The Employee's "Right to Lie"? – The Federal Labor Court on Employer Questions about Existing Severe Disabilities

INTRODUCTION

Employment laws prohibit employers from asking a variety of different questions in the hiring process. As a general rule, an employer may only ask questions if the employer has a legitimate, reasonable and protectable interest in receiving answers to those questions. Absent such interest, the applicant has a "right to lie" in response to the employer's questions. This means that an employee may answer a question untruthfully without having to be concerned that the employer may later challenge the employment agreement on the basis of fraudulent misrepresentation.

Until a few years ago, the Federal Labor Court (*BAG*) took the view that questions about severe disabilities are generally permitted regardless of whether the disability has any impact on the ability of the employee to perform his or her contractual obligations. Since § 81 para. 2 of the German Social Security Code (*SGB*) IX took effect on July 1, 2001 and the German General Equal-Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) took effect on August 18, 2006, this view is however no longer defensible, according to the prevailing opinion among legal scholars. The Federal Labor Court has not had occasion yet to decide this issue once and for all (see Federal Labor Court, decision of July 7, 2011 – 2 AZR 396/10). However, the Court has now decided in a decision dated February 16, 2012 to what extent an employer may ask questions about severe disabilities of employees who are already employed.

FACTS OF DECISION DATED FEBRUARY 16, 2012 6 AZR 553/10

The plaintiff had been recognized as being severely disabled with a 60-degree disability. The employer had no knowledge of the disability, however. When the employer entered insolvency after the plaintiff had worked for the company for about one and a half years, the employer and the local works council agreed to a so-called implementation agreement (*Interessenausgleich*) with a list of names that also included the plaintiff's name. To avoid mistakes in the social selection process, all employees had received a questionnaire at the beginning of the insolvency proceeding in which they were asked to provide information about their social status or to review existing data about their social status. In this questionnaire the plaintiff had answered in the negative the question of whether he suffered from any severe disabilities. Only after the plaintiff was terminated by the employer did the plaintiff disclose his disability in the course of the wrongful termination action filed by him against the employer, claiming that his termination was invalid because it had not been approved by the Integration Office (authority responsible for the protection of disabled individuals).

PRESS RELEASE FOR DECISION DATED FEBRUARY 16, 2012

According to the press release by the Federal Labor Court, it is lawful for an employer to ask employees about any existing disabilities at least after the employee has become eligible for special protection from termination, i.e., after six months of employment (§ 90 para. 1 no. 1 of Social Security Code IX). This rule is intended, in particular, to allow employers prepare for planned terminations. In the opinion of the Federal Labor Court, questions about any existing disabilities prior to termination are closely related to the employer's obligations to take into consideration any severe disabilities in the social selection process (§ 1 para. 3 of the German Wrongful Termination Act (*KSchG*)) and to obtain approval from the Integration Office prior to issuing any notices of termination (§ 85 of Social Security Code IX). If an employee with a severe disability answers this lawful question untruthfully, he is, in the view of the Court, precluded from invoking his severe disability in a subsequent wrongful termination action because doing so would be inconsistent with his earlier conduct. In the opinion of the Court, this holding does not discriminate against disabled individuals.

The rationale for the decision dated February 16, 2012 has not been published yet. However, it is likely that the Federal Labor Court will pursue a similar line of argument as the lower court did: The Regional Labor Court of Hamm, too, had denied the complaint. In its decision, this court too had recognized the need of the employer to ask questions about any existing severe disabilities in order to comply with the requirements of § 85 et seq. of Social Security Code IX thereby allowing the employer to determine whether an employee is eligible for special protection from termination. The Regional Labor Court of Hamm also found that an employer can meet the requirements of a proper selection process only if he knows and can take into consideration the criteria relevant for the balancing process. Another argument offered by the Regional Labor Court in support of its decision was that if an employee were allowed not to disclose a severe disability until after receiving notice of termination, the employee would be able to delay the termination effective date because the employer would then be required to obtain approval for another notice of

termination from the Integration Office immediately after the severe disability has been disclosed and the employer would have to issue another notice of termination after approval has been received.

PROSPECTS AND PRACTICAL RECOMMENDATIONS

It remains to be seen exactly how the Federal Labor Court will justify its decision. For all practical intents and purposes, however, the result of the decision is to be welcomed, because it provides employers with more leeway for asking questions of employees prior to termination. In the future, employers should consider asking questions about any existing disabilities prior to issuing any notices of termination, so as to avoid bad surprises down the road. In particular, such questions may avoid mistakes in the social selection process that must be completed prior to terminating employees for operational reasons, as well as delays caused by employees invoking special protection from termination.

Finally, it remains to be seen whether the Federal Labor Court's rationale will also address the related issue of whether questions about any existing disabilities may also be asked already during the hiring process. We expect, however, that the Federal Labor Court will, in effect, concur with the prevailing opinion among legal scholars that such questions are unlawful prior to signing of the employment agreement and that therefore questioned applicants, in fact, have a "right to lie".

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