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*German Tax and Legal News*

## **Notice of termination by reason of secret recording of a staff appraisal - Confidentiality of the spoken word as a contractual accessory obligation**

The State Labor Court of Rheinland-Pfalz had to decide on the consequences arising from a secret recording of a staff appraisal by using a Smartphone.

The secret recording of a staff appraisal is generally suitable to justify a behavior-based ordinary termination as well as an extraordinary termination „in itself“. The scope of legal consequences depends on the relevant circumstances of the case.

### **Facts**

On February 3, 2016 (7 Sa 220/15) the State Labor Court of Rheinland-Pfalz had to decide on the following facts: The plaintiff completed a jobeducation over a period of about three years and subsequently received a time-limited employment contract. From the beginning of the time-limited employment relationship the plaintiff was sick and unable to work. Therefore, the parties agreed upon reintegration measures. The start time of work 8 a.m. was ordered in writing. By reason that the plaintiff came to work only at 9:30 a.m. a few days later the supervisor had a staff appraisal with her. The plaintiff recorded the conversation – at least a part - secretly by using a smartphone. Later the employment contract was terminated by the employer by person-related reasons. During the following redundancy litigation, the plaintiff introduced the wording of the recorded staff appraisal into the procedure. Thereupon the defendant terminated the employment relationship again timely by reason of the secret recording of the staff appraisal and the unauthorized transfer to third parties. At the same time the employer reported an offence against the plaintiff. During the criminal proceedings, the plaintiff was given an order of punishment. The court had now to decide about the effect of the second termination of employment.

The State Labor Court dismissed the action and did not permit the appeal to the Federal Labor Court.

### **Judgment of the State Labor Court of Rheinland-Pfalz**

The court decided that the secret recording of a staff appraisal is generally suitable to justify a behavior-based termination or an extraordinary termination “in itself“. An employee who records a staff appraisal secretly breaches the contractual consideration duties in a significant way. The secret recording of the conversation is illegal because due to the general right of privacy everybody can generally decide who is allowed to record his spoken word as well as whether and in front of whom his recorded voice on audio file shall be played back. By secret recording of the confidential staff appraisal and the subsequent using during the legal proceedings the relationship of trust between the plaintiff and her supervisor as well as between the plaintiff and the defendant has been destroyed. An ordinary termination of employment which is based on this breach of duty is not disproportionate. Due to the seriousness of the breach of contractual duty a prior warning was not required. The defendant may assume that all employees are aware – even without being expressly advised - that the secret recording of a conversation is prohibited, especially because such behavior is punishable by law.

### **Comments**

In the present case the court carried out a detailed weighting of the affected interests. Therefore, the circumstances of the individual case are always decisive and should be taken into account. Every employee who records a staff appraisal secretly by using his smartphone will be liable to prosecution and must always fear consequences under labor law.

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