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## Reconsidering the Louisiana Doctrine of Employment at Will: On the Misinterpretation of Article 2747 and the Civilian Case for Requiring "Good Faith" in Termination of Employment

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RECONSIDERING THE LOUISIANA DOCTRINE OF  
EMPLOYMENT AT WILL: ON THE MISINTER-  
PRETATION OF ARTICLE 2747 AND THE CIVILIAN  
CASE FOR REQUIRING “GOOD FAITH” IN  
TERMINATION OF EMPLOYMENT

JOHN DEVLIN\*

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The traditional American rule of employment at will proceeds from the assumption that employment is a consensual relation. Therefore, absent an employment contract of specified length, employees may be fired or may quit their jobs at any time for any reason or no reason, without legal liability on either side. This rule and its concomitant rejection of any general cause of action for wrongful discharge serve important social objectives, such as the maintenance of a free and efficient flow of human resources and the avoidance of frictional expense when an employer fires an unproductive or disloyal employee. However, the legal rights conferred by the at-will rule are also subject to abuse, particularly by employers.<sup>1</sup> Louisiana employees have been coerced to do acts that

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1. The argument made in this article—that general principles of good faith and adherence to promises *should* govern employment contracts—applies to both sets of parties to such contracts. Such principles should apply to both at-will employees who quit their jobs and employers who fire their at-will employees. However, while the logic cuts in both directions, this article will focus only on employers’ abuses of the at-will doctrine. The reasons for this limited focus are twofold.

First, while the legal relations between employers and employees may be symmetrical, in the real world, power relations usually are not. Of course, employees with rare skills or expertise may have the economic clout to secure fixed-term employment contracts for themselves or protect themselves through unionization or some other way. In any event, the substantial cost to an employer of hiring and training a similarly skilled replacement usually creates an effective economic disincentive against bad faith termination. However, many employees do not have such skills, and most workers who lack irreplaceable skills come within the ambit of employment at will. As Louisiana courts have occasionally acknowledged, most at-will employees depend on their jobs far more than their employers depend on them; thus, at-will employees are more likely to suffer from the abusive use of the rights conferred by that doctrine. *See, e.g., Moore v. McDermott, Inc.*, 494 So. 2d 1159, 1161 (La. 1986) (quoting *Wiley v. Missouri Pac. R.R.*, 430 So. 2d 1016, 1019 (La. Ct. App.

are illegal or against public policy.<sup>2</sup> Louisiana employers have relied on the rule to avoid legal obligations, for example, by discharging an employee shortly before pension or other benefits vest,<sup>3</sup> or by

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3d Cir. 1982), *writ denied*, 431 So. 2d 1055 (La. 1983)). Consequently, use (and abuse) of the at-will doctrine by employers may be fairly said to pose the more exigent legal issues.

Second, the jurisprudence seems to indicate that employees are far more likely to feel that they have been victimized by their employers' exercise of the right to terminate their relation at will, than are employers to feel harmed by an employee's exercise of his right to depart. Except in the context of covenants not to compete or similar claims of unfair competition, cases involving employer complaints about an employee voluntarily leaving employment are far too few to provide much grist for the critical mill.

Nonetheless, in an appropriate case, one in which an employee's decision to resign might impose hardships on an employer similar to those normally imposed on terminated employees, the logic of the arguments proposed here would apply with equal force. The principles set forth in this article certainly apply and bind the employee as surely as they bind the employer.

2. *See, e.g.*, *Gil v. Metal Serv. Corp.*, 412 So. 2d 706, 707-08 (La. Ct. App. 4th Cir.) (finding cause of action for wrongful discharge where employee was fired because he refused to participate in illegal acts), *writ denied*, 414 So. 2d 379 (La. 1982).

The rigidity of the current Louisiana version of employment at will has also been relied on by at least one court to weaken the antidiscrimination protections that would otherwise be available to employees in Louisiana. *See Bradley v. Latter & Blum, Inc.*, 559 So. 2d 46, 47-48 (La. Ct. App. 4th Cir.) (distinguishing between federal and Louisiana laws against gender discrimination in the workplace), *writ denied*, 566 So. 2d 397 (La. 1990). The issue arises in the context of so-called "mixed motive" cases, where some evidence exists both to show that the challenged employer action was motivated by discriminatory reasons and also to show that it was motivated by legitimate nondiscriminatory reasons. *Id.* at 48. Even as restrictively interpreted in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), federal law provided that an employee who made a prima facie case that she was discriminated against because of her race or sex would prevail unless the defendant showed that the same result would have occurred anyway, based on nondiscriminatory reasons alone. *Id.* at 246. In *Bradley*, the court held that Louisiana's statute prohibiting employment discrimination, LA. R.S. 23:1006, should be read in conjunction with article 2747, and therefore interpreted differently than federal law. 559 So. 2d at 47-48. Because article 2747 requires no statement of reasons for termination, the court interpreted the state antidiscrimination statute as *not* requiring defendants in mixed-motive cases to prove that the same result would have been reached regardless of discrimination.

3. *See, e.g.*, *Walther v. National Tea*, 848 F.2d 518, 519-20 (5th Cir. 1988) (holding that firing an at-will employee in order to prevent the vesting of pension benefits did not constitute an "abuse of rights" under Louisiana law); *Hill v. Missouri Pac. Ry.*, 8 F. Supp. 80, 81 (W.D. La. 1933) (holding that a claim that an employer discharged an employee to avoid paying pension benefits stated no cause of action, despite employer's promise to employ worker "until such time as he retired on a full pension"). *Cf. Williams v. Touro Infirmary*, 578 So. 2d 1006, 1010 (La. Ct. App. 4th Cir. 1991) (holding that at-will employees who alleged that their employer fired them to avoid paying accrued retirement benefits did not state a cause of action, but noting that claims of employer's bad motive might suffice to disprove possible "qualified immunity" defense to employees' related slander claim).

Note, however, that this particular problem—employers terminating employees to avoid paying retirement benefits—has been rendered largely moot by federal ERISA

retaliating against employees or their families when employees assert legally protected rights and privileges.<sup>4</sup> Because of the breadth of the at-will doctrine in Louisiana, workers who have relied on what appeared to be commitments by the employer that the employee would be employed “permanently” or “for life,”<sup>5</sup> that the employee would be fired only for cause,<sup>6</sup> that certain procedures would be

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legislation, 29 U.S.C. §§ 1001-1371 (Supp. 1995). See, e.g., *Frost v. Metropolitan Life Ins. Co.*, 635 So. 2d 706, 709 (La. Ct. App. 1st Cir.), writ denied, 640 So. 2d 1353 (La. 1994).

4. See, e.g., *Martinez v. Behring's Bearings Serv., Inc.*, 501 F.2d 104 (5th Cir. 1974) (finding no cause of action under state law for at-will employee who was fired in retaliation for exercising legal right to file complaint to the Wage and Hour Division of the United States Department of Labor); *Portie v. Devall Towing & Boat Serv., Inc.*, 634 So. 2d 1324, 1328 (La. Ct. App. 3d Cir. 1994) (finding no cause of action when employer retaliated against employee who filed seaman's claim by firing the injured worker's brother); *Woodson v. Alarm Protection Servs., Inc.*, 531 So. 2d 542, 544 (La. Ct. App. 5th Cir.) (finding no cause of action when worker was fired because her husband received workers' compensation benefits), writ denied, 533 So. 2d 358 (La. 1988); *Ballaron v. Equitable Shipyards, Inc.*, 521 So. 2d 481, 483 (La. Ct. App. 4th Cir. 1988) (holding employer had not committed an abuse of rights when it fired employees who took an employer-mandated lie detector test, but refused to sign a consent form waiving all legal rights against the company administering those tests).

5. See, e.g., *Hill*, 8 F. Supp. at 80 (finding no cause of action for employee who was fired despite written contract promising lifetime employment, even though contract was entered into in return for employee's release of a pre-existing liability claim against employer); *Pechon v. National Serv., Inc.*, 100 So. 2d 213, 218 (La. 1958) (finding employee had no cause of action despite giving up a “high and responsible” position with the F.B.I. in the expectation that he would be employed for life); *Page v. New Orleans Pub. Serv., Inc.*, 167 So. 99, 100 (La. 1936) (holding that employee who gave up a lucrative position in California and traveled to Louisiana in order to assist employer during a strike in reliance on a promise of “lifetime employment” had no cause of action when he was fired without cause); *Pitcher v. United Oil & Gas*, 139 So. 760, 761 (La. 1932) (finding no cause of action for employee fired in apparent violation of contract stating that contract of employment was to continue as long as defendant company was operating); *Baynard v. The Guardian Life Ins. Co.*, 399 So. 2d 1200, 1203 (La. Ct. App. 1st Cir. 1981) (stating that “even if [plaintiff's employment] contract were expressly for life, it could still be terminated at any time by Guardian, as a matter of law.”); *Griffith v. Sollay Found. Drilling, Inc.*, 373 So. 2d 979, 982 (La. Ct. App. 3d Cir. 1979) (holding employee who moved from Atlanta in reliance on promise of “permanent” employment had no cause of action); *Simmons v. Westinghouse Elec. Corp.*, 311 So. 2d 28, 31 (La. Ct. App. 2d Cir. 1975) (holding that employer's promise not to fire employee without good cause was not enforceable and was binding only if supported by “special consideration”). The *Hill* case was noted and criticized in Note, *Recent Jurisprudence*, 9 TUL. L. REV. 444 (1935) [hereinafter *Recent Jurisprudence*].

6. See, e.g., *Senac v. L. M. Berry Co.*, 299 So. 2d 433, 434 (La. Ct. App. 4th Cir. 1974) (finding no cause of action for employee who alleged she was induced to leave another job in reliance on employer's promise that she would not be fired except for cause). Cf. *Morgan v. Avondale Shipyards*, 376 So. 2d 516, 517 (La. Ct. App. 4th Cir. 1979) (holding statement in “Employees Guide” that employee would be fired immediately for certain offenses did not constitute any promise not to fire for other offenses).

followed before dismissal,<sup>7</sup> or that the employee would receive certain benefits<sup>8</sup> or future rewards,<sup>9</sup> have all found their reliance to be misplaced.

In recent decades, the principle of at-will termination has been significantly eroded by numerous federal statutes that prohibit discrimination against private employees because of their membership in certain protected groups,<sup>10</sup> or prohibit retaliation against employees

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7. See, e.g., *Gilbert v. Tulane Univ.*, 909 F.2d 124, 126 (5th Cir. 1990) (holding that employee does not have a contractual right to enforce the grievance procedures specifically set forth in the Tulane employee handbook); *Mix v. University of New Orleans*, 609 So. 2d 958, 960-61 (La. 1993) (holding that employer's failure to follow its own published grievance procedures raised no cause of action for terminated employee); *Marson v. Northwestern State Univ.*, 607 So. 2d 1093, 1096 (La. Ct. App. 3d Cir. 1992) (announcing virtually per se rule that procedures set out in employee handbook are not binding on the employer); *Keller v. Sisters of Charity of the Incarnate Word*, 597 So. 2d 1113, 1115-17 (La. Ct. App. 2d Cir. 1992) (holding graded levels of discipline set out in employer's "personnel manual" do not constitute an enforceable contract); *Thebner v. Xerox Corp.*, 480 So. 2d 454, 457 (La. Ct. App. 3d Cir. 1985) (concluding that statements in employer's personnel policy manual did not constitute part of the contract between the parties, and violation of those policies by employer gave rise to no claim for damages), *writ denied*, 484 So. 2d 139 (La. 1986); *Terrebonne v. Louisiana Ass'n of Educators*, 444 So. 2d 206, 210 (La. Ct. App. 1st Cir. 1983) (holding employer not bound by letter, sent to employee before hiring and on which employee allegedly relied, which contained statement that no employee would be fired without a "due process" hearing), *writ denied*, 445 So. 2d 1232 (La. 1984); *Williams v. Delta Haven, Inc.*, 416 So. 2d 637, 638 (La. Ct. App. 2d Cir. 1982) (concluding at-will employee stated no cause of action where she alleged that she was fired without receiving the three prior warnings required by the employer's personnel policy).

8. See, e.g., *Wall v. Tulane Univ.*, 499 So. 2d 375, 376 (La. Ct. App. 4th Cir.), *writ denied*, 500 So. 2d 427 (La. 1987). In *Wall*, an employee sued to enforce tuition waiver benefits described in Tulane's "Staff Handbook." The court held that because the employee was at will, Tulane was free to terminate his employment or modify the benefits of that employment at any time. *Id.* at 376.

9. See, e.g., *O'Neal v. Chris Steak House, Inc.*, 525 So. 2d 325 (La. Ct. App. 1st Cir. 1988). In *O'Neal*, an at-will employee hired according to a contract which provided that he would be given stock in the business at a future date, was fired before that date. *Id.* at 326. The court held that since the plaintiff was employed without a specific term, he could be fired at will. *Id.* at 328. The court further concluded that the obligation to transfer the stock was subject to a suspensive condition, which firing made impossible, and was thus void. *Id.*; see also *Dunbar v. Williams*, 554 So. 2d 56, (La. Ct. App. 4th Cir. 1989) (noting that while "some states protect minority shareholders in closely held corporations from termination without cause," Louisiana does not); *Copeland v. Gordon Jewelry Corp.*, 288 So. 2d 404, 407-09 (La. Ct. App. 4th Cir.) (finding no cause of action for employee who was fired, apparently without cause, twenty-one days before accrual of stock option rights), *writ denied*, 290 So. 2d 911 (La. 1974).

10. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000h. (West 1988 & Supp. V 1995) (prohibiting, inter alia, termination because of an employee's race, color, religion, national origin or gender); The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988) (prohibiting discrimination against employees

who engage in certain protected activities.<sup>11</sup> However, such a piecemeal approach, even as supplemented by various states, is incapable of comprehensively addressing the basic issues of workplace fairness.<sup>12</sup> For these reasons, courts in most states have begun to

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because they are over forty years of age); The Americans with Disabilities Act, 42 U.S.C. § 12101 (West 1988 & Supp. IV 1995) (prohibiting discrimination against otherwise qualified employees because of their disabilities); The Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b(a) (West 1988 & Supp. IV 1995) (prohibiting discrimination against legal aliens because of that individual's alien status).

11. See, e.g., The Federal Jury System Improvement Act, 28 U.S.C. § 1875 (West 1988) (outlawing discharge of employees because of service on federal juries); The National Labor Relations Act, 29 U.S.C. § 158(a) (West 1988) (outlawing, among other things, discharge of employees because of their union activity); The Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (West 1988) (outlawing discharge of employees because they instituted or testified in proceedings brought under the Act); The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140 (West 1988 & Supp. IV 1995) (outlawing, among other things, discharge of employees for exercising any right granted by that Act); The Employee Polygraph Protection Act, 29 U.S.C. § 2002(3) (West 1988) (outlawing, inter alia, discharge of employees because they refuse to take or fail a lie detector test); The Family and Medical Leave Act, 29 U.S.C. § 2605(a) (West 1988) (outlawing discharge of employees who exercise or assert rights granted by that statute).

12. The underlying policy arguments for and against substantial judicial modification of the traditional rule of employment at will continues to be the subject of debate among scholars. See, e.g., Arthur S. Leonard, *A New Common-law of Employment Termination*, 66 N.C. L. REV. 631 (1988) (advocating substantial modification of the rule); see also Lawrence E. Blades, *Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1435 (1967) (same); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994) (defending the rule); Note, *Protecting At-will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824 (1980) (suggesting substantial modifications to the rule). Analysis of these competing arguments is beyond the scope of this article. For present purposes, however, it is sufficient to note that few, if any, commentators would argue that particular abusive uses of the rights granted by the at-will doctrine are in themselves social goods.

Assuming this is so, the second question is whether the judiciary should exercise an independent role in policing abuses of the at-will rule, or whether that task should instead be left to the legislature. While the legislature's role is important—indeed, primary—that does not mean that judges have no useful role to play. Cases show that legislatures can seldom fully anticipate, or express in general laws, all circumstances in which the right to terminate employment can be exercised in an abusive fashion. For example, the Louisiana legislature enacted LA. R. S. 23:1361 in order to prohibit employers from retaliating against employees who file workers' compensation claims. However, the legislature did not anticipate that employers might attempt to circumvent the law and intimidate compensation claimants by threatening the jobs of the claimants' relatives or spouses. Yet such abuses have taken place. See, e.g., *Portie v. Devall Towing & Boat Serv., Inc.*, 634 So. 2d 1324, 1325 (La. Ct. App. 3d Cir. 1994); *Woodson v. Alarm Protection Serv., Inc.*, 531 So. 2d 542, 544 (La. Ct. App. 5th Cir.), writ denied, 533 So. 2d 358 (La. 1988). It seems apparent that the only way to

modify the at-will doctrine, seeking legal principles that would preserve its general utility while limiting the potential for abuse. Typically, these courts have recognized one or more proposed exceptions to the doctrine of employment at will, exceptions rooted variously in concepts of public policy,<sup>13</sup> contract,<sup>14</sup> or tort.<sup>15</sup>

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prevent abuses in the myriad of novel circumstances that arise in the workplace is to permit judges to apply general principles, such as the duty of good faith, on a case-by-case basis.

13. This "public policy" exception to the at-will rule sounds in tort. It was first recognized by the California appellate courts in *Petermann v. Teamsters*, 344 P.2d 25, 27 (Cal. Ct. App. 1959), in which the employer fired an employee because he refused to commit perjury on behalf of his employer. Subsequent cases found terminations violative of public policy in a wide variety of circumstances. See, e.g., *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1331 (Cal. 1980) (employee refused to participate in employer's conspiracy to violate antitrust statutes); *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425, 426 (Ind. 1973) (employee fired because he exercised a statutory right by filing a workers compensation claim); *Phipps v. Clark Oil & Ref. Co.*, 408 N.W.2d 569, 571 (Minn. 1987) (employee refused to violate Clean Air Act by pumping leaded gasoline into a car requiring unleaded gasoline); *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) (married employee refused employer's sexual advances); *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225, 227-28 (S.D. 1988) (employee fired for refusing to participate in supervisor's scheme to steal from the company). For a thorough review of the development and present contours of this exception, see WILLIAM J. HOLLOWAY, *EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES* 133-98 (2d ed. 1993). For a comprehensive listing of cases, see KENNETH J. McCULLOCH, *TERMINATION OF EMPLOYMENT* ¶ 40.021 (1994); Michael A. DiSabatino, Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R. 4th 544, 555-58 (1982 & Supp. 1994).

14. There are two types of contract-based exceptions. The first group are those based on a finding that termination violated a representation made by the employer—that the employee could retain her job "permanently," that she would not be fired without some legitimate reason, that certain procedural steps would precede termination, or the like. Enforceable promises of this sort have been found embodied in a wide variety of written sources, including but not limited to, handbooks and other similar policy statements distributed by employers to employees. See, e.g., *Kinoshita v. Canadian Pac. Airlines*, 724 P.2d 110, 115-16 (Haw. 1986) (holding employer breached contract by failing to follow procedures set forth in employee handbook before firing at-will employee); *Woolley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257, 1258 (N.J.) (same as *Kinoshita*, modified, 499 A.2d 515 (N.J. 1985); *Lukoski v. Sandia Indian Management Co.*, 748 P.2d 507, 509 (N.M. 1988) (same); *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1370 (Nev. 1987) (enforcing employer's statements that, if employee performed adequately, he would be kept on "until retirement" or "as long as economically possible"). Oral communications containing similar representations have also been found to constitute enforceable promises. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373, 401-02 (Cal. 1988) (upholding trial court finding that discharge violated oral promise that employee would not be fired without good cause); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 492 (Ky. 1983) (same); *Kestenbaum v. Pennzoil Co.*, 766 P.2d 280, 288-89 (N.M.) (same), cert. denied, 490 U.S. 1109 (1989).

The second type of contract-based exception is rooted in the "implied covenant of good faith and fair dealing" that is traditionally read into all contracts. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). Courts in several states have relied on such an implied covenant to provide recovery to employees fired solely in order to prevent them from obtaining earned



Louisiana has followed the national trend toward modification of the at-will doctrine only to a limited degree. To be sure, Louisiana has enacted several specific constitutional and statutory exceptions to employment at will, including civil service protection for certain public employees,<sup>16</sup> antidiscrimination provisions broadly paralleling federal law,<sup>17</sup> laws that prohibit retaliation against employees who exercise certain legal rights,<sup>18</sup> and statutes which prohibit firings based

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benefits, or where the firing otherwise violates public policy. *See, e.g.*, *Reed v. Municipality of Anchorage*, 782 P.2d 1155, 1159 (Alaska 1989) (holding that the firing of "whistleblower" who reported workplace safety violations violated the implied covenant); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1257 (Mass. 1971) (holding discharge of an at-will salesman solely to avoid paying earned bonuses violated implied covenant).

For analysis of both types of contract-based claims, see generally HOLLOWAY, *supra* note 13, at 3-77, 95-104. The cases are collected at MCCULLOCH, *supra* note 13, ¶ 40.011; and DiSabatino, *supra* note 13, §§ 6-14, at 560-81. The cases which specifically relate to the enforceability of statements made in employee handbooks and the like are collected in Theresa Ludwig Kruk, *Right to Discharge Allegedly "At-Will" Employee as Affected by Employer's Promulgation of Employment Policies as to Discharge*, 33 A.L.R. 4th 120 (1984 & Supp. 1994).

15. Courts in some states have recognized that the circumstances in which an at-will employee is fired may give rise to a claim in tort. Where those circumstances have been sufficiently egregious, courts have allowed plaintiffs to assert claims based on a number of tort theories, including intentional infliction of emotional distress and defamation. *See, e.g.*, *King v. Brooks*, 788 P.2d 707, 711 (Alaska 1990) (intentional infliction of emotional distress); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1344 (Colo. 1988) (defamation); *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 318-19 (Mass. 1976) (same); *Cagle v. Bums & Roe, Inc.*, 726 P.2d 434, 437 (Wash. 1986) (same); *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 887 (Minn. 1986) (same). For an analysis of both types of tort-based claims, see generally HOLLOWAY, *supra* note 13, at 230-41, 244-75. Cases are collected in MCCULLOCH, *supra* note 13, ¶ 40.031.

16. *See* LA. CONST. art. X.

17. *See, e.g.*, LA. REV. STAT. ANN. §§ 23:971, 23:1006, 46:2251, 51:2231 (West 1985 & Supp. 1995) (prohibiting discrimination because of an employee's race, color, national origin, religion, gender, age, or handicap). *But see* *Bradley v. Latter & Blum, Inc.*, 559 So. 2d 46, 47-48 (La. Ct. App. 4th Cir.) (relying on Louisiana's rigid doctrine of employment at will to distinguish between federal and state antidiscrimination laws), *writ denied*, 566 So. 2d 397 (La. 1990).

18. *See, e.g.*, LA. REV. STAT. ANN. § 23:964 (West 1985 & Supp. 1995) (prohibiting employers from discharging employees who give testimony in investigations by the state Department of Labor); LA. REV. STAT. ANN. § 23:1361 (West 1985 & Supp. 1995) (prohibiting discrimination against employees because they filed claims for workers' compensation benefits); LA. REV. STAT. ANN. § 23:1691 (West 1985 & Supp. 1995) (prohibiting discrimination against employees because they filed claims for unemployment compensation); LA. REV. STAT. ANN. § 30:2027 (West 1985 & Supp. 1995) (prohibiting retaliation against an employee who "[d]iscloses or threatens to disclose, to a supervisor or public body" employer actions believed to be in violation of environmental law; or who

on an eclectic list of employee characteristics or activities.<sup>19</sup> Louisiana courts have occasionally assisted employees who were fired in an abusive way, either by broadly interpreting certain statutory exceptions

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“[p]rovides information to, or testifies before any public body conducting an investigation, hearing or inquiry into” environmental violations).

Louisiana courts have granted remedies to at-will employees discharged in violation of some of these statutory prohibitions. *See, e.g.*, *Ducote v. J.A. Jones Constr. Co.*, 471 So. 2d 704, 707 (La. 1985); *Moss v. Dixie Mach. Welding & Metal Works, Inc.*, 617 So. 2d 959, 961 (La. Ct. App. 4th Cir.) (broadly construing LA. R.S. 23:1361 to apply to employee who filed claim under federal Longshore and Harbor Workers’ Compensation Act), *writ denied*, 620 So. 2d 845 (La.), *and cert. denied*, 114 S. Ct. 469 (1993); *Bartlett v. Reese*, 569 So. 2d 195, 202 (La. Ct. App. 1st Cir. 1990) (upholding claim of employee fired in retaliation for reporting what he perceived to be an environmental violation), *writ denied*, 572 So. 2d 22 (La. 1991); *Guye v. International Paper Co.*, 488 So. 2d 1108, 1109-11 (La. Ct. App. 2d Cir. 1986) (upholding trial court finding that employee was fired in violation of LA. R.S. 23:1361); *Wiley v. Missouri Pac. R.R.*, 430 So. 2d 1016, 1018-20 (La. Ct. App. 3d Cir. 1982) (tracing the social history leading to the enactment of LA. R.S. § 23:1361 and awarding damages to federal employee who was fired in retaliation for having filed claim under the Federal Employer Liability Act). However, some of these statutes have been interpreted more narrowly. *See, e.g.*, *Fontenot v. Manpower, Educ. & Training, Inc.*, 594 So. 2d 998, 1000 (La. Ct. App. 3d Cir. 1992) (narrowly interpreting LA. REV. STAT. ANN. § 23:1691 to impose only criminal liability on employers who discriminate against employees who assert rights to social security, and holding the employee does not have a civil cause of action for damages).

19. *See, e.g.*, LA. REV. STAT. ANN. § 23:731 (West 1985) (limiting an employer’s right to terminate an employee whose wages have been garnished); LA. REV. STAT. ANN. § 23:961-62 (West 1985) (prohibiting discrimination against employees because of their political opinions or activities); LA. REV. STAT. ANN. § 23:963 (West 1985) (prohibiting employers from retaliating against employees who refuse to deal with particular vendors); LA. REV. STAT. ANN. § 23:965 (West 1985 & Supp. 1995) (prohibiting employers from discharging employees called to serve on juries); LA. REV. STAT. ANN. § 23:966 (West 1985 & Supp. 1995) (limiting the right of employers to discharge or otherwise discriminate against employees who smoke tobacco); LA. REV. STAT. ANN. § 23:981-87 (West 1992) (prohibiting employers from discharging employees who refuse to join unions); LA. REV. STAT. ANN. § 23:1001 (West 1985) (prohibiting discrimination against employees who have the sickle cell trait); LA. REV. STAT. ANN. § 40:1299.31 (West 1992) (prohibiting discrimination against medical personnel who refuse to participate in abortions).

Louisiana courts have at least occasionally proved willing to broadly enforce these statutes, awarding damages to employees fired in violation of their terms. *See, e.g.*, *Davis v. Louisiana Computing Corp.*, 394 So. 2d 678, 679-80 (La. Ct. App. 4th Cir.) (awarding damages for violation of LA. REV. STAT. ANN. § 23:961), *writ denied*, 400 So. 2d 668 (La. 1981). *But see* *Ballaron v. Equitable Shipyards, Inc.*, 521 So. 2d 481, 483 (La. Ct. App. 4th Cir. 1988) (narrowly interpreting LA. R.S. 23:963 as applying only where employers coerce “employees to purchase goods or services from persons or companies designated by the employer.”). Note also that the result in *Davis* may have turned on the particular language of § 961, which specifically provides that nothing within the statute precludes an employee from maintaining an action for damages. Statutes without such language may be interpreted differently.

to the at-will doctrine<sup>20</sup> or by finding causes of action against parties other than employers when employees are wrongfully discharged.<sup>21</sup> However, these statutes and decisions together cover only a small portion of employee dismissals.

In Louisiana, the majority of employee dismissals not covered by these piecemeal statutes and narrow decisions are instead covered by an expansive interpretation of employers' rights over at-will

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20. See, e.g., *Cheramie v. J. Wayne Plaisance, Inc.*, 595 So. 2d 619, 622 (La. 1992) (broadly construing a prior version of LA. R.S. 30:2027, which protected an employee from retaliation when that employee "reports or complains" of possible environmental violations; court gave a cause of action to an employee who was fired because he refused to perform certain work which he thought would harm a protected nesting site for brown pelicans); *Wiley*, 430 So. 2d at 1021 (broadly construing LA. R.S. 23:1361 to protect from discharge a railroad employee who had brought a claim against his employer under the Federal Employer Liability Act).

21. See, e.g., *Neel v. Citrus Lands of Louisiana, Inc.*, 629 So. 2d 1299, 1301 (La. Ct. App. 4th Cir. 1993) (holding at-will employee of mineral lessee who lost his job when lessor barred him from the land stated a claim against the lessor for intentional interference with contractual relations); *Nehrenz v. Dunn*, 593 So. 2d 915, 917 (La. Ct. App. 4th Cir. 1992) (concluding that an at-will employee had a cause of action against a drug testing laboratory which negligently tested a sample from that employee, causing that employee to lose his job); *Elliott v. Laboratory Specialists, Inc.*, 588 So. 2d 175, 176 (La. Ct. App. 5th Cir. 1991) (same), *writ denied*, 592 So. 2d 415 (La. 1992); *Lewis v. Aluminum Co. of Am.*, 588 So. 2d 167, 170 (La. Ct. App. 4th Cir. 1990) (same), *writ denied*, 592 So. 2d 411 (La. 1992).

However, this generosity has not been consistent. Because of the absolute nature of the at-will doctrine in Louisiana, other courts have held that at-will employees have no legally protected interest in retaining their jobs, and thus no claim against third parties who cause the loss of those jobs. See, e.g., *Durand v. McGaw*, 635 So. 2d 409, 412-13 (La. Ct. App. 4th Cir.) (holding at-will employee fired in response to complaints had no cause of action against third party for either intentional or negligent interference with contractual relations), *writ denied*, 640 So. 2d 1318 (La. 1994); *Herbert v. Placid Refining Co.*, 564 So. 2d 371, 373-74 (La. Ct. App. 1st Cir. 1990) (finding at-will employee who lost job as a result of a negligently performed and erroneous drug test has no cause of action against drug testing lab for negligence or negligent interference with contractual rights); *Ballaron*, 521 So. 2d 484 (finding that discharged employee stated no claim against polygrapher, despite polygrapher's violation of regulatory statutes).

Louisiana courts have also indicated—at least in principle—a willingness to follow their common-law counterparts by recognizing the theoretical possibility that an employee without a fixed term of employment may not be fired without cause if he or she has given the employer "special consideration" (going beyond mere performance of the job) in return for the employer's promise not to fire that employee. However, courts have seldom actually found such special consideration in fact. See, e.g., *Smith v. Sohio Petroleum Co.*, 163 So. 2d 124, 126 (La. Ct. App. 3d Cir. 1964) (indicating that release of a workers' compensation claim for personal injuries sustained on the job would constitute sufficient "special consideration" to support an employer's agreement to hire an employee "for life," but that such a contract was void as against public policy under then-Civil Code article 167, which limited employment contracts to a maximum of five years); see also *Hill v. Missouri Pac. Ry.*, 8 F. Supp. 80, 81 (W.D. La. 1933).

employees. To date, all attempts to persuade Louisiana courts to adopt any of the increasingly common jurisprudential exceptions have failed. Thus, Louisiana remains one of the dwindling minority of states that continues to refuse to recognize any cause of action for wrongful discharge or any nonstatutory exception to the doctrine of employment at will, no matter how egregious the circumstances.<sup>22</sup>

The reason most often articulated by Louisiana courts for their refusal to modify the expansive interpretation of employers' rights has been what the courts have seen as the entrenchment of the concept in the Louisiana Civil Code, particularly in Civil Code article 2747, and

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22. Louisiana courts are quite clear about the absolute nature of the version of employment at will in effect. See, e.g., *Mix v. University of New Orleans*, 609 So. 2d 958, 964 (La. Ct. App. 4th Cir. 1992) (stating that "[t]he reasons for termination need not be accurate, fair or reasonable," and further, that "[t]he question of why Mix was terminated is irrelevant and consequently raises no genuine issue of material fact"); *Gil v. Metal Serv. Corp.*, 412 So. 2d 706, 708 (La. Ct. App. 4th Cir.) (recognizing that many states have held that an employee has a cause of action if terminated for refusal to perform an illegal act, but nevertheless holding that Louisiana law provides no equivalent protection), *writ denied*, 414 So. 2d 379 (La. 1982).

Those same Louisiana courts have also, on occasion, denied that Louisiana law is different from the law of its sister states with respect to employment at will. See, e.g., *Mix*, 609 So. 2d at 961 n.1 (referring to "several excellent, well-reasoned cases from around the country" in order "to refute the contention that Louisiana policy is somehow aberrational or anachronistic"). If by this the courts mean that other states have retained some concept of employment at will as a basic rule of employment relations, they are absolutely correct. If, however, they mean that other states have continued to interpret and apply that doctrine in the same absolutist style as Louisiana, they are clearly wrong. Most other states have adopted one or more judicial exceptions to the strict rule of employment at will. See generally MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 524 (1994) (discussing the history of the at-will rule). Rothstein has stated the following:

During [the 1970s and 1980s] three major 'exceptions' to the at-will doctrine emerged: (1) breach of an express or implied promise, including representations made in employee handbooks; (2) wrongful discharge in violation of public policy; and (3) breach of an implied covenant of good faith and fair dealing. Almost every state accepts at least one of these causes of action.

*Id.*; see also HOLLOWAY, *supra* note 13, at 135 n.135 (listing forty-one states and the District of Columbia as having recognized a nonstatutory cause of action for retaliatory discharge in violation of public policy, and noting that Louisiana was one of only five states that had, as of 1993, still refused to do so); DiSabatino, *supra* note 13, §§ 3[a] & 4[a] (listing fourteen states that have implied a contract-based cause of action when termination of an at-will employee violates public policy, and twenty-seven states that have implied a tort-based cause of action in such circumstances); Kruk, *supra* note 14, § 4[a] (listing thirty-four states that have found representations made in employee handbooks regarding the grounds or procedures for dismissal to be enforceable).

A thorough state-by-state analysis of what exceptions have been recognized in particular jurisdictions can be found at 9A *Indiv. Emp. R. Man.* 505 (BNA) (1994).

the courts' professed unwillingness to deviate from that Code.<sup>23</sup> But this reliance on the Civil Code to justify an absolutist approach to employment at will is not without irony. One of the most basic principles of the Civil Code is the overarching principle of good faith.<sup>24</sup> The absolutist view of employment at will—as a unique exception to ordinary rules governing obligations under the Code, an exception that would permit an employer to fire an at-will employee for any reason not specifically proscribed by statute, no matter how unfair or abusive—is neither required by the language of the Louisiana Civil Code nor compatible with its overall spirit. On the contrary, careful review of the historical record reveals that the broad reading of employers' rights now prevalent in Louisiana was not developed from any codal source, but rather erroneously interpolated from common-law sources. That late and unnecessary interpolation should be discarded in favor of an analysis of employment contracts that is more compatible with the Civil Code's treatment of all other forms of commercial obligations.

It may well be that the Louisiana Civil Code articles dealing with employment should be comprehensively revised and expanded, so that the Code conforms with the reality of employment relations today. But it is the thesis of this article that until such a revision occurs, Louisiana courts can and should interpret employment contracts according to the same principles that govern all other commercial

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23. Louisiana Civil Code article 2747 provides the following:

ARTICLE 2747. A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause.

LA. CIV. CODE ANN. art. 2747 (West 1994). The cases citing Civil Code article 2747 as the locus of Louisiana's rigid doctrine of employment at will are literally too numerous to list. A representative sampling could include: *Thome v. Monroe City Sch. Bd.*, 542 So. 2d 490, 491 (La. 1989) (tracing origin of article 2747); *Moore v. McDermott, Inc.*, 494 So. 2d 1159 (La. 1986); *Keller v. Sisters of Charity of the Incarnate Word*, 597 So. 2d 1113, 1115 (La. Ct. App. 2d Cir. 1992); *Martin v. Lincoln Gen. Hosp.*, 588 So. 2d 1329, 1332 (La. Ct. App. 2d Cir. 1991), *writ denied*, 592 So. 2d 1302 (La. 1992); *Hammond v. Medical Arts Group, Inc.*, 574 So. 2d 521, 525 (La. Ct. App. 3d Cir. 1991); *Bradley v. Latter & Blum, Inc.*, 559 So. 2d 46, 47-48 (La. Ct. App. 4th Cir.), *writ denied*, 566 So. 2d 397 (La. 1990); *Herbert*, 564 So. 2d at 373; *Wise v. Dufresne*, 537 So. 2d 860, 862 (La. Ct. App. 5th Cir. 1989); *Jackson v. E.B.R. Parish Sch. Bd.*, 393 So. 2d 243, 245 (La. Ct. App. 1st Cir. 1980) (citing article 2747 as "the source of" the principle that employees without fixed-term contracts cannot maintain a claim for wrongful discharge, nor collect back wages on the basis of such a claim).

24. See *infra* notes 233-240 and accompanying text.

obligations, and further, that if the courts were to do so, they could retain the legitimate benefits of the general rule of employment at will while preventing its most egregious abuses. The Louisiana Civil Code recognizes important distinctions between contracts for a fixed term and contracts not for a fixed term.<sup>25</sup> Thus, one cannot, consistent with the Code, require “good cause” terminations of employees who do not have fixed-term contracts. However, properly interpreted, the Louisiana Civil Code requires the parties to *all* contracts, including employment contracts of indefinite term, to perform their obligations in good faith.

Part I of this article sets the stage by tracing the development of the principle of employment at will in Louisiana. Part II focuses on Louisiana Civil Code articles 167, 2746, and especially 2747—the texts that have been cited by courts and litigants to justify their treatment of employment for an indefinite term as an exception to the general rules governing obligations under the Code. Part II also demonstrates that those articles should not be interpreted in a broad manner. Part III then argues that at-will employment contracts should be constrained by the same obligations of good faith that the Louisiana Civil Code imposes on all other contracting parties.

One final note seems appropriate at the outset. It could be argued that even if the doctrine of employment at will in general, and article 2747 in particular, have been wrongly interpreted, the error has become so rooted in Louisiana law that it should now be changed only by legislation. The argument is not without force. Nonetheless, it should not preclude reinterpretation, if such reinterpretation proves justified. While the general concept of employment at will certainly is deeply embedded in the Code,<sup>26</sup> that general concept is not under attack here. By contrast, the misreading of article 2747 and the subsequent absolutist interpretation of employer’s rights under the doctrine of employment at will—which *are* under attack in this article—are both of much more recent vintage and dubious

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25. See *infra* note 220 and accompanying text.

26. See, e.g., *Andrepoint v. Lake Charles Harbor Terminal Dist.*, 602 So. 2d 704, 707-08 n.1 (La. 1992) (tracing the origin of related article 2749 back to the French *Projet du Gouvernement* of 1800, Book III, Title XIII, article 114); *Thorne*, 542 So. 2d at 491 (tracing the origins of the general rule of employment at will back to the Louisiana Digest of 1808 and Pothier, among others); *Brannan v. Wyeth Labs., Inc.*, 526 So. 2d 1101, 1103 (La. 1988) (citing the “consistent line of jurisprudence” supporting the general concept of employment at will in Louisiana). See *generally infra* note 220 and accompanying text.

provenance. In any event, civilian legal theory teaches that the law is found in the written Code itself rather than in the jurisprudence interpreting that Code.<sup>27</sup> And certainly the Louisiana Supreme Court has acted to correct other errors of interpretation in the Civil Code that crept into Louisiana jurisprudence through mistaken reliance on common-law principles.<sup>28</sup> The same action is required here.

#### I. PROLOGUE: EMPLOYERS, EMPLOYEES, AND THE LOUISIANA CIVIL CODES

The Louisiana Civil Code traditionally dealt with the relations of employers and employees in two places. Before repeal, Title VI of Book I of the Code dealt with the personal relations of masters and various types of “servants” in a manner similar to that in which other Titles of that Book treated the personal relations of husbands and wives or of parents and children.<sup>29</sup> Chapter 3 of Title IX of Book III of the Code, on the other hand, deals with the contractual

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27. As the Louisiana Supreme Court has said: “In a jurisdiction such as Louisiana which applies civilian theories of legal method, prior judicial decisions do not represent law: They are merely judicial interpretations. They should therefore be overruled when not in accord with what is now determined to be the legislative intent.” *Holland v. Buckley*, 305 So. 2d 113, 119-20 (La. 1974) (overruling a long line of inconsistent Louisiana cases interpreting article 2321, and looking instead to the original French sources of that article to determine its true, originally intended, meaning).

This basic principle is established in the very first article of the Louisiana Civil Code, which provides that “[t]he sources of law are legislation and custom,” not jurisprudence. LA. CIV. CODE ANN. art. 1 (West 1993). Revision comment (b) to article 1 makes explicit the superiority of written law, including the Code itself, to any interpretive case law:

According to civilian doctrine, legislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom.

LA. CIV. CODE ANN. art. 1 cmt. b (citing A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM §§ 31, 32 (1977)).

28. See, e.g., *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228, 234 (La. 1989) (reversing Louisiana’s long-standing rejection of claims for intentional interference with contractual relations as both outmoded and based on faulty, common-law influenced misinterpretation of the Civil Code); *Holland*, 305 So. 2d at 114 (overruling “as erroneous certain decisions which have crept in, based on the common law of England, that an owner of a domestic animal is not liable for injuries caused by the animal unless the victim proves that the owner knew or should have known of the animal’s harm-causing characteristic and nevertheless negligently let it do harm”).

29. These articles are rooted in a paradigm that views some types of servants as members of the master’s extended household. See *infra* notes 198-214 and accompanying text.

relations of those same masters and servants, generally conceiving the contractual relation as a type of "lease."<sup>30</sup>

After the abolition of slavery,<sup>31</sup> Book I of the Louisiana Civil Code recognized only a single class of servants, "free servants," comprehensively defined as all persons "who let, hire or engage their services to another in this State, to be employed therein at any work, commerce or occupation whatever . . ."<sup>32</sup> Article 164 subdivided those "free servants" into three subclasses: (1) "those who only hire out their services by the day, week, or year, in consideration of certain wages," who were considered to have only "leased" their services to their employer; (2) indentured or "bound" servants who were considered to have "sold" their services for a period of time; and (3) apprentices, who were also legally bound to serve for a fixed period of time.<sup>33</sup> The remaining articles of this chapter dealt with the

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30. Of course, the Code also touches on employer-employee relations in other places for specific purposes. Thus, for example, articles 3191 and 3252 establish a general privilege in favor of certain servants claiming back wages, and article 3494(1) establishes a prescriptive period of three years for such wage claims. See *infra* notes 185-197, 215-219 and accompanying text. However, the basic rules were and are set by the articles discussed in the text.

31. Prior to the abolition of slavery, the Louisiana Civil Codes recognized two classes of servants: "free servants" and "slaves." 1808 DIGEST OF THE CIVIL LAWS OF THE TERRITORY OF ORLEANS art. 1, at 36 (de la Vergne ed. 1968) [hereinafter LA. DIGEST OF 1808]; LA. CIV. CODE ANN. art. 155 (1825). The Digest and the 1825 Code also contained a separate chapter of this Title, detailing the rights and duties of masters and slaves. LA. DIGEST OF 1808, *supra* arts. 15-27, at 38-40; LA. CIV. CODE ANN. arts. 172-196 (1825).

32. Louisiana Civil Code article 163 provided the following:

Free servants are in general all free persons who let, hire or engage their services to another in this State, to be employed therein at any work, commerce or occupation whatever for the benefit of him who has contracted with them, for a certain price or retribution, or upon certain conditions.

LA. CIV. CODE ANN. art. 163 (West 1972). The article was derived, without substantial change, from equivalent provisions of the 1808 Digest and the Code of 1825. See LA. DIGEST OF 1808, *supra* note 31, art. 2, at 36; LA. CIV. CODE ANN. art. 156 (1825).

33. Louisiana Civil Code article 164 provided the following:

There are three kinds of free servants in this State, to wit:

1. Those who hire out their services by the day, week, month or year, in consideration of certain wages; the rules which fix the extent and limits of those contracts are established by the title: *Of Letting and Hiring*.

2. Those who engage to serve for a fixed time for a certain consideration, and who are therefore, considered not as having hired out, but as having sold their services.

3. Apprentices, that is, those who engage to serve any one in order to learn some art, trade or profession.



rights and duties of bound servants—that is, indentured servants and apprentices<sup>34</sup>—and with the effects of the master-servant relationship

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LA. CIV. CODE ANN. art. 164 (West 1972). This article was derived from equivalents in the Civil Code of 1825 and the 1808 Digest. LA. CIV. CODE ANN. art. 157 (1825); LA. DIGEST OF 1808, *supra* note 31, arts. 3, 4, at 36.

34. The pertinent Louisiana Civil Code articles provided the following:

ARTICLE 165. The regulations, manner and mode according to which persons may be bound to serve, either as apprentices or otherwise are prescribed by special laws.

ARTICLE 166. The time of the engagement of minors, if there be no stipulation that it shall terminate sooner, shall expire for males, when they attain the age of eighteen years, and females, when they attain the age of fifteen.

ARTICLE 167. Persons who have attained the age of majority cannot bind themselves for a longer term than ten years.

ARTICLE 168. Engagements of service contracted in a foreign country for a longer term, shall be reduced to ten years, to count from the day of the arrival of the person bound in this State.

ARTICLE 169. An implied condition of the contract entered into between the master and bound servant or apprentice is that the latter binds himself to serve the former during all the time of his engagement, and the master on his side binds himself to maintain the indentured servant or apprentice during the same time.

The master is also bound to instruct the apprentice in his art, trade or profession, and to teach him or cause him to be taught to read, write and cipher.

ARTICLE 170. Bound servants and apprentices and their masters may be compelled to the specific performance of their respective engagements, but those engagements may be rescinded before the time fixed for the contract, either at the suit of such bound servants or apprentices respectively, or at the demand of such master, if they have just cause to claim such rescission, and in such case the judge shall direct a restitution of such a part of the money received on account of such engagement, in proportion to the time not yet elapsed of that which has been fixed by the indenture, unless such rescission is occasioned by the fault of him who paid the money, in which case no restitution shall be made.

ARTICLE 171. If any master shall abuse, or cruelly or evilly treat his bound servant or apprentice, or shall not discharge his duty towards him, or if the bound servant or apprentice shall abscond or absent himself from the service of his master without leave, or shall not discharge his duty to his master, in any of these cases, there will be a sufficient cause to release the aggrieved party from his engagement, or to grant him such other redress as the equity and nature of the case may require, at the discretion of the judge.

ARTICLE 172. The death of the master of the apprentice dissolves the engagement of the latter, in the condition in which it is, and there can be no claim for remuneration on either side. But if the heir or one of the heirs of the master be a man of the same condition, trade or profession, he can cause himself to be authorized to take the place of the deceased with regard to the apprentice.

ARTICLE 173. A master may correct his indented servant or apprentice for negligence or other misbehavior, provided he does it with moderation, and provided he does not make use of the whip; but he can not exercise such rights with those who only let their services.

LA. CIV. CODE ANN. arts. 165-173 (West 1972). Each of these articles was derived from a similar provision of the Code of 1825 and the Digest of 1808. *See* LA. DIGEST OF 1808,

on third parties.<sup>35</sup> The entire Title was repealed in 1990 on the ground that it had become essentially anachronistic.<sup>36</sup>

By contrast, Chapter 3 of Title IX of Book III of the Code, the chapter which governs the contractual relations of employers and employees, has remained essentially unchanged from the initial organization of the Territory of Orleans until the present day.<sup>37</sup> Then, as now, the contractual relation between an employer and a free employee was conceptualized as a species of "lease"—specifically, a "lease of services"—and was made subject to the Code provisions governing obligations in general and leases in particular.<sup>38</sup> This Title of the Civil Code also distinguished among three categories of free employees: one general category of "servants" or "laborers"; and two

*supra* note 31, arts. 6-10, at 36-38; LA. CIV. CODE ANN arts. 157-167 (1825). Prior to repeal, the only significant amendments to the text were the 1964 change in articles 167 and 168 extending the maximum term for an engagement from five to ten years, and the repeal of article 166 in 1974. Act No. 355, 1964 La. Acts; Act No. 89 § 2, 1974 La. Acts.

35. Louisiana Civil Code articles 174 through 177 provided the following:

ARTICLE 174. A master may bring an action against any man for beating or maiming his servant, but in such case he must assign as a cause of action, his own damage arising from the loss of services, and this loss must be proved upon the trial.

ARTICLE 175. A master may justify an assault in defense of his servant, and a servant may justify an assault in defense of his master, the master because he has an interest in his servant, not to be deprived of his services; the servant because it is part of his duty for which he receives wages, to stand by and defend his master.

ARTICLE 176. The master is answerable for the offenses and *quasi*-offenses committed by his servants, according to the rules which are explained under the title: *Of quasi-contracts, and of offenses and quasi-offenses*.

ARTICLE 177. The master is answerable for the damage caused to individuals or to the community in general by whatever is thrown out of his house into the street or public road, and inasmuch as the master has the superintendence and police of his house, and is responsible for the faults committed therein.

LA. CIV. CODE ANN. arts. 174-177 (West 1972). These provisions were likewise derived from substantially similar predecessors in the 1808 Digest and 1825 Civil Code. *See* LA. DIGEST OF 1808, *supra* note 31, arts. 11-14, at 38; LA. CIV. CODE ANN. arts. 168-171 (1825).

36. Act, No. 705 § 1, 1990 La. Acts. The only provision of this Title that was retained was article 176, making an employer liable for offenses or quasi-offenses committed by his servant, which was redesignated as paragraph four of article 2320.

37. *Compare* LA. CIV. CODE ANN. arts. 2717-2721 with LA. DIGEST OF 1808, *supra* note 31, arts. 56-60, at 382.

38. Until its repeal in 1990, article 164 of the Louisiana Civil Code made this point expressly, stating that such employment contracts were subject to the rules "established in the title: *Of Letting and Hiring*." *See supra* note 33 (quoting article 164). Although article 164 has been repealed, other provisions contained within Title IX of Book III, "Of Lease," make it clear that the employees are still generally considered to be "leasing" their services to their employer. *See infra* notes 222-226 and accompanying text.

specialized categories of workers—"carriers and watermen" and "workmen who hire out their labor or industry to make buildings or other works"—whose occupations subjected them to special regulation.<sup>39</sup> Today, as in the past, the five articles dealing with the contractual rights and duties of "laborers" and "servants" in general have been regarded as applicable to all employees not falling into either of those special categories.<sup>40</sup>

While all five of these articles address the broad issue of tenure of employment, they differ markedly as to the breadth of their application. Article 2746 applies to all types of laborers and sets out the important principle that a worker cannot enforceably bind herself to service in perpetuity.<sup>41</sup> The remaining articles, in contrast, appear by their terms to apply to more limited classes of employees. Article 2747 refers on its face to servants "attached to [the] person or family" of their master, and provides that such servants can be dismissed or can depart at any time, without the need to assign any reason for doing so, and without legal liability on either part.<sup>42</sup> Article 2748 applies to

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39. Article 2745, which introduces the chapter "Of the Letting Out of Labor or Industry," explains:

ARTICLE 2745. Labor may be let out in three ways:

1. Laborers may hire their services to another person.
2. Carriers and watermen hire out their services for the conveyance either of persons or of goods and merchandise.
3. Workmen hire out their labor or industry to make buildings or other works.

The special regulations applicable to carriers and watermen are set out at articles 2751 through 2755, and those applicable to contractors, or other workmen who "build by a plot" or "work by the job" are set out in articles 2756 through 2777. Neither set of articles are applicable to the issues raised here.

40. This does not mean, however, that all provisions of articles 2746 through 2750 apply to all employees who are neither "carriers and watermen" nor contractors who hire out "to make buildings or other works." Article 2748, for example, applies by its terms only to a more limited class of "[l]aborers, who hire themselves out to serve on plantations or to work in manufactures," and article 2747 applies by its terms only to "hired servant[s] attached to [the master's] person or family."

41. Article 2746 provides the following: "A man can only hire out his services for a certain limited time, or for the performance of a certain enterprise." LA. CIV. CODE ANN. art. 2746 (West 1994). For the history and interpretation of this article, see *infra* notes 130-134 and accompanying text.

42. Article 2747 provides the following: "A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause." LA. CIV. CODE ANN. art. 2747 (West 1994). For the history and interpretation of this article, see the discussion in Part II, *infra*.

laborers “who hire themselves out to work on plantations or to work in manufactures,”<sup>43</sup> and articles 2749 and 2750 apply to those who are parties to fixed-term employment contracts.<sup>44</sup> Employees covered by these latter three articles can neither be dismissed nor leave their employment before their contractual terms expire, unless “just cause” or a “serious ground of complaint” can be shown.

These are the relevant articles. What remains for discussion are the concepts that lay behind the articles and the way in which those concepts have been interpreted and applied by Louisiana courts.

## II. A SHORT HISTORY OF EMPLOYMENT AT WILL IN LOUISIANA

The great majority of the available nineteenth and early twentieth century Louisiana cases dealing with what we today would call allegations of “wrongful termination” involve alleged or admitted fixed-term employment contracts. These cases usually turned on whether such a contract existed and, if so, whether “good cause” existed to terminate that contract.<sup>45</sup> These cases are important for their clear negative implication that “good cause” need not be

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43. Article 2748 provides the following:

Laborers, who hire themselves out to serve on plantations or to work in manufactures, have not the right of leaving the person who has hired them, nor can they be sent away by the proprietor, until the time has expired during which they had agreed to serve, unless good and just causes be assigned.

LA. CIV. CODE ANN. art. 2748 (West 1994).

44. Articles 2749 and 2750 provide the following:

ARTICLE 2749. If, without any serious ground of complaint, a man should send away a labourer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to such labourer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived.

ARTICLE 2750. But if, on the other hand, a laborer, after having hired out his services, should leave his employer before the time of his engagement has expired, without having just cause of complaint against his employer, the laborer shall then forfeit all the wages that may be due to him, and shall moreover be compelled to repay all the money he has received, either as due for his wages, or in advance thereof on the running year or on the time of his engagement.

LA. CIV. CODE ANN. arts. 2749, 2750 (West 1994).

45. See, e.g., *Berlin v. P.L. Cusachs, Ltd.*, 114 La. 744, 38 So. 539, 544 (1905) (finding no good cause for defendants to discharge plaintiff and awarding him the damages specified by article 2749); *Dietzgen Co. v. Kokosky*, 113 La. 449, 37 So. 24 (1904); *Ford v. Danks*, 16 La. Ann. 117 (1861); *Shoemaker v. Bryan*, 12 La. Ann. 698 (1857); *Lartique v. Peet*, 5 Rob. 91 (1843); *Sherburne v. Orleans Cotton Press*, 15 La. 360 (1840); *Beckman v. New Orleans Cotton Press Co.*, 12 La. 67, 70 (1838).

shown to dismiss an employee without a fixed-term contract. In other words, an important distinction has long been recognized between fixed-term and at-will employment. However, the cases say little about the central inquiry here, namely, whether an employer's right to dismiss an at-will employee should be limited by the requirement of good faith which applies to similar obligations under the Louisiana Civil Code. Although no early case discusses this issue directly, some indication of the original judicial understanding—and of how this original understanding came to be obscured—can be discerned.

A. *Glimpses of an Original Understanding: Nineteenth and Early Twentieth Century Jurisprudence on Termination of At-Will Employees*

Few reported cases from the nineteenth or early twentieth centuries involve termination of at-will employees. Fewer still involve any allegation of overreaching or abusive conduct on the part of the employer. However, the few cases indicate some judicial attention to the equities of the particular situation and an unwillingness to allow employers to use their right to terminate at will in unfair or abusive ways. Where the employer's exercise of the right to terminate an at-will employee was upheld, courts were careful to make clear that the employer was not exercising his right in such a way as to take undue advantage of the employee.

For example, in *Long v. Kee*,<sup>46</sup> the Louisiana Supreme Court was called upon to resolve a dispute between the owner of a plantation and the person he had hired to manage that plantation. Although the employment contract at issue "fixe[d] no period for its duration,"<sup>47</sup> the court clearly recognized that the employer was not completely free to fire the manager at any time. Rather, the employer's undisputed power to terminate the contract could only be exercised at the end of a year—in other words, when the manager had had a chance to reap the fruits of his labors for the year. Because the employer did notify the manager of his termination at the proper time, the termination was upheld.<sup>48</sup>

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46. 42 La. Ann. 899, 8 So. 610 (1890).

47. *Id.* at 902, 8 So. at 611.

48. *Id.* at 904, 8 So. at 612. It could be argued that *Long* is not a real employment at will case at all because its outcome could be explained by reference to a specific code

The Louisiana Supreme Court's decision in *Baron v. Placide*<sup>49</sup> is also illustrative. There, the court considered the claims of a French dancer who contracted to perform as a *danseuse* and *mime* at the defendant's New Orleans theater. Although the contract contemplated a fixed term, the employer reserved the right to discharge the plaintiff without cause upon two months notice. The contract also contained a penalty clause in the amount of 15,000 francs in the event of breach by either party. A dispute developed,<sup>50</sup> and the defendant peremptorily fired the dancer without notice. The defendant, in addition to contesting liability, contended that the maximum damages which he could be required to pay would be the two months salary to which the plaintiff would have been entitled had he properly exercised his option to dismiss her according to the contract. The court found for the plaintiff on both issues, rejecting the defendant's broad construction of his rights under the at-will clause as inherently unfair to the employee.<sup>51</sup> Notably, the court also rejected the plaintiff's demand for the full 15,000 francs that would have been due to her under the penalty clause and, instead, relied on a Code article applicable to

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provision, article 2748, which provides that "[l]aborers, who hire themselves out to serve on plantations" cannot "be sent away by the proprietor, until the time has expired during which they had agreed to serve, unless good and just causes be assigned." LA. CIV. CODE ANN. art. 2748 (West 1952). However, two points militate against such a conclusion. First, in this case there was no set "time" during which the defendant agreed to serve, thus making application of article 2748 problematic at best. Second, the opinion in *Long* nowhere refers to article 2748 or any of its predecessors; it appears to be based, instead, on what the court saw as more general principles of law. See also *Leonard v. Sparks*, 109 La. 543, 33 So. 594 (1903). In *Leonard*, the Louisiana Supreme Court upheld the right of an employer to fire one of two at-will employees, despite the allegation that the employees had formed a partnership to perform the assigned work, and that one could not be fired without the other. Though the bulk of the discussion in the case relates to the separate issue of whether the employees actually were partners *inter se*, the court was also careful to point out that the employer had not abused his rights by firing one of the two. On the contrary, the apparent preponderance of the evidence was that the plaintiff had "grossly insulted" his employer and, as the court noted, the employer's right to dismiss the plaintiff "cannot well be questioned, particularly if the change was for good cause." *Id.* at 549, 33 So. at 596 (emphasis added).

49. 7 La. Ann. 229 (1852).

50. The dispute arose when the defendant directed the plaintiff to, among her other duties, "dance parlor dances in parlor dress, with the figurants of the company" in a theatrical play which was being presented at his theater. The plaintiff ultimately refused to do so, on the ground that such employment was outside her duties (and apparently beneath her dignity) as a *premiere seconde danseuse*. *Id.* at 230.

51. The court reasoned both that such a construction would render the liquidated damages clause nugatory against the employer and, apparently, that the employee had been harmed by the abrupt way in which she had been fired. *Id.* at 231.

conventional obligations to order what would be a more fair settlement under the circumstances—that the plaintiff recover only the amount that would have been due her under the unexpired term of the contract.<sup>52</sup>

It also appears that during the early years of this century, Louisiana courts were far more willing than they later became to infer that an employment contract was for a definite term, particularly where doing so was necessary to avoid unfairness to the terminated employee. Such a presumption was long common with respect to agricultural employees—and remains clearly reflected in Civil Code article 2748—because of the evident impropriety of allowing a landowner to take advantage of a hired cultivator by dismissing him after the work of planting is done, but before the crops are reaped.<sup>53</sup> But the principle was not originally limited to this agricultural paradigm. Thus, for example, in *Woods v. W.A. Shumard Co.*,<sup>54</sup> the plaintiff sued on a verbal employment contract, a contract which both parties agreed “was for no definite fixed time.”<sup>55</sup> The court nonetheless held that since their arrangement obligated the employee to pay certain taxes and expenses on behalf of the employer, the contract must have been intended to extend for at least one year. Otherwise, the court reasoned, “defendant could have appropriated the plaintiff’s earnings for the payment of license taxes and other expenses, and terminated his employment,” raising an obvious potential for abuse of rights that the contract should be construed to avoid.<sup>56</sup> Similarly, in *Kramer v. Dixie Laundry Co.*,<sup>57</sup> the court resolved a conflict in testimony in favor of a plaintiff’s contention that his oral employment contract was for a one-year term, largely because the employee had relocated from another city in order to take the job. The court held that he therefore “should have been given some

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52. *Id.* (relying on article 2123 of the Louisiana Civil Code of 1825, which authorized the court to modify a penalty when the principal obligation has been partially executed).

53. *See, e.g., Miller v. Gidiere*, 36 La. Ann. 201, 204 (1884) (finding that a discharged overseer had an oral contract of employment for one year, but finding that the owner’s subsequent discharge of the overseer was “for cause”).

54. 114 La. 452, 38 So. 416 (1905).

55. *Id.* at 453, 38 So. at 418.

56. *Id.*, 38 So. at 419.

57. 8 Orleans App. 284 (1911).

assurance that his employment would be of a character sufficiently stable to justify" that move.<sup>58</sup>

In sum, the early case law on the rights and obligations that accompany employment contracts is sparse and for the most part indirect. However, it is noteworthy that this admittedly meager record gives no indication that, prior to the 1920s, Louisiana courts treated employment contracts without a fixed term as inherently different from other types of contracts terminable at the will of the parties. On the contrary, Louisiana courts appear to have treated employment contracts as subject to the same general regime as other types of conventional obligations.<sup>59</sup> There is also at least some evidence that courts were unwilling to allow employers to impose undue hardship on the terminated employee.<sup>60</sup> Finally, there is no indication that the Louisiana courts originally interpreted article 2747 to apply to ordinary at will employees or relied on that article to justify treating the legal rights and obligations of such employees as an exception to the general rules governing leases or other obligations terminable at will.

*B. Pitcher and Its Progeny: Importing the Common-Law Interpretation of Employers' Power over At-Will Employees*

Louisiana courts in the 1920s and 1930s often based decisions on perceived analogies to common-law precedents from other jurisdictions, rather than reasoning directly from the Louisiana Civil Code, as interpreted by civilian methodology.<sup>61</sup> This pattern also

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58. *Id.* at 285.

59. *See, e.g.,* Berlin v. P.L. Cusachs, Ltd., 114 La. 744, 38 So. 539 (1905) (determining the amount of damages by referring to provisions of the Civil Code dealing with conventional obligations in general).

60. The *Long*, *Woods*, and *Kramer* cases are discussed at notes 46-48 and 54-58, *supra*.

61. *See, e.g.,* Peter Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 LA. L. REV. 241, 257 (1985) (noting Louisiana's "drift towards the common-law for over a century and a half after the end of colonial rule," a drift that has been arrested only in "recent decades"). This tendency was particularly noticeable in the law of obligations, when Louisiana decisions from the 1920s and 1930s are full of analyses predicated on concepts of "consideration" and other common-law notions unknown to both the civilian tradition in general and the Louisiana Civil Code in particular. *See, e.g.,* United States Fidelity & Guaranty Co. v. Crais, 127 So. 414 (La. Ct. App. Or. Cir. 1930) (defining the relevant legal issue, for a contract governed by Louisiana law, as whether "the contract is supported by valid and legal consideration," and citing *Corpus Juris*, a common-law treatise, as controlling authority on the issue of the sufficiency of that "consideration").



prevailed with respect to the Louisiana courts' analysis of employment at will.

The first indication of the Louisiana courts' adoption of a common-law approach came not in cases raising issues of wrongful termination per se, but rather in cases involving the related issue of whether, if an employee continues to perform after the expiration of an originally fixed-term employment contract, the employment relation will be considered tacitly renewed for another term. During the nineteenth and early twentieth centuries, a line of Louisiana cases had held that employment contracts could be tacitly renewed in this fashion,<sup>62</sup> a conclusion that appears to have been based on an analogy between leases of services and leases of property, which the Code specifically makes renewable for a term by such tacit reconduction.<sup>63</sup> However, in its 1926 decision in *Russell v. White Oil Corp.*,<sup>64</sup> the

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62. See, e.g., *Sullivan v. New Orleans Stave & Heading Co.*, 44 La. Ann. 787, 791, 11 So. 89, 90 (1892) (denying a terminated employee any recovery in quantum meruit because his contract was considered to have been tacitly renewed); *Lalande v. Aldrich*, 41 La. Ann. 307, 311, 6 So. 28, 29 (1899) (holding that contract of plantation overseer was tacitly renewed for another year); *Alba v. Moriarty & Co.*, 36 La. Ann. 680, 681-82 (1884) (holding contract of salesman tacitly renewed). Cf. *National Automatic Fire Alarm Co. v. New Orleans & N.E.R.R. Co.*, 115 La. 633, 39 So. 738 (1905). The importance of *National Automatic* is somewhat obscure. The plaintiff in that case rendered services under a contract originally set for a two-year term. After that initial term expired, the plaintiff continued to render services for an additional three months before the defendant terminated the services. The plaintiff contended that the contract had been tacitly renewed for an additional two years, and that he was entitled to that which he would have earned at the contract price during those two years. It appears that the court was, at that time, still willing to admit the possibility that an employment contract could, like a lease of property, be tacitly renewed for a term. *Id.* at 636, 39 So. at 739 ("A contract for hire of services may also be continued by reconduction."). However, the court was clearly unwilling to adopt the logical consequence of that principle and award the plaintiff his full contract damages. Instead, the court distinguished *Sullivan* and *Lalande*, pointing out that in neither case did the employee recover for work not actually performed. Accordingly, the court awarded the plaintiff recovery only for the three months he actually provided services. Apparently, the conclusion that the contract had been renewed did not preclude the court from further concluding that the renewed contract could nonetheless be terminated prior to the expiration of its term. *Id.* at 638, 39 So. at 740.

63. LA. CIV. CODE ANN. arts. 2668, 2669 (West 1994). *Alba* and the other cases permitting tacit reconduction in the employment context failed to explain the conceptual basis for their holdings. The inference that the decisions were based upon an analogy between leases of property and leases of services is based primarily on the statements by Chief Justice Bermudez, dissenting in *Alba*, and Chief Justice Breaux, commenting on this line of cases in *National Automatic*. See *Alba*, 36 La. Ann. at 682-84 (Bermudez, C.J., dissenting); *National Automatic*, 115 La. at 638, 39 So. at 740.

64. 162 La. 9, 110 So. 70 (1926); see also *Williamson v. National Beneficial Life Ins. Co.*, 133 So. 515 (La. Ct. App. 2d Cir. 1931).

Louisiana Supreme Court rejected this prior line of Louisiana jurisprudence, holding instead that when such an employee continues to work after the expiration of a fixed-term contract, he reverts to at-will status. In doing so, the court conducted little analysis of Louisiana law in general, or the Civil Code in particular.<sup>65</sup> Instead, the court relied on common-law authority for the proposition that the employment relation must be mutual in its outlines—that if the employee is free to leave his job without liability, the employer must be reciprocally and equally free to fire the employee at any time, also without liability.<sup>66</sup> Because the court found that the plaintiff Russell would not have to serve another term, the employer White Oil was not bound to employ him either.<sup>67</sup>

The Louisiana Supreme Court first applied this new approach to terminations of pure at-will employees—and first signaled Louisiana's adherence to the absolutist, common-law analysis of employment at will—in its 1932 decision in *Pitcher v. United Oil & Gas Syndicate, Inc.*<sup>68</sup> There, the plaintiff alleged that he was fired by the defendant without cause and sought damages. The trial court granted the defendant's exception of no cause of action, and the Supreme Court affirmed, despite the plaintiff's proffer of a written employment contract that explicitly provided that "this contract of employment is to continue as long as [the defendant company] is operating."<sup>69</sup> In reaching this result, the court once again did not rely on codal or civilian authority of any kind; indeed, it cited only one Louisiana case, *Russell*, and only for the general (and unexceptional) proposition that contracts that are not for a fixed term can be terminated at will. On the crucial question of the legal effect of the contractual language, the

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65. The *Russell* court cited only a single Louisiana precedent, *National Automatic Fire Alarm Co. v. New Orleans & N.E.R.R. Co.*, 115 La. 633, 39 So. 738. *Russell*, 162 La. at 10, 110 So. at 71. Although *Russell* cited *National Automatic* as having "overruled" *Alba* and its progeny, that reading seems overstated. The *National Automatic* court explicitly reaffirmed the principle that employment contracts could be tacitly renewed for a term. Indeed, lower court opinions continued long after *National Automatic* to cite *Alba* as controlling authority on this point. See, e.g., *Newman v. Longshoremen's P.U. Benevolent Assoc.*, 11 Teiss. 38, 39 (La. Ct. App. 1913) (citing *Alba* for the proposition that, "[i]n a general way, the principle of tacit reconduction applies to a contract of hiring as well as to a lease upon property").

66. *Russell*, 162 La. at 11, 110 So. at 71 (citing CORPUS JURIS and *Cutter v. Powell*, 6 T.R. 320 (1795), reprinted in 2 SMITH'S LEADING CASES 1 (London 1929)).

67. *Id.* at 12, 110 So. at 71.

68. 174 La. 66, 139 So. 760 (1932).

69. *Id.* at 66, 139 So. at 761.

court in *Pitcher* relied entirely on common-law authority and common-law reasoning, and particularly on the common-law requirements that contractual promises must be “mutual” and supported by “consideration.”<sup>70</sup> The *Pitcher* court’s reliance on these common-law doctrines was explicit, permitting the court, in a rhetorical flourish, to expand on the public policy and legal issues it saw as relevant:

An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself; and the law will presume almost *juris et de jure* that he did not so intend. And if the contract of employment be not binding on the employee for the whole term of such employment, it cannot be binding upon the employer; there would be lack of “mutuality.” But if the employee has given, in addition to the services which he promised to perform, a consideration, whatever the nature of such consideration be, then he has in effect purchased, for a valuable consideration, an option to keep the employment for the term specified; and such a contract is a valid one.<sup>71</sup>

There are multiple ironies here. First, this opinion was written in 1932, at the depth of the worst economic depression in American history. At that time, few workers were likely to be “improving [their] condition” by trading steady employment for membership in the ranks of the jobless. Second, the court’s rhetoric—and its adoption of the mutuality requirement—allowed it to obscure the real issue at stake. Public policy might well forbid enforcement of promises by employees to remain in a particular job permanently.

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70. *Id.* The *Pitcher* court’s analysis was based in part on two cases, both from common-law states: *Sullivan v. Detroit, Ypsilanti & Ann Arbor Ry.*, 98 N.W. 756 (Mich. 1904), and *Rape v. Mobile & Ohio R.R.*, 100 So. 585 (Miss. 1924). However, the court appeared to place primary reliance, not on particular decisions, but rather on excerpts from two compilations of United States authority, “Ruling Case Law” and “American Law Reports”—excerpts which were themselves, as the *Pitcher* court proudly informed the reader, variously supported by case law from the following jurisdictions: Arkansas, California, Florida, Georgia, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Pennsylvania, Texas, West Virginia, and England. As a roster of common-law jurisdictions, this listing is indeed impressive. But as a guide to interpreting the unique legal traditions of Louisiana, such a recitation of authority should be somewhat less persuasive. See LA. CIV. CODE ANN. art. 1967 cmt. c (West 1987) (distinguishing cause from consideration).

71. *Pitcher*, 174 La. at 69, 139 So. at 761.

Legal authority ranging from the Thirteenth Amendment to the United States Constitution, to article 2746 of the Louisiana Civil Code might be cited in support of such a view. However, the case simply did not involve any issue regarding an alleged right of an employer to force an employee to remain on a job against his will. Unless one imports the common-law doctrine of mutuality, the contractual responsibilities of the parties should be analyzed separately, and public policy arguments relating to one would seem to have little relevance to the other. Finally, for reasons that should be obvious to any Louisiana lawyer, the argument made in *Pitcher* bears no relation to the Louisiana law of obligations. On the contrary, the terminology and the reasoning make sense only in the context of common-law analysis of contracts.<sup>72</sup>

In any event, applying those common-law requirements, the *Pitcher* court refused to enforce the employer's contractual promise not to fire Mr. Pitcher. Because the plaintiff was free to quit his job, mutuality required that the employer must—regardless of the words of the contract—remain similarly free to terminate the employee's services.<sup>73</sup> Such a unilateral promise not to fire would only be enforced when it was supported by "special consideration," a requirement which the court found absent from the case.<sup>74</sup>

Regardless of one's views of the proper relations between employers and employees, the conclusion seems inescapable that *Pitcher* was flawed in its reasoning, if not wrong in its result.<sup>75</sup> The

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72. See *infra* note 227 (discussing briefly the irrelevance of these traditional common-law concepts of "consideration" and "mutuality" to the Louisiana law of obligations).

73. *Pitcher*, 174 La. at 69, 139 So. at 761.

74. See *id.* The court stated the following:

But if the employee has given, in addition to the services which he promised to perform, a consideration, whatever the nature of such consideration be, then he has in effect purchased, for a valuable consideration, an option to keep the employment for the term specified; and such a contract is a valid one.

*Id.* As the court was quick to explain, "special consideration" had to be something that the employee gives to the employer over and above mere faithful performance by the employee of his work. *Id.*

75. The ultimate question of whether the court reached the right result in *Pitcher* depends in large part on issues of fact which the court did not explore. For example, whether sufficient cause could be found to support the employer's unilateral promise not to fire the employee might depend on the specific facts of the situation, including whether the employee reasonably relied on that promise to his detriment. See LA. CIV. CODE ANN. art. 1967 (West 1987). Alternatively, such a contract might have been rendered unenforceable

court was no doubt correct in its basic legal premise—that employment contracts for an indefinite term, like any other contracts for an indefinite term—can ordinarily be terminated at the will of either party. However, the court clearly failed in its analysis of whether the written contract, in which the employer had specifically promised to retain its employee as long as the company was operating, should have been interpreted as falling within that category of contracts terminable at will. Moreover, rather than analyze the parties' rights and obligations under the contract according to the established principles of the Louisiana Civil Code—including the established principle that parties to contracts terminable at will remain subject to the requirements of good faith in exercising their termination rights—the court chose instead to simply regard the employer's promise as unenforceable as a matter of law. In doing so, the *Pitcher* court imported into Louisiana law a set of alien concepts, concepts which continued to distort Louisiana's law of employment at will even after the revival of codal analysis in the Louisiana courts. Nonetheless, despite its flaws, *Pitcher* has deeply influenced subsequent Louisiana courts' consideration of all claims alleging wrongful termination of at-will employees.

From 1932 until 1988, the Louisiana Supreme Court took only a limited role in defining the contours of the at-will doctrine. The supreme court did act to some extent to confirm and extend the rule of *Pitcher*, holding that every employment contract reverts to at-will status after five years, regardless of the terms of the contract or any "special consideration" contributed by the employee.<sup>76</sup> However, on

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by article 2746, which provides that, "A man can only hire out his services for a certain limited time . . ." Or, if the contract had already been in operation for more than five years, perhaps it could have been argued that the contract converted to at-will status after that time. See LA. CIV. CODE ANN. art. 167 (West 1972). However, the relevance of article 167 to free employees is not at all clear. See *infra* note 127.

76. See, e.g., *Pechon v. National Corp. Serv.*, 234 La. 397, 408, 100 So. 2d 213, 218 (1958) (rejecting plaintiff's claim that he gave special consideration in the form of giving up a better job); *Lowther v. Fireside Mutual Life Ins. Co.*, 228 La. 946, 950, 84 So. 2d 596, 597 (1955) (rejecting the argument that article 167 was anachronistic); *Page v. New Orleans Pub. Serv., Inc.*, 184 La. 617, 620, 167 So. 99, 100 (1936) (holding that giving up a lucrative job in California is not special consideration justifying departure from the rule of employment at will and interpreting article 167 according to the doctrine of mutuality articulated in *Pitcher*); see also *Shaughnessy v. D'Antoni*, 100 F.2d 422, 424-25 (5th Cir. 1938) (holding ten-year employment contract valid for five years only); *Hill v. Missouri Pac. Ry.*, 8 F. Supp. 80, 81 (W.D. La. 1933) (holding plaintiff had no claim for wrongful discharge despite employer's contract to employ plaintiff for life or until retirement on full

the broader issue of interpreting the at-will rule, the Louisiana Supreme Court spoke rarely and with moderation.<sup>77</sup>

Despite the Supreme Court's quiescence, a distinct radicalization of the law took place in the Louisiana Courts of Appeal. Though there were occasional exceptions,<sup>78</sup> those courts tended to adopt a much

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pension; contract entered into in return for plaintiff's agreement to abandon claim for injuries); *Griffith v. Sollay Foundation Drilling Inc.*, 373 So. 2d 979 (La. Ct. App. 3d Cir. 1979) (relying on *Pitcher* to hold employee terminable without cause or notice, despite his having moved from Atlanta and accepted a job based on an oral promise of "lifetime employment"); *Thaxton v. Roberson*, 224 So. 2d 183, 185-86 (La. Ct. App. 3d Cir. 1969) (holding that a contract for a fixed-term of employment converts to at-will status after five years, but does not bar employee's recovery for services actually rendered thereafter); *Smith v. Sohio Petroleum Co.*, 163 So. 2d 124, 126 (La. Ct. App. 3d Cir. 1964) (finding contract converts to at-will status after five years).

Several of these decisions were criticized at the time they were rendered. *See, e.g.*, M.J.S., Note, 13 TUL. L. REV. 467 (1939) (criticizing *Shaughnessy* on the ground that article 167 should be interpreted to refer only to the maximum term for which apprentices and similar bound servants may bind themselves, not to any limitation on the contractual freedom of employers and free employees); Note, *Recent Jurisprudence, supra* note 5 (criticizing *Hill* for failure to recognize that the public policy behind article 167 does not extend to preventing employers from making unilateral promises limiting what would otherwise be their power to fire at will, especially when that promise was made in return for another valuable promise).

77. Between 1958 and 1988, the Louisiana Supreme Court decided only two cases which touched directly on issues of employment at will. In *Long v. Foster & Associates*, 242 La. 295, 136 So. 2d 48 (1961), the parties had entered into an employment contract for a five-year term, but the contract reserved to the employee the right to leave at any time, without liability. The employer fired the employee before the term had elapsed, but resisted liability on the ground that the contract was not "mutual" and that he could not be bound by a term unless the employee was likewise bound. The court enforced the contract, holding that the employer was bound despite the unilateral potestative condition. *Id.* at 53-54, 136 So. 2d at 309-14; *see* Note, 22 LA. L. REV. 872 (1962) (discussing *Long*). In *Moore v. McDermott, Inc.*, 481 So. 2d 602 (La. 1986), the court, in dictum, appeared to cast some doubt on the propriety of an absolutist reading of the at-will doctrine. Rather than argue in support of such an approach, the court instead quoted approvingly from *Wiley v. Missouri Pacific R.R.*, 430 So. 2d 1016 (La. Ct. App. 3d Cir. 1982), seemingly adopting the *Wiley* court's concerns regarding employers' superior bargaining power and the consequent movement away from an absolutist interpretation of the at-will rule in other jurisdictions. *Moore*, 481 So. 2d at 605.

In other cases, the Louisiana Supreme Court seemed to take into account the typical difference in bargaining power between employers and employees, though in no case did this result appear in an express holding modifying the rigors of the at-will rule in Louisiana. *See Wiley*, 430 So. 2d at 1018 (discussing in dictum the social reasons for the decline of an absolutist interpretation of employment at will in other states).

78. In a few cases from this period, lower courts seemed willing to find an oral contract of employment for a fixed-term based on nothing more than the "custom" of a particular industry. *See, e.g.*, *Roussel v. James U. Blanchard & Co.*, 430 So. 2d 247, 249 (La. Ct. App. 4th Cir. 1983) (finding an oral employment contract for a six-month term and holding where no term is expressed, the "understanding of the parties is to be determined

more absolutist interpretation of the at-will rule than the Louisiana Supreme Court, relying on *Pitcher* to uphold the employer's right to terminate employees regardless of the circumstances. Particularly during the 1970s and 1980s, lower courts in the state began to routinely uphold the employers' right to fire an at-will employee as a matter of law, without even permitting employees to present evidence that the firings violated public policy<sup>79</sup> or contradicted the employer's promises to the employee,<sup>80</sup> or that the circumstances otherwise

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from their written or oral negotiations, usages of the business and, in general, nature of the employment and its surrounding circumstances"); *Aguillard v. Lake Charles Stevedores, Inc.*, 284 So. 2d 124, 126 (La. Ct. App. 3d Cir. 1974) (relying on the custom of a particular workplace to hold that an at-will employee who was injured on the job could not be terminated; rather, the employer was required to pay salary and benefits for an additional term of two-and-a-half years); *Harrosh v. Fife Bros. Health Ass'n*, 1 So. 2d 323, 327 (La. Ct. App. Orleans 1941) (finding an oral contract of employment for a fixed term on weak facts; relying to a large extent on the inference that it would have been unreasonable to believe that the employee would have rejected a better offer, as he did, unless he was promised some sort of job security).

79. See, e.g., *Gil v. Metal Serv. Corp.*, 412 So. 2d 706, 708 (La. Ct. App. 4th Cir.) (holding that at-will employee who was fired when he refused to participate in employer's deceptive trade practices had no cause of action for wrongful termination, and rejecting the argument that then-article 11 (now article 7) embodies a public policy exception to the at-will rule), *writ denied*, 414 So. 2d 379 (La. 1982); *Baynard v. Guardian Life Ins. Co. of Am.*, 399 So. 2d 1200, 1202 (La. Ct. App. 1st Cir. 1981) (holding in a case arising before enactment of the federal Age Discrimination Act and its Louisiana equivalents, that an employee who was fired solely because of age states no cause of action against his employer); *Freeman v. Ebilco, Inc.*, 338 So. 2d 967, 968 (La. Ct. App. 4th Cir. 1976) (holding, in case arising before enactment of LA. R.S. 23:1361, that injured employee who allegedly was fired in retaliation for claiming workers' compensation stated no cause of action); see also *Martinez v. Behring's Bearings Serv., Inc.*, 501 F.2d 104, 107 (5th Cir. 1974) (holding that the plaintiff who alleged that he was fired in retaliation for making a complaint to the Wage and Hour Division of the federal Department of Labor stated no claim).

80. See, e.g., *Wall v. Tulane Univ.*, 499 So. 2d 375, 376 (La. Ct. App. 4th Cir.) (holding that since employee was at will, employer was free not only to fire him at any time but also to unilaterally revoke benefits described in the employer's Staff Handbook), *writ denied*, 500 So. 2d 427 (La. 1987); *Thebner v. Xerox Corp.*, 480 So. 2d 454, 455 (La. Ct. App. 3d Cir. 1985) (holding at-will employee who alleges that he was fired in violation of procedures set out in company policy manual states no claim), *writ denied*, 484 So. 2d 1239 (La. 1986); *Terrebonne v. Louisiana Ass'n of Educators*, 444 So. 2d 206 (La. Ct. App. 1st Cir. 1983) (holding that where teacher was fired despite Board resolution to re-employ all staff until a particular date, Board resolution was not binding and that teacher remained at-will because there was no "meeting of the minds" and because teacher remained free to quit); *Williams v. Delta Haven, Inc.*, 416 So. 2d 637, 638 (La. Ct. App. 2d Cir. 1982) (holding at-will employee who was fired without receiving the three prior warnings called for by employer's personnel policy stated no claim); *Senac v. L. M. Berry Co.*, 299 So. 2d 433, 434 (La. Ct. App. 4th Cir. 1974) (holding plaintiff failed to state cause of action where

indicated that the employer may have been exercising his rights in bad faith.<sup>81</sup>

Equally important was the gradual shift in the purported codal basis for these holdings. *Pitcher* did not rely on Civil Code authority at all. Shortly thereafter, however, lower courts rooted this line of cases in the Louisiana Civil Code. Article 167<sup>82</sup> was the first article courts seized upon. Post-*Pitcher* decisions initially relied on article 167 to justify their conclusions that employees who had employment contracts of indefinite term, or who had worked for more than five years, reverted to at-will status.<sup>83</sup> Later cases found an equivalent

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he was fired without cause, despite allegedly having been induced to leave another job based on an oral contract that he would not be dismissed without cause).

81. See, e.g., *Ballaron v. Equitable Shipyards, Inc.*, 521 So. 2d 481 (La. Ct. App. 4th Cir.) (holding employer had not committed an abuse of rights when it fired employees, who were willing to take employer-mandated lie detector test but refused to sign a consent form waiving all rights against the company administering those tests), *writ denied*, 522 So. 2d 571 (La. 1988); *O'Neal v. Chris Steak House*, 525 So. 2d 325, 328 (La. Ct. App. 1st Cir. 1988) (finding plaintiff stated no cause of action despite his claim that the employer fired him in order to prevent him from collecting on substantial conditional benefits); *Clements v. Ryan*, 382 So. 2d 279, 282 (La. Ct. App. 4th Cir. 1980) (holding employee who was accused of stealing, and was fired despite having twice passed lie detector tests, stated no cause of action for wrongful termination or defamation); *Ingram v. Kaiser Aluminum & Chem. Corp.*, 323 So. 2d 921, 923 (La. Ct. App. 4th Cir. 1975) (finding plaintiffs who claimed employer and union conspired to have them dismissed stated no cause of action under Louisiana law); *Copeland v. Gordon Jewelry Corp.*, 288 So. 2d 404, 407-09 (La. Ct. App. 4th Cir.) (holding employee who was discharged twenty-one days before he could exercise option to purchase stock had no claim for wrongful termination or for value of the stock), *writ denied*, 290 So. 2d 911 (La. 1974).

82. Prior to 1964, article 167 of the Louisiana Civil Code provided the following: "Persons who have attained the age of majority cannot bind themselves for a longer term than five years." In 1964, the article was amended to provide a maximum term of ten years. Act No. 355, 1964 La. Acts. In 1990, article 167 was repealed, along with most of the rest of Book I, Title VI, "Of Master and Servant." Act No. 705 § 1 1990 La. Acts.

83. See, e.g., *Lowther v. Fireside Mutual Life Ins. Co.*, 228 La. 946, 950, 84 So. 2d 596, 597 (1955) (rejecting argument that article 167 was anachronistic and thus ought be narrowly interpreted); *Page v. New Orleans Pub. Serv., Inc.*, 184 La. 617, 618, 167 So. 99, 100 (1936) (relying on article 167); see also *Shaughnessy v. D'Antoni*, 100 F.2d 422, 425 (5th Cir. 1938) (relying on article 167); *Hill v. Missouri Pac. Ry.*, 8 F. Supp. 80, 81 (W.D. La. 1933) (relying on article 167 to uphold dismissal of employee who had agreed to abandon a claim for injuries in return for a promise to employ him until retirement); *Thaxton v. Roberson*, 224 So. 2d 183, 186 (La. Ct. App. 3d Cir. 1969) (holding that article 167 not a bar to recovery for time actually worked beyond five years, but converts contract to at-will status after that time). Remarkably, article 167 continued to be cited for this proposition—that long-term contracts convert to at-will status after a period of years—even after it had been repealed. See *Chauvin v. Tandy Corp.*, 984 F.2d 695, 697-98 (5th Cir. 1993).



principle in article 2746.<sup>84</sup> Only in the early 1960s did courts begin to focus on article 2747<sup>85</sup> and the perceived dichotomy between articles 2747 and 2749<sup>86</sup> as the codal locus of the employment at-will rule in Louisiana. However, though this focus on article 2747 is of recent vintage, it quickly became and remains canonical. Since 1962, virtually all decisions involving the rights of at-will employees have relied on article 2747 to establish that employment at will is entrenched in the Civil Code of Louisiana.<sup>87</sup>

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84. See, e.g., *Pechon v. National Corp. Serv.*, 234 La. 397, 408, 100 So. 2d 213, 218 (1958) (rejecting employee's claim that he enjoyed an oral contract of employment "for life," based on articles 167 and 2746); *Manning v. Shreveport Transit Co.*, 130 So. 2d 497, 498 (La. Ct. App. 1st Cir. 1961) (citing article 2746 as the locus of the Louisiana doctrine of employment at will). See *supra* note 41 (quoting article 2746).

85. The first case which referred to article 2747 as the fount of Louisiana's law of employment at will appears to have been *Phillips v. Mid-Continent Life Insurance Co.*, 130 So. 2d 791 (La. Ct. App. 2d Cir. 1961). However, since the *Phillips* court found that the employee in that case enjoyed a contract for a term, that statement was arguably only dictum. *Phillips*, 130 So. 2d at 798. In *Baker v. Union Tank Car Co.*, 140 So. 2d 397, 402 (La. Ct. App. 1st Cir. 1962), that proposition first became a clear holding. The plaintiff in *Baker* had been employed by the defendant for twenty years. Although the collective bargaining agreement covering the plaintiff had expired, he and other workers continued to work during negotiations for a new agreement. Before that new agreement was finalized, the defendant fired the plaintiff. The court held that, under article 2747, in the absence of a fixed-term contract or a bargaining agreement in force, the plaintiff was an at-will employee who could be fired at any time. *Baker*, 140 So. 2d at 398-402.

86. See, e.g., *Breaux v. South Louisiana Elec. Coop. Ass'n*, 471 So. 2d 967, 968-69 (La. Ct. App. 1st Cir. 1985); *Hoover v. Livingston Bank*, 451 So. 2d 3, 4-5 (La. Ct. App. 1st Cir. 1984).

87. The cases from this period which refer to article 2747 as the source of Louisiana's at-will rule are far too numerous to list. See, e.g., *John P. Harris, M.D., Inc. v. Parmley*, 480 So. 2d 500, 503 (La. Ct. App. 5th Cir. 1985); *Thebner v. Xerox Corp.*, 480 So. 2d 454, 455 (La. Ct. App. 3d Cir. 1985), *writ denied*, 484 So. 2d 139 (La. 1986); *Aldahir v. Mobil Oil Exploration & Producing Southeast, Inc.*, 420 So. 2d 714 (La. Ct. App. 4th Cir.), *writ denied*, 423 So. 2d 1147 (La. 1982); *Gil v. Metal Serv. Corp.*, 412 So. 2d 706, 707 (La. Ct. App. 4th Cir.), *writ denied*, 414 So. 2d 379 (La. 1982); *Jackson v. East Baton Rouge Parish Sch. Bd.*, 393 So. 2d 243, 245 (La. Ct. App. 1st Cir. 1980); *Linzay v. Tangipahoa Parish Farm Bureau*, 387 So. 2d 1343, 1345 (La. Ct. App. 1st Cir.), *writ denied*, 393 So. 2d 748 (La. 1980); *Clements v. Ryan*, 382 So. 2d 279, 281 (La. Ct. App. 4th Cir. 1980); *Jackson v. East Baton Rouge Parish Indigent Defender's Bd.*, 353 So. 2d 344, 345 (La. Ct. App. 1st Cir. 1977); *Griffith v. Sollay Found. Drilling Inc.*, 373 So. 2d 979, 981 (La. Ct. App. 3d Cir. 1979); *Ingram v. Kaiser Aluminum & Chem. Corp.*, 323 So. 2d 921, 923 (La. Ct. App. 4th Cir. 1975).

C. *From Brannan to the Present: Absolutism Triumphant*

In 1988, the Louisiana Supreme Court granted writs in *Brannan v. Wyeth Laboratories Inc.*,<sup>88</sup> a grant which gave the court, for the first time in thirty years, an opportunity to review Louisiana's law of employment at will. But instead of re-examining that doctrine, the supreme court merely reaffirmed the flawed precedent of *Pitcher* and placed its imprimatur on the lower courts' reliance on article 2747 as the source of the at-will principle in Louisiana.

The facts of *Brannan* were not disputed. In 1964, the plaintiff left a secure civil service job to take a position as a pharmaceutical salesman with Wyeth Labs.<sup>89</sup> Though his employment was not for a fixed term, the plaintiff alleged, and the jury evidently believed, that he took the Wyeth job in reliance on oral assurances that he would not be fired except for just cause.<sup>90</sup> Although his performance was not stellar, the plaintiff received raises every year from 1964 until 1982.<sup>91</sup> In 1982, the employer received complaints from doctors, stating that Brannan had failed to take their orders for Wyeth Products.<sup>92</sup> After an investigation, the employer discovered that Brannan had falsified some "doctor call" reports; Brannan claimed to have made solicitations that he never made. Wyeth dismissed the plaintiff.<sup>93</sup>

Brannan brought suit alleging, among other things, wrongful termination of an oral employment contract. After trial, the jury found in favor of the plaintiff, awarding him \$250,000 in damages on that claim.<sup>94</sup> The Fifth Circuit affirmed.<sup>95</sup> The court of appeal correctly acknowledged that, as a general rule, at-will employees can quit or be

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88. 526 So. 2d 1101 (La. 1988).

89. *Brannan*, 526 So. 2d at 1102.

90. *Id.* The plaintiff also relied on the defendant's "Territory Managers Manual," which set out a multistep process for dealing with employees who do not perform adequately. According to that manual, such employees are to be first put in a "performance improvement program"; then, if their performance does not improve, on probation. Only after probation can an employee be fired. *Id.* at 1102-03.

91. *Id.* at 1103. In 1979, Brannan was placed on the performance improvement program in an effort to increase his number of daily doctor calls from approximately six to a minimum of seven calls per day. Though he did not improve, he continued to be employed. *Id.* at 1102-03.

92. *Id.*

93. *Id.*

94. *Id.* at 1102. The plaintiff was awarded an additional \$60,000 for defamation, wrongful denial of stock option rights, and accrued dental benefits.

95. *Brannan v. Wyeth Lab., Inc.*, 516 So. 2d 157, 173 (La. Ct. App. 5th Cir. 1987), *aff'd in part and rev'd in part*, 526 So. 2d 1101 (La. 1988).

fired at any time without liability, and that employment contracts generally could not at that time extend beyond ten years.<sup>96</sup> However, the court went on to hold that both of these principles could be modified. First, the ten-year rule would not apply where the employee gives “special consideration” in return for lifetime employment. Second, employers could contractually agree to modify or condition what would otherwise be their right to terminate employees at will. Third, the manuals and other documents relied on by the plaintiff, while not contracts in themselves, nonetheless could be used as evidence of an underlying oral agreement not to fire the plaintiff without sufficient cause.<sup>97</sup> Applying these principles, the Fifth Circuit found that sufficient evidence supported the jury’s conclusion that the employer had orally agreed not to fire the plaintiff except for just cause, and that sufficient cause was lacking in this case.<sup>98</sup>

The Louisiana Supreme Court reversed.<sup>99</sup> The court cited four Civil Code articles as “pertinent to” the issue of wrongful termination: the familiar articles 167 and 2746 and, for the first time in the supreme court, articles 2747 and 2024 as well.<sup>100</sup> The court did not, however, engage in any thorough re-examination of the importance of these articles. Rather, it simply relied on *Pitcher* and the line of post-*Pitcher*

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96. *Id.* at 164.

97. *Id.*

98. *Id.* at 165-68. The Fifth Circuit was less specific on the issue of whether sufficient special consideration existed to support modification of the ten-year rule in this case. However, the implication seems to have been that the special consideration here was the plaintiff’s decision to give up a secure civil service job. *But see* Page v. New Orleans Pub. Serv., Inc., 184 La. 617, 167 So. 99, 100 (1936) (holding that plaintiff’s act of giving up a lucrative job in California not special consideration justifying modification of the rule of article 167).

99. *Brannan*, 526 So. 2d 1101 (reversing the decision below except with respect to plaintiff’s claim for \$50 worth of unpaid dental benefits).

100. *Id.* at 1103. Of these articles, articles 167 and 2746, which at that time precluded an employee from binding himself for more than ten years, were familiar bases for prior Louisiana Supreme Court decisions on these issues. *See, e.g.*, Pechon v. National Corp. Serv., 234 La. 397, 408, 100 So. 2d 213, 218 (1958). *Brannan* did, however, break new ground, at least for the Louisiana Supreme Court because the court relied on articles 2747 and 2040. Specifically, *Brannan* marked the first time that the Louisiana Supreme Court held that article 2747, which provides that a servant attached to the person or family of the employer can quit or be dismissed at any time without liability, embodied a principle of employment at will applicable to the generality of employees. It also marked the first Louisiana Supreme Court reference to employment at will in connection with article 2024, which provides generally that contracts of unspecified duration can be terminated by either party, on reasonable notice to the other. *See supra* notes 34, 41, 42 (quoting articles 167, 2746, and 2747, respectively); *see also infra* note 122 (quoting article 2024).

jurisprudence to reaffirm that employment contracts for an indefinite term or for a term in excess of ten years are treated as terminable at will, at least in the absence of "special consideration."<sup>101</sup> In particular, the court approvingly quoted the passage from *Pitcher*, which rooted these doctrines in the common-law concepts of mutuality and consideration. Applying these principles, the court found that Brannan's decision to leave his civil service job to take a higher paying position with Wyeth Labs did not constitute "special consideration" and that his employment was therefore terminable at will, regardless of whether the employer had made any promises to the contrary.<sup>102</sup> His claim for wrongful termination was therefore denied.

In one sense, the Louisiana Supreme Court's decision in *Brannan* should not be surprising. The facts of the case presented little evidence of bad faith or abusive conduct by the employer; on the contrary, dismissal of Brannan could have been justified on any interpretation of employment at will.<sup>103</sup> Indeed, as the court went out of its way to point out, Brannan's conduct would likely have provided good cause for termination of an employee with a fixed-term contract.<sup>104</sup> However, the court's analysis of the issues could be taken as evidence that easy cases can make (or at least perpetuate) bad law.

The *Brannan* court's adoption of article 2747 as the source of the at-will rule and its reaffirmation of the *Pitcher* analysis resulted in a continuation and intensification of the hostility with which lower courts in Louisiana have regarded all claims of wrongful termination brought by at-will employees, a hostility which has often prevailed regardless of circumstances indicating bad faith on the part of the employer. Thus, since *Brannan*, Louisiana courts have relied on these principles to hold that an employer, though statutorily barred from direct retaliation against a workers' compensation claimant, may nonetheless retaliate by dismissing the claimant's relative<sup>105</sup> or

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101. *Brannan*, 256 So. 2d at 1103-04.

102. *Id.* at 1104.

103. It is noteworthy that, although the jury in the case determined that Wyeth lacked adequate grounds to fire Brannan, the Louisiana Supreme Court devoted more than a page of its opinion to a detailed recitation of his deficiencies, particularly his falsification of doctor call reports. *Id.* at 1102-03.

104. *Id.* at 1004-05.

105. *Portie v. Devall Towing & Boat Serv., Inc.*, 634 So. 2d 1324, 1326 (La. Ct. App. 3d Cir. 1994) (holding that workers' compensation claimant stated no cause of action when employer retaliated by firing claimant's brother). The court ruled that article 2747 and *Brannan* insulate the employer from liability for dismissal of at-will employees unless that

spouse.<sup>106</sup> They have relied on article 2747 to distinguish federal law and hold that an employer may escape liability for violating state laws against employment discrimination simply by showing that a nondiscriminatory reason also contributed to the dismissal.<sup>107</sup> Louisiana courts have also held that at-will employees who claimed that they were fired solely in order to deprive them of accrued retirement benefits,<sup>108</sup> or as part of an internal corporate power struggle,<sup>109</sup> or because of a soured sexual relationship with their boss,<sup>110</sup> or as the result of nothing more than an error by a co-

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firing contravenes a *specific* statutory exception, and that LA. R.S. 23:1361 is a "penal statute" which must be narrowly interpreted to grant protection only to the compensation claimant himself. *Id.*

106. *Woodson v. Alarm Protection Servs., Inc.*, 531 So. 2d 542, 543-44 (La. Ct. App. 5th Cir.) (holding that the wife of a workers' compensation claimant had no claim despite being fired in retaliation for her husband's claim; holding also that section 1361 protects only the individual employee asserting the claim), *writ denied*, 533 So. 2d 358 (La. 1988).

107. *Bradley v. Latter & Blum, Inc.*, 559 So. 2d 46, 48 (La. Ct. App. 4th Cir.), *writ denied*, 566 So. 2d 397 (La. 1990). Louisiana courts generally interpret LA. R.S. 23:1006(B), a Louisiana statute outlawing employment discrimination, in conformity with federal law interpreting Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000h. However, in *Bradley*, the court relied on article 2747 to articulate a rare analysis different from—and less favorable to employees—that which was applied under federal law. In *Bradley*, a terminated probationary employee brought an action under LA. R.S. 23:1006(B), alleging that she was fired because of her gender. The employer countered by alleging that the plaintiff had been excessively absent. Under federal antidiscrimination law, as it existed at the time, the employee could prevail unless the employer showed that he would have reached the same decision to fire solely on the basis of its asserted legitimate nondiscriminatory motive. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989). The *Bradley* court, relying on the strong tradition of employment at will in Louisiana, held in contrast that LA. R.S. 23:1006(B) imposed no similar burden on the employer to show the absence of "but for" causation. Rather, the employer can apparently prevail in such a case simply by showing that nondiscriminatory reasons contributed to the decision to fire, even if that decision was also the result of prohibited discrimination.

108. *Williams v. Touro Infirmary*, 578 So. 2d 1006, 1010 (La. Ct. App. 4th Cir. 1991) (holding that at-will employees who claimed they were fired in an effort to deprive them of accrued retirement benefits stated no claim for wrongful discharge).

109. *Dunbar v. Williams*, 554 So. 2d 56 (La. Ct. App. 4th Cir.), *reh'g granted in part*, No. CA-8330, 1989 La. App. LEXIS 899 (La. Ct. App. 4th Cir. May 9, 1989). A minority shareholder was deprived of the vice presidency and later fired, all as part of an intra-corporate dispute. The court held that, despite any possible equities, the minority shareholder enjoyed neither a contract for a term nor express statutory protection, and was therefore terminable at will. *Id.* at 69.

110. *Hammond v. Medical Arts Group, Inc.*, 574 So. 2d 521, 523 (La. Ct. App. 3d Cir. 1991). In *Hammond*, the plaintiff nurse had a consensual sexual relationship with one of the members of the medical partnership which employed her. After the affair ended, tension developed between the plaintiff and that doctor. The plaintiff finally quit and brought an action alleging constructive discharge. The court held that the plaintiff stated no

employee,<sup>111</sup> did not state claims sufficient to permit the employees to introduce evidence of their contentions. Courts have even relied on article 2747 and *Brannan* to bar dismissed employees from asserting otherwise applicable tort claims against employers<sup>112</sup> or third parties.<sup>113</sup>

In a related line of cases, Louisiana courts have likewise upheld employers' power to fire at-will employees without liability even when the termination breached the employer's express representations to the employee that he would not be fired unless certain procedures were

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claim either for wrongful discharge or for intentional infliction of emotional distress. *Id.* at 525.

111. *See, e.g., Johnson v. Delchamps, Inc.*, 897 F.2d 808, 809 (5th Cir. 1990) (holding at-will plaintiff who was fired after failing polygraph exam allegedly negligently administered by co-employee was precluded by article 2747 and *Brannan* from stating any claim for wrongful termination); *Martin v. Lincoln Gen. Hosp.*, 588 So. 2d 1329, 1337-38 (La. Ct. App. 2d Cir. 1991) (reversing jury verdict in favor of an at-will employee fired because of a co-employee's apparently inaccurate reports of financial improprieties, and holding that article 2747 precludes all claims for wrongful discharge), *writ denied*, 592 So. 2d 1302 (La. 1992).

112. *See, e.g., Massey v. G.B. Cooley Hosp.*, 593 So. 2d 460, 464 (La. Ct. App. 2d Cir. 1992) (denying fired employee's claims against employer for wrongful termination and intentional infliction of emotional distress on the ground that employer's conduct was not sufficiently "outrageous"; citing *Gil* for the proposition that Louisiana law gives employer "the right to fire [an employee] for any reason at all"), *judgment set aside*, 616 So. 2d 1242 (La. 1993); *Roberts v. Louisiana Bank & Trust*, 550 So. 2d 809, 812 (La. Ct. App. 2d Cir.) (finding the fired bank teller stated no cause of action for wrongful termination or defamation), *writ denied*, 552 So. 2d 398 (La. 1989).

113. *See, e.g., Durand v. McGaw*, 635 So. 2d 409, 411-12 (La. Ct. App. 4th Cir.) (holding that fired employee could state no claim against third party for intentional or negligent interference with contract; since employee was terminable at will, he had "no contract or legally protected interest in his employment necessary for a claim for tortious interference with contract."), *writ denied*, 640 So. 2d 1318 (La. 1994); *Herbert v. Placid Ref. Co.*, 564 So. 2d 371, 373-74 (La. Ct. App. 1st Cir.) (holding that employee stated no claim for negligence or negligent interference with contract rights against drug lab that allegedly negligently performed drug test, causing termination; since employee was at will, he cannot complain about reasons for that firing), *writ denied*, 569 So. 2d 981 (La. 1990). *But see* *Neel v. Citrus Lands of Louisiana, Inc.*, 629 So. 2d 1299, 1301 (La. Ct. App. 4th Cir. 1993) (holding that at-will employee of mineral lessee who lost job when lessor barred him from land states a cause of action against that lessor for intentional interference with contractual relations); *Neherenz v. Dunn*, 593 So. 2d 915, 918 (La. Ct. App. 4th Cir. 1992) (allowing claim against drug lab whose allegedly negligent tests led to plaintiff's dismissal; plaintiff's at-will status not a bar); *Lewis v. Aluminum Co. of Am.*, 588 So. 2d 167 (La. Ct. App. 4th Cir. 1991) (same as *Neherenz*). As the court in *Lewis* explained:

Even when employment is terminable at will, La. Civ. Code article 2747, the employment is a subsisting relationship, of value to the employee until it is terminated. Thus while the possibility of employment termination at any time affects the amount of damages sustained by the employee, it should not affect the employee's right of recovery.

588 So. 2d at 171 n.4.

followed.<sup>114</sup> Thus, for example, the plaintiff in *Mix v. University of New Orleans*,<sup>115</sup> a discharged employee at will alleged that his termination was invalid because the employer failed to follow its own "Grievance Procedure for Unclassified Personnel." The court of appeal affirmed the trial court's decision to grant summary judgment in favor of the defendant, holding that the grievance procedure was not bargained for and instead was presented as an inducement for the employee to accept employment. In the court's eyes, the grievance procedure was nothing more than a "unilateral expression of company policy" or a "mere gratuity," as to which there was no "meeting of the minds," and thus was not binding on the employee.<sup>116</sup> The plaintiff could therefore be fired at any time with no procedures or reason required.<sup>117</sup> It is particularly noteworthy that while the court in *Mix* was insistent that Louisiana's doctrine of employment at will is based in civil rather than common law, and that therefore common-law

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114. See also *Marson v. Northwestern State Univ.*, 607 So. 2d 1093, 1096 (La. Ct. App. 3d Cir. 1992) (holding against discharged nontenured faculty member who claimed that notice of termination was not sent in accord with Faculty Handbook; and upholding summary judgment for defendant, announcing what appears to be a *per se* rule that, as a matter of law, "policy handbooks do not constitute a part of the contract per se"); *Miceli v. Universal Health Servs., Inc.*, 606 So. 2d 908, 910 (La. Ct. App. 5th Cir.) (holding that employee was at will, despite language in employee handbook; court both applied disclaimer to find that the handbook was not part of employee's contract, and then recited all of the provisions of this noncontract that the employee assertedly breached), *writ denied*, 609 So. 2d 227 (La. 1992); *Keller v. Sisters of Charity of Incarnate Word*, 597 So. 2d 1113, 1115 (La. Ct. App. 2d Cir. 1992) (holding employer's personnel manual, which laid out graded levels of discipline preceding termination, not to be a contract). The *Keller* court followed *Thebner v. Xerox Corp.*, 400 So. 2d 454 (La. Ct. App. 3d Cir. 1985), *writ denied*, 484 So. 2d 139 (La. 1986), in asserting that the "elements for confection [of a contract were not] not present," but did not specify which element was missing. See also *Gilbert v. Tulane Univ.*, 909 F.2d 124, 126 (5th Cir. 1990) (following *Wall v. Tulane Univ.*, 499 So. 2d 375 (La. Ct. App. 4th Cir. 1986), *writ denied*, 500 So. 2d 427 (La. 1987), and holding that the Tulane employee handbook is not an enforceable contract). *But see* *Cowart v. Lee*, 626 So. 2d 93, 94-96 (La. Ct. App. 3d Cir. 1993) (holding that LA. R.S. 17:81.5 does place some procedural restraints on school boards who terminate employees, and thus removes employees from category of employees at will).

115. 609 So. 2d 958 (La. Ct. App. 4th Cir. 1993).

116. *Id.* at 961 (citing *Pitcher v. United Oil & Gas Synd.*, 174 La. 66, 139 So. 760 (1932); *State v. Motor*, 551 P.2d 783 (Kan. 1976)).

117. As the court stated: "The reasons for termination need not be accurate, fair or reasonable . . . . The question of why *Mix* was terminated is irrelevant and consequently raises no genuine issue of material fact." *Id.* at 964.

“exceptions” to that doctrine cannot apply,<sup>118</sup> the court’s actual analysis employed common-law concepts and methodology throughout.<sup>119</sup>

Perhaps the ultimate expression of the lower courts’ hostility to the claims of terminated employees can be found in the Fifth Circuit’s recent decision in *Finkle v. Majik Market*.<sup>120</sup> The plaintiff, a discharged assistant store manager, conceded that he was employed at will and could thus be fired without cause.<sup>121</sup> However, he contended that company policy and Louisiana Civil Code article 2024, the article which governs termination of contracts terminable at will,<sup>122</sup> both required that such firing be preceded by reasonable notice. The district court granted summary judgment for the defendant, and the Fifth Circuit affirmed. In an effort to justify the failure to provide the employee even the minimal “notice” rights embodied in article 2024, the *Finkle* court embarked on a novel analysis, arguing that

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118. *Id.* at 961 n.1.

119. The *Mix* court was sensitive to the potential for conflation of common- and civil-law authority, at least to some extent. Thus, while the court noted that the defendant had relied on “several excellent, well reasoned cases from around the country involving remarkably similar facts,” it declined to rely expressly on them, except “to refute the contention that Louisiana policy is somehow aberrational or anachronistic.” *Id.* at 961 n.1. However, on a deeper level, the court’s implicit reliance on common-law concepts and reasoning is apparent. Nowhere in *Mix* does the court discuss the parties’ contract in terms of “cause” or any other codal requirement for enforceability of conventional obligations; rather, the grievance procedure relied on by the plaintiff was held to be unenforceable essentially because of the lack of the common-law requirements of mutuality or consideration. Nor did the court attempt to reason from the language and purpose of article 2747, the only Civil Code article which it apparently found relevant to the dispute before it. Instead, the court relied solely on precedent and appeared to regard the lack of precedent which squarely supported the plaintiff as dispositive against him. *Id.* at 962-64.

Again, it may be that the same result could have been reached through civilian analysis. Or perhaps not. But in either event, it is clear that the reasoning process which Louisiana courts have actually followed in *Mix* and elsewhere continues to bear all the hallmarks of its common-law origin.

120. 628 So. 2d 259 (La. Ct. App. 5th Cir. 1993).

121. *Id.* at 260.

122. Louisiana Civil Code article 2024 provides the following:

ARTICLE 2024. A contract of unspecified duration may be terminated at the will of either party by giving notice, reasonable in time and form, to the other party.

This article was added in 1984. However, as the revision comments make clear, the concept it states was not new, but rather only makes generally applicable a principle of good faith that had previously been embodied in other more specific code articles. LA. CIV. CODE ANN. art. 2024 cmts. (West 1987). Remarkably, in light of the result in *Finkle*, revision comment (c) following article 2024 explicitly states that discharge of at-will employees is governed by that article: “(c) Under this Article, a contract for employment for an indefinite duration may be terminated at the will or either party.” (Emphasis added.)



employment relations can be classified into three, rather than the traditional two, separate regimes: those in which the employment is for a definite term; those in which the employee is employed according to a contract of unspecified duration; and employees at will, now conceived of as a third category of employees governed by article 2747 alone.<sup>123</sup> Thus, the court accepted the defendant's argument that this last category of employment relations is not even contractual in nature, and thus article 2024 did not apply.<sup>124</sup> Apparently, according to the court in *Finkle*, the employee just happened to show up to work each day, and the employer just happened to give him money each week, without any promise on either side or any understanding that the payment was in return for the performance.

The purpose behind presenting the case law has not been to imply that all of the cases reached the wrong result, or that Louisiana should abandon the doctrine of employment at will. Rather, the cases highlight two important points about the Louisiana courts' current approach to these issues. First, the current approach did not develop organically out of the Louisiana Civil Code and was not interpreted by traditional civilian methods of analysis. Instead, that approach has its roots in common-law analysis and concepts. Although later cases have attempted to root their analyses in various articles of the Louisiana Civil Code—initially article 167, later article 2746, and after 1961 and continuing until today, in article 2747—the historical process shows that the courts' analysis has been “grafted onto” rather than “derived from” those articles. Louisiana's adoption of absolutist common-law concepts of employment at will came first. The Civil Code was cited in support of that analysis only later. Second, the Louisiana Supreme Court has never definitively ruled that issues such as good faith or reliance on representations by employers are irrelevant to an analysis of employment at will in Louisiana. Although the absolutist tradition is strong in Louisiana, the actual *holdings* that

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123. *Finkle*, 628 So. 2d at 261-62.

124. In the court's words:

In this case, defendant has provided ample evidence to show that the relationship between it and plaintiff was simple, at-will employment. The affidavits of the company personnel state that plaintiff was not hired under a contract for an *indefinite or definite* term.

*Id.* at 262. Cf. *Brannan v. Wyeth Labs, Inc.*, 526 So. 2d 1101 (La. 1988) (identifying article 2024 as one of the articles of the Civil Code “pertinent to” termination of at-will employees).

embody this extreme version of the doctrine exist only among the courts of appeal; the views of the Louisiana Courts of Appeal have never been ratified or adopted by the Louisiana Supreme Court.

It is not enough, however, to demonstrate that Louisiana's doctrine of employment at will has been shaped by common-law influences, or that the state's highest court has not yet definitively ruled on the more extreme uses to which that analysis has been put. What remains unclear is how that analysis *should* proceed so that it conforms to the terms and methodology of the Louisiana Civil Code.

III. ON THE MISINTERPRETATION OF ARTICLES 167, 2746, AND 2747:  
WHY AT-WILL EMPLOYMENT AGREEMENTS SHOULD BE TREATED  
LIKE ALL OTHER OBLIGATIONS TERMINABLE AT WILL

Louisiana courts have treated at-will employment contracts as *sui generis*, to be analyzed without reference to the analysis accorded similar obligations terminable at will. Although originally borrowed from common-law sources, this specialized treatment has been justified by reference to certain specific Louisiana Civil Code articles—former article 167 (present article 2746) and today article 2747—and by the implicit rule that specific codal provisions prevail over general ones. Thus, the first step in analysis must be to determine the importance of these articles, whether they apply to ordinary employees and, if so, whether they should be interpreted in a manner that subjects ordinary employees to a specialized regime, one which does not apply to similar leases and conventional obligations.

A. *Former Article 167*

Former article 167 can be disposed of quickly. Until its repeal in 1990, that article provided the following: "Persons who have attained the age of majority cannot bind themselves for a longer term than ten years."<sup>125</sup> Because article 167 has been repealed,<sup>126</sup> it certainly provides no current basis for interpreting the relations of employers and employees according to a special regime. However, it

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125. LA. CIV. CODE ANN. art. 167 (West 1972). Originally, the maximum term permitted by article 167 was five years. It was amended in 1964 to extend the term to ten years. Act No. 355 1964 La. Acts.

126. Act No. 705, § 1 1990 La. Acts.

is worth noting that even when still in effect, article 167 provided no justification for an absolutist approach to an employers' right to terminate at-will employees. Several reasons underlie this conclusion. First, the sources and context of article 167 strongly suggest that it was intended to apply only to "bound" servants, such as apprentices or indentured servants, who were considered to have "sold" rather than "leased" their services.<sup>127</sup> Second, article 167 was intended, and should have been interpreted, to protect rather than to justify bad faith conduct toward employees.<sup>128</sup> Finally, even if

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127. Several items of evidence converge to support the conclusion that article 167 was intended to apply only to bound servants. First, the drafting history of the group of articles of which article 167 was a part indicates that all—including article 167—were intended to apply only to bound servants. Articles 165 through 173 were derived from substantially similar provisions of the Louisiana Civil Code of 1825. LA. CIV. CODE ANN. arts. 157-167 (1825); *see supra* note 34 (presenting articles 165 through 173). In particular, article 167 was a verbatim copy of a predecessor provision in the Code of 1825, a provision which had no cognate in the Digest of 1808. LA. CIV. CODE ANN art. 160 (1825). As the *Projet* for the 1825 Civil Code made clear, these articles were all added, as a group, in order to conform the Code to statutory law regulating bound servants:

We have been under the necessity of altering this chapter in order to insert in it the principal dispositions of the act of May 21, 1806, entitled "an act to regulate the duties and rights of apprentices, & c."

LOUISIANA LEGAL ARCHIVES: A REPUBLICATION OF THE PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825, at 11 (1937) [hereinafter *PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825*].

The plain language of articles 165 through 173 also clearly indicates that they are of limited application, either because they specifically refer to apprentices or "bound" servants, or because they would make little sense in any other context. *See supra* note 34 (setting out the full texts of the relevant articles). Thus, although the English text of article 167 does not specifically limit its application to apprentices or indentured servants, the context in which that article appears is certainly suggestive.

Finally, this pervasive unity of application is particularly evident in the French texts of the corresponding articles of the 1825 Civil Code, which use the verb "*s'engager*" to describe the process by which an apprentice or indentured servant becomes bound, and the cognate noun "*engagé*" throughout the predecessors of the above articles to describe the class of servants to which they apply. The French text of the 1825 predecessor of article 167, in particular, used this same term, "*engagé*," to identify those servants to which it applied. *See generally* M.J.S., *supra* note 76, at 467 (arguing that article 167 should be understood, from its context, to apply only to bound servants).

128. When the predecessor of article 167 was first inserted into the Louisiana Civil Code in 1825, the drafters chose to shorten the maximum term for engagement from the seven years permitted by the then-applicable statute to the five years originally permitted by the Code. La. Civ. Code Ann. art. 160 (1825). As the drafters of the 1825 *Projet* explained: "The term formerly permitted was seven, but it is better for the person employed to renew his engagement, if he thinks proper, than to be bound for so long a time." *PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825*, *supra* note 127, at 12.

expansively interpreted, article 167 provided only that contracts for more than a set number of years reverted to at-will status thereafter.<sup>129</sup> Article 167, by itself, limited only the permissible length of the contracts to which it refers. Article 167 contained no language suggesting how the substantive rights of employers and employees in at-will relationships should be interpreted, nor provided any authority for interpreting such contracts differently than any other contract terminable at will.

*B. Article 2746*

Article 2746 likewise provides no justification for treating employment contracts as inherently different from other sorts of contracts terminable at will. That article provides the following: "A man can only hire out his services for a certain limited time, or for the performance of a certain enterprise."<sup>130</sup> Unlike former article 167, article 2746 remains in effect and does appear to apply to ordinary employees.<sup>131</sup> However, the drafting history<sup>132</sup> and ultimate

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Subsequent courts and commentators have recognized the dominant purpose of article 167 to protect, rather than disadvantage, employees. *See, e.g.,* Thaxton v. Roberson, 224 So. 2d 183, 185 (La. Ct. App. 3d Cir. 1969) (holding that since article 167 was intended to protect employees, it should not be interpreted to bar recovery, at the contract rate, for time an employee actually worked beyond the maximum five-year term of his contract); *Recent Jurisprudence*, *supra* note 76 (discussing a plethora of civilian and Louisiana authority for the proposition that article 167 was intended only to prevent employees from being bound for more than five years, and not to confer any rights on the employer).

129. *See supra* note 76 (discussion therein).

130. LA. CIV. CODE ANN. art. 2746 (West 1994).

131. The grounds for distinguishing the applicability of article 2746 from that of former article 167 are at least twofold. First is their respective contexts. Former article 167 appeared in the Code among a series of other articles which unmistakably applied only to apprentices, indentured servants, and the like. *See supra* note 127 (discussion therein). Article 2746, in contrast, is placed in Book III, Title IX, Chapter 3, the chapter which discusses the contractual relations of employers and employees in general. The second difference between article 2746 and former article 167 is their language. Former article 167 spoke of the maximum length of time for which employees may "bind themselves" ("*s'engage*," in the French version of the 1825 predecessor), a choice of words which suggests some form of bound servitude. Article 2746, in contrast, speaks of the limits on a person's ability to "hire out his services," ("*engager ses services*" in the French version of the 1825 predecessor), a choice which suggests a more limited, and thus more typical, kind of employer-employee relation.

132. Current article 2746 is a verbatim copy of a predecessor in the Louisiana Civil Code of 1825, which was itself copied, without substantial change, from the Louisiana Digest of 1808. La. Civ. Code Ann. art. 2717 (1825); La. Digest of 1808, *supra* note 31, art. 56, at 382. The French text of the article was also copied verbatim from the Digest of 1808 to the Code of 1825, and reads as follows: "On ne peut engager ses services qu'à tems, ou

sources<sup>133</sup> of article 2746 clearly indicate that this article too was intended only for a limited purpose—i.e., to protect employees by preventing them from alienating the whole of their life's working capacity, an act which the original French sources of article 2746 saw as equivalent to selling oneself into slavery.<sup>134</sup> At most, article

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pour une entreprise déterminée." LA DIGEST OF 1808, *supra* note 31, art. 56 at 383; LA CIV. CODE ANN. art. 2747 (West 1972) (notes). As can be seen, the English text is, in this case, an accurate translation of the French original.

133. The French text of this article was copied verbatim from the French Code Civil of 1804, the Code Napoleon. CODE CIVIL art. 1780 (1804); LA CIV. CODE ANN. art. 2746 (West 1972) (notes). See generally Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 113 (1971). Article 1780 of the French Code Civil of 1804 was in turn derived from a somewhat differently phrased article of the French Projet of 1800, the study that led to the Code Napoleon: "111. On ne peut engager ses services qu'à temps, et non pour la vie." PROJET DE CODE CIVIL, PRESENTE PAR LA COMMISSION NOMINEE PAR LE GOUVERNEMENT LE 24 THERMIDOR AN VIII. bk. III, tit. XII, art. 111 (1800) [hereinafter FRENCH PROJET OF 1800].

134. The draft version of this article as it originally appeared in the French Projet of 1800 made this purpose explicit because it expressly forbade enforcement of employment contracts "for life" ("*pour la vie*").

This understanding was also made clear in the "*Observations*" of the French Appellate Tribunals on the draft text of the Projet of 1800, and in the "*Discussions*" of the Conseil d'Etat, in which that draft text was amended and cast into its final form. Several of the Tribunaux d'Appel suggested that a reasonably short maximum term for employment contracts should be established in order to prevent employment from degenerating into a kind of servitude. 5 P.A. FENET, RECUEIL COMPLET DES TRAVAUX PREPARATOIRES DE CODE CIVIL 84 (Paris 1836) (comments of the Tribunal d'Orleans); 4 FENET, *supra*, at 209 (comments of the Tribunal de Lyon). The Conseil d'Etat was also clear that this was the reason for the provision, and that the change in terminology between the Projet of 1800 and the Code Civil of 1804 was not intended to change its meaning:

A l'occasion du louage des domestiques et ouvriers, il éstat convenable de consacrer de nouveau le principe de la liberté individuelle; c'est ce que fait le projet en statuant qu'on ne peut engager ses services qu'à temps ou pour une entreprise déterminée.

4 FENET, *supra*, at 339.

Villaume, in his nineteenth century commentary of the Code Napoleon, was even more explicit, both as to the reason for the inclusion of this article in the Code Napoleon, and its intent to protect the employee. The employer, according to Villaume, gained no rights by virtue of this article. He wrote:

La loi n'admet pas comme valable l'obligation prise par un homme de servir toute sa vie, ce que serait contraire à la liberté naturelle et à la dignité humaine. Il en serait de même si l'engagement éstat fait pour un temps fixe ou un entreprise déterminée, si ce temps ou la durée de l'entreprise étaient assez considérables pour absorber la vie de celui qui s'oblige.

Mais je ne vois pas ce qui empêcherait le maître de s'obliger à garder un domestique pendant toute sa vie; dans cette convention, rien de contraire à l'ordre public, rien à la liberté; cet article ne s'y oppose pas; seulement, si l'ouvrier manque à ses engagements, le maître peut le renvoyer.

2746 provides some authority for the proposition that contracts without a specific end point should be considered terminable at will; it also says nothing about whether exercise of the right to fire an at-will employee requires good faith, or whether the right can be modified by contract.

C. *Article 2747*

Article 2747, in contrast, poses a more difficult interpretive challenge. Louisiana courts have relied on this article for the last thirty years to justify their absolutist approach to employment at will. In contrast to former article 167 and article 2746, article 2747 does provide authority for an absolutist approach to an employer's right to fire, at least in the circumstances to which it refers. Article 2747 provides as follows:

A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause.<sup>135</sup>

Remarkably, although this article has been cited and quoted by Louisiana courts on many occasions, no court has expressly considered the question of whether article 2747 applies to *all* employees who work without a fixed-term contract, or rather to only a limited subcategory of such employees. While many courts have assumed without discussion that the article can be broadly applied,<sup>136</sup> the plain language of article 2747 suggests that it does *not* apply to every employee. Instead, the article, on its face, appears to apply to only a restricted class of employees—to servants who are “attached to [the master’s] person or family.” The question is whether this apparently limiting language should be interpreted in accord with its ostensible meaning.<sup>137</sup> To answer this question, it will be necessary to investigate the sources from which the article was drawn, the specific language

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M. F. VUILLAUME, COMMENTAIRE ANALYTIQUE DU CODE NAPOLEON 598 (Paris 1858).

135. LA CIV. CODE ANN. art. 2747 (West 1988).

136. See *supra* notes 84-85 and accompanying text.

137. I am indebted to a colleague, Robert Pascal, for pointing out the significance of this limiting language. Like the courts of Louisiana, I too read article 2747 for years without ever paying attention to those words or reflecting on their possible meaning. That we did so is a testament to the power of a received understanding to obscure what should have otherwise been obvious. That Professor Pascal perceived the plain meaning of the words is a testament to the value of rigorous civilian scholarship and to the virtues of critical awareness of and fidelity to texts which such training engenders.

which it employs, the relation between article 2747 and other articles of the Louisiana Civil Code which also deal with similar categories of employees, and the early case law defining those special categories.

### 1. Origin and Sources of Article 2747

The drafting history of article 2747 is clear, although not in itself helpful in elucidating the meaning of the relevant phrase. Article 2747 has never been amended, and is thus not accompanied by any Revision Comments. Its text was copied verbatim from a predecessor article of the Louisiana Civil Code of 1825,<sup>138</sup> which was itself copied from the Louisiana Digest of 1808.<sup>139</sup> Moreau-Lislet's "source notes" to the Louisiana Digest of 1808 do not list any source for the predecessor of present article 2747.<sup>140</sup> However, the text of the relevant article of the Louisiana Digest of 1808 is a close copy from the French *Projet du Gouvernement* of 1800,<sup>141</sup> the study that led to the Code Napoleon.<sup>142</sup> Thus, scholars have had no difficulty in concluding that the ultimate source of current article 2747—like that of all the other Code articles on lease of services—was the French *Projet* of 1800<sup>143</sup> and more broadly, the Roman and French legal traditions which underlay that *Projet*.

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138. LA. CIV. CODE ANN. art. 2718 (1825).

139. LA. DIGEST OF 1808, *supra* note 31, art. 57, at 382. The English text of this article in the Digest is identical to current article 2747. The French text of the article—which, as the language in which the Digest was composed, is the more authoritative—reads slightly differently than the English version, as follows:

ARTICLE 57. Les domestiques attachés à la personne du maître, ou au service des maisons, peuvent être renvoyés en tout tems sans expression de cause, et peuvent de même quitter leurs maîtres.

140. LA. DIGEST OF 1808, *supra*, note 31, opp. at 382. *See generally* Mitchell Franklin, *An Important Document in the History of American Roman and Civil Law: The de la Vergne Manuscript*, 33 TUL. L. REV. 35 (1958) (describing the discovery and initial evaluation of the de la Vergne manuscript); Robert Pascal, *A Recent Discovery: A Copy of the "Digest of the Civil Laws" of 1808 with Marginal Source References in Moreau-Lislet's Hand*, 26 LA. L. REV. 25 (1965) (describing the discovery of and evaluating another volume apparently containing the original draft of Moreau-Lislet's notes).

141. FRENCH PROJET OF 1800, *supra* note 133, bk. III, tit. XII, art. 112.

142. Interestingly, the relevant article from the French *Projet* of 1800 was never incorporated into the Code Napoleon, or into any subsequent version of the French Code Civil. It lives today only in the Civil Code of Louisiana. *See infra* notes 161-166 and accompanying text.

143. LA. CIV. CODE ANN. art. 2747 (West 1972) (notes); Batiza, *supra* note 133, at 113.

## a. The Ancienne Regime: Of Rome and Pothier

A central institution of Roman private law was the “family,” an expansive concept that included not just blood and adoptive relations, but also the servants and retainers attached to the family. All who lived within and as part of that extended family—sons, slaves, and everyone in between—lived under the originally absolute and always substantial power of the *paterfamilias*, who alone owned and disposed of family property.<sup>144</sup> Productive labor was generally performed within the context of the nearly self-sufficient household and by its members. For this reason, the lease of labor or services by nonfamily outsiders, though recognized at Roman law,<sup>145</sup> was a relatively rare and unimportant institution, one which was never well articulated or developed in Roman law.<sup>146</sup> It is clear, however, that Roman law maintained an important distinction between workers who resided within the master’s household and were subject to his general authority, and workers who were not part of the household and whose relations to the *paterfamilias* were solely contractual in nature.<sup>147</sup>

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144. As one commentator has stated:

The word *Familia* has many meanings, but in its strict sense it denotes a group consisting of a *paterfamilias* and those under his control, *i.e.*, his children, adoptive or natural, who have not passed out of the family by emancipation or the like, remoter issue through males, in the same case, the wife, . . . civil bondsmen and slaves.

WILLIAM W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 102 (1921); *see also* HENRY MAINE, ANCIENT LAW 135-46 (Legal Classics Library ed. 1982); BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 65-67 (1962).

145. This lease could take one of two forms: the *locatio conductio operarum*, in which the worker, as lessor, places his services at the disposal of the employer, as lessee; and the *locatio conductio operis*, in which the employer, as lessor, places out a piece of work to be done (the worker, as lessee, in effect leases the job). Interestingly, only certain forms of work—those relatively laborious, menial or “illiberal” arts which could be valued in money—could be the subject of the *locatio*. Exercise of the “liberal arts” such as the services of an attorney, were not considered appropriate for lease. *See generally* BUCKLAND, *supra* note 144, at 500-03; L. B. CURZON, ROMAN LAW 152-54 (1966); NICHOLAS, *supra* note 144, at 182-83.

146. WILLIAM BUCKLAND, ELEMENTARY PRINCIPLES OF ROMAN PRIVATE LAW 276 (1912) (“In view of the large part which *locatio* plays in modern life, and it seems, must have played at Rome, the paucity of our information in the texts is somewhat surprising.”); NICHOLAS, *supra* note 144, at 183-84; Thomas Tucker, *Sources of Louisiana’s Law of Persons: Blackstone, Domat and the French Codes*, 44 TUL. L. REV. 264, 268-69 (1970).

147. Tucker, *supra* note 146, at 268-69.



The law of pre-revolutionary France was broadly similar to that of Rome. Although the family no longer held unquestioned primacy as the organizing principle of civil society in pre-revolutionary France,<sup>148</sup> members of the household still performed much work within the context of the household. Lease of services, though still recognized, continued to be a relatively undeveloped category of legal analysis.<sup>149</sup> Jurists of the time typically discussed the overall topic of leases and hires almost entirely in the context of leases of things, and generally dealt with problems arising out of the lease of services only as relatively minor specifications of or deviations from the basic rules governing leases in general.<sup>150</sup> It appears, however, that the important

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148. See, e.g., 1 JEAN DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER*, tit. 2, § 2, at 141-42 (Luther Cushing trans., William Strahan ed., 1853) (noting that the Roman-derived distinction between fathers and sons remained important as a basis for French law, but adding that new distinctions among persons unknown to Roman law—such as those regarding the nobility, burgesses, and vassals—had also become important as well).

149. One French commentator summed it up this way:

Our ancient authors, with Pothier at their head, were not concerned with the letting of work; they did not determine either its nature, nor its conditions, nor its effects, and there are two reasons for that: (1) the Roman law could not serve them as a guide, having known only servile work; (2) under the ancient monarchy, industrial work was subjected either to a corporative regime regulated by interior rules of the corps of industry, or to the regime of privileged manufacturers, the first form of big industry, governed by royal ordinances. All that was considered as a matter of policy, much more than of law. And the jurists, such as Pothier, found as submitted to juristic principles, only the hiring of domestics, a small and infertile matter, especially at that time.

2 MARCEL PLANIOL, *TRAITE ELEMENTAIRE DE DROIT CIVIL* NO. 1828, at 102 (Louisiana State Law Institute, 11th ed. 1939, 1959); see also Tucker, *supra* note 146, at 273.

150. Thus, for example, Domat's treatment of leases of services was limited to such specialized issues as the degree of care which the worker must exercise with regard to the employer's property, the special duties of carriers and watermen, allocating the risk when the project is destroyed before completion, and the liability of the employer for wages under various eventualities. DOMAT, *supra* note 148, bk. I, tit. IV, §§ 8 & 9, at 278-83. Domat treated the issue of lease of property, especially real property, first and most extensively. Only the two relatively short sections of his treatise noted above dealt with the *locatio operarum*, the leases of services.

Pothier, in his treatise on leases, wrote extensively about leases of labor or industry only in two places. The more lengthy of the two treatments, Part Seven of the treatise, dealt with the *locatio operis*, the letting and hiring of a piece of work. Though important, the legal relationship contemplated in this Part was more akin to what we would classify as the relationship between a principal and an independent contractor, rather than that existing between an employer and an employee. ROBERT POTHIER, *TREATISE ON THE CONTRACT OF LETTING AND HIRING* §§ 392-457, at 146-71 (G.A. Mulligan trans., 1953). That latter relationship, conceptualized as the letting or hiring of services by a worker to an employer (*locatio operarum*), was discussed by Pothier in only a single article of thirteen sections. The only issues discussed in that article were the questions of whether and to what extent

distinction between servants who were members of the employer's household and those who only leased their labor was maintained. Thus, for example, Pothier, in his limited discussion of the lease of services, seems to speak of at least two different types of persons who enter into such leases, distinguishing between *serviteurs* or *domestiques* (domestic or personal servants) and *ouvriers* (workers or artisans).<sup>151</sup> Pothier also clearly distinguished between servants who live with the master and those who do not, stating, for example, that a master must ordinarily pay wages to servants of the former class even when the servants are ill and cannot work, but that the master owes no similar obligation to servants of the latter class.<sup>152</sup>

More important for purposes of this article, however, Pothier specifically noted that while it was customary to hire farmworkers or artisans for a fixed period, the custom of the time permitted masters to discharge servants who "serve the person of their master" at any time, without cause or liability. Section 176 of Pothier's treatise states:

To hire servants for fixed periods is customary in the case of rural servants, such as plough-men, vintagers, millers, etc. and also in the case of farm-maids. Hirings for fixed periods are likewise customary

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general principles regarding the remission of rent should be applied to the analogous problem of remission of wages in situations where an employee is unable to perform the tasks assigned. POTHIER, *supra*, §§ 165-177, at 65-69.

151. POTHIER, *supra* note 150, §§ 165-178, at 92-98; see Tucker, *supra* note 146, at 274 (quoting POTHIER, *supra* note 150, § 10. Tucker read Pothier as distinguishing between three types of servants:

Whenever the lease of services was distinguished in Pothier's *Traite* from the lease of a thing, it was only with reference to the three sorts of servants mentioned [in § 10, "*serviteurs et servantes*," "*manouvres*," and "*artisans*"], though the term, *serviteur*, seems to have been used interchangeably with *domestique*, and *manouvres* with *ouvriers*. These are the same three referred to in the *Projet* [of 1800], which used *domestique*, *ouvrier*, and *ouvrier artiste*.

Tucker, *supra* note 146, at 274.

152. Pothier wrote:

Now, one can say that our servants, living with us, are in our service, even while they are ill, and that they do not cease to be in our service, nor cease to be able to describe themselves as being our servants. This cannot, however, have any application to a contract of lease, for when a man lets me his services for a year for a certain sum, the sum which I undertake to pay him, is intended by both of us to be a wage for the actual services he is to render, and not to be a consideration paid to him for merely occupying the position of servant: he must have rendered me the services or have been in a position to do so during the whole of the period of his contract. The cases are, therefore, not parallel . . .

POTHIER, *supra* note 150, § 168, at 66-67.

in towns in the case of artisans. But as to servants who let their services to persons in town of the bourgeois class, or in the country to members of the nobility to serve the person of their master; though suchlike services are let at so much per annum, they are nevertheless considered to be let only for such time as it may please the masters to retain them. That is why masters can dismiss at will such servants, without giving a reason, and paying them only up to the date of dismissal.<sup>153</sup>

Notably, Pothier was equally clear that the freedom to terminate the relationship did not apply in both directions.<sup>154</sup> The second paragraph of § 176 stated that house and family retainers, though subject to dismissal at any time, were not free to quit before the end of their term. Pothier wrote:

These servants, however, are not allowed to leave their master's service without his permission, and if they do they will be ordered by the Court to return and to remain in their master's service, either until the day of the next term up to which it is customary in the locality to hire servants, or during such a period of time as will be sufficient to enable the master to obtain another servant, this period to be determined by the judge. In this matter the various customs of the various localities must be observed.<sup>155</sup>

Regardless of how one might view this lack of mutuality, the crucial point is that for Pothier, it is only a special, limited custom which pertains only to limited classes of servants who perform domestic tasks within the household or who are otherwise attached to the

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153. *Id.* § 176, at 69. The distinctions which Pothier draws—between industrial workers (“ouvriers”) and farmworkers (“serviteurs de campagne”) on the one hand, and domestic or personal servants (“service de la personne du maître”) on the other—are more evident in the French text:

Ces louages de services pour un temps déterminé sont d'usage à l'égard des serviteurs de campagne, tels que les serviteurs de labour, de vigneron, de meuniers, etc., les servantes de cour. Ils sont aussi d'usage dans les villes à l'égard des ouvriers. À l'égard des serviteurs qui louent leurs services aux bourgeois des villes ou même à la campagne aux gentilshommes pour le service de la personne du maître; quoiqu'ils les louent à raison de tant par an, ils sont néanmoins censés ne les louer que pour le temps qu'il plaira au maître de les avoir à son service. C'est pourquoi le maître peut les renvoyer quand bon lui semble, et sans en dire la raison, en leur payant leurs services jusqu'au jour qu'ils les renvoie.

154. ROBERT POTHIER, *OUVRES DE POTHIER: TRAITE DU CONTRAT DE LOUAGE ET TRAITÉ DES CHEPTELS* § 176, at 97 (Nouvelle ed., 1806).

155. POTHIER, *supra* note 150, § 176, at 69.

*person* of the master that gives the master the right to dismiss such servants at will without assigning a reason and without incurring any liability for future wages. Moreover, since Pothier found it necessary to state that domestics subject to dismissal at will could nonetheless be required to remain at service “until the day of the next term up to which it is customary in the locality to hire servants,” it is clear that the employer’s unilateral right to discharge the servant at will would apply even if the servant and master had entered into a contract which, by custom or otherwise, contemplated a set term of employment. In other words, for Pothier, the kind of “employment at will” contemplated in § 176 is not the converse of employment for a fixed term. It is, rather, a limited *exception* to the general rules governing lease of services—an exception that applies regardless of whether those services are let by the day or by the year, but one that applies to only a very limited class of employees.

b. The French Projet of 1800

The French Projet de Code Civil of 1800<sup>156</sup> continued these distinctions, embodying them in a series of articles which retained the traditional differentiations among types of servants noted by Pothier. Those articles appear to have been carefully drafted to maintain a distinction between three types of workers: *domestiques*, *ouvriers*, and *ouvriers artiste* (artisans).<sup>157</sup> More specifically, the Projet carefully and clearly distinguished between two types of domestiques: those who were “attached to the person of the master, or to service of the house,” who could quit or be dismissed at will

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156. FRENCH PROJET OF 1800, *supra* note 133.

157. In addition to the articles quoted in the text, section 116 articulates a special rule of nonliability for a limited class of artisans (“*ouvriers artiste*”) employed by the day. Section 116 states in part: “116. L’ouvrier artiste employé à la journée, n’est pas tenu de la mal-façon de son ouvrage.” FRENCH PROJET OF 1800, *supra* note 133, art. 116. See generally M. F. VUILLAUME, COMMENTAIRE ANALYTIQUE DU CODE NAPOLEON art. 1780, at 598 (1855) (distinguishing between *domestiques* and *ouvriers*). Vuillame wrote:

Je crois que l’on doit donner la qualification de *domestiques* aux serviteurs à gages qui donnent leurs soins à la personne ou au ménage, ou qui aident dans les travaux agricoles, qui logent et vivent dans la maison.

La denomination d’*ouvriers* est donnée aux gens de travail qui louent leurs services à tant par jour, ou dont la profession est classée parmi les arts mécaniques.

without cause; and those who worked in other capacities, who could not:

112. Les domestiques attachés à la personne du maître, ou au service des maisons, peuvent être renvoyés en tout temps sans expression de cause, et peuvent de même quitter leurs maîtres.

113. Les domestiques attachés à la culture, les servantes de cour, les ouvriers artistes, ne peuvent ni quitter leurs maîtres, ni être renvoyés par eux, avant le temps convenu, que pour le cause grave.

114. Si, hors le cas de cause grave, le maître renvoie son domestique ou son ouvrier avant le temps convenu, il doit lui payer le salaire entier de l'année, ou du temps pour lequel il l'avait loué, déduction faite de la somme que le domestique ou l'ouvrier pourra vraisemblablement gagner ailleurs, pendant le temps qui reste à courir.

115. Si c'est le domestique ou l'ouvrier qui quitte sans cause légitime, il doit être condamné, envers le maître, à une indemnité qui est fixée sur ce qu'il en coûte de plus au maître pour obtenir d'un autre les mêmes services.<sup>158</sup>

The Projet took at least a small step in the direction of egalitarianism by providing that the servants attached to the master's person or household were as free to quit as the master was free to discharge them.<sup>159</sup> However, the Projet, like Planiol, made it clear that only that limited class of house or personal servants was subject to this absolute rule of termination at will. As the articles quoted above make clear, other types of domestics, like other workers or artisans, were not covered by article 112 and thus could neither quit nor be fired without good cause before the expiration of their terms of employment.<sup>160</sup> Nor would there be any basis in Pothier or the Projet

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158. FRENCH PROJET OF 1800, *supra* note 133, arts. 112-115.

159. Note, however, that not all vestiges of class distinction were eliminated from the Projet's treatment of these issues. For example, the Projet provided that the master's affirmation was to be considered conclusive in any dispute over the amount of a servant's wages or over what sums, if any, were due to that servant. *Id.* art. 110.

160. This point was also made explicitly in the "*Observations*" of the Tribunal de Colmar, one of the appellate courts which made official comments on the draft text of the Projet of 1800. That tribunal expressed concern that article 112 made no express provision for payment of wages due to dismissed house and personal servants. While article 113 did include such a provision, the Tribunal de Colmar decided that article 113 would not apply to house and personal servants of the sort referred to in article 112:

L'article 112 et suivants traitent des domestiques. Le premier porte que les domestiques attachés à la personne du maître ou au service des maisons peuvent être renvoyés, en tout temps, sans expression de cause, et peuvent de même quitter leurs maîtres; mais il ne statue pas sur le mode de paiement de leurs gages. Les

to argue that leases of services for an indeterminate term by other types of domestics or ordinary workers would be treated any differently than any other form of lease for an indeterminate term.

The rationale for such a tradition of exceptional treatment of house or body servants seems reasonably self-evident. As Roman and traditional law recognized, family or personal retainers effectively constituted a part of the master's family. Such retainers, and those whom they serve, participate in a relationship that presupposes and requires a unique kind of intimacy and trust. As Pothier and the French *Projet* of 1800 seem to have recognized, such an intimate relationship cannot subsist in the absence of mutual trust.

Despite these policy arguments, however, the articles quoted above were not ultimately incorporated into the French Civil Code, which was adopted in 1804.<sup>161</sup> The reasons for this rejection are not entirely clear. The collected *Observations* of the Tribunal de Cassations and the *Tribunaux d'Appel* on the proposed text of the *Projet* contain few references to the relevant articles, none of which shed light on why the articles were dropped.<sup>162</sup> In addition, the

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articles suivants contiennent des dispositions à cet égard; mais comme ils ne parlent que des domestiques attachés à culture, on pourrait dire que le mode de paiement de ceux-ci n'est pas applicable aux domestiques dont parle l'article 112. Il serait bon, par conséquent, que la loi s'expliquât plus particulièrement.

3 FENET, *supra* note 134, at 491.

It is also interesting to note that the Tribunal de Nancy suggested that articles 112 through 115 should be combined into a single article, which would have subjected *all* employees who work for wages to a single, unilateral regime: All wage earners could be fired at-will by their employer, but none could quit without good cause. 4 FENET, *supra* note 134, at 616. This suggestion was never acted on. However, the fact that it was made further demonstrates that the regimes contemplated by articles 112 and by 113 through 115 apply to different categories of servants, not just different types of contracts.

161. The French Civil Code of 1804, the Code Napoleon, retained only two of the *Projet's* articles concerning workers and domestics in general:

1780. On ne peut engagé ses services qu'à temps, ou pour une entreprise déterminée.

1781. Le maître est cru sur son affirmation, Pour les quotité des gages; Pour le paiement du salaire de l'année échue; Et pour les a-comptes donnés pour l'année courante.

CODE CIVIL arts. 1780, 1781 (1804). Plainly, none of these articles deal with issues regarding the terminability of leases of services.

162. Other than the comments of the Tribunals of Colmar and Nancy (*see supra* note 160), the observations relevant to the articles discussed here were few and relatively nonsubstantive: (1) the Tribunal de Cassation suggested only that article 114 be amended to deny employers the benefit of a deduction for wages that the unreasonably discharged employee could earn elsewhere, 2 FENET, *supra* note 134, at 732; (2) the Tribunal de

relevant articles already had been deleted from the later draft which was discussed and amended by the Conseil d'Etat.<sup>163</sup> Nevertheless, one can at least surmise, with Planiol, both that the egalitarian and individualist thrust of the French revolution made legal distinctions based on personal status unpalatable,<sup>164</sup> and that the simultaneous enactment of an extensive industrial law by the Consulate rendered unnecessary any detailed codal treatment of the rights and duties of employers and employees.<sup>165</sup>

Finally, it is worth noting that the common law of England, though starting from different basic principles, had given rise to a similar distinction between those servants who are and those who are not part of the master's household. Thus, for example, Blackstone distinguished between "*menial servants*"; so called from being *intra*

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Montpellier and the Tribunal de Toulouse both suggested that articles 114 and 115 should be amended to provide for liquidated damages equivalent to a set fraction of the annual salary, 4 FENET, *supra* note 134, at 462; 5 FENET, *supra* note 134, at 623; (3) the Tribunal de Paris wanted to substitute the term "*artisans*" for "*ouvriers artistes*" in articles 113 and 116, 5 FENET, *supra* note 134, at 277; (4) the Tribunal de Poitiers wanted to add a provision to article 112 limiting any indemnity due to masters whose servants leave (or to servants terminated without cause), 5 *id.* at 317; and (5) the Tribunal de Rouen noted only that police regulations would be required to carry out the purposes of article 112, *id.* at 543.

163. 4 FENET, *supra* note 134, at 231-32, 255-56, 287-88, 303-04 (recording the proceedings during which a draft of the Code Civil—one which did not include any of the Projet articles quoted in the text—was discussed and amended by the Conseil d'Etat). Despite the absence of an equivalent to Projet article 112, some comments indicate that the Conseil d'Etat also understood that legal distinctions needed to be made between "domestic servants" and ordinary "workers." *Id.* at 255 (quoting M. Defermon that "les règles relatives aux ouvriers ne sont pas les mêmes que celles qui concernent les domestiques"); *see also id.* at 320-21, 339 (stating the "*Communication Officielle Au Tribunal*" which accompanied the transmission of the final amended draft of the Code Civil to the French General Assembly).

164. *See, e.g.*, 1 PLANIOL, *supra* note 149, at No. 584 (commenting on the applicability of other provisions of the Civil Code, which established the domicile of a servant as that of his master). Planiol suggested:

First of all, it is necessary that the person really work in the capacity of a domestic, though it is not designated as such in the Code, *through scruples probably*, but which it describes is beyond a doubt. The codal text is addressed to persons who serve or work habitually for another person and who live with him and in the same house.

*Id.* (emphasis added); *see also* TUCKER, *supra* note 146, at 275. *But see* CODE CIVIL art. 1781 (1804) (depriving servants of the opportunity to be heard to contest masters' affirmations regarding the amount and payment of their wages). *See generally infra* notes 185-219 and accompanying text.

165. 2 PLANIOL, *supra* note 149, at No. 1829 (discussing the law of 22 Germinal, Year XI). Since that time, the law governing the relations of employers and employees has been, in France, governed almost completely by statute rather than by the Civil Code.

*moenia*, or domestics,”<sup>166</sup> and “*laborers*, who are only hired by the day or week, and do not live *intra moenia*, as part of the family.”<sup>167</sup> Although Blackstone was apparently not the direct source of those provisions of the Louisiana Digest of 1808 that dealt specifically with leases of services, it is clear that the drafters of the Digest were familiar with his work and relied on it in drafting other portions of that Digest,<sup>168</sup> including several articles relating to the relations of masters and servants.<sup>169</sup>

c. Louisiana Digest and Civil Codes: Incorporation and Early Interpretation

While the French Projet of 1800 had only a limited influence on the ultimate shape of employer-employee relations in France, it was the source of Louisiana’s law of lease of services. The drafters of the Louisiana Digest of 1808 adhered closely but not exactly to the text of the French Projet, writing as follows:

Art. 57. Les domestiques attachés à la personne du maître, ou au service des maisons, peuvent être renvoyés en tout temps sans expression de cause, et peuvent de meme quitter leurs maîtres.

Art. 58. Les personnes qui ont loué leurs services sur les habitations, ou dans toutes autres manufactures pour y être employées ax travail qui say font, ne peuvent ni quitter le propriétaire auquel ils sont loués, ni être renvoyés par eux avant le tems convenu, que pour cause grave.

Art. 59. Si hors le cas de cause grave, le propriétaire renvoie la personne qui lui a loué ses services, ainsi qu’il marqué en l’article précédent, avant l’expiration du temps convenu, il doit lui payer le salaire entier de l’année, ou du temps pour lequel il l’avait loué.

Art. 60. Si c’est au contraire la personne qui a engagé ainsi ses services, qui quitte le propriétaire, sans cause légitime, il perdra le salaire pour le tems qui s’est écoulé jusqu’alors sur son engagement.

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166. 1 WILLIAM BLACKSTONE, COMMENTARIES \*425.

167. *Id.* at \*426-\*27.

168. Batiza, *supra* note 133, at 12, 45, 61-62 (crediting Blackstone’s COMMENTARIES as an important source of twenty-five articles of the Louisiana Digest of 1808, including articles on the application and construction of laws and the law of corporations).

169. *Id.* at 51 (crediting Blackstone as the sole source of Book I, Title VI, articles 8-14 of the Louisiana Digest of 1808, which dealt with the rights and duties of indentured servants and the effects of the master-servant relationship on third parties).



ou sera obligé de restituer au propriétaire ce qu'il aura reçu de lui d'avance sur l'année courante, ou sur le tems de l'engagement.<sup>170</sup>

The changes made by the drafters of the Louisiana Digest from the text of the French *Projet* of 1800 appear to have been both intentional and meaningful. In particular, it is noteworthy that the Louisiana draftsmen retained the terminology of the *Projet* only in article 57 of the Digest of 1808, using the traditional terms “*domestique*” and “*maître*” only when speaking of those servants “*attachés à la personne du maître, ou au service des maisons,*” who can be terminated at will. In all other contexts, terms such as “*personne qui ont loué [or engagé] leurs services*” and “*propriétaire*” were used. The obvious implication is that the Louisiana draftsmen intended, by their choice of terms, to reinforce the limiting language of article 57, namely, that article 57 applied only to a limited class of servants who form part of the master’s extended family by living in his home and rendering personal or household services while there.<sup>171</sup> The English version of the Louisiana Digest of 1808, a translation of the original and authoritative French text, made the same distinctions that were made in the French version, using the terms “servant” where the French text used “*domestique,*” “laborer” where the French text used “*personne qui ont loué [or engagé] leurs services,*” and generally, “proprietor” or “employer” where the French text used “*propriétaire.*”<sup>172</sup> This choice of English terminology may have been

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170. LA. DIGEST OF 1808, *supra* note 31, arts. 57-60, at 383.

171. This implication is strengthened by the use made of the term “*domestique*” elsewhere in the Louisiana Digest of 1808. As is discussed in more detail at note 211, *infra*, the French text of Book I of the 1808 Digest defines “free servants” as including “*domestiques de maison.*” LA. DIGEST OF 1808, *supra* note 34, art. III, at 37.

172. In English, articles 57 through 60 provided as follows:

Article 57. A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause.

Article 58. Labourers who hire themselves out to serve on plantations or to work in manufactures, have not the right of leaving the person who has hired them, nor can they be sent away by the proprietor, until the time has expired during which they had agreed to serve, unless good and just causes can be assigned.

Article 59. If, without any just ground of complaint, a man should send away a labourer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to said labourer, the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived, whether said labourer was hired by the month or by the year.

unfortunate, however. Because of the broader meaning which the common law has of ten assigned to the term “servant,” using the term to refer to any sort of employee inadvertently increased the potential for future misinterpretation.

The Louisiana Civil Code of 1825 maintained these distinctions, re-enacting both the French and the English texts of these articles without official comment<sup>173</sup> and without substantial change.<sup>174</sup> The Louisiana Civil Code of 1870, which was promulgated only in English, reproduced only the English version of these articles (though again without substantial change) yielding articles 2747 through 2750 as they exist today.<sup>175</sup>

Louisiana cases from the nineteenth century clearly indicate that the predecessors of present article 2747 were originally understood in the traditional manner—as applying only to a narrowly defined category of servants. Thus, the article was held to be applicable to the claims of a household cook<sup>176</sup> (but not to the claims of an attorney<sup>177</sup>),

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Article 60. But if, on the other hand, a labourer, after having hired out his services, should leave his employer, before the time of his engagement has expired, without having any just cause of complaint against said employer, the labourer shall then forfeit all the wages that may be due to him and shall moreover be compelled to repay all the money he may have received either as due for his wages or in advance thereof on the running year or on the time of his engagement.

LA. DIGEST OF 1808, *supra* note 31, arts. 57-60, at 382.

173. The Projet of 1823, the document which formed the basis of the Louisiana Civil Code of 1825, suggested many changes from its predecessor, the Louisiana Digest of 1808—including several changes to other articles involving the lease of services. However, that Projet made no reference to the particular articles under investigation here. Those articles were instead simply incorporated, without discussion, from the 1808 Digest. PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825, *supra* note 127, at 325-26.

174. LA. CIV. CODE ANN. arts. 2747-2750 (West 1972).

175. *See supra* notes 42-44.

176. *Bethmont v. Davis*, 11 Mart. [o.s.] 195 (La. 1822).

177. *Orphan Asylum v. Mississippi Marine Ins. Co.*, 8 La. 181 (1835). The plaintiff, an attorney, had a contract to represent the defendant for one year. He was dismissed after two-and-a-half months, and sued for the balance of his contractual salary. The trial court held that the attorney could be discharged at will under the authority of article 2718, the predecessor of current article 2747. The Louisiana Supreme Court disagreed:

[W]e are unable to admit [the correctness of the district court's opinion] without relinquishing our understanding of language and opinions touching the relations of men in civil society, counselors and attorneys are admitted to the profession of law, on the supposition of learning and integrity. To place them in the precise category of *menial and domestic servants*, appears to us would be incongruous and unauthorized by the law.

*Id.* at 184 (emphasis added).

a superintendent of a commercial business<sup>178</sup> or a river pilot,<sup>179</sup> none of whom were found to fall into the category of “menial and domestic servants.”<sup>180</sup>

Cases from that era make it equally clear that article 2747’s predecessors were understood in the manner of Pothier—as establishing not the converse of employment for a fixed term, but rather a narrow *exception* to the ordinary rules governing the ordinary relations of employers and employees, an exception that would permit termination at will even if the domestic servant was hired according to a contract of fixed length. For example, in *Bethmont v. Davis*,<sup>181</sup> the Louisiana Supreme Court considered the claims of a French cook, who entered into a contract by which he was to leave France, travel to the defendant’s home in New Orleans, and there serve as a cook for eighteen months. After some months, the defendant discharged the plaintiff, apparently without cause. The trial court rejected the plaintiff’s claim for his salary for eighteen months, awarding him only a salary for the period he had actually worked, apparently on the ground that the predecessor of article 2747 permitted summary discharge of domestics whether or not there was a contract of definite length. The Louisiana Supreme Court affirmed, reasoning:

Our Code declares, that a man is at liberty to dismiss a hired servant, attached to his person or family, without assigning any reason for it. This argument cannot be shaken by the argument so strongly enforced by plaintiff’s counsel; that in the present case the parties had contracted for a longer time. Because it is precisely for cases of this kind that we must presume the law to have been made.<sup>182</sup>

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178. *Beckman v. New Orleans Cotton Press Co.*, 12 La. 67 (1838) (holding that contract of superintendent of defendant’s business was governed not by the predecessor of article 2747, but rather by articles 2719, 2720, and 2721 of the 1825 Code (current articles 2748-2750)).

179. *Shoemaker v. H. & L. Bryan*, 12 La. Ann. 697 (La. 1857). The plaintiff was the pilot of a river steamer. The court held that he could not be discharged without cause before the end of his contract, arguing that article 2720 (predecessor to current 2749) applies “to all persons, *except menial servants*, who hire out their services for a fixed period . . . .” *Id.* at 698 (citing *Angelloz v. Rivollet*, 2 La. Ann. 652 (1847) (noting that article 2720, rather than article 2719, applies to claims of person hired to accompany defendant to Louisiana to aid her in recovering an inheritance); *Decamp v. Hewitt*, 11 Rob. 290 (La. 1845) (holding claims of salesman governed by 2720); *Lartigue v. Peet*, 5 Rob. 91 (La. 1843) (holding claims of bookkeeper governed by 2720)).

180. *Orphan Asylum v. Mississippi Marine Ins. Co.*, 8 La. 181, 184 (1835).

181. 11 Mart. [o.s.] 195 (La. 1822).

182. *Id.* at 198-99.

By contrast, in *Orphan Asylum v. Mississippi Marine Insurance Co.*,<sup>183</sup> the Louisiana Supreme Court held that an attorney is not a “menial or domestic servant” of the sort contemplated by the predecessor to current article 2747, and that therefore his fixed-term contract had to be enforced according to its terms.<sup>184</sup>

In short, the original Roman, French, and common-law sources of article 2747, the words chosen by the drafters of the article, and the original case law interpreting it, demonstrate that article 2747 was never intended or understood to apply as broadly as modern courts have applied it. Rather, article 2747 was intended only as a specific exception to otherwise applicable law, an exception that applies only to a narrow class of domestic—that is to say, household and personal—servants who reside and work within the family of those whom they serve.

## 2. Article 2747 in Context: Concepts of “Domestic” and “Servant” in Other Articles of the Louisiana Civil Code

A number of sources reinforce by analogy the conclusion that article 2747 should be interpreted narrowly. The sources include Book III, Title XXI, which establishes the privilege enjoyed by certain “servants” for satisfaction of wage claims; Book I, Title VI, which describes the various types of “servant” as well as the impact of those relations on third parties; and Book III, Title XXIV, which

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183. *Orphan Asylum*, 8 La. at 181.

184. In the court’s words:

Any license given to parties bound by contracts to dissolve the obligation arising from them at the will of either, forms an exception to the general rule of inviolability which should prevail in all agreements legally made between individuals. The attorney employed by the defendants in the present case, does not come within any exception to the general rule; he and those under him have therefore a right to claim its benefit.

*Id.* at 185.

Soon after *Orphan Asylum* was decided, the law became clear that an attorney can be dismissed at will, and that such an attorney has only a claim for quantum meruit for services already rendered. However, that result was not based on any claim that attorneys are governed by article 2747 or its predecessors. Rather, the analysis came to be that attorneys are not lessors of services or “employees” of any sort; rather they are agents, governed by the Civil Code articles concerning mandate. *See, e.g.*, *Gurley v. City of New Orleans*, 41 La. Ann. 75, 5 So. 659-61 (La. 1889). *But see In re Dissolution of Mosquito Hawks, Inc.*, 109 So. 2d 815, 819-20 (La. Ct. App. Or. Cir. 1959) (following *Orphan Asylum* in holding that an attorney is not covered by article 2747, and that therefore article 2749 and rules applying to ordinary laborers apply).

relates to prescription. All reaffirm the conclusions drawn above as to the meaning of article 2747, and as to the identity of the limited class of "*domestiques*" to which article 2747 was intended to refer.

a. Analogies from Book III, Title XXI: Servants Entitled to Privilege

The closest analogue in the current Code to the language of article 2747 can be found in Book III, Title XXI, which establishes a system of special privileges entitling specific classes of creditors to a preference in satisfying their claims out of their debtors' assets.<sup>185</sup> Among those entitled to a general privilege on movables are certain domestic servants who live with and work for the master's family. Articles 3191 and 3205 provide in part:

ARTICLE 3191. The debts which are privileged in all the movables in general, are those hereafter enumerated, and are paid in the following order:

\* \* \*

4. The wages of servants for the year past, and so much as is due for the current year.

\* \* \*

ARTICLE 3205. Servants or domestics are those who receive wages, and stay in the house of the person paying and employing them for his service or that of his family; such are valets, footmen, cooks, butlers, and others who reside in the house.<sup>186</sup>

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185. LA. CIV. CODE ANN. arts. 3184-3189 (West 1994).

186. LA. CIV. CODE ANN. arts. 3191, 3205 (West 1994). The limited nature of the class of servants to which article 3191 subdivision 4 applies is underlined by the language in some of the other articles of that chapter. Thus, where the drafters of the Code wished to establish a privilege for clerks and secretaries, they found it necessary to acknowledge that such employees are not "servants," but that they are entitled to a privilege anyway:

ARTICLE 3214. Although clerks, secretaries and other agents of that sort can not be included under the denomination of servants, yet a privilege is granted them for their salaries for the last year elapsed, and so much as has elapsed of the current year.

LA. CIV. CODE ANN. art. 3214 (West 1994).

Note that article 3252 also lists "servants" seeking recovery of wages as one of the classes of creditors entitled to a privilege on both movables and immovables. However, since that chapter does not contain any definition of "servant," it must be presumed that the class referred to is the same as that defined in article 3205. LA. CIV. CODE ANN. art. 3252 (West 1994).

Article 3191 was derived without substantive modification from a corresponding article of the 1825 Code,<sup>187</sup> which was in turn derived from a somewhat differently phrased predecessor in the Digest of 1808.<sup>188</sup> Article 3205, which defines the class of servants entitled to the privilege, was also derived without substantive change from the English text of the Code of 1825, where it first appeared.<sup>189</sup> It is noteworthy, however, that the French text of that provision in the 1825 Code was even more explicit in confining the class of servants entitled to the privilege to those who render “personal” service to the master or his family. The 1825 French version of article 3205 provided the following:

On appelle domestiques ou gens de service, ceux qui reçoivent des gages, et demeurent dans la maison de la personne qui les paye et les emploie à son service personnel ou à celui de sa famille. Tels sont les valets, laquais, cuisiniers, maîtres d’hôtel ou autres qui sont à demeure dans la maison.<sup>190</sup>

The similarity between the limited class of domestic servants described in article 3205 and that described in 2747 is thus apparent, both in the current English texts of the articles<sup>191</sup> and in the original French.<sup>192</sup>

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187. LA. CIV. CODE ANN. art. 3158 (1825).

188. The Louisiana Digest of 1808 provided the following:

The debts which are privileged on all the moveables in general, are those hereinafter enumerated, and they are liquidated in the following order,

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4thly. The salaries of persons who lent their services [per French text: “Les salaires de gens de service”] for the year last past or for what is due on the current year.

LA. DIGEST OF 1808, *supra* note 31, art. 73, at 468-69.

189. LA. CIV. CODE ANN. art. 3172 (1825). The new article defining “servant” for these purposes was first proposed in the *Projet* for the 1825 Civil Code, though without any recorded explanation or comment. *PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825*, *supra* note 127, at 368.

190. LA. CIV. CODE ANN. art. 3205 (West 1972) (notes) (emphasis added). The notes point out that omission of the adjective “personal” from the English text was a mistranslation of the French original.

191. *Compare* LA. CIV. CODE ANN. art. 2718 (1825) (speaking of “a hired servant attached to [the master’s] person or family”) with LA. CIV. CODE ANN. art. 3172 (1825) (defining “servants” or “domestics” as “those who receive wages, and stay in the house of the person employing them for his service or that of his family”).

192. *Compare* LA. CIV. CODE ANN. art. 2719 (Fr. text 1825) (“[l]es domestiques attaches à la personne du maître, ou au service des maisons”) with LA. CIV. CODE ANN. art. 3206 (Fr. text 1825) (defining “domestiques” as “ceux qui reçoivent des gages, et demeurent

Case law from the nineteenth century clearly indicates that this article applied to a limited class of household domestic servants. Neither foremen,<sup>193</sup> laborers who maintained commercial buildings and grounds,<sup>194</sup> laborers of other sorts,<sup>195</sup> nor even serving persons in commercial taverns and hotels<sup>196</sup> were included in this small group.<sup>197</sup>

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dans la maison de la personne qui les paye et les emploie a son service *personnel* ou a celui de sa famille" (emphasis added)).

193. *Lewis v. Patterson*, 20 La. Ann. 294 (La. 1868 (holding foreman in printing office not entitled to privilege as either a "servant" or a "secretary")); *Lauran v. Hotz*, 1 Mart. [n.s.] 141 (Dist. Ct. E.D. 1823) (finding foreman of tailor not entitled to privilege for salary under Louisiana Digest of 1808, articles 68, 73, and 76, and holding that article applies only to domestic servants, narrowly defined).

194. *World's Indus. & Cotton Centennial Exposition v. North, Central & South Am. Exposition*, 39 La. Ann. 1, 1 So. 358 (1887). The claimants were "part of quite a large number of employees engaged to do the current, simple manual or menial work at the exposition, such as cleaning the grounds, sweeping and washing the floors, oiling the machinery, cleaning lamps, stopping leaks on the roofs, and similar matters, as might be required by the ordinary course of things or some emergency." *Id.* at 3, 1 So. at 359. The Supreme Court affirmed that they were "neither servants nor domestics" and therefore not entitled to any privilege. *Id.*

195. *See, e.g., Barbour v. Duncan's Curator*, 17 La. 439 (La. 1841) (holding that laborers employed at a sawmill at daily or monthly wages have no privilege against assets of defunct employer).

196. *Bartels & Dana v. Their Creditors & the Creditors of Stafford, Bartels & Co.*, 11 La. Ann. 433, 435 (1856) (holding that employees of a hotel are not "servants" of the sort entitled to a privilege on movables under the 1825 version of article 3172); *Cook v. Dodge*, 6 La. Ann. 275 (1851) (holding that serving persons in a tavern are not "servants" entitled to a privilege under the 1825 version of articles 3158 and 3172). The court in *Cook* was particularly conscientious in its review, consulting both French and English texts of the Code before concluding that:

We think it was the intention of the lawgiver in [article 3172] to protect domestic servants, that is to say those employed in the service of a family or the private establishment of a person keeping house, and that the servants of a place of public entertainment were not contemplated.

*Id.* at 277.

197. At least one case does appear to have given the concept of "servant" a broader reading. *Succession of Caldwell*, 8 La. Ann. 42 (1853) (holding that a manager of a ten-pin alley was entitled to a privilege, either as a "clerk" or a "servant"). Specifically, the *Caldwell* court reasoned:

[Claimant] had charge of the ten pin alleys, and received the money paid at them during the day, and made his returns when they were closed. If this occupation did not give him a privilege as an agent under the articles cited, we are of the opinion that it is included within the class of servants which is more comprehensive in the sense of the Code, and authorizes the privilege allowed.

*Id.* at 43. Although the court in *Caldwell* did suggest that the term "servant" could be susceptible to a broad interpretation, the case does not lend much support to such a construction. As the above quote makes clear, the court in *Caldwell* placed its primary reliance on subdivision 6 of article 3191, one which gives a privilege to "clerks, secretaries

b. Analogies from Book I, Title VI: Domestic Servants as “Family”

Until its repeal in 1990,<sup>198</sup> Title VI of Book I of the Louisiana Civil Code dealt with the personal relationship of masters and various types of servants. Leaving aside those provisions which dealt solely with issues peculiar to apprentices or other kinds of bound or indentured servants, the relevant articles of Title VI can be classified into two groups: those articles which classify different types of servants,<sup>199</sup> and those articles which deal with the effects of this master-servant relationship on third parties.<sup>200</sup> These articles

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and other persons of that kind.” Its comments on subdivision 4, granting a privilege to “servants,” appear to be little more than ill-considered dictum.

198. Act No. 705, § 1, 1990 La. Acts (repealing LA. CIV. CODE ANN. articles 162-165, 167-175, and 177, and redesignating article 176). The reason for repeal was that those articles, which dealt largely with apprentices and similar bound servants, had become outmoded and anachronistic. Article 166, which had provided that the time of engagement of minors (apprentices) would expire at age eighteen for males and age fifteen for females, had previously been deleted. Act No. 89, § 2, 1974 La. Acts.

199. Before repeal, the relevant articles of the Louisiana Civil Code of 1870 provided the following:

ARTICLE 162. There is only one class of servants in this State, to wit: Free servants.

ARTICLE 163. Free servants are in general all free persons who let, hire or engage their services to another in this State, to be employed therein at any work, commerce or occupation whatever for the benefit of him who has contracted for them, for a certain price or retribution, or on certain conditions.

ARTICLE 164. There are three kinds of free servants in this State, to wit:

1. Those who only hire out their services by the day, week, month or year, in consideration of certain wages; the rules which fix the extent and limits of those contracts are established in the title: *Of Letting and Hiring*.

2. Those who engage to serve for a fixed time for a certain consideration, and who are therefore considered not as having hired out but as having sold their services.

3. Apprentices, that is, those who engage to serve any one, in order to learn some art, trade or profession.

LA. CIV. CODE ANN. arts. 162-164 (West 1972).

200. Articles 174 through 177 provide the following:

ARTICLE 174. The master may bring an action against any man for beating or maiming his servant, but in such case he must assign as a cause of action, his own damage resulting from the loss of his service, and this loss must be proved on the trial.

ARTICLE 175. A master may justify an assault in defense of his servant, and a servant in defense of his master, the master because he has an interest in his servant, not to be deprived of his service; the servant because it is part of his duty for which he receives wages, to stand by and defend his master.



were derived from the Louisiana Civil Code of 1825,<sup>201</sup> which was itself derived from the Digest of 1808.<sup>202</sup> Moreau-Lislet's source notes give little indication of the origin of the relevant provisions of the 1808 Digest.<sup>203</sup> However, Professor Batiza assigns most of the credit to Blackstone, though Batiza also recognized the contributions of Domat and Pothier.<sup>204</sup>

The presence of these articles in Book I, among other Titles which deal with the bilateral personal relations of husbands and wives,<sup>205</sup> and of parents and children,<sup>206</sup> lends support to a narrow

ARTICLE 176. The master is answerable for the offenses and *quasi*-offenses committed by his servants, according to the rules which are explained under the title of *quasi-contracts, and of offenses and quasi-offenses*.

ARTICLE 177. The master is answerable for the damage caused to individuals or to the community in general by whatever is thrown out of his house into the street or public road, and inasmuch as the master has the superintendence of his house, and is responsible for the faults committed therein.

LA. CIV. CODE ANN. arts. 174-177 (West 1972).

201. LA. CIV. CODE ANN. arts. 155-157, 168-171 (1825). The only substantive change in the relevant articles of the Louisiana Civil Code of 1825 to the Civil Code of 1870 was the abolition of slavery. While the Code of 1825, like its 1808 predecessor, provided for that institution, the Code of 1870 did not. *Compare* LA. CODE CIV. ANN. art. 155 (1825) ("There are in this State two classes of servants, to wit: the free servants and slaves.") with LA. CIV. CODE ANN. art. 162 (1870) ("There is only one class of servants in this State, to wit: free servants."). The Digest of 1808 and the Civil Code of 1825 each contained an extensive chapter delineating the basic relations of master and slave. LA. CIV. CODE ANN. arts. 172-196 (1825); LA. DIGEST OF 1808, *supra* note 31, arts. 15-27, at 38-43.

202. LA. DIGEST OF 1808, *supra* note 31, arts. 1-4, 11-14, at 36-39. The only significant change in the articles under discussion here between the Digest of 1808 and the Civil Code of 1825, was the recognition of a new class of "free" but nonetheless "bound" or indentured servants. *Compare* LA. CIV. CODE ANN. art. 157 (1825) with LA. DIGEST OF 1808, *supra* note 31, art. 3, at 36, 37.

203. Moreau-Lislet's notes opposite the French text list no direct source for articles 1-4, and the notes opposite the English text refer only to the Digest's own article on lease of services and Pothier's *Traite du Contrat de Louage* as collateral material dealing with the same subject. The notes opposite the French text of articles 11-14 list no source for article 11, but refer to *Las Siete Partidas* as the source of the others. LA. DIGEST OF 1808, *supra* note 31, opp. at 36-39. The relevance of the particular laws of the *Partidas* to which Moreau-Lislet refers remains, however, obscure.

204. Batiza, *supra* note 133, at 51. Professor Batiza cites Domat and Pothier as the sources of article 4 of the Louisiana Digest of 1808. *Id.* (citing 1 DOMAT, *supra* note 148, at 277 n.c. (analogizing a contractor's undertaking of a piece of work—the Roman "*locatio operis*"—to a "sale" of his labors); POTHIER, *supra* note 150, at No. 394 (same)). For the rest of the relevant articles discussed in text, Professor Batiza cites only Blackstone as a source. *Id.* (citing 1 BLACKSTONE, *supra* note 166, at 425 (distinguishing types of servants and recounting the ways in which third parties may be affected by the relation of master and servant)).

205. LA. CIV. CODE ANN. arts. 86-101 (West 1994).

206. LA. CIV. CODE ANN. arts. 178-245 (West 1994).

interpretation of article 2747. As is shown by its placement, the drafters of the Louisiana Civil Code evidently grouped at least some “servants” with other members of a master’s household. Moreover, several of the specific provisions of these former articles—such as provisions which obligated “servants” to physically defend their master against assault,<sup>207</sup> or which held the master responsible for damage caused by objects thrown by servants from the master’s house<sup>208</sup>—would make little sense in the context of a limited, purely contractual relationship such as that between ordinary employers and employees. On the contrary, such provisions make sense only if some “servants” are part of the master’s household and subject to his general authority.

In any event, even if this concept of the servants as members of the master’s family were only implicit in the Digest of 1808, the concept was made quite explicit in the Louisiana Civil Codes of 1825 and 1870. Both of those Codes expressly included “servants of the family” in the extended definition of “family,” as that term is used in the Codes. Article 3506(12) provides the following:

Family, in a limited sense, signifies father, mother and children. In a more extensive sense, it comprehends all the individuals who live under the authority of another, and includes the servants of the family.<sup>209</sup>

The sources and drafting history of this article also make clear that the class of “servants” referred to as members of the family includes only a limited class of personal or household servants—those commonly referred to in current parlance as domestic servants, and in the French text of the Codes as “domestiques.” Blackstone and Pothier, the sources of this Title, all differentiated among servants along these precise lines, treating such domestic servants as analytically distinguishable from all others.<sup>210</sup>

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207. LA. CIV. CODE ANN. art. 175 (West 1972).

208. LA. CIV. CODE ANN. art. 177 (West 1972).

209. LA. CIV. CODE ANN. art. 3506(12) (West 1994). This article was moved, with minimal change, from its original location in the Code of 1870. LA. CIV. CODE ANN. art. 3556(12) (1870) (including servants of “the father of” the family in the definition of “family”); see also LA. CIV. CODE ANN. art. 3522(16) (1825) (including also “slaves of the father of” the family). See generally Tucker, *supra* note 146 (tracing this concept of “servants” as members of the family, to the Louisiana Civil Code of 1825, the Digest of 1808, and *Las Siete Partidas*).

210. See *supra* notes 153-156, 166-167 and accompanying text.

Moreover, the original French text indicates that the drafters of the Digest and the Code of 1825 had just such a distinction in mind when they composed Book I, just as they did when they composed the predecessor of article 2747. Book I, Title VI, article 3 of the Digest of 1808—the provision which set up the basic classifications of free servants in Louisiana—reads, in the original French, as follows:

Art. III. Il y a deux sortes de serviteurs libres dans ce Territoire savoir:

Les serviteurs proprement dits, c'est-à-dire ceux qui se louent ou s'engagent envers un autre pour être employés à un travail ordinaire ou de force; tels que *les domestiques de maison*, les ouvriers, manœuvriers et tous ceux qui s'engagent pour travailler aux champs et sur les habitations &c.<sup>211</sup>

While the main purpose of this article was doubtless to distinguish apprentices from all other workers, the listing of “types” of workers is suggestive. The drafters were careful to mention domestic servants (“domestiques”) as a specific and separate class of workers.

However, this distinction was not carried over when the French text of article III was translated into English. The passage was mistranslated and the reference to “household domestics” was inexplicably dropped from the English version:

Art. III. There are two sorts of servants in this territory, to wit:

Servants properly so called, or those who let or engage themselves to another, to be employed at some ordinary or hard labor; such are workmen, laborers, and all those who engage to serve in husbandry or upon plantations.<sup>212</sup>

Remarkably, this anomaly—a French text that spoke of “domestiques de maison” and an English text that did not—was carried forward without apparent recognition or comment into the Louisiana Civil Code of 1825.<sup>213</sup> To make matters worse, the Code of 1870 distributed only in English, carried forward only the English text, without rectifying its omissions.<sup>214</sup>

Nevertheless, the erroneous translation of article III of the 1808 Digest (an error that persisted in the English text of article 164 until its

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211. LA. DIGEST OF 1808, *supra* note 31, art. III, at 37 (emphasis added).

212. *Id.* at 36.

213. See LA. CIV. CODE ANN. art. 164 (West 1972) (notes) (reproducing the French and English texts of article 157 of the Louisiana Civil Code of 1825).

214. *Id.*

repeal in 1990) does not alter the conclusion that important language within the original French text of article III was left out of the English translation. Indeed, the location, sources, and original text of the relevant articles of Book I lend support to the conclusion that the class of servants (or “*domestiques*”) attached to the master’s person or family is a narrow one indeed.

c. Analogies from Former Book III, Title XXIII: Prescribing Servants’ Wage Claims

Before the 1983 amendments,<sup>215</sup> Louisiana Civil Code article 3534 established a prescriptive period of one year for wage claims brought by “workmen, laborers and servants, for the payment of their wages.”<sup>216</sup> That article was derived without substantial change from a corresponding article of the Code of 1825,<sup>217</sup> which was in turn derived from a somewhat differently phrased article of the Louisiana Digest of 1808.<sup>218</sup> While these articles made no distinction between domestic servants and other types of employees for purposes of prescription, the fact that each version was carefully drafted to include “servants,” “workmen,” and “laborers” lends additional

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215. Act No. 173, 1983 La. Acts (comprehensively revising Chapter 4 of Title XXIV of Book III of the Civil Code of Louisiana. The prescriptive period for wage claims is now set by article 3494, which establishes a three-year period for all claims for wage, fees, and the like.

216. LA. CIV. CODE ANN. art. 3534 (West 1972).

217. LA. CIV. CODE ANN. art. 3499 (1825). The French text of the 1825 version of the article is similar, distinguishing between “gens de travail” (laborers) and “gens de service” (servants):

Celle des ouvriers, gens de travail et de service, pour le payement de leurs journées, gages et salaires.

LA. CIV. CODE ANN. art. 3534 (notes).

218. Article 77 provides the following:

ARTICLE 77. The claims of teachers or school masters . . . may be prescribed against, after a year has elapsed.

The provisions of this article extend likewise to . . . that of workmen and day labourers for the payment of their days works and of the materials by them furnished; and for that of the domestics which lent their services by the year.

LA. DIGEST OF 1808, *supra* note 31, art. 77, at 488. The French text is similar:

Article 77. [L’action] des ouvriers et gens de travail, pour le payement de leurs fournitures, journées et salaires; Celle de domestiques qui se louent à l’année, pour le payement de leurs gages;

Se prescrivent par un an . . .

*Id.*

support to the argument that the terms referred to different types of employees. That is to say, codal references to “servants” (or, in the French version of the Digest of 1808, “*domestiques*”) should not be understood to include ordinary workers. Such was the original understanding of these provisions. Several cases from the early nineteenth century state specifically that the term “servant” in the articles on prescription applies only to “menial” servants and not to ordinary workers.<sup>219</sup>

Thus, from all the foregoing, it should be clear that neither article 2747 nor any other provision of the Louisiana Civil Code provides any legitimate reason to regard the vast majority of at-will employees—that is, all who work in capacities other than that of domestic servants—as subject to any special regime. Properly interpreted, neither article 2747 nor any other provision of the Code grants such “ordinary” employees and employers any special rights or obligations that would serve to distinguish their legal relations from those of parties to any other sort of contract terminable at the will of the parties.

Does this then mean that the principle of employment at will should be abandoned, that the existence of a contract for a fixed term is irrelevant, or that good cause should be required for termination of all employees regardless of contractual status? Clearly not. Unlike article 2747, Louisiana Civil Code articles 2749 and 2750 apply to ordinary employees.<sup>220</sup> These latter articles clearly ascribe legal consequences to the existence of a contract for a fixed term—specifically, that an employee with such a contract can neither quit nor be fired without good cause, without incurring liability for damages. By negative implication, employees who do not work according to a

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219. See, e.g., *Coote v. Cotton*, 5 La. 12, 14 (1832) (holding that a plaintiff seeking compensation for services rendered in collecting, superintending, and trading in slaves owned by defendant was not limited by the one-year prescription period applicable to a “servant, laborer or workman”). As the court in *Coote* explained, “[t]he plaintiff was neither a workman nor a laborer, and the word *servant* in the Civil Code, 3499, is in our opinion to be restricted to *menial* servants.” *Id.* at 15; see also *Keaghey v. Barnes*, 11 Rob. 139 (La. 1845) (“The plaintiff was neither a workman, nor a laborer. The word *servant* is *nomen generalissimum*, and in this article of the Code it must be confined to *menial* servants, otherwise it would extend to every one employed by another.”); *Cresap v. Winter*, 14 La. 553, 555 (1840) (tracing the origin of article 3500 of the Code of 1825—providing that claims for back wages can be brought even though the claimant is still employed—to the need to overcome French authority prohibiting *menial* servants from instituting such claims against the master they were presently serving).

220. The texts of these articles are quoted at note 44, *supra*. They contain no language limiting the types of employees to which they refer.

contract of fixed term can quit and can be fired without good cause and without incurring liability. In other words, the basic doctrine of employment at will is alive and well in the Louisiana Civil Code.

However, the shift in codal basis for the doctrine—from the narrow but express command of article 2747, to the negative implication of articles 2749 and 2750—has important consequences. Although courts may read article 2747 as a specific exception to the ordinary rules that would normally apply, no such implication can be drawn from articles 2749 and 2750. Thus, while it remains the case that employment contracts without a fixed term can be terminated at the will of either party, nothing in articles 2749 or 2750 suggests that such contracts should be interpreted or enforced in any special or unique manner. On the contrary, employment agreements terminable at will should be subject to the same regime that the Civil Code applies to all other agreements terminable at the will of the parties.

#### IV. INTERPRETING EMPLOYMENT AT WILL ACCORDING TO THE LOUISIANA CIVIL CODE: APPLYING THE REQUIREMENT OF GOOD FAITH

Despite the novel analysis set forth in *Finkle v. Majik Markets*,<sup>221</sup> the Louisiana Civil Code is clear in its classification and treatment of employment at will. The Louisiana Civil Code, like its Roman and French predecessors,<sup>222</sup> classifies employment as a bilateral nominate contract and, specifically, as a type of “lease,” one in which the employee lets out his labor or industry for a fee.<sup>223</sup>

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221. 628 So. 2d 259 (La. Ct. App. 5th Cir. 1993). See *supra* notes 120-124 and accompanying text.

222. See, e.g., 6 SAUL LITVINOFF, LOUISIANA CIVIL LAW TREATISE: OBLIGATIONS: BOOK 1 §§ 124-125, at 207 (1969) (noting that Planiol treated contracts relative to labor, including contracts for the lease of labor, as one of the three major classes of contracts). See *generally* discussion at notes 148-155, *supra*.

223. Louisiana Civil Code articles 2669, 2673, and 2675 make clear that the employment relation—that is, any arrangement by which an employee leases out his labor in return for wages—is contractual in nature and is conceived as a type of “lease”:

ARTICLE 2669. *Lease or hire* is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor, at a fixed price.

ARTICLE 2673. There are two species of contracts of lease, to wit:

1. The letting out of things.
2. the letting out of labor or industry.

Notwithstanding the holding in *Finkle*, this conclusion follows regardless of whether the particular employment contract at issue is oral or written<sup>224</sup> or terminable at will or for a fixed term.<sup>225</sup> Thus, employment agreements remain subject to basic requirements which the Civil Code makes applicable to all similar conventional obligations, and to all similar leases.<sup>226</sup> Determining what limits, if any, those basic requirements place on the employer's otherwise absolute authority to terminate an at-will employee is thus the central question which must now be answered.

A complete answer to this question would require a thorough analysis of a wide range of issues, including: the characterization and enforceability—under true civilian principles—of employers' promises not to fire an employee except for cause, or after certain procedures are first followed,<sup>227</sup> the possible application of the

ARTICLE 2675. To let out labor or industry is a contract by which one of the parties binds himself to do something for the other, in consideration of a certain price agreed on by them both.

LA. CIV. CODE ANN. arts. 2669, 2673, 2675 (West 1994). These articles have not been substantively amended since the present Code was enacted, and have remained virtually unchanged since 1808. Cf. LA. CIV. CODE ANN. arts. 2639, 2643, 2645 (1825); LA. DIGEST OF 1808, *supra* note 31, arts. 1, 3, at 372.

224. Article 1927 states that "unless the law prescribes a certain formality" for a particular type of contract, either the offer or the acceptance, or both, may be oral. LA. CIV. CODE ANN. art. 1927. Contracts of employment are not among those which require any particular formality.

225. Louisiana Civil Code article 1770 makes clear that contracts terminable at the will of one or both of the parties are still contracts, and that the option to terminate must be performed in good faith. See LA. CIV. CODE ANN. art. 1770 (West 1987).

226. Article 2668, the first article of Book III, Title IX of the Code, "Of Lease," makes the point explicitly:

ARTICLE 2668. The contract of lease or letting out (besides the rules in which it is subject in common with other agreements, and which are explained under the title: *Of Conventional Obligations*) is governed by particular rules, which are the subject of the present title.

227. LA. CIV. CODE ANN. art. 2668 (West 1994). Though a full codal analysis of the enforceability of such promises might well be an article in itself, a few basic principles seem reasonably clear.

First, an employer is free, under the Code, to contractually limit what would otherwise be his absolute freedom to terminate an at-will employee without cause or particular procedures. Former article 11 of the Civil Code of 1870 expressly stated that any person may renounce such a right or privilege. Comment (c) to current article 7 explains that the express language was dropped because the proposition was "self evident." LA. CIV. CODE ANN. art. 7 cmt. (c) (West 1993); see also LA. CIV. CODE ANN. arts. 1971, 1983 (West 1993). Louisiana courts have recognized this freedom, in principle at least. See, e.g., *Chauvin v. Tandy Corp.*, 984 F.2d 695, 689-99 (5th Cir. 1993) (holding that an issue of fact was

presented as to whether an employer's request that the employee remain in a particular post for an additional year amounted to an enforceable promise not to fire that employee for one year); *Mix v. University of New Orleans*, 609 So. 2d 958, 963 (La. Ct. App. 4th Cir. 1993) (noting the possibility of a contractual modification of the employer's rights); *Morgan v. Avondale Shipyards*, 376 So. 2d 516, 517 (La. Ct. App. 4th Cir. 1979) (same).

Second, Louisiana courts which have found such promises by employers to be unenforceable have done so for reasons which do not appear to withstand analysis according to the Louisiana Civil Code. In *Brannan v. Wyeth Laboratories, Inc.*, 526 So. 2d 1101, 1104 (La. 1988), the leading modern case on these issues, the court found an alleged promise unenforceable for three reasons: (1) enforcement would violate the command of what was then article 167, limiting employment contracts to a maximum term of ten years; (2) the promise was made without "consideration"; and (3) the obligation was not "mutual." *Brannan*, 526 So. 2d at 1104 (quoting *Pitcher v. United Oil & Gas Syndicate*, 174 La. 66, 139 So. 760 (1932)). However, this reasoning has been undermined by recent amendments to the Civil Code and is at odds with basic Civil Code principles governing conventional obligations.

Article 167, which limited employment contracts to a maximum of ten years, was repealed in 1990, along with almost all of the rest of Book I, Title VI, "Of Master and Servant." To be sure, article 2746 still provides that, "A man can only hire out his services for a certain limited period of time, or for the performance of a certain enterprise." However, this article, unlike former article 167, appears to have been intended only for the limited purpose of precluding contracts that unduly limit the employee's freedom by consigning her to perpetual service. Like article 167, it was not intended to preclude employers from obligating themselves to exercise their power to terminate an employee only under certain circumstances, or to provide certain procedures prior to termination. *Thaxton v. Roberson*, 224 So. 2d 183, 185-86 (La. Ct. App. 3d Cir. 1969). For a discussion of the limited purposes of articles 167 and 2746, see generally *Recent Jurisprudence, supra* note 76, and discussion at notes 125-34, *supra*.

The second alleged obstacle to enforcing such employer promises—lack of "consideration"—appears to be, if anything, even less firmly based on any principle that can be legitimately derived from the civilian law of obligations, as embodied in the Louisiana Civil Code. The Code makes clear that conventional obligations, including modifications of the terms of existing contracts, need not be supported by "consideration." LA. CIV. CODE ANN. arts. 1927, 1966, 1967 (West 1994); see LA. CIV. CODE ANN. arts. 1967 cmt. (c) (distinguishing the common-law requirement of "consideration" from the civilian requirement of "cause"). The Louisiana Supreme Court has recently recognized that employers' promises may be enforced regardless of any additional "consideration" by the employees. See *Knecht v. Board of Trustees for State Colleges & Univs.*, 591 So. 2d 690, 694-95 (La. 1991) (holding that unclassified university employees who worked overtime pursuant to a "compensatory leave" policy which contemplated paid time off for employees who worked such overtime, had an enforceable contractual right to receive that compensatory paid time off). After reciting the requirements for a valid conventional obligation under the Civil Code, the court noted that, "[n]early every state has determined, using precepts similar to our civilian principles, that when an employer promises a benefit to employees, and the employees accept by their actions in meeting the conditions, the result is not a mere gratuity or illusory promise but a vested right in the employee to the promised benefit." *Id.* The court concluded that a like result should be reached in that case.

Finally, the asserted problem of "mutuality"—that if the employee is free to leave his employment without restriction, then the employer must be likewise free to fire the employee without restriction—likewise rests on an asserted requirement derived originally from common-law rather than civilian sources. The Louisiana Civil Code, unlike the



principles of detrimental reliance or estoppel;<sup>228</sup> the interpretation and application of article 2024, which provides that contracts terminable at will should be terminated only on provision of reasonable notice to the other party;<sup>229</sup> the relevance of the emerging tort of “abuse of

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common law, does not require and has never required “mutuality” of obligations between the parties to a contract. Rather, the Code specifically contemplates contracts which are “unilateral” in their entirety. LA. CIV. CODE ANN. art. 1907 (West 1987). While it has been held that an employment contract is a “synallagmatic” or “bilateral” relation, this does not necessarily mean that every aspect of the contract must be bilateral. Nothing in the Code precludes imposition of particular unilateral duties or rights on one party to what is, overall, a bilateral contractual relationship. Thus, in *Long v. Foster & Associates, Inc.*, 343 La. 48, 136 So. 2d 48 (1962), the Louisiana Supreme Court held that an employee could recover the full amount of wages due him under the unexpired term of a five-year employment contract, even though that contract permitted the employee—but not the employer—to terminate that contract at any time, on two weeks notice. The court had no trouble recognizing the contract despite the nonmutual right of termination. *Id.* at 52-53. Other examples of valid contracts with unilateral terms include the following: Civil Code article 1975, which specifically authorizes “output” or “requirements” contracts, by which one party to the contract has a unilateral right to determine the “amount” of the contractual object; and the so-called “take or pay” contracts, familiar from mineral law, which similarly give one contracting party a unilateral right to determine how much oil or gas will be extracted.

It is also noteworthy that many common-law jurisdictions in the United States have begun to abandon strict application of these requirements in the context of termination of employment. Courts in many states have held that employer promises not to terminate an employee without cause, or without following certain prior procedures, can be enforced regardless of any lack of mutuality or specific consideration for that promise. *See, e.g., Holloway, supra* note 13, at 3-17; *Rothstein et al., supra* note 22, at 526 (noting that “about three quarters of the states hold that promises contained in an employment manual may bind an employer,” and that those “[c]ourts have addressed the consideration and mutuality of obligation obstacles either by viewing employment manuals as unilateral contracts or by applying the doctrine of promissory estoppel”).

228. Claims that an employer’s unilateral statements operate to estop the employer from exercising the right to summarily fire at-will employees have been rejected by Louisiana courts. *See, e.g., Thebner v. Xerox Corp.*, 480 So. 2d 454, 458 (La. Ct. App. 3d Cir. 1985) (construing narrowly and ultimately rejecting plaintiff’s claim that his employer’s decision to fire him violated principles of estoppel), *writ denied*, 484 So. 2d 139 (La. 1986).

However, it may not be appropriate to dispose of the concept quite so summarily. Common-law jurisdictions have relied on the doctrine of promissory estoppel to provide protection to at-will employees who rely to their detriment on an employer’s promises. *See Mohammed Yehis Mattar, Promissory Estoppel: Common-law Wine in Civil Law Bottles*, 4 TUL. CIV. L.F. 71, 118-19 (1988). Moreover, while the term “estoppel” is of common-law rather than civilian origin, the core idea that it expresses is reflected in closely related concepts (including “detrimental reliance” and the need to perform obligations in good faith) that are firmly rooted in the Civil Law in general and the Louisiana Civil Code in particular. LA. CIV. CODE ANN. arts. 1759, 1967, 1983 (West 1987). *See generally* Mattar, *supra*.

229. Article 2024 provides the following:

rights;<sup>230</sup> and the possible applicability of other tort theories.<sup>231</sup> It is thus a task that is best left for another day.

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ARTICLE 2024: CONTRACT TERMINATED BY A PARTY'S INITIATIVE. A contract of unspecified duration may be terminated at the will of either party by giving notice, reasonable in time and form, to the other party.

LA. CIV. CODE ANN. art. 2024 (West 1987). As comment (a) to this article points out, the article is new. It was not, however, intended to change the law. Rather it was intended to make generally applicable the principle previously articulated in article 2686 of the Louisiana Civil Code of 1870.

The difficult issue is in defining exactly what kind of notice is required by this article. The revisors of article 2024 put it this way:

In proceeding under this Article, the parties must comply with the overriding duty of good faith. Reasonable advance notice will usually be required to avoid unwarranted injury to the interest of the other party.

LA. CIV. CODE ANN. art. 2024 cmt. (e) (West 1987). Cases interpreting article 2024 are relatively sparse, but appear sufficient to establish some basic notion of what the requirement of "reasonable notice" entails. *See, e.g.,* Jones v. Crescent City Health & Racquetball Club, 489 So. 2d 381, 383 (La. Ct. App. 5th Cir. 1986) (upholding trial court finding that a "lifetime" membership in a health club was a contract for an indefinite duration, terminable by either party on giving of reasonable notice, and that, on the facts of the case, a requirement of two years' notice was not unreasonable); Caston v. Woman's Hosp. Found., Inc., 262 So. 2d 62, 64-65 (La. Ct. App. 1st Cir.) (holding photographer had contract of unspecified duration with hospital, under which he was permitted to photograph newborn babies and sell photos to parents and awarding damages equal to six months' profit when hospital terminated the arrangement without notice), *writ denied*, 266 So. 2d 220 (La. 1972); *see also* System Fed. No. 59 v. Louisiana & A. Ry., 30 F. Supp. 909 (W.D. La. 1940) (holding if parties specify notice period in their contract, that period controls), *aff'd*, 119 F.2d 509 (5th Cir.), *and cert. denied*, 314 U.S. 656 (1941).

230. In Louisiana, the tort of abuse of rights has been held applicable "only in limited circumstances" when the plaintiff can show:

that the holder of the right used it either:

(1) to harm another or where the predominant motive was to cause harm;

or

(2) where there is no serious or legitimate interest worthy of judicial protection; or

(3) where the holder uses the right in violation of moral rules, good faith or elementary fairness; or

(4) where the holder uses it for a purpose other than that for which the right was granted.

*Dufour v. Westlawn Cemeteries, Inc.*, 639 So. 2d 843, 848 (La. Ct. App. 5th Cir. 1994) (citing *Truschinger v. Pak*, 513 So. 2d 1151, 1154 (La. 1987); *Kok v. Harris*, 563 So. 2d 374, 377 (La. Ct. App. 1st Cir. 1990)).

Some courts have interpreted these standards narrowly, rejecting claims of abuse of rights in the context of alleged wrongful termination of at-will employees. *See, e.g.,* *Walther v. National Tea Co.*, 848 F.2d 518, 519-20 (5th Cir. 1988); *Jones v. New Orleans Legal Assistance Corp.*, 568 So. 2d 663 (La. Ct. App. 4th Cir. 1990); *Ballaron v. Equitable Shipyards, Inc.*, 521 So. 2d 481, 483 (La. Ct. App. 4th Cir.), *writ denied*, 522 So. 2d 571 (La. 1988); *see also* *Johnson v. Delchamps, Inc.*, 897 F.2d 808, 811 (5th Cir. 1990) (following *Ballaron*). Nonetheless, it is clear that the tort is recognized in this jurisdiction,

It is, however, possible to at least begin sketching a few of the most basic outlines of what a truly Civil Code-based analysis of employment at will would require. Thus, for example, it appears that some of the growing common-law "exceptions" to the strict rule of employment at will, such as the free standing "public policy" exception, have no legitimate place in Louisiana employment law.<sup>232</sup>

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and that it can be applied in the context of an abusive discharge of an at-will employee. *Morse v. J. Ray McDermott & Co.*, 344 So. 2d 1353, 1370-71 (La. 1976) (granting recovery to a terminated at-will employee whose employer terminated him solely to avoid paying him substantial deferred compensation to which he would otherwise have been entitled).

It is also noteworthy that a variety of commentators have advocated the use of the concept in a variety of contexts, including some which bear analytic similarities to contracts of employment. See, e.g., George M. Armstrong & John C. LaMaster, *Retaliatory Eviction as Abuse of Rights: A Civilian Approach to Landlord-Tenant Disputes*, 47 LA. L. REV. 1 (1986); Julio Cueto-Rua, *Abuse of Rights*, 35 LA. L. REV. 965, 1004 (1975); Hunter C. Leake, II, Comment, *Abuse of Rights in Louisiana*, 7 TUL. L. REV. 426 (1933); Comment, *"At-will" Franchise Terminations and the Abuse of Rights Doctrine—The Maturation of Louisiana Law*, 42 LA. L. REV. 210, 218 (1981); see also *Onorato v. Maestri*, 173 La. 375, 137 So. 66, 69 (1931) (granting recovery to lease broker when lessor attempted to avoid payment of commission by exercising legal right to rescind lease negotiated by broker, then re-entering into similar lease with same prospective lessee).

231. By far the most common tort claim made by discharged employees has been the allegation that their termination constituted "intentional infliction of emotional distress." It would seem, however, that this tort is at best a problematic vehicle to remedy workplace unfairness. The tort has been narrowly construed by the Louisiana Supreme Court, which has articulated the legal standard as whether the defendant's actions were "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *White v. Monsanto Co.*, 585 So. 2d 1205, 1209 (La. 1991). Lower courts in this state have continued this tradition of narrow interpretation, uniformly refusing to grant discharged at-will employees any recovery based on claims of intentional infliction of emotional distress, regardless of the surrounding circumstances. See, e.g., *Portie v. Devall Towing & Boat Serv., Inc.*, 634 So. 2d 1324, 1325 (La. Ct. App. 3d Cir. 1994) (employee fired in retaliation for his brother filing a workers' compensation claim); *Massey v. G.B. Cooley Hosp.*, 593 So. 2d 460, 461 (La. Ct. App. 2d Cir. 1992) (employer made allegedly defamatory statements about employee), *judgment set aside*, 616 So. 2d 1242 (La. 1993); *Hammond v. Medical Arts Group, Inc.*, 574 So. 2d 521 (La. Ct. App. 3d Cir. 1991) (nurse fired because of failed sexual relationship with employer); *Ballaron*, 521 So. 2d at 481 (employer attempting to force employee to give up rights against a third party). See generally Dennis D. Duffy, *Intentional Infliction of Emotional Distress and Employment at-will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387 (1994).

232. One court in Louisiana has indicated, though in dictum, that discharge of an at-will employee would be actionable if it contravened "an established social policy." *Schulteiss v. Mobil Oil Exploration & Producing Southeast*, 592 F. Supp. 628, 630 n.2 (W.D. La. 1984) (citing, inter alia, dictum from *Wiley v. Missouri*. Pac. R.R., 430 So. 2d 1016, 1019 n.7 (La. Ct. App. 3d Cir. 1982) (noting the imposition of a good faith requirement in other states), *writ denied*, 431 So. 2d 1055 (La. 1983))). The precedential force of this decision is limited, however. The relevant language was only dictum, and the court's reasoning was based more on an analogy to federal maritime law than on an analysis

By contrast, it appears equally clear that other potential limits on the right to terminate employment—in particular, the requirement that all obligations must be performed in good faith—should apply to at-will employment in exactly the same way as they have applied to all other agreements which are subject to termination at the will of the parties.

#### A. *The Requirement of Good Faith*

One of the most fundamental principles of the Louisiana Civil Code is the basic requirement of “good faith,” a requirement which applies to and governs all contractual relations. The universality of this principle is explicitly stated in the Code<sup>233</sup> and has been repeatedly reaffirmed by leading commentators.<sup>234</sup> In particular, Louisiana Civil Code article 1770 specifically states that the

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of Louisiana law. More importantly, the free-standing “public policy” exception which has been adopted by some common-law courts also seems out of place in Louisiana. The Civil Code does have an article which implicates such concepts of public policy:

ARTICLE 7: LAWS FOR THE PRESERVATION OF THE PUBLIC INTEREST. Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.

LA. CIV. CODE ANN. art. 7 (West 1987). However, article 7 is limited by its terms to “juridical acts” which derogate from “laws enacted” by the legislature. Even if an employment contract could be considered a juridical act, article 7 would not provide courts a mandate to determine for themselves whether a particular termination violated “public policy”; that policy could only be determined by reference to specific statutes. As noted above, the legislature has added “anti-discrimination” or “anti-retaliation” provisions to its statutes in some cases, presumably where it deemed necessary. Judicial assertion of a “public policy” exception to employment at-will would amount to engrafting such a provision onto a statute for which the legislature has declined to provide, something a Louisiana court should not do. Cf. Christopher Pennington, Comment, *The Public Policy Exception to the Employment-at-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583 (1994) (reviewing and analyzing “public policy” decisions from a variety of common-law jurisdictions, and advocating its use in such jurisdictions).

233. Articles 1759 and 1983 provide the following:

ARTICLE 1759: GOOD FAITH. Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.

ARTICLE 1983: LAW FOR THE PARTIES; PERFORMANCE IN GOOD FAITH. Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith.

LA. CIV. CODE ANN. arts. 1759, 1983 (West 1994).

234. See, e.g., 5 SAUL LITVINOFF, LOUISIANA CIVIL LAW TREATISE: THE LAW OF OBLIGATIONS § 1.8, at 17 (1992); ALAIN A. LEVASSEUR, LOUISIANA LAW OF OBLIGATIONS IN GENERAL: A PRECIS 23 (1993) (describing the obligation of good faith rooted in Roman law, but raised to the status of an explicit Code provision by a process of induction—as one which “underlies the entire law of obligations”).

obligation of good faith governs termination of contracts terminable at will:

ARTICLE 1770. A suspensive condition that depends solely on the whim of the obligor makes the obligation null.

A resolutive condition that depends solely on the will of the obligor must be fulfilled in good faith.<sup>235</sup>

Clearly, the power of either the employer or the employee to terminate an at-will employment contract ends the employment contract, and is thus a "resolutive condition" as that term is used in article 1770.<sup>236</sup> This power to terminate the contract is also one

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235. LA. CIV. CODE ANN. art. 1770 (West 1994). Although this article is new (it was adopted in 1984), it was not intended to change the law. Rather, it was a consolidation of the substance of three predecessor articles of the Louisiana Civil Code of 1870. The change was necessary to avoid the confusion that had been introduced into the law by judicial misinterpretation and misuse of the concept of the "potestative condition." LA. CIV. CODE ANN. art. 1770, cmts. (a) & (e) (West 1994). The 1870 predecessors of current article 1770 provided as follows:

ARTICLE 2024. The potestative condition is that which makes the execution of the agreement depend on an event which it is in the power of one or the other of the contracting parties to bring about or to hinder.

ARTICLE 2034. Every obligation is null, that has been contracted, on a potestative condition, on the part of him who binds himself.

ARTICLE 2035. The last preceding article is limited to potestative conditions, which make the obligation depend solely on the exercise of the obligor's will; but if the condition be, that the obligor shall do or not do a certain act, though the doing or not doing of the act depends on the will of the obligor, yet the obligation depending on such condition, is not *void*.

Article 2024 was derived without substantial change from the Louisiana Civil Code of 1825 and the Digest of 1808. Articles 2034 and 2035 were derived without substantial change from the Code of 1825, but had no equivalents in the Digest of 1808. See LA. CIV. CODE ANN. arts. 2019, 2029, 2030 (1925); LA. DIGEST OF 1808, *supra* note 31, art. 70, at 272.

Prior to the enactment of current article 1770, an extensive body of jurisprudence had developed which was devoted to distinguishing "potestative" conditions which rendered contracts null from other conditions which did not have such an effect. These cases generally reached results paralleling the distinction between "will" and "whim" articulated in article 1770. See, e.g., *Sam's Style Shop v. Cosmos Broadcasting Corp.*, 694 F.2d 998, 1001-03 (5th Cir. 1982); *State v. Laconco, Inc.*, 430 F. Supp. 1376, 1385 (D.D.C. 1977); *Franks v. Louisiana Health Servs. & Indemnity Co.*, 382 So. 2d 1064, 1068 (La. Ct. App. 2d Cir. 1980); *Professional Billing Agency, Inc. v. Tarantino*, 350 So. 2d 258, 260 (La. Ct. App. 4th Cir. 1977); *Lee Lumber Co., Ltd. v. International Paper Co.*, 321 So. 2d 244, 247 (La. Ct. App. 4th Cir. 1975). See generally Vernon Palmer & Andrew L. Plauché, Jr., *A Review of the Louisiana Law on Potestative Conditions*, 47 TUL. L. REV. 284 (1973).

236. Article 1767 defines a "resolutive condition" as follows: "If the obligation may be immediately enforced but will come to an end when the uncertain event occurs, the condition is resolutive." Clearly, an "at-will" employment contract is one which will come

which depends on the “will” rather than the “whim” of the employer,<sup>237</sup> and therefore does not render the employment agreement null.<sup>238</sup> Indeed, that power must be regarded as dependent on the parties’ “will” rather than their mere “whim” in order to avoid rendering at-will employment contracts wholly illusory.<sup>239</sup> Thus, the

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to an end if and when an uncertain event, the decision of either party to terminate the arrangement, occurs.

237. The distinction between “whim” and “will,” as those terms are used in article 1770, is explained in the 1984 Revision Comments:

An event which is left to the obligor’s whim is one whose occurrence depends entirely on his will, such as his wishing or not wishing something . . . . An event is not left to an obligor’s whim when it is one that he may or may not bring about after a considered weighing of interests, such as his entering a contract with a third party.

\* \* \*

Thus, in the traditional example, an obligation to buy a house if the obligor moves to Paris is valid rather than null because it is assumed that moving to Paris or not will be decided according to serious reasons such as obtaining a position there or securing admission to a school in that city. It is assumed, in other words, that the obligor will not decide not to move to Paris for the sole purpose of deceiving the other party.

LA. CIV. CODE ANN. art. 1770 revision cmts. (d) & (e) (West 1987).

By this definition, the decision of an employer to fire an employee (or of an employee to quit her job) is clearly a matter of “will” rather than “whim.” For either party, the termination of the agreement will have meaningful consequences: The employer will have to find and train another employee or do without the services that the fired employee performed, and the employee will have to secure another job, one which will involve different terms and conditions than the job she left. Thus, for both employer and employee, the decision is one which will ordinarily reflect a “considered weighing of interests” rather than mere caprice.

238. Cf. *Long v. Foster & Assoc.*, 242 La. 295, 303, 136 So. 2d 48, 52-53 (1962) (holding that the inclusion of a unilateral right in the employee to terminate on two weeks notice did not constitute a potestative condition nullifying what was otherwise a fixed-term contract of employment).

239. Application of this principle to contracts terminable at will—and the necessity of limiting the right to terminate in this way in order to prevent the underlying obligation from becoming illusory—is explained in comment (f) of the official Revision Comments following article 1770:

COMMENT (f). Under the second paragraph of this Article, a resolutive condition that depends solely on the obligor’s will must be fulfilled in good faith, but does not make the obligations null. Thus, a “termination at-will” clause is not necessarily null if the right to terminate is exercised in good faith.

\* \* \*

Practical reasons prevent the conclusion that a resolutive condition that depends on the will of the obligor should always make the obligation null. Thus, in a simple sale in which the vendee reserves the choice of paying the price or returning the thing, it is clear that there is a resolutive condition that depends on

decision to end any at-will contract, including an at-will employment contract, must necessarily be governed by the second sentence of article 1770 and its requirement that the power be exercised in "good faith."<sup>240</sup> The hard questions, however, lie in determining what this requirement of "good faith" means, and how it should be applied in the context of employment at will.

### B. *Defining the Requirement of "Good Faith"*

Remarkably, although the concept of "good faith" appears in many places in the Louisiana Civil Code,<sup>241</sup> the Code nowhere attempts to define that term. However, commentary and case law provide a working definition of the elusive concept of "good faith."

As Professor Litvinoff has recently noted, the concept of "good faith" has both subjective and somewhat objective (or at least inter-

the will of the vendee, who is obligor of the obligation to pay the price. Neither the contract nor the vendee's obligation is null in such a case, however.

LA. CIV. CODE ANN. art. 1770 revision cmt. (f) (West 1994).

240. Though the Revision Comments to the relevant provisions of the Louisiana Code are not as explicit as one might wish, they appear to contemplate that the analysis and results proposed here do apply to termination of contracts of employment at-will. Comment (f) to article 1770 contains a specific cross-reference: "For employment contracts, see Comment (C) to C.C. Article 2024." That comment (c), in turn, states that "a contract of employment for an indefinite duration may be terminated at the will of either party." While that statement may seem like little more than a tautological definition, it appears that the use of the word "will" in comment (c) was advised and intentional and should be understood in light of the distinction between "will" and "whim" articulated in article 1770.

To be sure, a few decisions can be found which reject application of article 1770 to at-will contracts of employment. See, e.g., *Frichter v. National Life & Accident Ins. Co.*, 620 F. Supp. 922, 927 (E.D. La. 1985) (denying that a "duty to perform the at-will contract in good faith create[s] in and of itself an expectation of employment security" and does not limit an employer's power to fire at-will), *aff'd*, 790 F.2d 891 (5th Cir. 1986). These cases have, however, reached these results on the basis of the erroneous assumption that article 2747 requires that employment contracts be interpreted *sui generis*, rather than according to ordinary codal principles.

For an interesting comparison, see generally Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate only in Good Faith*, 93 HARV. L. REV. 1816 (1980) (advocating application of a good-faith requirement for discharge of at-will employees in common-law jurisdictions).

241. A very partial but representative list might include LA. CIV. CODE ANN. arts. 96 (civil effects of absolutely null marriage extended to party who entered into it in good faith); 488 (possessor in good faith of products has right to reimbursement of expenses); 523 (defining "good faith" in the context of transfer of moveables); 1963 (contract made with third party to prevent threatened injury may not be rescinded for duress if third party was in good faith); and 3475 (prescriptive period of 10 (rather than 30) years for possessor of property if "good faith [and] just title").

subjective) components. Specifically, good faith requires the actor to sincerely (even if erroneously) believe that he is acting according to law, and that his actions comport with minimal standards of probity, honesty, and loyalty to other parties to the contract.<sup>242</sup> In the particular context of conventional obligations, these underlying principles suggest that a party to a contract is not free to pursue his individual ends without regard for the interests of the other parties to the contract. Rather, each party is required to collaborate with other parties to facilitate attainment of their mutual ends.<sup>243</sup> Revision Comment (f) to

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242. Litvinoff explains:

Although the words “good faith” are of very current use, and though they are used on the general assumption that everybody understands what they mean, the fact is that the concept of good faith is not easy to define. It has been said that, in a legal context, good faith has a psychological and an ethical component. The former would consist in a belief that one is acting according to the law, and is designated as good faith-belief. The latter would consist in conducting oneself according to moral standards, and is designated as good faith-probity, or good faith-honesty, and is germane to the ideas of loyalty and respect for the pledged word. From the vantage point of the psychological component, it does not matter if the belief is erroneous, provided that it is sincere. That is recognized in other provisions of the Louisiana Civil Code that, for particular purposes, define a person's good faith as ignorance of the existence of the adverse interest of other persons. From the vantage point of the ethical component, good faith provides one of the opportunities in which morality meets with the law.

5 LITVINOFF, *supra* note 234, § 1.8, at 17.

These observations can help resolve some apparent confusion in the cases as to whether the standard of “good faith” in the Louisiana Civil Code is an objective or subjective one. Compare *National Safe Corp. v. Benedict & Myrick, Inc.*, 371 So. 2d 792, 794-95 (La. 1979) (holding that the standard is objective, and party held to have breached contract by inducing away key employees of other party, even though nothing in the agreement specifically forbade such conduct) with *Brill v. Catfish Shaks of Am., Inc.*, 727 F. Supp. 1035, 1040-41 (E.D. La. 1989) (upholding a subjective standard). The truth appears to be that the requirement of “good faith” can be violated either by consciousness of wrongdoing or by grossly inappropriate conduct.

243. As Professor Litvinoff has suggested:

[The principle of good faith is] general and should be applicable to all kinds of obligations, regardless of their origin. In the case of contracts, however, further elaboration of the principle is possible: they should be performed according to the parties' intent and in conformity with recognized standards of honesty and loyalty.

The idea of good faith in conventional obligations may be conceived in a livelier and more complex fashion . . . . In modern times, the emphasis once placed on the individual end pursued by each of the parties has been shifted to the end pursued in common by all the parties, as if every contract were a joint venture—almost a partnership—where the idea of opposed interests dividing the parties yields to the idea of a certain union of interests among them. Thus, insofar as the expected performance is concerned, the creditor is no longer a creditor



article 1770 of the Code elaborates on these principles, explaining that to be in good faith, a party exercising the power to terminate a contract at will "should consider not only his own advantage but also the hardship which the other party will be subjected to because of the termination," and that "termination because of purely personal rather than business reasons could constitute bad faith."<sup>244</sup>

The meaning of good faith can also be derived from an examination of its converse, "bad faith."<sup>245</sup> Louisiana Civil Code articles 1996 and 1997 distinguish good and bad faith for purposes of assessing damages for breach of contract.<sup>246</sup> Comment (b) to article 1997 defines "bad faith" narrowly as an "intentional[] and

without more; he also becomes a debtor with a duty of collaboration, an obligation to cooperate in the attainment of mutual ends.

7 SAUL LITVINOFF, LOUISIANA CIVIL LAW TREATISE: OBLIGATIONS, BOOK 2 § 4, at 6-7 (1975).

The concept of good faith has come to be interpreted similarly in common-law jurisdictions as requiring both honesty in fact and faithfulness to the parties' common purpose. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 205 cmts. (a) & (d) (1981).

244. The revision comment to article 1770 states the following:

In order to comply with the requirement of good faith, a party exercising his right to terminate a contract at-will should consider not only his own advantage, but also the hardship which the other party will be subjected to because of the termination. Thus, a party to a requirements contract that chooses to terminate it because he has an opportunity to sell the same things elsewhere at a higher profit could violate the good faith requirement if the other party cannot find an alternative source of supply. Likewise, termination because of purely personal rather than business reasons could constitute bad faith.

LA. CIV. CODE ANN. art. 1770, revision cmt. (f) (citations omitted).

245. Louisiana courts have construed the terms "good faith" and "bad faith" as complementary terms. Any act which is not taken in good faith is necessarily in bad faith, and vice versa. *See, e.g.*, *Bond v. Broadway*, 607 So. 2d 865, 866-67 (La. Ct. App. 2d Cir.) (adopting the definition of bad faith found in Black's Law Dictionary as the "opposite of good faith generally implying or involving actual or constructive fraud"), *writ denied*, 612 So. 2d 88 (La. 1993). Defining one of these terms thus necessarily serves to define the other.

246. Articles 1996 and 1997 provide the following:

Article 1996. Obligor in good faith. An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made.

Article 1997. Obligor in bad faith. An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.

LA. CIV. CODE ANN. arts. 1996, 1997. These articles are new but were not intended to make any substantive change to the law. They reproduce the substance of article 1934(1) of the Louisiana Civil Code of 1870, quoted at note 248, *infra*.

malicious[)]” failure to perform an obligation.<sup>247</sup> Similarly, former article 1934(1) of the 1870 Louisiana Civil Code, from which current articles 1996 and 1997 were derived, defines “bad faith” as “a designed breach of [the contract] from some motive of interest or ill will.”<sup>248</sup> However, case law interpreting these concepts has made it clear that a showing of bad faith does not necessarily require a showing that the defendant’s conduct was intentional; rather, other types of “gross fault” may suffice.<sup>249</sup>

*C. Applying the Duty of “Good Faith” to Termination of At-Will Employees*

This definition of the obligation of “good faith” applies with full force to a party’s exercise of contractual rights. This includes situations where a contract allows one or both parties to exercise discretion with respect to particular terms, such as an at-will employment contract. It is, in other words, no contradiction in terms to say that a party to a contract exercised a contractual right, but did so in bad faith.

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247. Comment (b) to article 1997 states the following:

COMMENT (B). An obligor is in bad faith if he intentionally and maliciously fails to perform his obligation.

LA. CIV. CODE ANN. art. 1997, revision cmt. (b) (West 1994).

248. Article 1934 provided the following:

Article 1934.

\* \* \*

1. when the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. By *bad faith* in this and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will.

LA. CIV. CODE ANN. art. 1934 (West 1992).

Though former article 1934 was repealed, Louisiana courts continue to hold that article 1934 explains the meaning of current article 1997. *See, e.g., AAA Brick v. City of Carencro*, 640 So. 2d 483 (La. Ct. App. 3d Cir.) (relying on the language of former article 1934 to interpret current article 1997), *writ denied*, 642 So. 2d 870 (La. 1994); *Williams v. Coe*, 417 So. 2d 426 (La. Ct. App. 1st Cir. 1982) (same).

249. As the Louisiana Supreme Court has suggested:

Although it is clear that “bad faith” or “lack of good faith” in this context means something more reprehensible than ordinary negligence, imprudence or want of skill, it is apparent that our courts have perceived the term to include some forms of gross fault as well as intentional and malicious failures to perform

*Great Southwest Fire Ins. Co. v. CNA Ins. Co.*, 557 So. 2d 966, 969 (La. 1990)

The point here is subtle but important. It is certainly true that the statutory duty to perform obligations in good faith generally cannot give parties rights inconsistent with the express terms of their contract.<sup>250</sup> However, this does not mean that one must show a violation of a specific contract term in order to show a violation of the duty of good faith. While certain language in article 1997 and the Comments to that article could be read to imply such an interpretation,<sup>251</sup> this view is too myopic.

Several reasons support this conclusion. First, the articles which impose the obligation of good faith, articles 1759 and 1983, are located in sections of the Louisiana Civil Code which purport to establish general principles for the interpretation of all contracts.<sup>252</sup> By contrast, article 1997 is located in a section of the Code which is concerned solely with a single, limited issue—calculation of damages.<sup>253</sup> This location strongly suggests that article 1997 was not intended to operate as a general limit on the applicability of the principle of good faith established elsewhere in the Code. Second, any interpretation of “bad faith” which would require a breach of a specific

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250. See, e.g., *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 485 (5th Cir. 1984); *Bonanza Int'l, Inc. v. Restaurant Management Consultants, Inc.*, 625 F. Supp. 1431, 1448 (E.D. La. 1986). In exceptional circumstances, however, when one party attempts to make use of the terms of a contract in an obviously unfair way, courts have found a breach of the duty of good faith even though the contract purported to permit the defendant to do what he did. See, e.g., *Andrus v. Cajun Insulation Co.*, 524 So. 2d 1239 (La. Ct. App. 3d Cir. 1988). In *Andrus*, leased mobile telephone equipment had from the beginning been so defective as to not serve the purposes for which it was purchased. *Id.* at 1240. The court denied the lessor's claim for delinquent rent even though the lease agreement contained express language disclaiming all warranties of fitness or merchantability. *Id.* at 1245. The court held that, despite the language purporting to disclaim warranties, the duty to provide merchantable goods is correlative to the obligation to pay rent, and that it would amount to a violation of the duty of good faith imposed by the predecessor of current article 1983 to simultaneously demand rent and disclaim all warranties. *Id.* at 1239-45. Other Louisiana courts, however, have reached contrary results on similar facts. See, e.g., *Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc.*, 377 So. 2d 92 (La. 1979); *First Continental Leasing Corp. v. Howard*, 618 So. 2d 642, 645 (La. Ct. App. 2d Cir. 1993).

251. Both article 1997, quoted at note 248, *supra*, and comment (c) to that article state that an obligor in bad faith is liable for all damages caused by his “failure to perform.” That terminology could be interpreted to require a failure to perform some particular contractual obligation as a prerequisite to a finding of bad faith.

252. Article 1759 is located in Book III, Title III, Chapter 1 of the Civil Code, a chapter entitled “General Principles” applicable to obligations in general. Article 1983 is located in Book III, Title VI, Chapter 8, Section 1, a section devoted to explicating the “General Effects of Contracts.”

253. LA. CIV. CODE ANN. bk. III, tit. IV, ch. 8, § 4 (entitled “Damages”).

contractual term, or which would make the requirement of good faith inapplicable to exercises of discretion contemplated by a contract, would be inconsistent with Louisiana Civil Code article 1770. Article 1770 expressly makes resolutive conditions dependent on the will of the obligor subject to the requirements of good faith.<sup>254</sup> Such an interpretation would also contradict a line of Louisiana authority which has found a violation of the duty of good faith, or its equivalent, even though the defendant's conduct did not violate any express term of the contract<sup>255</sup> or involved an issue which the contract expressly left to the defendant's discretion.<sup>256</sup> Finally, such a crabbed interpretation of the

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254. LA. CIV. CODE ANN. art. 1770.

255. See, e.g., *National Safe Corp. v. Benedict & Myrick, Inc.*, 371 So. 2d 792 (La. 1979). In *National Safe*, the defendant had solicited the plaintiff to become the exclusive Louisiana distributor of the defendant's products. The defendant later terminated the distributorship agreement with the plaintiff, without cause, and gave the business to a new partnership formed by one of the defendant's officers and one of the plaintiff's employees. Although this course of conduct violated no express term of the distributorship agreement, the Louisiana Supreme Court found that the defendant violated the underlying obligation of good faith imposed by the Civil Code on all contracts by offering inducements to key employees of its contract partner. *Id.* at 795; see also *Azar v. Shilstone*, 607 So. 2d 699, 701 (La. Ct. App. 4th Cir. 1992) (holding that individual who was both the majority shareholder and major creditor of a business violated the duty of good faith by, inter alia, structuring a sale of the business in a form that would unfairly benefit himself (by taking most of the purchase price in the form of payment for a personal covenant not to compete) rather than in a form that would equitably benefit minority shareholders).

256. See, e.g., *Morse v. J. Ray McDermott & Co.*, 344 So. 2d 1353 (La. 1977). In *Morse*, an employer sought to avoid payment of deferred compensation to an at-will employee by firing that employee before his entitlement to that deferred compensation could vest. *Id.* at 1359. The court ordered compensation paid anyway, relying on former Civil Code article 2040, which provides that a "condition is considered as fulfilled, when fulfillment of it has been prevented by the party bound to perform it." The court noted that former article 2040 was subject to an exception when the party which prevents performance does so through the exercise of a legal right. *Id.* at 1359-60. However, the court refused to apply that exception in the case before it on the ground that termination of an at-will employee, without cause, solely to prevent vesting of such deferred compensation, constituted an abuse of right. Though the court did not explicitly analyze the case in terms of the requirement of good faith, the analogy between concepts of "bad faith" and "abuse of rights" is evident. The *Morse* case is discussed, and its implications explored, in Note, *Obligations-Deferred Compensation Supplemental Awards & Pension Plans*, 52 TUL. L. REV. 427 (1978); see also *Onorato v. Maestri*, 173 La. 375, 137 So. 67 (1931). The plaintiff in *Onorato* was a broker who arranged a fifteen year commercial lease in return for a commission. The lease contained a clause which gave the owner the right to terminate that lease if certain events occurred. The owner took advantage of that clause to rescind the original lease and then entered into replacement leases with the original lessee—a sequence which had the effect of reestablishing essentially the same relations between owner and lessee, while depriving the plaintiff of his commission. *Id.* at 378, 137 So. at 68. As in *Morse*, the court held that the condition for the payment of the commission should be

applicability of the duty of good faith would have the perverse effect of reducing a fundamental principle of contract law to a virtual nullity. If violating a specific contract term were required, plaintiffs could in all cases base their suit solely on the alleged breach of that term. Additional allegations that the breach was in bad faith would be deemed irrelevant to any issue on the merits.

What then does the requirement of good faith mean, as applied in the specific context of terminating at-will employees? At the outset, it must be emphasized that a requirement of "good faith" in discharges of at-will employees is not the same as a requirement of "good cause" for such a discharge. The absence of any requirement of good cause for termination of at-will employment is clearly implicit in Civil Code articles 2749 and 2750, which impose liability for discharge or cessation of work in the absence of "good cause" only for fixed-term employment.<sup>257</sup>

The distinction between good faith and good cause may not be easy to pin down. For example, if an employer fired an employee because that employer sincerely but erroneously believed that an employee was disloyal, such a discharge would likely not constitute good cause. It might well, however, constitute good faith, at least if the employer was not reckless in believing and acting as he did. Termination on such facts would seem to satisfy both the "subjective" and the somewhat more "objective" tests for good faith. The employer's sincere belief satisfies the first criterion. The second prong is also met because society generally recognizes that termination on the basis of an employee's apparent disloyalty does not demonstrate lack of probity, honesty, or loyalty, and does not indicate self-interest or ill will. Likewise, the case law provides a number of examples in which terminations were not made for "good cause," but were nevertheless made in "good faith": termination of an engineer employed by the outgoing governing board of the harbor and terminal district in part so that the new board could hire their own engineer;<sup>258</sup> a medical corporation's termination of a physician employee because

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considered satisfied, under the authority of former Civil Code article 2040. While the owner acted within his legal rights in rescinding the original lease, thus preventing the plaintiff from completing the conditions for payment of his commission, the court found, in effect, that his acts were in bad faith. *Id.* at 382, 137 So. 2d at 69.

257. See text accompanying *supra* note 220.

258. *Andrepoint v. Lake Charles Harbor & Terminal Dist.*, 602 So. 2d 704 (La. 1992).

she failed to apply for staff privileges at a local hospital;<sup>259</sup> or an employee's act of leaving employment in part because of a personal desire to avoid travel.<sup>260</sup>

Nonetheless, while the requirement of "good faith" is not the same as the requirement of "good cause," applying the general duty of good faith to termination of at-will employees would have important consequences for the law of Louisiana. In particular, the duty of good faith, if enforced as it should be in the context of employment at will, would serve to eliminate many of the most egregious abuses spawned by the current absolutist view of the at-will rule. For example, it was held in *Gil v. Metal Service Corp.*, that the Louisiana doctrine of employment at will barred any cause of action on behalf of an at-will employee who was fired solely because he refused to actively participate in the employer's attempts to perpetrate fraud.<sup>261</sup> If the case had instead been analyzed in accord with the duty of good faith that underlies all contracts, the employer's act could readily be seen as motivated by a lack of "honesty" and "loyalty" toward the employee, as placing an unjustifiable hardship on that employee, and as motivated by an illicit self-interest or ill will on the part of the employer. Such a violation of the duty of good faith then would—as it should have in *Gil*—give rise to a cause of action for damages in favor of the discharged employee. Similarly, recognition of a duty of good faith would have led to very different results in *Walther v. National Tea Co.*,<sup>262</sup> in which the Fifth Circuit relied on Louisiana's absolutist view of employment at will to absolve an employer who terminated an at-will employee solely to prevent the vesting of the employee's pension benefits. In *Portie v. Devall Towing & Boat Service, Inc.*<sup>263</sup> and

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259. *Prevost v. Eye Care & Surgery Ctr.*, 635 So. 2d 765 (La. Ct. App. 1st Cir.), writ denied, 639 So. 2d 1168 (La. 1994).

260. *Sell v. Department of Employment Sec.*, 499 So. 2d 1285, 1286-87 (La. Ct. App. 4th Cir. 1986).

261. 412 So. 2d 706, 708 (La. Ct. App. 4th Cir.), writ denied, 414 So. 2d 379 (La. 1982).

262. 848 F.2d 518 (5th Cir. 1988); see also *Hill v. Missouri Pac. Ry.*, 8 F. Supp. 80, 81 (W.D. La. 1933) (holding that a claim that an employer discharged an employee to avoid paying pension benefits stated no cause of action, despite employer's promise to employ worker "until such time as he retired on a full pension"); *Williams v. Touro Infirmary*, 578 So. 2d 1006, 1009 (La. Ct. App. 4th Cir. 1991) (same).

263. 634 So. 2d 1324, 1328 (La. Ct. App. 3d Cir. 1994).

*Woodson v. Alarm Protection Services, Inc.*,<sup>264</sup> the courts found no viable claim could be asserted against an employer who punished an employee who filed claims for compensation for work-related injuries by firing that employee's relative and spouse. In *Martinez v. Behring's Bearings Service, Inc.*,<sup>265</sup> the court found no cause of action under state law for an at-will employee who was fired in retaliation for exercising the legal right to file a complaint to the Wage and Hour Division of the United States Department of Labor.

In all of these cases, the employer's decision to terminate employment clearly failed to meet the minimal requirements of honesty and loyalty toward the employee that are the bedrock of "good faith." In each case, the employer did act out of illicit motives, attempting to secure an improper advantage in "bad faith." In each case, the law should have permitted, consistent with the requirement of good faith, appropriate relief for the wronged employee.

#### V. CONCLUSION

Louisiana courts' virtually absolute interpretation of the rule of employment at will has let serious abuses by employers to go unrectified. The most egregious of these results are not, however, mandated by anything in the Louisiana Civil Code. On the contrary, the Code, properly interpreted, contemplates a cause of action in favor of a discharged at-will-employee whenever the termination was not carried out in "good faith."

Over the last thirty years, litigants and courts have justified the absolutist view of employment at will, and its attendant hardships, as mandated by the terms of Louisiana Civil Code article 2747. However, the derivation and history of article 2747 makes clear that the article was never intended to apply to the generality of employees. Rather, that article was written and intended as a very narrow exception to the ordinary rules applicable to employment, an exception which should properly be applied only to an extremely limited class of household and personal servants.

Since article 2747 does not apply, the rights and duties of most at-will employees should be determined according to the codal principles

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264. 531 So. 2d 542, 543-44 (La. Ct. App. 5th Cir.), *writ denied*, 533 So. 2d 358 (La. 1988).

265. 501 F.2d 104, 105 (5th Cir. 1974).

applicable to all other contracts terminable at will. First among these general principles is the duty of “good faith,” which the Code makes applicable to all contracts, including contracts terminable at will, and to all exercises of contractual rights, including exercising an option to terminate a contract at will. If applied, as it should be, to at-will employment contracts, this duty of good faith would permit Louisiana to retain the substance of the rule of employment at will, while ridding the system of its worst abuses.