Social Media & WhatsApp in the context of employment

(Not only) the "El Ghazi" case before the BAG

Introduction

The question of when the line of permissible expression of opinion is crossed has long since ceased to concern only criminal and administrative courts. Increasingly polarised social debates have also led to labor courts becoming more involved. For example, what may appear to be a private opinion expressed on social media could also have consequences under labor law in certain circumstances. This issue has gained particular relevance due to the case of former Mainz 05 player Anwar El Ghazi, in which the Federal Labor Court (BAG) has now rejected the club's appeal against refusal of leave to appeal.

Off-duty conduct

Sharing and posting content on social media generally falls within the employee's private sphere. Nevertheless, an employee's off-duty conduct can lead to warnings and terminations if the employee thereby violates their duty of consideration toward the employer, jeopardizes workplace harmony, or similar. Statements made by employees, for example on social media, can therefore have consequences under labor law—particularly if the employee is recognizable as a member of the company (e.g., through work attire or explicit mention) and the content is likely to damage the employer's reputation. Such a work-related connection may also generally be considered in the case of messages in work-related WhatsApp chat groups.

Relevance of Fundamental Rights

Nevertheless, politically controversial statements by employees regularly touch on areas sensitive to fundamental rights; freedom of expression, in particular, must be observed here. This can result in heightened requirements for a warning or termination. In

principle, all value judgments fall within the scope of protection of freedom of expression. Even excessive or harsh criticism is protected, as long as the primary focus is not on defaming the person (so-called “abusive criticism”). In cases of doubt, ambiguous statements fall within the scope of protection of freedom of expression. However, this does not grant the employee carte blanche. Instead, when assessing a breach of duty in a specific individual case, freedom of expression is weighed against the employer’s legitimate interests in ensuring smooth business operations and protecting their reputation. Therefore, defamatory statements by the employee may also justify a warning or termination. False factual claims and abusive criticism, on the other hand, do not fall under the protection of freedom of expression. However, this does not automatically grant the employer the authority to issue a warning or terminate employment. Even offensive statements made by an employee in private WhatsApp chat groups may be exceptionally protected by their general right of personality, depending on the circumstances of the individual case, if the statement was made in a strictly private setting and the employee could reasonably assume confidentiality.

The “El Ghazi” Case

The principles outlined above were most recently discussed in the high-profile case of professional soccer player Anwar El Ghazi. He was a player of 1. FSV Mainz 05 and, on 15th October 2023—just over a week after Hamas’s terrorist attack on Israel—posted a message on his private Instagram account that included the phrase *“From the river to the sea, palestina will be free.”* Following a note from the club, he deleted the post after just a few minutes. After the club announced in a press release that it had issued a warning to the player because he had distanced himself from his original statements and expressed regret, the player in turn stated online that he neither distanced himself from his statements nor regretted his stance. The club subsequently terminated his employment contract without notice. The player’s unfair dismissal suit against this decision was successful before the Labor Court of Mainz and the State Labor Court of Rheinland-Pfalz. The BAG has also dismissed the appeal against the refusal of leave to appeal. The grounds for this decision have not yet been published. The judgment is thus final.

The State Labor Court based its decision in particular on the fact that, through its public press release and the warning (“yellow card”) mentioned therein, the club had tacitly waived its right to terminate the contract (“red card”) regarding the social media post of 15th October 2023. The player’s subsequent posts, on the other hand, did not contain any statements that were demonstrably no longer covered by freedom of speech. In particular, it was not apparent that the player had denied the right of the State of Israel to exist or justified Hamas’s terrorist attack on the State of Israel on 7th October. In any case, however, a warning is generally required before termination without notice can be issued for judgmental or misleading statements. This warning was not present here.

Practical Note

The “El Ghazi” case once again highlights the challenges involved in dealing with employees' unwelcome political statements, as well as other offensive statements, particularly on social media. While termination without notice is generally possible in such cases, any ambiguities or multiple possible interpretations work against the employer. It is therefore important to thoroughly investigate the facts and the circumstances surrounding the statement.

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