

Legal Update

Labour and employment

Questions Regarding Past Criminal Investigation Prior to Employment

Jens Völksen
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Employers may not ask candidates for employment whether they were ever the subject of criminal investigation. Candidates therefore have the “right to lie” in this connection.

Facts

The plaintiff applied for a teaching position at a general secondary school. Before he was hired, the candidate was asked to indicate whether he had a criminal record on a form and confirm that he was not under investigation by the Public Prosecutor’s Office and had not been in the course of the preceding three years. The plaintiff provided no information, although he had been under investigation several times in the past, but no charges were ever brought. The school then learned of the investigatory proceedings from an anonymous source. The plaintiff, who had in the meantime been hired as a teacher, was then dismissed with immediate effect for cause.

Decision

The Federal Labor Court ruled that the dismissal was invalid (Federal Labor Court, 15 November 2012, 6 AZR 339/11). The court stated that the plaintiff was under no obligation to provide on information past investigatory proceedings if no charges were brought. Referring to the plaintiff’s right to informational self-determination, the court reasoned that in view of the system of values underlying the Basic Law, the right of personality of a candidate for employment – as regards criminal investigation that did not result in charges – takes precedence over a potential employer’s interest in obtaining information. According to the court, this also follows from section 53 of the Federal Central Criminal Register Act (Bundeszentralregistergesetz – BZRG). According to this legislation, anyone convicted of a criminal offense may also claim that he or she has no criminal record if the sentence was relatively light (e.g., a fine of no more than 90 days’ earnings). This applies all the more so in the case of investigatory proceedings.

Comments

Job applicants are occasionally faced with the question as to whether they are allowed to lie when answering certain questions. This is considered acceptable, for example, in the case of questions regarding pregnancy or trade union membership. The question as to whether a person has a severe disability is also considered inadmissible in some cases. An employee must not face neg-

ative consequences from an untruthful answer in such cases. On the other hand, if an employee fails to answer a legitimate question truthfully that also has a bearing on the future employment relationship, the employment relationship may under certain circumstances even be terminated retrospectively. This could be the case, for example, if a significant conviction is concealed (e.g., fraud in the case of a bookkeeping employee or alcohol-related offenses in the case of a driver).

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author himself: Jens Völksen +49 221 33660-503 or jvoelksen@goerg.de. For further information about the author visit our website www.goerg.com.

Our office

GÖRG Partnerschaft von Rechtsanwälten

BERLIN

Klingelhöferstraße 5, 10785 Berlin
Tel +49 30 884503-0, Fax +49 30 882715-0

COLOGNE

Kennedyplatz 2, 50679 Köln
Tel +49 221 33660-0, Fax +49 221 33660-80

ESSEN

Alfredstraße 220, 45131 Essen
Tel +49 201 38444-0, Fax +49 201 38444-20

FRANKFURT AM MAIN

Neue Mainzer Straße 69 – 75, 60311 Frankfurt am Main
Tel +49 69 170000-17, Fax +49 69 170000-27

HAMBURG

Dammthorstraße 12, 20354 Hamburg
Tel +49 40 500360-0, Fax +49 40 500360-99

MUNICH

Prinzregentenstraße 22, 80538 München
Tel +49 89 3090667-0, Fax +49 89 3090667-90