Recent Legal Developments concerning Employer Letters of Reference

INTRODUCTION

Disputes concerning letters of reference are increasingly keeping the labor courts busy. Recent judgments by the Federal Labor Court have prompted us to provide this analysis of the current legal situation.

THE FINAL EVALUATION

Employers are obliged to make a final evaluation of the work performance and conduct of their employee, for which they may avail themselves of a scale of satisfaction levels similar to a school grading system. If an employer states that the employee has performed the duties assigned to him "to our full satisfaction", this is comparable to the grade "satisfactory". "Always to our full satisfaction" is comparable to an evaluation of "good", and "always to our utmost satisfaction" is equivalent to the grade "excellent".

According to the case law of the Federal Labor Court, the grade "satisfactory" (= "to our full satisfaction"), as the average grade on the scale of satisfaction, was deemed to be the starting point for the question of how the burden of substantiation was to be allocated in the specific case, inasmuch as the employee bears the burden of substantiation and proof for an evaluation above that grade, while this is borne by the employer for an evaluation below that grade.

DECISION OF THE REGIONAL LABOR COURT BERLIN-BRANDENBURG OF MARCH 21, 2013 – 18 SA 2133/12

These principles were most recently being given a real shake-up by the decisions of the lower courts. The Regional Labor Court Berlin-Brandenburg had based its deliberations on a dispute concerning a letter of reference on studies investigating what the "average" evaluation is, which came to the conclusion that 90 % of the examined letters of reference contained the final grade "good" or "excellent". The Regional Labor Court Berlin-Brandenburg concluded that the starting point for the allocation of the burden of substantiation and proof would have to be the grade "good" instead of the grade "satisfactory".

DECISION OF THE FEDERAL LABOR COURT OF NOVEMBER 18,2014 – 9 AZR 584/13

The Federal Labor Court, however, rejected the view of the Regional Labor Court Berlin-Brandenburg in its judgment of November 18, 2014 and thus confirmed its previous case law on the second appeal that the grade "satisfactory" forms the starting point for the allocation of the burden of substantiation and proof for a higher or lower grade. Although the Federal Labor Court did not dispute that the clear majority of references being written today contains the grades "good" or "excellent", one cannot derive any conclusions (to the benefit of the employee) whatsoever in the individual case from this fact.

CONCLUSION

Ultimately, the Federal Labor Court continues to view these cases as it did in the past, so that the case law of the Federal Labor Court remains in place. However, one should not draw a hasty conclusion that employers can see the giving of an above-average evaluation of performance upon separation as being "negotiable". If an employee has already received an interim letter of reference with an above-average grade or if above-average performance has been attested to in performance evaluations for bonus payments, there must be weighty reasons - which must be proven if disputed- for why these prior evaluations should suddenly no longer apply. Even if there really are such grounds, one must still ask which types of performance by the employee were ultimately most characteristic of the overall employment relationship.

CLOSING WORDS

Letters of reference regularly contain closing words such as "We thank … for our many years of working together and wish…. all the best in the future, both personally and professionally.“ These types of closing sentences certainly enhance the value of a letter of reference.

What applies if there is a dispute between the employer and the employee regarding the wording?

DECISION OF THE FEDERAL LABOR COURT OF DECEMBER 11, 2012 – 9 AZR 227/11

The Federal Labor Court had already clarified in its judgment of December 11, 2012 that the employer's expressions of personal feelings, such as thanking an employee for their work together, do not constitute required content in an employer letter of reference.

SEC. 109 (1) COMMERCIAL CODE

According to the Federal Labor Court, there is no basis in the statutes for the employee's claim to closing words, and certainly not to specific wording. In particular, this claim cannot be derived from Sec. 109 (1) Commercial Code (Gewerbeordnung= "GewO"), which establishes the claim of the employee to a letter of reference and defines the content of the letter. A duty to write a closing that is in keeping with the overall "grade" would ultimately mean that the evaluation of performance and conduct which had already been given would have to be repeated in a formulaic

manner. This kind of duty to provide a "double evaluation of performance" cannot be derived, however, from the law.

SEC. 109 (2) S. 2 COMMERCIAL CODE

The Federal Labor Court does not allow for a claim to a (particular) closing be derived from Sec. 109 (2) s. 2 GewO, according to which a letter of reference may not contain any features or wording which have the purpose of making a statement on the employee other than the statement evident from the form or content. Although the Federal Labor Court did not state in the above judgment whether the absence of closing words is to be interpreted as a "secret code" within the meaning of Sec. 109 (2) s. 2 GewO, it did state that Sec. 109 (2) s. 2 GewO contains at the very most a claim on the part of the employee that wording *not* be used. This claim to desist from using wording is sufficiently honored if the employer issues a letter of reference *without any* closing words upon the employee's request.

CONCLUSION

The employee thus has no claim to having the letter of reference contain a note of thanks or of best wishes for the future.

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