PRIVATE LAW

Federal Labor Court strengthens religious freedom at the workplace

By Achim Seifert

Introduction

The decision of the Bundesarbeitsgericht [Federal Labor Court, Abbr. BAG] of October 10, 2002[1] raises essentially the increasingly important question of the exercise of religious freedom at the workplace. The case concerned the ordinary dismissal of a Moslem saleswoman employed in a big department store claiming to wear during the working time, according to the rules of her religious belief, as headgear a shawl covering the hair. The court has declared that the dismissal is violating section 1 par. 2 Kündigungsschutzgesetz [Act on the Protection against Unfair Dismissal, Abbr. KSchG] and has mainly stated that the wearing of a headgear at the workplace as an expression of the religious belief does not justify as such the ordinary dismissal of an employee.

Seldom, a court decision has caused such heated and emotional reactions in the public. According to the President of the BAG, never before the court has received so many letters from the public criticizing the decision or even insulting the judges who have participated in the decision. At first glance, this must appear as surprising since religious freedom is constitutionally guaranteed by article 4 Grundgesetz [Basic Law, Abbr. GG] and develops also a horizontal effect in the employment relationship.[2] But if we look deeper, the reactions caused by the decision of the BAG reveal a society which traditionally has been molded by the different groups of Christian belief and which only since the immigration to Germany starting in the sixties is facing the coexistence between Christianity and several non Christian religions such as the Moslem religion. Although meanwhile religious pluralism has become, as a result of a strong immigration since the sixties, something normal, the

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1 2 AZR 472/01. The text of the decision is available by internet: http://www.bundesarbeitsgericht.de/

2 On the horizontal effect of the fundamental rights in the employment contract and of the guarantee of religious freedom in particular cf. RICHARDI, in: Münchener Handbuch zum Arbeitsrecht, 2nd edition, München 2000, volume 1, § 10, in particular notes 47-49.

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result of this social process is not yet deeply rooted in the consciousness of German society. Christianity and its symbols are still often seen as the symbols of a dominant culture whereas the symbols of other non Christian religious communities often are not recognized in the same way and are supposed to take second place.

The decision of the BAG joins some other recent court decisions concerning the religious freedom at the workplace and reflecting a new self-consciousness particularly of Moslems claiming increasingly their religious freedom before the courts. In this context, the decision of the Landesarbeitsgericht Hamm [Labor Court of Appeal of Hamm, Abbr. LAG Hamm] of January 18, 2002[3] has to be recalled in which the question was raised whether the constitutionally guaranteed religious freedom, enshrined in art. 4 GG, entitles a Moslem employee to interrupt his work for several minutes in order to make his prayer according to the rules of his Moslem faith. Another example which is by far more related to the decision of the BAG is the ruling of the Bundesverwaltungsgericht [Federal Administrative Court, Abbr. BVerwG] of July 4, 2002.[4] In that case the court had to decide whether the State of Baden-Wuerttemberg had the right to refuse to employ a young female teacher at a secondary school because she announced to wear a shawl covering her hair as expression of her Moslem belief during school classes. The court ruled that the State's refusal to employ the teacher was legal and relied basically on the constitutional principle of religious neutrality of the State which has to be respected in public schools. The "shawl-decision" of the BVerwG, therefore, only concerns the wearing of the Moslem shawl in some establishments belonging to the public sector whereas the decision in hand of the BAG deals with the religious freedom of employees and its limits in enterprises of the private sector.

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3 5 Sa 1782/01, Neue Juristische Wochenschrift (2002) [Abbr. NJW], p. 1970.

4 2 C 21/01, NJW (2002), p. 3344; see also the decision of the Verwaltungsgericht Stuttgart [Administrative Court of Stuttgart], 15 K 532/99, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (2000) [Abbr. NVwZ], p. 959 and the decision of the Verwaltungsgerichtshof Mannheim [State Administrative Court of Mannheim], 4 S 1439/00, NJW 2001, p. 2899. The case is now pending at the Bundesverfassungsgericht [Federal Constitutional Court, Abbr. BVerfG] (2 BvR 1436/02). A similar case coming up from Switzerland lead to the decision of the European Court of Human Rights of February 15, 2001, No. 42393/98, NJW 2001, p. 2871 (the decision is also available via internet: www.coe.int/portalT.asp). The court holds that the State forbidding his teachers to wear a Moslem headgear during the classes does not violate article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms because such a limitation of the religious freedom of a teacher would be necessary in a democratic society for the protection of the religious freedom of others (article 9 par. 2 of the Convention).

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The facts and the procedure

The plaintiff was employed as a saleswoman by the defendant, who is running a big department store selling *inter alia* fashionable articles, cosmetics, toys, stationary, sweats but no groceries and employing about 100 employees in a small town in the STATE OF HESSE. Coming back from her parental leave in May 1999, the plaintiff informed the defendant that her religious faith has meanwhile changed and that she intended to wear a shawl covering her hair as an expression of her affiliation to the Moslem religion during the working time. The defendant denied her wish and gave her some days time for reflection. After affirming her intention to wear the headgear, the defendant dismissed the plaintiff without notice in May 1999. But the defendant later withdrew this dismissal. In August 1999, the defendant informed the works council about his intention to dismiss the plaintiff with notice and declared that it is not in conformity with "the style of the house" to employ salespersons who are wearing a headgear during the working time; customers would not accept that. After receiving the unanimous approval of the works council to the ordinary dismissal, the defendant dismissed the plaintiff with two months' notice on August 30, 1999. The plaintiff never performed her work wearing the headgear.

In the then following law suit before the Labor Courts, the plaintiff attacked the legality of the ordinary dismissal. Leaving aside the question whether the works council was consulted according the legal requirements of section 102 Betriebsverfassungsgesetz [Works Constitution Act, Abbr. BetrVG], the case mainly raised the question whether the ordinary dismissal was in accordance with the KSchG which requires a social justification for the dismissal (section 1 par. 2 KSchG).[5] Possible social justifications for an ordinary dismissal are economic reasons, reasons concerning the employee's behavior and reasons concerning the employee's personality. In this case, the question was whether the plaintiff's headgear constitutes a reason concerning the employee's behavior or a reason concerning the employee's personality. Moreover, the plaintiff claimed the payment of wages since the dismissal has entered into force because of the defendants' non-acceptance of her work performance (section 615 BGB).

The Arbeitsgericht Hanau [Labor Court of Hanau], the court of first instance, dismissed the plaintiffs' action by decision of April 13, 2000. Also the plaintiffs' appeal

[5] For a more in depth analysis of the Act on the Protection against Unfair Dismissal cf. Weiss/Schmidt, *The Federal Republic of Germany*, p. 106 in: Blancpain (ed.), *International Encyclopedia for Labour Law and Industrial Relations*, The Hague London Boston, Volume 6 (March 2000).

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to the LAG Hessen was without success. According to the LAG,[6] the ordinary dismissal has been socially justified because the plaintiffs' intention to wear a headgear during the working time constitutes a reason concerning the personality (section 1 par. 2 KSchG). Although there are no explicit dress regulations for the defendants' salespersons, these have the contractual obligation resulting from the principle of good faith (section 242 BGB) to dress themselves in an appropriate way for work which means in the case of the defendants' department store in a discreet, non provoking way. Therefore, the plaintiff had the duty to adopt her appearance during the working time to the defendants' customers who have for their majority "rural and conservative views"; the headgear would not be in accordance with these requirements. The court conceded that the rules of the Moslem religion are forbidding the plaintiff to perform the work without a headgear; in so far she is exercising her constitutionally guaranteed religious freedom. But on the other hand, the defendant as well can invoke constitutional rights: he is protected by the guarantee of free enterprise (article 2 par. 1, article 12 par. 1 and article 14 par. 1 GG). He therefore cannot be obliged to allow the plaintiff by way of trial to perform the work with a headgear. It would be probable that the plaintiffs' behavior would cause conflicts with colleagues and promote the estrangement of customers from the defendants' department store. Moreover, the defendant had no other workplace to which the plaintiff could have been transferred without causing these troubles.

REASONING OF THE FEDERAL LABOR COURT

The BAG overruled the decision of the LAG Hessen and declared the ordinary dismissal of the plaintiff as unfair and violating section 1 par. 2 KSchG. Since the necessary facts to calculate the plaintiffs' wage claims had not been stated by the LAG Hessen, the BAG had to remand the case to the LAG.

Contrary to the opinion of the LAG Hessen, the BAG does not hold, that the plaintiffs' work performance with headgear is a reason concerning the personality of the plaintiff socially justifying her dismissal. Although it is possible that an employee looses his ability to perform his work for religious reasons, the plaintiffs' religiously motivated covering of the hair with a shawl does not have such an impact on the performance of the parties' employment contract: the plaintiff is still able to sell goods in the defendants' department store and has therefore still the necessary ability to perform her contractual work as a saleswoman.

Furthermore, the BAG doesn't see fulfilled the legal requirements for an ordinary dismissal for a reason concerning the employee's behavior. The plaintiff would not

[6] 3 Sa 1448/00, NJW 2001, p. 3650.

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violate her contractual obligations in wearing a headgear as an expression of her religious belief during the working time. The courts' point of departure is that the employee has, in principal, the contractual duty (section 242 BGB) to dress himself according to the needs of the employers' enterprise; the employer can concretize this duty by issuing instructions regarding the clothing during the working time to his employees.

This right of the employer to issue instructions is limited by the principle of equity enshrined in section 315 par. 1 BGB. As this general clause has to be interpreted in the light of the constitutional rights – according to the jurisdiction of the BVerfG they have an indirect horizontal effect –,[7] the BAG weighs the fundamental rights of the defendant and of the plaintiff at that point.

The plaintiff, on the one hand, can invoke the constitutional guarantee of religious freedom (article 4 GG). The court argues that the Moslem headgear is a symbol for a certain religious belief. In this context, it is not relevant whether the headgear is the expression of an obliging rule of the Koran: article 4 GG does not only guarantee the freedom to exercise a religion according to the rules of religious authorities but also the freedom of an Individual to act according to its inner beliefs. The only condition is that the behavior of the Individual is motivated by its religious belief.

On the other hand, the behavior of the plaintiff can also affect the constitutional guarantee of free enterprise (article 12 par. 1 GG). But since the defendant as employer has the burden of proof concerning the facts constituting the social justification of the dismissal (section 1 par. 2 s. 4 KSchG) and since he did not present sufficiently concrete facts with regard to potential disadvantages which can result from the plaintiffs' wearing of a headgear during the working time, the BAG considered himself unable to find out to which extent this constitutional freedom of the employer is affected. With view to the high value attributed to the religious freedom by the Constitution, the court holds that the employer has to explain a real endangerment of his constitutional freedom; the realization of the defendants' fears would not be probable according to the "experience of life".

As a result of the high consideration the guarantee of religious freedom has in the Constitution and in art. 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the court argues that the defendant as employer had the obligation to find out by way of trial whether the plaintiffs' work performance with headgear causes the problems with colleagues and customer preferences feared by the employer. If that were the case, the employer then would

7 Cf. BVerfG, decision of November 22, 1951, BVerfGE 7, p. 198 (204) – "Lüth".

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be obliged to find out whether these problems could be resolved in another way than by a dismissal of the employee.

CRITIQUE

The decision of the BAG has to be welcomed. It marks an important step forward in the protection of religious freedom and of religious pluralism at the workplace in Germany. Nevertheless, it gives grounds for some further observations.

The decision raises the general question to which degree the employer is entitled to limit individual rights of employees if they are in conflict with his customers' preferences.[8] Until now, the question has not been widely discussed in German labor law. It only has been raised in the context of the principle of equal treatment between men and women at the workplace (section 611a par. 1 BGB): according to this rule, a discrimination between the sexes is only allowed if the sex constitutes a necessary condition for the occupation. It is consented that in interpreting the notion of "necessary condition" also the opinions of thirds can be taken into consideration.[9] But it is not clear yet, to which extent the employer can take into account customer preferences. It would be probably too far-reaching if only the employers' subjective consideration of his customers' preferences were sufficient.

It has therefore to be approved, when the BAG holds that, with view to the high consideration the religious freedom has in the constitution, the employer only fulfills the requirements of his burden of proof concerning the social justification of the dismissal (section 1 par. 2 s. 4 KSchG), if he explains in a concrete way how the headgear of a saleswoman could endanger his constitutional freedom of enterprise. There is no "experience of life" which could justify a *prima facie* evidence in such cases. On the contrary, the "experience of life" speaks rather for the secondary importance of the headgear of a saleswoman in a big department store. In particular in the retail sector, in which there is generally a very hard competition, the main term of competition still remains the price of the commodity. Therefore the employer has to explain concretely why a particular clothing of his salespersons can be in conflict with customer preferences.

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8 Cf. Thüsing, *Vom Kopftuch als Angriff auf die Vertragsfreiheit*, NJW 2003, p. 405 (406).

9 Cf. LAG Berlin, decision of January 14, 1998, 8 Sa 118/97, NJW 1998, p. 1429; Pfeiffer, in: Becker/Etzel, et al., Gemeinschaftskommentar zum KSchG und zu sonstigen kündigungsschutzrechtlichen Vorschriften, 6th edition, Neuwied/Kriftel 2002 (Abbr.: KR-author), § 611a BGB, note 54.

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If the employer cannot concretely explain that a particular clothing of employees which is religiously motivated affects customer preferences, he principally has the obligation to tolerate the religious headgear. The uncertainty concerning possible customer reactions is in favor of the employee who is invoking his religious freedom. The employer only can refuse employing a saleswoman with the religious headgear, if the customers react in a negative way and do not frequent anymore the store of the employer. The problem in the future will be to define to which degree the employer is obliged to take the negative customer reactions and the thereby following decrease in sales. On the one hand, it is probably to far-reaching, if the employer only could react in case that the religiously motivated headgear causes *existential* economic problems to his enterprise. But on the other hand, every negative economic consequence for the employer can be sufficient neither. It would be in contradiction with the principles on dismissals under third-party pressure, according to which,[10] a dismissal under the economic pressure of colleagues or of other thirds such as the employer's customers has to be the only legal means for the employer to avoid "serious economic consequences" for his enterprise.

Surprisingly, the BAG had not recourse to the constitutional principle of equal treatment which forbids discriminations on the ground of religion and belief (article 3 par. 3 constitution), although dismissals violating this constitutional norm are contrary to public policy and are void (section 134 BGB).[11] Regarding dismissals, section 134 BGB applies independently of section 1 par. 2 KSchG. Whether article 3 par. 3 GG only covers direct or also indirect discriminations, is still object of a debate,[12] that, after two recent decisions of the BVerfG, seems to be decided for the practice in favor of the submitting of indirect discriminations to article 3 par. 3 GG.[13] The BAG would not have had to enter into this debate, since the dismissal constituted a direct discrimination on the ground of religion: as the defendant himself explained that most of his customers have "rural and conservative views", it can be suggested that not the plaintiffs' headgear as such was bothering him but the headgear as an expression of her Moslem belief. A discrimination on the ground of religion or belief therefore only can be considered as legal, if it is justified

10 Cf. KR-Fischermeier, § 626 BGB, note 208 with references.

11 Cf. KR-Friedrich, § 13 KSchG, note 183; BAG, decision of September 28, 1972, 2 AZR 469/71, Entscheidungssammlung zum Arbeitsrecht [Abbr. EzA] Nr. 25 zu § 1 KSchG.

12 For further details see Osterloh, in: Sachs (ed.): *Kommentar zum Grundgesetz*, 3rd edition, München 2003, Art. 3, note 255 with further references.

13 Cf. BVerfG, decision of November 27, 1997, 1 BvL 12/91, BVerfGE 97, p. 35 (43); decision of January 30, 2002, 1 BvL 23/96, BVerfGE 104, p. 373 (393). The text of these decisions also can be found on the homepage of the BVerfG: www.bundesverfassungsgericht.de

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by colliding constitutional law,[14] in particular by the defendants' freedom of enterprise (article 12 par. 1 GG). This conflict between the principle of equal treatment and the freedom of enterprise has to be resolved according to the principle of proportionality leading to the same considerations the court had made with regard to the conflict between the plaintiffs' religious freedom and the defendants' freedom of enterprise.

Finally, the question has to be raised, how has to be decided, if the employee has no customer contact. In the case that the work performance is only limited to the "inner circle" of the employers' enterprise, the wearing of a shawl as an expression of her Moslem belief only can cause internal troubles within the personnel. But the employers' concrete fear that internal conflicts within the personnel could be raised by such a practice does not justify as such the dismissal of an employee. For he has the contractual obligation to protect an employee exercising his religion at the workplace against intolerant colleagues and to intervene, if it is necessary, to make sure that the religious freedom of the employee is respected. This obligation results from the principle of good faith (section 242 BGB). Insofar the principles that have been developed by the BAG with regard to dismissals pronounced under third-party pressure apply: according to them, the employer is obliged to protect the employee in question if colleagues or other thirds create economic pressure on the employer and demand the dismissal of an employee; only if the serious reconciliation efforts of the employer have no success, he can submit to their economic pressure and dismiss the concerned employee.[15] There is no reason, why this should not apply to cases in which internal conflicts are caused because an employee exercised one of his constitutional freedoms.

PROSPECTS: THE NEW EUROPEAN DIRECTIVE ON EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION

The decision of the BAG gives the opportunity for some indications on the prospects. In the near future, the case decided by the court has to be considered in the light of the European Directive 2000/78/EC of the Council from November 27, 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation.[16] The Directive has to be implemented by the Member States until December 2, 2003.

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14 Cf. Osterloh, op. cit., Art. 3, note 254.

15 Cf. KR-Fischermeier, § 626 BGB, note 206 with further references.

16 Official Journal of the EC, L 303/16 of December 2, 2000.

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This important new Directive, laying down a general framework for combating discrimination on various grounds, *inter alia* the discrimination on the grounds of religion and belief (article 1), covers not only conditions for access to employment, employment and working conditions and the pay but also dismissals (article 3 par. 1 lit. c). It not only forbids direct but also indirect discrimination on the grounds enumerated in the Directive. According to the definition of the Directive (article 2 par. 2 b), indirect discrimination supposes that an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, at a particular disadvantage compared with other persons.

According to these new anti-discrimination rules, direct discriminations on the grounds of religion or belief – such as in the present case –, will generally be forbidden. The Directive foresees only two restrictive justifications for an unequal treatment on the grounds of religion or belief. Article 4 par. 1 allows the Member State to provide that the unequal treatment shall not constitute a discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. For the moment it is unclear, whether the FRG will make use of this authorization in the Directive. But even if the German legislature made use of it, the present case would have been decided in the same way: it is probably not a "genuine and determining occupational requirement" for the plaintiff as a saleswoman in a big department store to omit wearing a headgear as an expression of her Moslem belief. The second possible justification for a direct discrimination on the grounds of religion or belief only concerns the special case of occupational activities within churches (article 4 par. 2), which is not of interest in the present context and therefore can be left aside.

The rules of the Directive will by far have a stronger impact for indirect discriminations on the grounds of religion and belief. They go beyond the principle of equal treatment in article 3 par. 3 GG. The difference between European and German constitutional law is less the focus on the indirect discrimination: as already said before, the BVerfG tends in his recent decisions to submit also indirect discriminations to article 3 par. 3 GG. The main difference between the two is probably that the principle of equal treatment only develops an attenuated horizontal effect in the employment contract and is therefore more "flexible" with regard to the results whereas the new Directive focuses directly on employment and occupation and forbids in principle also all indirect discriminations on the grounds of religion and belief, unless the discriminating provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (article 2 par. 2 b i). Article 10 par. 1 shifts the burden of proof to the employer that there has been no breach of the principle of equal treatment, if the dis-

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criminated employee has established facts, from which it may be presumed that there has been an indirect discrimination.

With regard to the present case, the wearing of a Moslem shawl at the workplace, the Directive's provisions on indirect discrimination on the grounds of religion or belief can have a strong impact if there are dress regulations for the employees in the enterprise established by the employer himself or by works agreement concluded between the employer and the works council.[17] Dress regulations generally forbidding employees to wear a headgear during the working time without explicitly differentiating between religious beliefs, for instance, particularly can put female employees belonging to the Moslem religion at a particular disadvantage compared with their colleagues having another belief. In these cases, the judge has to ask, whether this discriminating practice is objectively justified by a legitimate aim and whether the means of achieving that aim are appropriate and necessary (article 2 par. 2 b i): therefore the indirect discrimination has to be necessary and appropriate to protect the employers' freedom of enterprise (cf. article 16 of the Charter of Fundamental Rights of 2000).[18] Since the rate of sales can depend on customer preferences, the employers' respect of them is certainly covered by the constitutional freedom of enterprise and hence a legitimate aim for an indirect discrimination. The great challenge for the Labor Courts will be to find out to which degree the respect of customer preferences is appropriate and necessary to protect the employers' legitimate interests. Regarding this point, the Directive does not give any concrete hints. It therefore will be up to the courts to develop criteria permitting to reconcile the opposing interests of employer and employee. On the one hand, it would certainly not be in accordance with the aim of the Directive, if every negative economic impact on the employer's business were sufficient to justify an indirect discrimination on the grounds of religion or belief: for this would too widely open the door for indirect discriminatory practices and hence undermine the general interdiction of indirect discriminations in article 2 par. 2 lit. b of the Directive. But on the other hand, it is probably too far-reaching, if the employer only could react in case that the religiously motivated headgear of an employee causes existential economic problems to his enterprise. The adequate solution will probably be in between both extremes: at least, serious economic problems caused should be required.

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17 If there is a works council in the establishment, the employer has to respect the works councils' codetermination right with regard to the elaboration of dress regulations (section 87 par. 1 No. 1 BetrVG): cf. BAG, decision of August 8, 1989 – 1 ABR 65/88 and of December 1, 1993 – 1 AZR 260/92, Arbeitsrechtliche Praxis [AP] No. 15, 20 zu § 87 BetrVG 1972 *Ordnung des Betriebes*.

18 The text of the Charter of Fundamental Rights of the EC can be found on the following internet-address: www.ue.eu.int/df/docs/en/ChartEN.pdf

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These principles on indirect discrimination on the grounds of religion or belief also apply to the cases where no explicit dress regulations are existing in the enterprise. As already mentioned before, the employee has the contractual duty resulting from the principle of good faith (section 242 BGB) to dress himself according to the character of the employers' business and the expectations of his customers if there are no explicit dressing regulations in the enterprise. If such implicit dress regulations forbid female employees to wear a headgear covering the hair, they also can constitute an indirect discrimination on the grounds of religion or belief. In these cases, the Directive limits the employee's contractual duty resulting from the principle of good faith. The courts therefore will have to interpret the principle of good faith in the light of article 2 par. 2 b i) of the Directive: particularly, they will have to examine whether such implicit dressing regulations are justified by legitimate interests of the employer and whether the restrictions resulting from them for the employee are appropriate and necessary to protect his freedom of enterprise.

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