illustrating the potential fallout from public statements.

Mitigating Circumstances

In evaluating misconduct, considerations such as spontaneity, social media dynamics, and contextual factors can affect outcomes. Consider this example:

An employee's offensive comments made in a moment of frustration may be treated more leniently compared to calculated, premeditated statements.

Impact of Criminal Conduct on Employment

While employment law primarily addresses civil matters, violations of criminal statutes can significantly affect employment relationships. Relevant examples include:

- **Defamation** (Section 185 of the Criminal Code, StGB)
- **Incitement to Hatred** (Section 130 StGB)
- **Violent Representation** (Section 131 StGB)

A serious breach of contract often arises when an employee's statements violate criminal laws. Statements that

incite violence or hatred can lead to immediate termination, particularly if they disrupt workplace harmony or contravene ethical codes.

Evidence and Usage Concerns – Especially Regarding WhatsApp

Admissibility of Private WhatsApp Chats

A recent ruling by the Federal Labour Court (BAG) last year provides crucial insights into the admissibility of private chat content in employment disputes:

- **Context:** An employee made offensive, racist, and violent statements in a private WhatsApp group with seven members.
- **Ruling:** The employee could only claim a legitimate expectation of confidentiality in exceptional circumstances. Such an expectation is contingent on the chat's content and the group's composition.
- **Conclusion:** If messages contain abusive or dehumanizing remarks about colleagues, it is challenging to justify a confidentiality expectation.

Implications of the Ruling

- **Expectation of Confidentiality:** Members of private chat groups may lose this expectation if their discussions involve harmful speech.
- **Broader Implications:** The BAG's ruling underscores the necessity of balancing personal privacy rights with workplace responsibility.

Challenges Arising from Online Expression

- **Shifting Content:** Chats that begin as innocuous can devolve into harmful discussions over time.
- **Loss of Confidentiality:** An individual's objectionable remark can jeopardize confidentiality for the entire group, resulting in potential repercussions for all members.

Case Study 1

A recent viral video from a nightclub features a group of people singing racist slogans to the tune of a popular party

song. This incident sparked outrage from political figures, including the Federal Anti-Racism Commissioner.

What if employees at your organization engaged in similar behavior? Despite the public backlash and the involvement of state authorities, German employment law provides robust protections for workers. The fundamental principle is that private behavior typically should not affect the employment status. The German Civil Code (BGB) and the Protection Against Dismissal Act (KSchG) establish that an employee's private actions are not automatically grounds for dismissal unless they explicitly violate workplace conduct or contract terms.

Key Legal Considerations:

- **Public vs. Private Conduct:** While private behavior is generally protected, the nature of the incident and its visibility complicate matters. The fact that the video went viral and was intentionally filmed indicates an awareness that their actions might not remain private.
- **Expectation of Confidentiality:** Referring to a recent ruling by the BAG, the court stated that individuals who engage in racist or violent speech in a private setting can forfeit their expectation of confidentiality. The ruling emphasized that if the participants in a chat or video are aware that their actions may become public, the protective scope of private communication diminishes significantly.

Case Study 2

In October 2024, a German labor court ruled that the dismissal of an employee for sharing a post on social media was justified. The employee had shared an offensive image in a private group in with a text that was seen as a critical commentary directed at the company's management in response to a recent employee survey.

Several employees, including union representatives, filed complaints about the post, feeling that it was threatening. The company decided to terminate the employee's contract without notice. The labor court ruled that the post constituted a clear threat to colleagues, causing a significant disruption to workplace harmony.

Key Legal Considerations:

1. The Impact of Social Media Behavior on Workplace

Harmony: Employees are expected to maintain a professional and respectful online presence, as social media posts that are perceived as threatening or harmful to colleagues or the company can have a direct impact on the work environment. The court's decision underscores that such behavior may justify disciplinary actions, including dismissal.

2. Context and Perception: While the post was shared in a private group, the court focused on how it was perceived by others, particularly union representatives and colleagues. Even in private online spaces, content that can be interpreted as threatening or offensive to others may breach the expected standards of conduct and lead to consequences for the employee.

Potential Consequences for Employees

Employers have begun to take action against the individuals involved in the nightclub incident, with some reported dismissals. The rationale is that the actions captured in the video represent a breach of both ethical standards and the company's values, particularly in a society that condemns racism.

- **Employment Status:** Dismissals can be legally justified if it can be shown that the employee's actions severely harm the employer's reputation or violate established conduct codes. However, employees may argue against dismissals based on their right to private conduct.
- **Public Image and Reputation:** Given the high-profile nature of the incident and the media attention it attracted, the potential for reputational damage to the employer is significant. Employers must weigh this against legal obligations to provide employees with fair treatment.

Potential Legal Proceedings

Should the dismissed employees choose to contest their terminations, they could face considerable media scrutiny, further complicating their situation. Expressing remorse or contrition may significantly impact the proceedings. The perception of whether individuals recognize the gravity of their actions will likely influence any potential legal outcomes.

The Role of Works Councils in Employment Decisions

German employment law mandates the involvement of the works council in significant employment decisions, including terminations. The relevant sections of the Works Constitution Act (BetrVG) stipulate that employers must inform and consult with the works council before dismissing employees. Key provisions include:

- **Section 102 BetrVG:** Employers must communicate the reasons for a dismissal to the works council before proceeding.
- **Section 80 BetrVG:** Works councils have the right to represent employees' interests, ensuring fair treatment in employment matters.

Implications for the nightclub case

In the context of the nightclub incident, the involvement of works councils could ensure that any disciplinary actions, including terminations, adhere to legal and procedural standards. Given the public nature of the incident, there will likely be heightened scrutiny on whether the proper processes were followed.

Conclusion

Employers must remain vigilant and informed about their rights and responsibilities, recognizing that what may begin as a private expression can have major implications for employment relationships and the reputation of a company. By fostering open communication, developing clear policies, and adhering to established legal guidelines, organizations can create a work environment that respects both individual freedoms, collective values, and corporate image.

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