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DIVORCING YOUR JOB FRENCH STYLE AN ARGUMENT TO END AT WILL EMPLOYMENT IN THE UNITED STATES

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Although the American Revolution (1775-1783) and the French Revolution (1789-1799) occurred over two hundred years ago, they continue to impact the thoughts and beliefs of each country, their ethics and morals. Influenced by British philosopher John Locke (1724-1804), the drafters of the U.S. Constitution imbedded his belief that people have inalienable rights and that government's purpose is to protect those rights (Donaldson & Werhane, 1999). In *Two Treatises of Government*, Locke (1999, original published in 1690) wrote, "...no one ought to harm another in his life, health, liberty or possessions" (p. 271). Just a few years after the American Revolution, the citizens of France under the motto of "Liberty, Equality, Fraternity" began their revolution.

Over the past two hundred years both countries enacted labor laws to protect employers and employees and to develop equality in their bargaining powers. One area where the two countries and societies diverge in thought and practice is the area of employee termination. The United States and France are at opposite

ends of the spectrum in their legal treatment and regulation of employee terminations.

Employment law in the United States follows the old English common law rules of master-servant and a doctrine known as at will employment (Wood, 1877). Under this legal principle, the employment relationship can be terminated by either side at any time without need to show good cause for the termination. As a result, most U.S. workers are employed at the whim of their employer. In comparison, France is very protective of employees' rights to keep their jobs and has enacted

comprehensive laws that regulate the termination process and has established specialized courts called employment tribunals to specifically address employee terminations (French Act January 18th, 1979 L.79-44). In France, good cause is not subjective; it is spelled out in detail in labor legislation (French Labor Code Article L. 1232-6). Regardless of whether the termination is initiated by a voluntary resignation of the employee or forced by the employer, in France most employees are entitled to severance pay, called indemnity payments.

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In an effort to reduce its high unemployment rates, France loosened its tight grip in this area by enacting a law in June 2008 that allows the parties to negotiate their own voluntary employment separation agreements (French Act June 25th, 2008 L.2008-596). This is a departure from the very strictly regulated system of dismissal by the employer and introduces a more flexible method of separation. It reflects a major government policy shift, in which the intentions of both parties are weighted more than the framework set out by the law. This change is no doubt a reflection of current business needs and better suited to the volatility of the labor market that exists in today's Europe. Even with this change, France remains the leader in promoting employee protection.

In order to understand the magnitude of this shift, it is important to understand how encompassing and protective the previous French law was for employees and how this shift did not erode the government's scope of protection in the area of employment termination. Prior to this change, employers could only terminate for reasons permitted by law (French Act August 8th, 1989 L.89-549). In addition, employers were required to provide severance pay under all circumstances except terminations based on grave or gross misconduct of the employee. The severance amount is based on years of service and is required to be paid whether the termination was mutual or initiated solely by the employer. Unlike the U.S. standard for good cause, issues such as excessive absences and arguing with supervisors do not rise to the level of grave or gross under the French standard (French Labor Code Article L. 1232-1). To qualify for gross misconduct, the employee's action must have been taken knowingly with intent to cause prejudice to the employer. The French Act June 25th, 2008 provides a more equitable process of separation from an employer when the parties mutually agree to a separation. This law, however, does not change any rights currently protecting employees in the case of terminations forced solely by the employer.

An employment relationship can sometimes end through an employee resignation. In France,

resignation cannot be presumed or implied (French Act July 13th 1973 L. 73-680). An employer cannot insert a clause in an employment contract that implies resignation by an employee (e.g. irregular absences, refusal of a transfer to a new position, returning late from a paid leave). Nor is a resignation valid if an employee is coerced, angry, agitated, threatened, or intimidated. Even a resignation given by an employee who is under threat of legal action or dismissal for serious or gross professional misconduct is invalid (French Labor Code Article L. 1232-1). A resignation is not valid until it has been reviewed and determined that it is not a disguised termination. Under the French Act June 25th, 2008 the terms of the separation and the future obligations of the parties must be stated in writing. If an employee claims that the resignation was coerced, the burden is on the employee to provide proof that the consent is flawed in law. A resignation that does not meet the strict standards of the law is deemed invalid. Furthermore, a dismissal without genuine or serious grounds exacts a penalty on the employer. The employer must pay the employee compensation in the amount equal to the last six months of employment for violating the law. In addition, the court must set the amount of compensatory damages actually suffered by the employee due to unjustified loss of employment.

A voluntary separation agreement becomes valid only after review by an established administrative authority which has 15 business days from receipt to verify that the consent was freely given and the agreement complies with the law. The termination agreement is only valid if approved. If the authorities refuse to approve it within 15 days, either party (or both) can appeal against that refusal. In the event of a denial after appeal, the case is treated as a forced termination by the employer and indemnity payments are set according to law.

The strict review of the settlement agreement and setting of the indemnity amount parallels the process in the United States in divorce and separation proceedings. Decisions in matrimonial cases in the United States are subject to court

review and approval (NY Domestic Relations Law 236B[5]). The reasoning for each is the same. The parties may not be of equal strength in the bargaining process, whether it be the employer over the employee or one spouse, usually the husband, over the other, usually the wife. The court's role is to ensure equity and fairness in the process. In matrimonial actions there are two issues the court must address: the separation of the parties and the equitable distribution of the marital property. Recognizing that the parties may not be equal and may not be in the right state of mind, property distributions and issues of marital support and child support require a judge's consent. Perhaps it is time for the United States to implement the same standard that is utilized in divorces to the area of employment termination.

From an ethical perspective, a strong argument can be made to provide some type of protection from the harsh consequences that at will employment agreements cause because there is no

protection against employer-initiated termination actions. An employee with no bargaining power and no protection under the law is vulnerable to an employer's exploits. In many cases, loss of a job can be more traumatic and financially devastating than a failed marriage. Challenging that status quo in the United States means challenging the doctrine of at will employment, one that is deeply imbedded in American culture.

The United States is unique among industrialized countries with respect to the issue of at will employment. At will employment is rooted in the U.S. Constitution and ingrained in the fabric of our society. The individual who has had the greatest impact on this concept was John Locke. Locke argued that people are born with "inalienable" rights, such as the right to "life, liberty, and property," and that the function of government is to protect those rights (Boatright, 2003). Locke believed that government

interference on society should be minimal.

An at will employment relationship is a natural extension of the rights argument. It would violate the freedom and protected rights of the parties if the government were to interfere and require one party to that agreement to act contrary to their will. Epstein (1984) explains: "If government regulation is inappropriate for personal, religious, or political activities, then what makes it intrinsically desirable for employment relations?" (p. 954). What basis would justify binding the hands of an employer? This is reinforced in the

U.S. Constitution. John Locke's influence on rights even extended to the area of contracts. The U.S. Constitution protects society from unnecessary governmental control or interference by declaring: "nor [shall any person] be deprived of life, liberty, or property without due process of law" (U.S. Const. amend V) and in Article I Section 10, "No state shall...pass any... law impairing the obligation of contracts" (U.S. Const. Art I sec. 10). In an employment contract

the parties are free to interject whatever terms to which they agree. Unless the parties specifically bargain away their rights to at will employment, it would be unfair to either party to take away that right (Werhane, 1985).

In the U.S., the employment relationship can be viewed as strictly an economic, and not a moral, one. The employer/capitalist is in need of the resource of labor and the employee has the resource of labor for sale. In economics there is no difference in the treatment of a machine and an employee, except that one resource is labeled capital and other labor (Bowie & Werhane, 2005). As long as the machine or the employee is generating profits, it will be employed by the firm. Economics dictates that the firm owner will try to maximize profits. In economic terms, an employer will continue to hire workers until the marginal product of labor equals the wage or cost of that worker (McConnell & Brue, 1990).

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When morality enters the debate, at will employment is difficult to justify. The concept of employment at will is not acceptable to a utilitarian (Werhane, 1985). According to Werhane, a utilitarian "...would say that one cannot justify harming someone, in particular restraining their freedom, for the sake of some collective or corporate benefit" (p. 93). The logic of Immanuel Kant's (1724-1804) *Fundamental Principles of the Metaphysic of Morals* (1949, original published in 1785) can be extended to the area of employment as well. As per Kant, "...morality is a condition under which alone a rational being can be an end in himself, since by this it is possible that he should be a legislating member in the kingdom of ends. Thus morality, and humanity, as capable of it, is that which alone have dignity" (p. 52). "To treat a person simply as a cost is to violate Kant's respect for the persons principle" (Bowie & Werhane, 2005, p. 45).

If we are to talk about the rights of individuals, then one can argue that by subjecting oneself to exclusive control of an employer, this person has subjected his or her ability to make a livelihood to that employer as well. In the rights-oriented society of the United States, the employee's right to a job and a right to a livelihood is recognized only for jobs in the government sector. Federal and State government employees have a right to their job and that right can only be taken away for good cause. The burden is on the government employer to prove good cause for termination.

Locke would argue that at will employment is fair to the employee since the parties entered into the employment relationship as equal partners and each was free to contract as they wished, and even free to refrain from contracting (Werhane, 1985). Unfortunately, in reality we do not have perfect markets in the employment area. While employers in many cases face a perfectly competitive labor market, employees do not. In most cases, employees are not able to bargain effectively because the supply of labor to the employer is virtually endless for unskilled labor. Employees with unique skills or higher levels of education are better able to bargain with their

employer and often enter into written employment agreements that negate at will employment. In such instances the labor market is not considered perfectly competitive for employers seeking to fill a specialized position.

Over fifty years ago, author Frank Tannenbaum insightfully wrote:

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands (Tannenbaum, 1951 p. 9).

These words ring true today as well. Not only are unskilled employees unable to bargain effectively, they are often financially devastated by the loss of their job. If the market was perfectly competitive for the employee as well as the employer there would be no need for unions. Unions provide that collective clout to bargain effectively for its members. Union members are protected in their terminations by the collective bargaining agreement which, similar to government employment, requires that the employer show good cause for all employment terminations. Employees who do not have the benefit of such protections are at the mercy of their employer who has the legal right to terminate the employment relationship at any time without showing good cause. To these employees, termination is more than just a severing of the relationship; it is more than just a termination of the sale of the labor resource. It is the loss of financial security and a loss of the employee's livelihood, a loss of the ability to provide for the needs of one's family and is no different than the issues facing a couple in the termination of their marriage. To provide judicial protection for one and not the other cannot be justified.

Although at will employment is still deeply imbedded in the American culture, it is not uniformly applied. The State of Montana is the first and only state to enact legislation protecting all workers from at will termination of employment. In Montana an employer must have just cause for the termination (Montana Code Annotated Title 39 Chapter 2 (MCA) §901-915). Just cause includes employee wrongful conduct as well as termination by an employer for economic reasons.

Under the U.S. Constitution and Civil Service legislation, termination of federal, state, and local government workers requires just cause as a basis for termination (U.S. Const. amend. V). Employees with bargaining power, such as executives and managers often bargain for protection by negotiating an employment contract that includes a clause allowing termination only for specified acts of wrongful conduct by the employee or some provision for guaranteed employment for a specific term of years. In firms where employees are represented by a union, the collective bargaining agreement always requires that an employer have good cause for an employee termination and a grievance procedure to challenge the termination. Regardless of the terms of employment, an employee cannot be terminated from employment if the sole basis for the termination violates a law, such as the Civil Rights Act of 1964.

While every state provides parties with protection and oversight in marital property settlements, the same is not true of employment separations. This lack of equality in how employment terminations are regulated in the United States strengthens the argument to protect employees from the harshness of at will employment terminations. The State of Montana had the political will to enact such legislation. Moving from no protection to one requiring a showing of just cause for all employment terminations would be a major step in the right direction. That would open the courts for oversight of terminations for employees who believe that they were not fairly dealt with by their employer.

Clearly the two countries differ on their approach

to employment contracts and terminations. While it is difficult for individuals in the U.S. to fathom a world where there is a legally-protected expectation that a job will last a lifetime, or be entitled to severance pay for voluntary termination of a job, it is equally difficult for employees in France to even comprehend why so many workers in the U.S. have at will jobs with no protection except the good will of their employer. Ethical principles of equality dictate that the United States needs to move away from at will employment and begin treating all employees equally with dignity and respect.

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