

# Offer at Your Own Risk: Why Louisiana Employers Who Withdraw an Offer of Employment May Find Themselves Liable Under Civil Code Article 1967

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# Offer at Your Own Risk: Why Louisiana Employers Who Withdraw an Offer of Employment May Find Themselves Liable Under Civil Code Article 1967

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#### INTRODUCTION

Meet Bob, an extremely successful and hardworking individual who has unexpectedly found himself without a job or a way to put food on the table for his family. Just a few weeks ago, Bob was happily employed with a good salary when Kirk, owner and chief executive officer of the largest Louisiana company specializing in Bob’s area of expertise, contacted him. Kirk offered Bob employment at his company with a salary substantially higher than Bob’s current job. Kirk told Bob that he could start in two weeks. Bob had to think of his family, his future, and his co-workers that he would be leaving if he accepted Kirk’s offer. After serious consideration and multiple conversations with Kirk about the sincerity of his offer, Bob finally accepted the position and quit his current job. Bob and his family were thrilled at the prospect of greater economic liberty that would come with the promised increase in income.

Shockingly, Kirk called Bob the Friday before his start date and withdrew his offer of employment, telling Bob that he no longer thought that hiring Bob was a good idea for the company. Bob was in disbelief upon hearing this, and immediately called his former employer begging to return, but it had no longer wanted Bob back. Because Bob works in a specialized field, he faces bleak prospects of finding another job at his skill level in a reasonable time. Despite being elated just hours before, Bob’s entire family was now at risk.

Kirk’s actions and promises led directly to Bob’s calculated decision to quit his job, and Bob would not be unemployed if Kirk had not offered him a better job. Despite this obvious problem, Louisiana courts have applied the state’s at-will employment doctrine to hold that relying on an

offer of employment is unreasonable as a matter of law.<sup>1</sup> This holding means that an aggrieved prospective employee has no chance to argue his or her case on the merits, no matter how egregious the employer's actions.<sup>2</sup> This result is surprising in light of Louisiana's detrimental reliance theory that is codified in Louisiana Civil Code article 1967, which seems perfectly tailored for Bob's situation.<sup>3</sup>

The current Louisiana jurisprudence that categorically bars recovery on revoked offers of employment claims is misguided and should be overruled. Under Louisiana law, courts should not consider relying on an offer of employment unreasonable as a matter of law, even if that employment is at will. In certain circumstances, a prospective employee's reliance on an employer's offer of employment is completely reasonable.

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1. See *May v. Harris Mgmt. Corp.*, 928 So. 2d 140, 148 (La. Ct. App. 1st 2005) ("We hold that it is unreasonable as a matter of law to rely on an offer of at-will employment, just as it is patently unreasonable to rely on the permanency of at-will employment once it begins."); RICK J. NORMAN, *LOUISIANA PRACTICE: EMPLOYMENT LAW* § 3:9, at 36 (Supp. 2013–2014 ed., 2013) (citing the *May* holding as the rule); Tracy A. Bateman, *Employer's State-law Liability for Withdrawing, or Substantially Altering, Job Offer for Indefinite Period Before Employee Actually Commences Employment*, 1 A.L.R.5th 401 (West, Westlaw through 2015) (using *May* as the Louisiana Rule); *Bains v. Young Men's Christian Ass'n of Greater New Orleans*, 969 So. 2d 646, 652 (La. Ct. App. 4th 2007) (Armstrong, J., dissenting) ("Present Louisiana case law finds that it is inherently unreasonable to rely on an offer of at-will employment."); *infra* Part II.A. (discussing at-will employment in Louisiana).

2. This result is due to the fact that Louisiana jurisprudence requires a plaintiff in detrimental reliance cases to prove three elements by a preponderance of the evidence, and an absence of one of the elements can lead to the dismissal of the plaintiff's claims at the summary judgment stage. To recover under the theory of detrimental reliance the plaintiff must prove: (1) the promisor made a representation by conduct or word; (2) the promisee's justifiable/reasonable reliance on the promisor's representation; and (3) a change in the promisee's position to his or her detriment because of that reliance. *May*, 928 So. 2d at 145; see also *Murphy Cormier Gen. Contractor, Inc. v. Dep't of Health & Hosps.*, 114 So. 3d 567, 596 (La. Ct. App. 2013); *Amitech U.S.A., Ltd. v. Nottingham Constr. Co.*, 57 So. 3d 1043, 1052 (La. Ct. App. 2010). This Comment focuses on the second element.

3. The article in pertinent part states:

A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise.

LA. CIV. CODE art. 1967 (2015). The facts in this hypothetical share many similarities with the facts of *Bains*, 969 So. 2d 646. See *infra* Part I.C.2 (discussing the *Bains* decision).

Thus, Louisiana courts should consider revoked offer of employment claims on their own merit under article 1967.

In Part I, this Comment gives an overview of the approaches and solutions that various American jurisdictions have taken, then turns its focus to the Louisiana jurisprudence regarding reliance on an offer of at-will employment. Part II outlines Louisiana's at-will employment doctrine and also discusses the evolution of detrimental reliance as a basis for recovery in Louisiana. Part II concludes with a discussion of the various aspects of Louisiana law that make reliance on an offer of employment even more reasonable in Louisiana than in common law states. Part III highlights the problems with the failure of Louisiana courts to apply detrimental reliance in the context of a withdrawn offer of employment. Finally, Part IV applies a solution to Bob's problem that removes the categorical bar of recovery for claims of detrimental reliance.

#### I. TRYING TO FIND THE ANSWER: THE VARIOUS APPROACHES TO RESCINDED EMPLOYMENT OFFERS

At-will employment is a jurisprudential doctrine that allows either the employee or employer to end the employment relationship at any time for any reason.<sup>4</sup> The doctrine is premised on the ideas that the employer and the employee are on equal footing, and that because the employee is free to resign whenever the employee pleases, the employer should likewise be able to discharge the employee whenever the employer sees fit.<sup>5</sup> At-will employment serves 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."<sup>6</sup> Courts across the United States are divided on whether an

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4. See, e.g., *Burnett v. E. Baton Rouge Parish Sch. Bd.*, 99 So. 3d 54, 59 (La. Ct. App. 2012) ("[A]n employer is at liberty to dismiss an at-will employee at any time for any reason without incurring liability for the damage."); *Martin v. Sterling Assocs., Inc.*, 72 So. 3d 411, 416 (La. Ct. App. 2011) ("An at-will employee is free to quit at any time without liability to her employer."); see also *infra* Part II.A.

5. Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3.

6. John Devlin, *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*, 69 TUL. L. REV. 1513, 1514 (1995); see also *LaBove v. Raftery*, 802 So. 2d 566, 582 (La. 2001) ("Employers cannot be required to continue to employ workers who are under-productive and/or ineffective.").

employer should be liable to a prospective employee for withdrawing an offer of at-will employment.<sup>7</sup>

*A. Jurisdictions that Allow a Wronged Prospective Employee a Cause of Action*

Multiple states allow an aggrieved prospective employee a chance to recover when the employer has revoked his or her offer of employment.<sup>8</sup> States that find the employer liable generally do so on the basis of promissory estoppel.<sup>9</sup> The idea of promissory estoppel is that a promise can become legally binding when one acts on that promise to his or her detriment.<sup>10</sup> Although the basic premise is consistent, jurisdictions vary on the reasons they allow promissory estoppel for rescinded employment offers.

In one of the most well-known cases on this issue, the Minnesota Supreme Court in *Grouse v. Group Health Plan, Inc.*<sup>11</sup> held that the prospective employee, Grouse, could recover reliance damages on the basis of promissory estoppel.<sup>12</sup> Grouse was originally employed as a

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7. Many jurisdictions have splits among their intermediate appellate courts, and some jurisdictions are silent on the issue. *See May*, 928 So. 2d at 147; *Goff-Hamel v. Obstetricians & Gynecologists, P.C.*, 588 N.W.2d 798, 802 (Neb. 1999); *Bateman*, *supra* note 1 (outlining the general approaches taken by states); David K. Lucas, Note, *Unreasonably Reasonable Reliance: Prospective At-Will Employment and Promissory Estoppel in Goff-Hamel v. Obstetricians & Gynecologists, P.C.*, 79 NEB. L. REV. 199 (2000) (discussing various state cases that come out on both sides of the issue); MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 830 (4th ed. 2010) (noting that courts have only “sometimes” invoked promissory estoppel in this context).

8. *See, e.g., Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981).

9. *Bateman*, *supra* note 1, at § 2(a) (“In order for there to be liability based on promissory estoppel, the prospective employee must have detrimentally relied on the promised employment, and such reliance was usually found where an employee quit a prior job or incurred expenses in relocating in order to begin promised employment.”).

10. The basic formulation for the theory can be found in the Restatement (Second) of Contracts, which states:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

11. 306 N.W. 2d 114.

12. *Id.* at 116.

pharmacist at Richter Drug in Minneapolis.<sup>13</sup> He later interviewed for a new position with Group Health, which offered him an at-will job at one of its clinics.<sup>14</sup> Based on this offer, Grouse put in his two-weeks notice with Richter Drug and turned down a job offer that he had received from another employer.<sup>15</sup> To be hired at Group Health, Grouse had to pass a background check, and Group Health needed to obtain a favorable written reference on his behalf.<sup>16</sup> After having already offered Grouse the job, Group Health was unable to receive a favorable reference for him and, as a result, hired someone else.<sup>17</sup> When Grouse called and informed Group Health that he was ready to begin work, Group Health told him that the position had already been filled.<sup>18</sup> Consequently, Grouse suffered wage losses and struggled to find new full-time employment.<sup>19</sup>

According to the Minnesota Supreme Court, Grouse was not barred from using promissory estoppel to enforce Group Health's offer of employment.<sup>20</sup> The court noted that Group Health knew that Grouse resigned from his then-current employment.<sup>21</sup> Taking this into account, the court stated that "[u]nder these circumstances it would be unjust not to hold Group Health to its promise."<sup>22</sup> Finally, the *Grouse* court stressed that its conclusion would not hold an employer liable when it terminated any at-will employee, but rather "under the facts of this case the appellant had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of respondent once he was on the job."<sup>23</sup>

Likewise, an Indiana appellate court allowed a plaintiff to sue on the basis of promissory estoppel in *Pepsi-Cola General Bottlers, Inc. v. Woods*.<sup>24</sup> Pepsi hired Woods to an at-will position following an interview.<sup>25</sup> Before this, Woods had been employed at two different places, and Pepsi advised her that she would need to resign from those jobs before accepting its offer.<sup>26</sup> After she resigned, but before she began work,

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13. *Id.* at 115.

14. *Id.*

15. *Id.*

16. *Id.* at 115–16.

17. *Id.* at 116.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*; see also *Gorham v. Benson Optical*, 539 N.W.2d 798, 801–02 (Minn. Ct. App. 1995).

24. 440 N.E.2d 696 (Ind. Ct. App. 1982).

25. *Id.* at 696.

26. *Id.*

Pepsi informed Woods that the company would no longer hire her.<sup>27</sup> Pepsi became concerned because Woods's boyfriend worked at Coca-Cola, which could pose a potential security problem.<sup>28</sup> After two weeks, she found employment at Ramada Inn, and over the course of 26 weeks, she made \$800 less than she would have made with Pepsi.<sup>29</sup>

Pepsi defended the action on the grounds that it could not be liable to Woods due to the at-will employment doctrine.<sup>30</sup> The court rejected this argument stating, "[w]e have no difficulty in finding that Woods has a right of action under promissory estoppel; clearly Woods quit her former employment in reliance upon a promise of employment with Pepsi."<sup>31</sup> Although Woods was eventually unable to show the damages necessary to recover under the theory, the court acknowledged a cause of action based on promissory estoppel.<sup>32</sup>

In contrast to Minnesota and Indiana courts that applied promissory estoppel to potentially hold an employer liable, courts in other jurisdictions have held that the at-will employment doctrine should not control. Those courts reason that a promise to employ is a separate and distinct contract from the actual employment contract.<sup>33</sup> The courts' disregard of the at-will employment doctrine is supported by the following loophole available to employers: an at-will employer who fires an employee on the first day has fulfilled the promise of employment, whereas one who withdraws the offer

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27. *Id.* at 697.

28. *Id.*

29. *Id.* The court also noted in its opinion that the working conditions at Ramada Inn were "less than desirable," but the court did not provide any further details. *Id.* The 26 weeks accounts for the amount of time that it took her to find other employment at the same pay rate Pepsi had offered her. *Id.*

30. *Id.*

31. *Id.* at 699; *see also* Peck v. Imedia, Inc., 679 A.2d 745, 753 (N.J. Super. Ct. App. Div. 1996) ("We believe that plaintiff should be permitted to proceed to trial on her promissory estoppel claim.").

32. *Pepsi-Cola*, 440 N.E.2d. at 699.

33. *See* Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1270 (9th Cir. 1990) ("By its own terms, the portion of the contract set forth in the writing did not begin to govern termination of the employment relationship *until* B & W assigned Comeaux work and a salary. . . . We must look, instead, to the terms set forth in Comeaux's telephone conversation with B & W's hiring manager on the day B & W offered Comeaux employment in order to determine the terms of the relationship prior to when the 'at will' provision was to take effect." (emphasis in original)); Hackett v. Foodmaker, Inc., 245 N.W.2d 140, 142 (Mich. Ct. App. 1976) ("[I]f a contract was proven by plaintiff that he was to become manager of the Ypsilanti store and was prevented from so doing due to defendant's repudiation thereof prior to the time any services were commenced, plaintiff has a right to recover.").

before the employee commences work has not.<sup>34</sup> Regardless of the reason, each approach these jurisdictions have taken that provides an employee with a cause of action attempts to protect the prospective employee from injustice and to hold employers accountable for their actions. As one California court explained, “an employer cannot expect a new employee to sever his former employment and move across the country only to be terminated before the ink dries on his new lease, or before he has had a chance to demonstrate his ability to satisfy the requirements of the job.”<sup>35</sup>

If the plaintiff is granted relief, the remedy available to the plaintiff is the recovery of reliance damages.<sup>36</sup> The *Restatement (Second) of Contracts* states that these damages “includ[e] expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.”<sup>37</sup> The reliance damages stemming from a withdrawal of an offer of employment depend on the specific acts of reliance in each case but could include moving expenses, lost wages from previous employment, or the costs sustained by the prospective employee if unemployed for a period of time.<sup>38</sup> As the Nebraska Supreme Court explained:

[T]he damages sustained by an employee who quits current employment to accept another job are different than the damages sustained by an employee who had no prior employment but may have moved to a new location in reliance upon a job offer. In the latter case, wages from prior employment are not considered in the determination of damages because the party did not give up prior employment in reliance upon the new offer.<sup>39</sup>

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34. *Bower v. AT&T Techs., Inc.*, 852 F.2d 361, 364 (8th Cir. 1988) (“In the former case [post commencement], the employer has completely fulfilled his promise; in the latter [prior to commencement], the promise has not been kept *in any respect*.” (emphasis in original)).

35. *Sheppard v. Morgan Keegan & Co.*, 266 Cal. Rptr. 784, 787 (Ct. App. 1990).

36. *Pepsi-Cola*, 440 N.E.2d at 699 (“Promissory estoppel would have entitled Woods to damages for expenses incurred in reliance on Pepsi’s promise.”).

37. RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981).

38. *See, e.g., Goff-Hamel v. Obstetricians & Gynecologists, P.C.*, 588 N.W.2d 798, 805 (Neb. 1999) (“In any event, the amount of damages to be awarded, if any, is a question of fact to be determined from the circumstances of each case, i.e., as justice requires.”).

39. *Id.*

This remedy does not include, however, damages based on what the rescinding company was to pay the during future employment.<sup>40</sup> The justification behind this policy is that at the time actual employment commences, the employee becomes an at-will employee who could be terminated at any time.<sup>41</sup> Also, the prospective employee has a duty to seek other suitable employment in a timely fashion to mitigate any damages.<sup>42</sup>

*B. Jurisdictions that Do Not Allow a Wronged Prospective Employee a Cause of Action*

Alternatively, numerous jurisdictions refuse to allow prospective employees a cause of action when an employer has withdrawn an offer of employment after the employee has detrimentally relied on that offer.<sup>43</sup> The courts in these jurisdictions generally hold that allowing a prospective employee a cause of action before the employment period is illogical because, due to the at-will employment doctrine, the employee could be fired on the very first day of the job and have no recourse.<sup>44</sup> Some of these

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40. The notion that an employee is only entitled to reliance damages to the exclusion of future wages has been reiterated by the Proposed Final Restatement of Employment Law, which states:

If, however, the employer promised the employee or prospective employee employment that, however attractive the compensation and other terms, would be terminable without cause, and the employee reasonably relies to his detriment on such a promise, the affected employee has a claim only for limited reliance damages, such as relocation costs, because no particular period of employment with the employer was promised.

RESTATEMENT OF EMPLOYMENT LAW § 9.01 cmt. i (2014).

41. See *Goff-Hamel*, 588 N.W.2d at 805 (“In neither case are damages to be based upon the wages the employee would have earned in the prospective employment because the employment was terminable at will.”); *Grouse v. Grp. Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981) (“Since, as respondent points out, the prospective employment might have been terminated at any time, the measure of damages is not so much what he would have earned from respondent as what he lost in quitting the job he held and in declining at least one other offer of employment elsewhere.”).

42. See, e.g., *Monteleone v. First State Bank & Trust Co.*, 477 So. 2d 130, 133 (La. Ct. App. 1985) (“Under the doctrine of mitigation of damages an injured person has a duty to exercise reasonable diligence and ordinary care in attempting to minimize his damages after an injury has been inflicted.”).

43. See, e.g., *Morsinkhoff v. De Luxe Laundry & Dry Cleaning Co.*, 334 S.W.2d 639 (Mo. Ct. App. 1961).

44. A South Carolina federal district court adopted this position stating: [T]o hold otherwise would create an anomalous result and would undermine the doctrine of employment at-will in this state. If an employee such as plaintiff is permitted to recover damages from a potential employer that breaks a promise of at-will employment before the employee begins

jurisdictions refuse to allow a claim based on promissory estoppel, arguing that the type of risks that come with leaving one job for another are a normal part of the employment process.<sup>45</sup>

For example, in *Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co.*, a Missouri Court refused to recognize the prospective employee's promissory estoppel claim.<sup>46</sup> Morsinkhoff originally worked as a plant engineer for five years at Crawford Manufacturing Company, but seeking to improve his employment opportunities, he interviewed at DeLuxe.<sup>47</sup> During this interview with two employees, Morsinkhoff discussed various aspects of DeLuxe's business including the company's future plans and starting salaries.<sup>48</sup> Although the nature of the agreement reached during this meeting was subject to some debate, Morsinkhoff clearly was under the impression that he had been offered employment at DeLuxe for a period of one year for a salary of \$10,000.<sup>49</sup> He believed the new job would start after he resigned from his then current position, and as a result, he gave his current employer a month's notice of his decision to resign.<sup>50</sup> Before his starting date, but after resignation, Morsinkhoff was informed that "the whole deal was off," and that DeLuxe had changed its mind.<sup>51</sup> DeLuxe's withdrawal left Morsinkhoff unemployed for two months.<sup>52</sup>

In rendering its decision, the court first established that the employment in this particular case would have been at will.<sup>53</sup> After deciding this, the court denied Morsinkhoff his promissory estoppel claim<sup>54</sup> because the court found that allowing Morsinkhoff recovery during this interim period would be illogical when, due to the at-will employment doctrine, he would be without remedy if the termination occurred on the first day of his employment.<sup>55</sup> The court also contended

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to work, then the employee would be placed in a better position than an employee whose at-will employment is terminated at some point after he begins working since the courts of this state have expressly denied recovery on many occasions in the latter situation.

*White v. Roche Biomedical Labs., Inc.*, 807 F. Supp. 1212, 1220 (D.S.C. 1992).

45. See, e.g., *Marrero v. McDonnell Douglas Capital Corp.*, 505 N.W.2d 275, 278 (Mich. Ct. App. 1993) ("[R]esignation from one position to assume another and relocation of family would be customary and necessary incidents of changing jobs rather than consideration to support a promissory estoppel claim.").

46. 344 S.W.2d 639.

47. *Id.* at 640.

48. *Id.*

49. *Id.*

50. *Id.* at 640-41.

51. *Id.* at 641.

52. *Id.*

53. *Id.* at 642.

54. *Id.* at 643-44.

55. *Id.* at 643.

that invoking promissory estoppel in this context was merely an attempt to out-maneuver Missouri's at-will employment doctrine.<sup>56</sup>

These cases serve to highlight the difficulty some courts have had when faced with a potential conflict to their state's at-will employment doctrine. Strict adherence to the doctrine and ignoring the validity and usefulness of promissory estoppel to revoke an offer of employment, however, has led to the miscarriage of justice in many situations.

### *C. Louisiana's Misguided Approach*

Currently, Louisiana's published jurisprudence on this issue is sparse. Louisiana's approach thus far, however, aligns with the jurisdictions that deny employees a cause of action when an employer reneges on an offer of at-will employment.<sup>57</sup> The first recorded decision that directly confronted this issue was *May v. Harris Management Corp.* in 2005.<sup>58</sup>

#### *1. A First Take: May v. Harris Management Corp.*

In *May*, an owner and operator of nursing homes, Harris Management Corporation ("HMC"), offered May a position as the nursing home administrator at one of its homes.<sup>59</sup> May was employed at the time of the offer and had to resign before accepting HMC's offer of employment.<sup>60</sup> On her last day at her prior job, May filled out various employment documents at the HMC nursing home.<sup>61</sup> Five days before May was to begin her employment at HMC, the company informed her that it was withdrawing its offer.<sup>62</sup> By this point, May was unable to return to her previous job.<sup>63</sup> She later brought suit, seeking damages on the basis of detrimental reliance because she resigned from her previous employment as a result of HMC's offer.<sup>64</sup> The Louisiana First Circuit Court of Appeal ultimately held that, "it is unreasonable as a matter of law to rely on an

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56. *Id.*

57. *See supra* note 1.

58. 928 So. 2d 140, 144 (La. Ct. App. 1st 2005) ("In this case, we must decide a *res nova* legal issue in Louisiana: whether recovery is allowed under the doctrine of detrimental reliance when an employer withdraws an offer of at-will employment prior to the designated time for the employee to begin work.").

59. *Id.* at 143.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

offer of at-will employment, just as it is patently unreasonable to rely on the permanency of at-will employment once it begins.”<sup>65</sup>

*a. The May Majority’s Faulty Rationale*

The court began its analysis by stating that “[i]t is difficult to recover under the theory of detrimental reliance, because estoppel is not favored in our law.”<sup>66</sup> The court then emphasized the strength of the at-will employment doctrine in Louisiana.<sup>67</sup> Further, the court noted that nothing in the record indicated the existence of a bargained-for exchange between the parties or that May provided any additional consideration for the employment agreement.<sup>68</sup> Next, because this case presented a matter of first impression in Louisiana, the court inquired into positions taken by other jurisdictions.<sup>69</sup> After analyzing opinions on both sides, the court declared that in their view, it is “patently unreasonable” to rely on an offer of at-will employment.<sup>70</sup> The court believed that to hold otherwise would undermine Louisiana’s strong at-will employment doctrine.<sup>71</sup> Also, the court expressed concerns over perverse incentives for employers if recovery to the plaintiff was allowed. For example, an employer could just wait until the first day of employment to fire the employee to receive the full protection of the at-will employment doctrine.<sup>72</sup> The court concluded that allowing recovery in this context would defy logic, as the prospective employee would seemingly have more power than one actually working at the company.<sup>73</sup>

*b. The May Concurrence’s Apprehensive Rationale*

Judge Downing concurred with the *May* result but only because he did not believe that May could prove the damages necessary to succeed on a

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65. *Id.* at 148. It is worth noting that two of the judges on the three judge panel actually disagreed with this statement. *Id.* at 149–50 (Gaidry, J., dissenting); *Id.* at 150–51 (Downing, J., concurring).

66. *Id.* at 145 (majority opinion).

67. *Id.* at 145–47.

68. *Id.* at 146; *see also infra* Part II.C.1.a (discussing consideration).

69. *May*, 928 So. 2d at 147 (“As for the cases involving at-will employment offers being withdrawn *before* the employee actually begins work, we must look outside of Louisiana to cases with similar facts.” (emphasis in original)). For examples of these rationales see *supra* Part I.A–B.

70. *May*, 928 So. 2d at 148.

71. *Id.*

72. *Id.* (“[I]t would inevitably result in employers actually waiting until the employee starts work before terminating them . . .”).

73. *Id.* The court was worried over this purported illogical result:

detrimental reliance claim because after HMC withdrew its offer, May found other employment with a higher rate of pay than her previous job.<sup>74</sup> Yet Judge Downing disagreed with the majority's reasoning, arguing that "[i]t seems to me patently absurd that we could find it patently unreasonable for an employee to rely on an offer of at-will employment when the employee cannot accept the offer without leaving secure employment and incurring expenses."<sup>75</sup> Judge Downing further explained that he based his conclusion on the inherent differences between being actually employed and having agreed to employment but not yet having commenced work. In particular, he noted the individual's understanding of the risks involved in the process.<sup>76</sup> He also argued that calling this type of reliance unreasonable is essentially the same as saying the assumption that employers act in bad faith is reasonable.<sup>77</sup> For these reasons, he concluded that "[a] prospective employee should be able to collect damages for costs of moving and other provable damages as a result of a breach of promise on which a normally reasonable person would rely."<sup>78</sup>

*c. The May Dissent's Well-Reasoned Rationale*

Judge Gaidry in dissent disagreed with the main holding of the court's opinion.<sup>79</sup> He believed that applying the at-will employment doctrine to a

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It would be an anomalous result if employers who had already decided to terminate an employee could avoid liability simply by waiting for the actual employment to begin, whereas if they withdraw an offer of employment before the prospective employee starts working, they are faced with liability for detrimental reliance claims.

*Id.*

74. *Id.* at 151 (Downing, J., concurring).

75. *Id.* at 150.

76. *Id.* at 150–51 (“Common sense and experience demonstrate that people seeking new employment for whatever reason know that risk is involved in the employment, but not in the acceptance of the employment. . . . [W]hile the ‘at-will’ doctrine precludes damages for actual lost employment, the ‘at-will’ doctrine does not apply to a party who is not yet an employee.”).

77. *Id.* at 151. In fact, Judge Downing believed that employers actually generally act in good faith. He explained:

When we say that it is unreasonable as a matter of law for an employee to rely on a promise of employment, we say that it is reasonable for employees to expect employers to breach their promises and act in reckless disregard of the prospective employees' welfare. I believe the contrary: that employers generally act honorably and in good faith. I therefore believe that it is highly reasonable to rely on an employer's promise of employment.

*Id.*

78. *Id.*

79. *Id.* at 149–50 (Gaidry, J., dissenting).

*prospective* employee was legal error.<sup>80</sup> Instead, Judge Gaidry found that detrimental reliance was the proper remedy when a prospective employee relied to his or her detriment on an offer of employment.<sup>81</sup> He also pointed out that the majority's discussion of consideration was misplaced because "[Louisiana Civil Code article] 1967 does not define 'cause' in terms of 'consideration,'" that is "in terms of obtaining something in return for binding oneself."<sup>82</sup> Judge Gaidry explained that all May had to prove were the elements necessary for a detrimental reliance claim, and, according to Judge Gaidry, May had done so.<sup>83</sup> Importantly, Judge Gaidry also addressed the argument that allowing prospective employee a cause of action is absurd when that same employee would be barred from bringing a claim due to the at-will doctrine if fired on the first day of employment. He wrote: "Would the result be different and anomalous if HMC had terminated Ms. May's employment the day after she started, with no consequent liability? It certainly might appear so, but the line must be drawn somewhere."<sup>84</sup>

## 2. *Another Chance*: *Bains v. The Young Men's Christian Ass'n of Greater New Orleans, Louisiana*

Although the First Circuit's holding in *May* is generally cited as the rule in Louisiana,<sup>85</sup> the Louisiana Fourth Circuit Court of Appeal had an opportunity to decide a similar case just two years later in *Bains v. The Young Men's Christian Ass'n of Greater New Orleans, Louisiana*.<sup>86</sup> The trial court granted YMCA's exception of no cause of action,<sup>87</sup> which cited to the *May* decision for support.<sup>88</sup> The Fourth Circuit refused to follow *May*'s holding that reliance on an offer of at-will employment is unreasonable as a matter of law.<sup>89</sup> The Fourth Circuit reversed the lower

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80. *Id.* at 150.

81. *Id.* ("[S]uch a conclusion is an unwarranted extension of the at-will employment principal to a classic factual scenario of detrimental reliance governed by [Louisiana Civil Code article] 1967.").

82. *Id.* This is of particular importance because unlike in common law states, Louisiana does not abide by the doctrine of consideration. Instead, Louisiana uses the doctrine of cause. *See infra* Part II.C.1.b (discussing cause).

83. *May*, 928 So. 2d at 150 (Gaidry, J., dissenting).

84. *Id.* at 150.

85. *See supra* note 1.

86. 969 So. 2d 646 (La. Ct. App. 4th 2007).

87. *Id.* at 647.

88. *Id.* at 650.

89. *Id.* at 652; *but see id.* (Armstrong, J., dissenting) ("Present Louisiana case law finds that it is inherently unreasonable to rely on an offer of at-will employment.").

court's opinion and remanded the case for further proceedings.<sup>90</sup> Unfortunately, however, the court failed to justify or explain its decision, merely referencing some potential problems with the *May* decision.<sup>91</sup>

In the case, Bains began discussing new employment opportunities with YMCA.<sup>92</sup> As a result of these discussions, Bains was offered the position of director of development, with a starting salary that was \$25,000 more per year than her current one.<sup>93</sup> YMCA's CEO confirmed to Bains that the offer was legitimate on multiple occasions.<sup>94</sup> Bains also received an email from the CEO stating that if she wanted the job, she could start on June 6.<sup>95</sup> Consequently, Bains resigned from her then-current employment.<sup>96</sup> When the time came for Bains to finally start working for YMCA, she was informed that the offered position was no longer available and that it may not become available until the fall.<sup>97</sup> As a result, Bains remained unemployed for seven months.<sup>98</sup> Bains then brought suit, seeking damages due to her detrimental reliance on YMCA's promise of employment.<sup>99</sup>

Unlike *May*,<sup>100</sup> the *Bains* court began its analysis by acknowledging the codification of detrimental reliance in the Louisiana Civil Code,<sup>101</sup> as well as discussing some traditional civilian doctrines for the enforcement of cases on the basis of reliance.<sup>102</sup> In a similar fashion to Judge Gaidry's dissent in *May*, the court also stated that discussions of consideration are

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90. *Id.* (majority opinion).

91. In its explanation the court stated:

Therefore, because it is possible to reconcile the codal articles that at first blush appear to be in conflict by a thorough analysis of our civil code, and because there are certain scenarios in which the law may offer Ms. Bains relief, we reverse the granting of defendant's exception of no cause of action and remand for further proceedings in accord with this opinion.

*Id.* at 652.

92. *Id.* at 647.

93. *Id.*

94. *Id.* ("On no less than three occasions, the CEO reiterated that she was offered the job.").

95. The email included the following: "Unless you change your mind after meeting everyone, I would like you to start on June 6." *Id.*

96. *Id.* at 648.

97. *Id.*

98. *Id.*

99. *Id.*

100. *May v. Harris Mgmt. Corp.*, 928 So. 2d 140, 145 (La. Ct. App. 1st 2005) ("It is difficult to recover under the theory of detrimental reliance, because estoppel is not favored in our law.").

101. LA. CIV. CODE art. 1967 (2015).

102. *Bains*, 969 So. 2d at 649 (discussing the doctrines of *venire contra factum proprium non valet* and *culpa in contrahendo*). For more on these doctrines, see *infra* Part II.B.1.a.

improper and that, in Louisiana, the proper inquiry is one of cause.<sup>103</sup> Because the defendant cited *May* in support of its position,<sup>104</sup> the Fourth Circuit pointed out deficiencies in the *May* reasoning.<sup>105</sup> First, the court explained that *May* was wrong in following the common law approach of other jurisdictions instead of consulting the Louisiana Civil Code.<sup>106</sup> In particular, the court found that the *May* approach had two major problems: “one, most other American jurisdictions do not have a Civil Code; and two, common law jurisdictions allow their judiciary more leeway in estoppel because of the history of courts in equity.”<sup>107</sup> Citing to *May*’s concurring and dissenting opinions, the Fourth Circuit found that the factual scenario presented in this case was distinguishable from at-will employment decisions because the plaintiff was not yet employed.<sup>108</sup> Additionally, the court found that Louisiana’s at-will employment doctrine, embodied in Civil Code article 2747,<sup>109</sup> does not serve as a shield that protects the employer in every factual scenario and that the article should be tempered by the underlying duty of good faith.<sup>110</sup>

Thus, although *May*’s holding currently appears to be the accepted stance in Louisiana when dealing with rescinded offers of employment,<sup>111</sup> the multitude of problems with the decision are well illustrated by the Louisiana’s Fourth Circuit Court of Appeal in *Bains*. The problems *Bains* highlights—and other unique characteristics of Louisiana’s civil law system—lead to the conclusion that *May*’s categorical bar on allowing prospective employees a cause of action is the incorrect result.

## II. LOUISIANA DOCTRINES SUPPORTING THE EXISTENCE OF PRE-EMPLOYMENT CLAIMS: THE AT-WILL EMPLOYMENT DOCTRINE, DETRIMENTAL RELIANCE, AND CIVIL LAW DISTINCTIONS

Although looking to jurisprudence on this issue is worthwhile, understanding the concepts and doctrines that underlie those decisions is even more vital. The fundamental concepts and doctrines unique to

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103. *Bains*, 969 So. 2d at 649; *see also infra* Part II.C.1.b (discussing cause).

104. *Bains*, 969 So. 2d at 650.

105. *Id.* at 650–52.

106. *Id.*

107. *Id.* at 650 (“Comparing this approach with the civilian approach, Louisiana’s judiciary is tied more closely to following the legislature’s mandate as laid out in the Code.”).

108. *Id.* at 650–51.

109. LA. CIV. CODE art. 2747 (2015) (“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.”).

110. *Bains*, 969 So. 2d at 651–52.

111. *See supra* note 1.

Louisiana's civil law system further bolster the notion that a prospective employee who has relied to his or her detriment on an offer of employment should be granted a cause of action against the rescinding employer.<sup>112</sup>

*A. The At-Will Employment Doctrine in Louisiana*

At least some version of the at-will employment doctrine is recognized in all American jurisdictions.<sup>113</sup> In Louisiana, at-will employment has a strong presence in the law and in jurisprudence,<sup>114</sup> and the state's adherence to the doctrine is one of the strongest in the nation.<sup>115</sup> As one legal scholar explained:

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>116</sup>

Louisiana Civil Code article 2747 has become the foundation for Louisiana's at-will employment rule. This article states "[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>117</sup> This at-will relationship between the employer and employee is contractual in Louisiana.<sup>118</sup> Generally, an employer does not have to show any reason at all to discharge an employee.<sup>119</sup> Thus, any challenge that directly tries to weaken the doctrine is unlikely to find much success in a Louisiana courtroom. Louisiana's stronghold to at-will

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112. See *infra* Part II.A–C.

113. See generally MELINDA J. CATERINE ET AL., EMPLOYMENT AT WILL: A STATE-BY-STATE SURVEY (2011) (providing a breakdown of each state's doctrine); see also *supra* Part I.

114. See *May v. Harris Mgmt. Corp.*, 928 So. 2d 140, 145 (La. Ct. App. 1st 2005); *Harrison v. CD Consulting, Inc.*, 934 So. 2d 166, 171 (La. Ct. App. 2006).

115. See Muhl, *supra* note 5, at 4 ("Three southern States—Florida, Georgia, and Louisiana—and Rhode Island do not recognize *any* of the three major exceptions to employment at will." (emphasis in original)); see also CATERINE ET AL., EMPLOYMENT AT WILL: A STATE-BY-STATE SURVEY 19-2 (Supp. 2013) ("Louisiana courts have continued to emphasize Louisiana's long-term adherence to the at-will employment doctrine, in the absence of a contract for a fixed term, and tempered only by federal and state antidiscrimination laws.").

116. Devlin, *supra* note 6, at 1523.

117. LA. CIV. CODE art. 2747 (2015).

118. *Quebedeaux v. Dow Chem. Co.*, 820 So. 2d 542, 545 (La. 2002).

119. *Burnett v. E. Baton Rouge Parish Sch. Bd.*, 99 So. 3d 54, 59 (La. Ct. App. 2012); *Saacks v. Mohawk Carpet Corp.*, 855 So. 2d 359, 364 (La. Ct. App. 2003).

employment, however, is based on a misinterpretation and misapplication of 2747.

*1. Louisiana Courts' Misapplication of Article 2747*

Although courts rely on Civil Code article 2747 as a basis for the at-will employment doctrine, the state's unusually strong stance on the doctrine is one that developed through the jurisprudence, originally without reference to the Civil Code.<sup>120</sup> This jurisprudential development is based on a misunderstanding of the article's foundation.<sup>121</sup> Before 1962, Louisiana courts did not interpret article 2747 to apply to ordinary at-will employees.<sup>122</sup> In the 1920s and 1930s, Louisiana courts began looking to common law jurisdictions for guidance for how to handle the situation of a breached promise of at-will employment.<sup>123</sup> The courts then worked this common-law interpretation of the doctrine into preexisting Civil Code articles.<sup>124</sup> As one commentator explained, "[o]nly in the early 1960s did courts begin to focus on article 2747 and the perceived dichotomy between articles 2747 and 2749<sup>125</sup> as the codal locus of the employment at-will rule in Louisiana."<sup>126</sup> In time, the focus landed on article 2747, and, since 1962, practically all at-will employment decisions have relied on the article as the basis of the at-will doctrine in Louisiana.<sup>127</sup>

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120. See Devlin, *supra* note 6, at 1532–44 (discussing Louisiana's early jurisprudence on termination of at-will employees, and the importation of common law interpretations of the doctrine into the state's courts).

121. See *id.* (explaining the history of Civil Code Article 2747 and the reasons leading up to its ultimate misinterpretation).

122. Professor Devlin argues:

[T]here 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.

*Id.* at 1535.

123. *Id.* at 1535–44.

124. *Id.*

125. Article 2749 is entitled "Liability for dismissal of laborer without cause," and states:

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

LA. CIV. CODE art. 2749 (2015).

126. Devlin, *supra* note 6, at 1544.

127. *Id.*

The history of article 2747 leads to the conclusion that the article was never intended or originally interpreted by the courts to apply broadly to employment relationships.<sup>128</sup> Instead, the article was only intended to be applicable to servants living and working within the family they served—a very narrow class of laborers.<sup>129</sup> Although Louisiana courts have emphasized this one code article in their insistence on a firm application of the at-will employment doctrine, they have ignored another important provision that arguably militates against such a strong rule—the duty of good faith.<sup>130</sup>

## 2. *The Requirement of Good Faith in the At-Will Relationship*

The underlying duty of good faith comes from various articles in the Civil Code.<sup>131</sup> Some scholars, and even some Louisiana courts, have called for the promise of at-will employment to be treated like any other obligation in the Civil Code; that is, that the at-will employment relationship be subject to the underlying duty of good faith.<sup>132</sup> In Louisiana law, no set definition of what constitutes good faith exists; thus, the words “are used on the general assumption that everybody understands what they mean.”<sup>133</sup>

Notwithstanding the history and likely misuse of Civil Code article 2747, if one analyzes the construction of the article in the at-will

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128. *Id.* at 1569, 1571 (“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.”).

129. *Id.* at 1571.

130. *See, e.g.*, *Stanton v. Tulane Univ.*, 777 So. 2d 1242, 1251 (La. Ct. App. 2001) (“[Plaintiff] would rely on jurisprudence in other states that he contends creates a ‘covenant of good faith and Fair Dealing’ exception to employment at will . . . . [This concept remains] foreign to the scheme of Louisiana employment law.”).

131. *See* LA. CIV. CODE art. 1759 (2015) (“Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.”); *id.* art. 1983 (“Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on the grounds provided by law. Contracts must be performed in good faith.”).

132. *See* *Allbritton v. Lincoln Health Sys., Inc.*, 51 So. 3d 91, 96 (La. Ct. App. 2010) (“Although Louisiana is an at-will employment state, employer has a duty of good faith.”). For another state’s perspective, see *Peck v. Imedia, Inc.*, 679 A. 2d 745, 753 (N.J. Super. Ct. App. Div. 1996) (“[T]he doctrine of ‘good faith and fair dealing’ applies where there is some type of employment contract, even if it is merely ‘at will.’”). *See generally* Devlin, *supra* note 6, at 1599 (“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 worse abuses.”).

133. SAÛL LITVINOFF, THE LAW OF OBLIGATIONS § 1.8, *in* 5 LOUISIANA CIVIL LAW TREATISE 17 (1992).

employment context, the argument that good faith should apply to the employer-employee relationship is strengthened. The at-will employment relationship is a conditional obligation<sup>134</sup> subject to a resolutive condition because it immediately ends with the discharge of employment.<sup>135</sup> As a resolutive condition that depends solely on the will of the obligor, the employer, or the employee, must perform in good faith.<sup>136</sup> In addition, as the *Bains* court pointed out, to comply with the requirement of good faith when terminating an at-will contract, one “should consider not only his own advantage but also the hardship to which the other party will be subjected because of the termination.”<sup>137</sup>

It has even been argued that failing to comply with this duty of good faith in the at-will context may trigger the civilian doctrine of “abuse of rights.”<sup>138</sup> However, the abuse of rights argument has not been successful in this context so far.<sup>139</sup>

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134. LA. CIV. CODE art. 1767 (“A conditional obligation is one dependent on an uncertain event.”). The uncertain event in this context is the decision made by the employee or employer to terminate the employment relationship. This could happen tomorrow, or their relationship might last for the entire existence of the business.

135. *Id.* (“If the obligation may be immediately enforced but will come to an end when the uncertain event occurs, the condition is resolutive.”).

136. *Id.* art. 1770 (“A resolutive condition that depends solely on the will of the obligor must be fulfilled in good faith.”).

137. *Bains v. Young Men’s Christian Ass’n of Greater New Orleans*, 969 So. 2d 646, 651 (La. Ct. App. 4th 2007); *see also* LA. CIV. CODE art. 1770 cmt. f (“[T]ermination because of purely personal rather than business reasons could constitute bad faith.”).

138. As explained by the Louisiana Supreme Court:

The Abuse of Rights doctrine is a civilian concept which is applied only in limited circumstances because its application renders unenforceable one’s otherwise judicially protected rights. . . . The Abuse of Rights doctrine has been applied only when one of the following conditions is met:

- (1) if the predominant motive for it was to cause harm;
- (2) if there was no serious or legitimate motive for refusing;
- (3) if the exercise of the right to refuse is against moral rules, good faith, or elementary fairness;
- (4) if the right to refuse is exercised for a purpose other than that for which it is granted.

*Truschinger v. Pak*, 513 So. 2d 1151, 1154 (La. 1987); *see also* Mohamed Yehia Mattar, *Promissory Estoppel: Common Law Wine in Civil Law Bottles*, 4 TUL. CIV. L.F. 71, 120 (1988).

139. 6 EMPLOYMENT DISCRIMINATION COORDINATOR § 22:3 (West 2013) (“[T]he doctrine has yet to be successfully asserted in Louisiana as a basis for challenging decisions to terminate at-will employment.”).

*B. The Evolution of Detrimental Reliance in Louisiana*

As the *Bains* court explained, “[t]he detrimental reliance theory is a general part of the Civil Law and springs forth from the idea that in a civil society people should keep their word.”<sup>140</sup> Despite the differing terminology, the Louisiana theory of detrimental reliance is in large part the same as the promissory estoppel theory that common law states use.<sup>141</sup> Common law states base their theories of promissory estoppel on Section 90 of the *Restatement (Second) of Contracts*.<sup>142</sup> On the other hand, Louisiana’s theory of detrimental reliance is found in article 1967 of the Civil Code.<sup>143</sup>

*1. Pre-Civil Code Article 1967*

Detrimental reliance has quite an extensive history not only in Louisiana’s civilian heritage but also in the state’s jurisprudence.<sup>144</sup> In 1984, Louisiana’s detrimental reliance theory was codified in Civil Code article 1967.<sup>145</sup>

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140. *Bains*, 969 So. 2d at 650.

141. See Jon C. Adcock, Comment, *Detrimental Reliance*, 45 LA. L. REV. 753, 753 (1985) (“The theory of detrimental reliance is embodied in the theory of promissory estoppel.”); Amos J. Oelking, III, *Morris v. Friedman: Detrimental Reliance and Statutory Writing Requirements*, 57 LA. L. REV. 1375, 1377 (1997) (“[T]he common law doctrine of promissory estoppel is the primary source of detrimental reliance in Louisiana Civil Code article 1967.”); Mattar, *supra* note 138, at 137 (“Apparently, the drafters of the code were influenced by the Restaters in formulating Louisiana’s provisions on detrimental reliance.”).

142. Mattar, *supra* note 138, at 137 (“Under Section 90 of the Restatement, which is followed by almost all jurisdictions in the United States . . . .”); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.”).

143. LA. CIV. CODE art. 1967 (2015).

144. See, e.g., David V. Snyder, *Comparative Law in Action: Promissory Estoppel, the Civil Law, and the Mixed Jurisdiction*, 15 ARIZ. J. INT’L & COMP. L. 695, 698 (1998) (“Louisiana and the civil law have protected reliance in various ways for a long time.”); Mattar, *supra* note 138, at 72 (“That one should be precluded from contradicting his own acts or words when they have been relied on by another to his detriment is a well recognized principle in civil law.”).

145. Louisiana Civil Code article 1967 became effective on January 1, 1985.

a. *Historic Civil Law Roots*

The Anglo-American common law did not originate the theory of promissory estoppel, as a form of the doctrine had already existed for centuries in the civil law.<sup>146</sup> The two civilian theories are the Roman principle *venire contra factum proprium*—no one is allowed to go against the consequences of his own act—and the German doctrine of *culpa in contrahendo*—fault in contracting.<sup>147</sup>

Louisiana courts have acknowledged and applied these two theories.<sup>148</sup> For example, one court has held on the basis of *venire contra factum proprium non valet* “that our lessor cannot be allowed to evict our lessee for failing to actually spend the withheld rent on repairs when it was the lessor herself who importuned the lessee to delay those repairs.”<sup>149</sup> Thus, detrimental reliance is a well-established civilian concept that has taken

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146. As explained by Shael Herman:

Anglo-American jurisprudence did not invent detrimental reliance as a substitute for consideration or a basis for enforcement. On the continent, it already had long and venerable antecedents before the Norman Conquest. It appeared in Roman texts, and so venerable was the idea of detrimental reliance that it even acquired its own Latin maxim: *venire contra proprium factum* (no one can contradict his own act).

Shael Herman, *Detrimental Reliance in Louisiana Law—Past, Present, and Future (?)*: *The Code Drafter’s Perspective*, 58 TUL. L. REV. 707, 714 (1984); see also Snyder, *supra* note 144, at 712 n.100.

147. Adcock, *supra* note 141, at 755–56. For a more in-depth discussion of the two theories see Mattar, *supra* note 138, and *Bains v. Young Men’s Christian Ass’n of Greater New Orleans*, 969 So. 2d 646, 649 (La. Ct. App. 4th 2007). *Venire contra factum proprium* is sometimes referred to as the longer *venire contra factum proprium non valet*. Compare *Tex. E. Transmission Corp. v. Amerada Hess Corp.*, No. CIV. A. 97–0518, 1997 WL 613125, at \*11 (E.D. La. 1997), with *Sanders v. United Distributors, Inc.*, 405 So. 2d 536, 537 (La. Ct. App. 1981).

148. See *Coleman v. Bossier City*, 305 So. 2d 444, 447 (La. 1974) (discussing *culpa in contrahendo* but holding under the circumstances there was no need to decide whether or not the theory would be applicable); *Hebert v. McGuire*, 447 So. 2d 64, 65 (La. Ct. App. 1984) (“If the promise had come *after* the debt for surgery was incurred, it would be a clearer case of a gratuitous promise, as to which estoppel (or the civil law doctrine against contravening one’s own acts) would, however, reasonably apply . . .” (emphasis in original)); Saúl Litvinoff, *Still Another Look at Cause*, 48 LA. L. REV. 3, 22 (1987) (“[T]he Louisiana jurisprudence, in a clear manner, has traced the ancestry of reliance as basis for obligation back to the civilian *venire contra factum proprium*.”); but see *Sanders*, 405 So. 2d at 537 n.2 (“This writer has not found an instance of Louisiana’s expressly utilizing the civil law principle *venire contra factum proprium non valet*.”).

149. *Davilla v. Jones*, 418 So. 2d 724, 725 (La. Ct. App. 1982). But this decision was later overruled by the Louisiana Supreme Court with no mention of the doctrine. *Davilla v. Jones*, 436 So. 2d 507 (La. 1983).

hold in Louisiana. There are examples of Louisiana courts allowing recovery under theories of detrimental reliance dating back to over a century.<sup>150</sup> For example, in the 1896 case of *Choppin v. LaBranche*, a plaintiff's action succeeded under the principle of estoppel.<sup>151</sup> In *Choppin*, the defendant attempted to remove the remains of the plaintiff's ancestor from a tomb that the defendant owned despite previously promising the plaintiff that he would not.<sup>152</sup> The Louisiana Supreme Court granted the plaintiff's injunction to restrain the removal of the remains and held, "[t]he principle of estoppel, so often applied, in controversies involving pecuniary rights, will not permit the withdrawal of promises or engagements on which another has acted. It seems to us that the principle can well be applied in this controversy."<sup>153</sup>

*b. Ducote v. Oden: Louisiana Supreme Court's Questionable Rejection of Promissory Estoppel*

Despite the apparent civilian roots of detrimental reliance, in 1952, the Louisiana Supreme Court in *Ducote v. Oden* held that promissory estoppel had no place in the state's law.<sup>154</sup> There, Ducote alleged that he and Oden entered into an agreement under which Ducote was to remove the layer of dirt covering Oden's gravel pit.<sup>155</sup> The alleged agreement was to last for a period no less than three years.<sup>156</sup> Even with these alleged terms, Oden declared the contract was to be terminated after a period of about six months from when Ducote commenced the work.<sup>157</sup> As a result, Ducote sought damages based on the estimated profit he would have made over the remainder of the term as well as damages stemming from the cost of moving machinery to the site.<sup>158</sup> Ducote was forced to turn to the theory of promissory estoppel when he was unable to produce evidence of the contract with Oden.<sup>159</sup> The Court rejected this theory, holding that "[promissory estoppel] is unknown to our law, and counsel has not attempted to show its applicability under the provisions of the Civil Code, by which we are bound in suits of this type."<sup>160</sup>

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150. Oelking, *supra* note 141, at 1377; Herman, *supra* note 146, at 715.

151. 20 So. 681 (La. 1896).

152. *Id.* at 681–82.

153. *Id.* at 682.

154. 59 So. 2d 130 (La. 1952).

155. *Id.* at 130.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 131.

160. *Id.* at 132. The Louisiana Supreme Court has since reaffirmed that prior to article 1967, promissory estoppel was not a recoverable theory in Louisiana.

Some have argued that the holding was based largely on the fact that the Louisiana Supreme Court saw promissory estoppel as an unwarranted intrusion by the common law into the state.<sup>161</sup> These commentators praised the court's decision not to follow the *Restatement (Second) of Contracts* section 90.<sup>162</sup> The court may have reached a different conclusion had the plaintiff based his argument on traditional civilian theories instead. As one commentator speculated, "[o]ne may wonder if the Louisiana Supreme Court would have been equally hostile to the plaintiff's claim if he had invoked the venerable Roman maxim, *venire contra proprium factum*, instead of the *Restatement (Second) of Contracts* section 90."<sup>163</sup> *Ducote's* progeny is what led the *May* majority to declare that detrimental reliance is not favored under Louisiana law and that recovering under the theory is difficult.<sup>164</sup>

### 2. A Defining Moment: Louisiana Legislature's Codification of Article 1967

Although the civil law's historic take on detrimental reliance and the Louisiana jurisprudence on the matter is important, the most critical part

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*See Morris v. Friedman*, 663 So. 2d 19, 26 (La. 1995) ("[P]rior to the enactment of [Louisiana Civil Code article] 1967, the common law theory or promissory estoppel had been expressly rejected by this Court.").

161. *See Herman, supra* note 146, at 716 ("Louisiana courts have not been uniformly receptive to an aggrieved party's invocation of detrimental reliance, particularly when it has been overtly characterized as the promissory estoppel of the *Restatement of Contracts*."); *Mattar, supra* note 138, at 84 ("Louisiana courts have been even less receptive to the idea of detrimental reliance as a basis of liability when expressed in common-law estoppel terms.").

162. Professor J. Denson Smith proclaimed, "[i]t is heartening that our court is not willing to succumb to its wiles." *Herman, supra* note 146, at 717 (citing J. Denson Smith, *Conventional Obligations*, 13 LA. L. REV. 236, 241 (1953)).

163. *Id.*

164. *May v. Harris Mgmt. Corp.*, 928 So. 2d 140, 145 (La. Ct. App. 1st 2005) ("All estoppel claims must be examined carefully and strictly."); *see, e.g., Rodden v. Davis*, 293 So. 2d 578, 582 (La. Ct. App. 1974) ("The cases holding that estoppel is not favored by our courts are legion. One who seeks to avail himself of the application of the principal must establish his right to do so with unusual clearness."). The *May* court cited in support of this contention *Wilkinson v. Wilkinson*, 323 So. 2d 120 (La. 1975), a Louisiana Supreme Court decision from 1975. *Wilkinson* stemmed from a divorce proceeding. *Id.* at 122. Before Mr. and Mrs. Wilkinson were married, they entered into a prenuptial agreement that stated that there would be no community property. *Id.* But Mrs. Wilkinson was an unemancipated minor at the time that she signed the agreement. *Id.* Thus, the court held the agreement to be null, and applied the default rule of community property. *Id.* Mr. Wilkinson argued that he had relied on the prenuptial agreement. *Id.* at 126. The Louisiana Supreme Court found that Mr. Wilkinson failed to prove all elements necessary for the plea of estoppel. *Id.* at 126-27.

of this inquiry is Louisiana Civil Code article 1967 itself because “[i]n Louisiana, as in other civil law jurisdictions, legislation is superior to any other source of law.”<sup>165</sup> Thus, because legislation is superior, the codification of the theory of detrimental reliance in Civil Code article 1967 should be the focus regardless of prior Louisiana jurisprudence on the matter.<sup>166</sup>

When the time to overhaul the Louisiana Civil Code’s section on Obligations arrived in the 1970s and 1980s, the Louisiana State Law Institute asked that the doctrine of promissory estoppel be incorporated into the Civil Code.<sup>167</sup> This request led to the eventual codification of article 1967, the theory of detrimental reliance, in the year 1984.<sup>168</sup> The drafters of article 1967 wanted to clarify that detrimental reliance would be recognized as not only a valid legal theory but also as an additional ground for the enforcement of obligations under Louisiana law.<sup>169</sup> Comment (d) to the article explains that prior jurisprudence holding otherwise was overruled: “[u]nder this Article, a promise becomes an enforceable obligation when it is made in a manner that induces the other party to rely on it to his detriment. . . . The case of *Ducote v. Oden* . . . (holding that promissory estoppel is not recognized in Louisiana) is thus overruled.”<sup>170</sup> Although the comments to the Code are not the law, comment (d) serves as strong evidence of the legislature’s full endorsement of the theory of detrimental reliance, despite the theory’s rejection by the state’s highest court. A valid and enforceable contract is clearly not required to recover under the article; all that is needed is a

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165. LA. CIV. CODE art. 1 cmt. c (2015).

166. The decisions of judges do not play as important a role in civil law systems as they do in common law systems. As a result, “the judge’s decision is consequently less crucial in shaping civil law than the decisions of legislators and legal scholars who draft and interpret the codes.” Univ. of Cal. at Berkeley Sch. of Law, *The Common Law and Civil Law Traditions*, available at <https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf> [perma.cc/QQA3-JM5P]; see also Robert Anthony Pascal, *Of the Civil Code and Us*, 59 LA. L. REV. 301, 307 (1998) (“It also may serve as a guide to what should or should not be considered a proper interpretation or application of the law in future similar cases; but it may not be considered to project an authoritative rule for the future.”).

167. Adcock, *supra* note 141, at 754.

168. For an interesting and in-depth discussion on the codification of article 1967, see Snyder, *supra* note 144. Louisiana Civil Code article 1967 became effective on January 1, 1985.

169. LA. CIV. CODE art. 1967 cmt. a (“This Article . . . . incorporates detrimental reliance as an additional ground for enforceability.”); see also *Kethley v. Draughon Bus. Coll., Inc.*, 535 So. 2d 502, 506 (La. Ct. App. 1988) (“LSA–C.C. Art. 1967 changed Louisiana law by incorporating detrimental reliance as an additional basis for the enforceability of obligations.”).

170. LA. CIV. CODE art. 1967 cmt. d.

promise that induces reliance to one's detriment. Once this occurs, one can seek redress under article 1967.<sup>171</sup>

### C. *Unique Civilian Concerns*

Outside of Louisiana's at-will employment doctrine and the state's theory of detrimental reliance, other critical distinctions between Louisiana and common law jurisdictions exist that clarify that allowing prospective employees a cause of action when an offer of employment is withdrawn is the proper solution for Louisiana. One of these critical distinctions is that the civil law uses the theory of cause, instead of the common law theory of consideration.<sup>172</sup> Another significant distinction is the existence of codes in civilian systems of law.<sup>173</sup>

#### 1. *Civil Law Cause as Compared to Common Law Consideration*

A major difference between Louisiana's civil law jurisdiction and common law jurisdictions is the concept of cause as compared to the common law doctrine of consideration.<sup>174</sup> Confusion over the differences between the two doctrines is somewhat understandable because despite some considerable differences, the two theories play similar roles in their respective legal systems.<sup>175</sup> As Professor Saul Litvinoff explains, "[a]t common law, lack of consideration is a good reason to deny enforceability

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171. See *Suire v. Lafayette City-Parish Consol. Gov't*, 907 So. 2d 37, 59 (La. 2005) ("[P]roof of a detrimental reliance claim does not require proof of an underlying contract. This is so because detrimental reliance is not based upon the intent to be bound."); see also Oelking, *supra* note 141, at 1389.

172. Litvinoff, *supra* note 148, at 3; see *infra* Part II.C.1.

173. See *infra* Part II.C.2.

174. Despite this, attorneys practicing in Louisiana still have to deal with consideration. See Herman, *supra* note 146, at 719 ("For Louisiana lawyers both cause and consideration are meaningful, but for different reasons. Cause is important because of the Civil Code and the continental tradition it bespeaks; consideration is important because Louisiana shares a largely common-law national tradition, and as a consequence, Louisiana attorneys can hardly escape daily reference to consideration.").

175. See Federick H. Sutherland, Comment, *Promissory Estoppel and Louisiana*, 31 LA. L. REV. 84, 88 (1970) ("The requirement of consideration in the Anglo-American law of contract has often been compared with the requirement of cause in the civil law."); see also ALAIN A. LEVASSEUR, *COMPARATIVE LAW OF CONTRACTS: CASES AND MATERIALS* 79 (2008) ("[Under common law] the existence of 'some' consideration is a required element for the validity of all contracts . . . meant to be binding, whereas at civil law there must exist a lawful 'cause' or lawful reason to make a promise by one party binding on that party or on both parties depending on the nature of the juridical acts entered into.").

of a promise. In civilian systems . . . absence of cause, or unlawfulness or immorality of the cause, is a good reason to deprive an obligation of its legal effect.”<sup>176</sup>

*a. Common Law’s Burdensome Requirement of Consideration*

The doctrine of consideration is often thought to be the cornerstone of Anglo-American contract law.<sup>177</sup> Generally speaking, the focus of American contract law’s consideration analysis is on whether the contract in question involved a bargain.<sup>178</sup> Something is bargained for “if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”<sup>179</sup> The doctrine is rigid, as a promise not supported by a legal consideration is not binding regardless of the promisor’s intentions to be bound.<sup>180</sup>

*b. Civil Law’s Flexible Cause*

Louisiana does not adhere to the common law doctrine of consideration,<sup>181</sup> and the comments to article 1967 clarify that cause and consideration are two distinct theories.<sup>182</sup> In Louisiana, cause is defined in the first paragraph of Civil Code article 1967 as “the reason why a party

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176. Litvinoff, *supra* note 148, at 3.

177. Sutherland, *supra* note 175, at 85.

178. E. ALLAN FARNSWORTH, *CONTRACTS* 45 (3rd ed. 1999); *see also* RESTATEMENT (SECOND) OF *CONTRACTS* § 71 (1981) (“(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. (3) The performance may consist of: (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation. (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.”).

179. FARNSWORTH, *supra* note 178, at 45 (quoting RESTATEMENT (SECOND) OF *CONTRACTS* § 71).

180. P.S. ATIYAH, *AN INTRODUCTION TO THE LAW OF CONTRACT* 124 (4th ed. 1989) (emphasis in original).

181. *Aaron & Turner, L.L.C., v. Perret*, 22 So. 3d 910, 915 (La. Ct. App. 2009) (“Louisiana law does not follow the common law tradition that requires consideration to effect an enforceable contract.”).

182. The relevant comment to article 1967 states:

Under this Article, “cause” is not “consideration.” The reason why a party binds himself need not be to obtain something in return or to secure an advantage for himself. An obligor may bind himself by a gratuitous contract, that is, he may obligate himself for the benefit of another party without obtaining any advantage in return.

LA. CIV. CODE art. 1967 cmt. c (2015).

obligates himself.”<sup>183</sup> Thus, a bargain is not necessary, and the focus is on the promisor’s will to be bound.<sup>184</sup> One commentator has gone as far as to say that in the civil law the most fundamental principle is that a mere agreement without any additional element serves to constitute a contract.<sup>185</sup> Under this theory, “[a]ll that is required for a valid contract are parties capable of contracting, their consent legally given, and a lawful purpose.”<sup>186</sup> Due to these characteristics, some have said that the addition of detrimental reliance in Civil Code article 1967 was unnecessary. For example, one scholar noted that because cause is broader than consideration, more promises may be enforced without even having to turn to promissory estoppel.<sup>187</sup>

Altogether, these differences between cause and consideration bolster the notion that even though the prospective employee has not given any consideration for the receipt of the job offer, this employment agreement should not be barred from having some legal effects due to the doctrine of cause in a civil law system like Louisiana.

## 2. Other Civil Code Provisions Affect the Analysis

When analyzing an article in a civil code, one should recognize that the articles do not exist in a vacuum, but rather all of the articles relate together to form one comprehensive system of law.<sup>188</sup> Thus, when analyzing an issue, one should look to various articles throughout the Civil Code and not just to articles 1967 and 2747.

The Civil Code has numerous articles that protect an individual when some sort of harm is done to that person to the advantage or benefit of another. For example, Civil Code article 2315 states that, “[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”<sup>189</sup> Similarly, article 2298 says, “[a] person who

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183. *Id.* art. 1967.

184. *See Aaron & Turner, L.L.C.*, 22 So. 3d at 915 (“[T]he mere will of the parties will bind them . . . .”); J. Denson Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2, 5 (1951) (“An expression by one person of a will to bind himself, when concurred in by another, constitutes a concurrence of wills, or contract.”).

185. Sutherland, *supra* note 175, at 88.

186. *Id.*

187. *Id.* at 107–08; *see also* Mattar, *supra* note 138, at 149 (“In civil law jurisdictions, the argument has been made that there is no need to resort to a substitute for cause because, under the concept of cause, a gratuitous promise is enforceable and promissory estoppel would then serve no useful end.”).

188. *See, e.g.,* Pascal, *supra* note 166, at 306 (“[Louisiana Civil Code of 1870’s] articles in any Title or Chapter could be read continuously, as a whole, as they should be, so that the relationship of each article to the others as parts of the whole could be understood.”).

189. LA. CIV. CODE art. 2315 (2015).

has been enriched without cause at the expense of another person is bound to compensate that person.”<sup>190</sup> Various articles in the Code, however, do not hold a person liable when another’s deception or mistake led to the agreement.<sup>191</sup> Article 1951 provides that, “[a] party may not avail himself of his error if the other party is willing to perform the contract as intended by the party in error.”<sup>192</sup> These articles are just some examples that have led one commentator to the conclusion that “[i]n my judgment, the principles of mutual respect and cooperation for the common good underlie the entire Civil Code.”<sup>193</sup> Therefore, when courts look to the articles that encompass Louisiana’s at-will employment doctrine<sup>194</sup> and its detrimental reliance theory,<sup>195</sup> they should do so with these underlying principles of the Civil Code in mind. Further, these courts should acknowledge that parties in an at-will employment relationship should treat each other fairly and work in cooperation.

The foundational concepts and doctrines unique to Louisiana’s civil law system bolster the notion that a prospective employee that has relied to his or her detriment on an offer of employment should be granted a cause of action against the rescinding employer. For one, Louisiana jurisprudence has misapplied Louisiana Civil Code article 2747, and it has ignored the duty of good faith that underlies all obligations. Louisiana courts also have failed to recognize the importance of the legislature’s codification of detrimental reliance in Civil Code article 1967. Finally, the civilian concept of cause, and the spirit that underlies the Louisiana Civil Code leads to a conclusion that favors recovery.

### III. THE FAILURE OF LOUISIANA’S CURRENT APPROACH

Louisiana’s current approach to rescinded offers of employment is undesirable. The legal history of the state, the improper interpretation of Civil Code articles by Louisiana courts, the unique characteristics of

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190. *Id.* art. 2298.

191. *See, e.g., id.* art. 1924 (“The mere representation of majority by an unemancipated minor does not preclude an action for rescission of the contract. When the other party reasonably relies on the minor’s representation of majority, the contract may not be rescinded.”); *id.* art. 3010 (“The principal is not bound to the mandatary to perform the obligations that the mandatary contracted which exceed the limits of the mandatary’s authority unless the principal ratifies those acts.”); *id.* art. 3021 (“One who causes a third person to believe that another person is his mandatary is bound to the third person who in good faith contracts with the putative mandatary.”).

192. *Id.* art. 1951.

193. Pascal, *supra* note 166, at 310.

194. LA. CIV. CODE art. 2747 (2015).

195. *Id.* art. 1967.

Louisiana's civil law system, and public policy considerations all point to recovery in these circumstances.

*A. Detrimental Reliance Should Not Be Disfavored in Louisiana Law*

When a court begins its analysis of reliance on an offer of employment, the court should not begin by saying that detrimental reliance is disfavored in Louisiana law.<sup>196</sup> This premise comes from a failure to acknowledge the importance of the codification of Civil Code article 1967 as well as an unawareness of the longstanding tradition of reliance in civil law systems.<sup>197</sup> In those legal systems, legislation is a greater source of authority than jurisprudence;<sup>198</sup> thus, starting an analysis by citing any cases inconsistent with Civil Code articles—particularly cases that preceded codification of an article that changed the law—is an improper approach. Therefore, the *May* court mistakenly asserted that estoppel is not favored in Louisiana law when it cited to *Wilkinson v. Wilkinson*,<sup>199</sup> which was decided before the codification of article 1967.<sup>200</sup>

*B. The At-Will Employment Doctrine Should Not Supersede Article 1967*

Article 1967 and later jurisprudence clarify that detrimental reliance is an independent source of obligations and that the theory has its own ground for enforceability.<sup>201</sup> Because article 1967 is its own source of obligations, what gives rise to the claim for damages by the enticed prospective employee is not the existence of the employment relationship itself nor the employment contact. Rather, the claim for damages depends simply on the prospective employee's reliance on the promise of employment.<sup>202</sup> Thus, allowing the at-will employment doctrine that

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196. See Adcock, *supra* note 141, at 757–58 (“Our courts also cannot start their analysis of detrimental reliance with a statement of its disfavored status . . .”).

197. See *supra* Part II.B.

198. LA. CIV. CODE art. 1 cmt. c (“In Louisiana, as in other civil law jurisdictions, legislation is superior to any other source of law.”).

199. *Wilkinson v. Wilkinson*, 323 So. 2d 120, 126 (La. 1975).

200. See *May v. Harris Mgmt. Corp.*, 928 So. 2d 140, 145 (La. Ct. App. 1st 2005).

201. LA. CIV. CODE art. 1967 cmt. a; see also *Kethley v. Draughon Bus. Coll., Inc.*, 535 So. 2d 502, 506 (La. Ct. App. 1988) (“[Louisiana Civil Code article] 1967 changed Louisiana law by incorporating detrimental reliance as an additional basis for the enforceability of obligations.”).

202. See *Suire v. Lafayette City-Parish Consol. Gov't.*, 907 So. 2d 37, 59 (La. 2005) (“[P]roof of a detrimental reliance claim does not require proof of an underlying contract. This is so because detrimental reliance is not based upon the intent to be bound.”).

governs the employment relationship to control is illogical when the claim for damages is not dependent on that employment relationship.

Additionally, the words of article 1967 are clear and unambiguous. Civil Code article 9 states, “[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.”<sup>203</sup> Thus, article 1967 should be applied as written. Opponents to this approach argue that allowing recovery in this context would be an absurd consequence,<sup>204</sup> but this argument is flawed. By adopting article 1967, the legislature endorsed a ground of enforceability outside of the contract itself, and thus outside of the at-will employment context. Nothing about allowing these two bases of recovery—one in contract and one in detrimental reliance—is absurd.<sup>205</sup> To hold otherwise would be to say that the legislature made an absurd decision when it codified article 1967. Further, from a purely common sense approach, allowing someone who has been adversely harmed by the promises of another to recoup any losses from the promisor is not absurd.<sup>206</sup>

Likewise, “[a] ‘plain reading’ of the terms of Article 1967 further supports the view that Article 1967 requires *only* a ‘promise’ and ‘reasonable reliance’ in order for an aggrieved promisee to recover and does *not require* a valid and enforceable contract.”<sup>207</sup> Certainly, the employer–employee relationship is one that is contractual in nature, and the at-will employment doctrine bars the recovery of damages from termination of this contractual relationship. Therefore, the at-will employment doctrine would bar any claim stemming from a termination that occurred during the existence of the contractual employment relationship. The at-will employment doctrine should not, however, bar reliance damages that come into existence before the commencement of employment and before the existence of any contractual relationship because of the difference between a promise of employment and actually working at the job. Thus, the application of the at-will doctrine before

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203. LA. CIV. CODE art. 9.

204. *See, e.g., supra* note 44. Although the absurdity argument raised by common law courts is not within the context of Civil Code article 9, the argument can be easily analogized to the absurdity contemplated by the article.

205. Oelking, *supra* note 141, at 1389.

206. This is in the same general spirit as Louisiana Civil Code article 2315, which states, “[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.” LA. CIV. CODE art. 2315.

207. Oelking, *supra* note 141, at 1388 (emphasis in original).

commencement of employment is an unwarranted intrusion of the doctrine into an area that should not be subject to its rules.<sup>208</sup>

Further, the basis for recovery is distinct because with a detrimental reliance claim, the plaintiff is seeking recovery for a job he or she relinquished in response to a promise, rather than contractual damages stemming from the actual withdrawal of the offer of employment.<sup>209</sup> Saying that an employer has a right to terminate an employee for any reason is one thing; but saying that an employer can induce a person to give up a job with another employer without liability is quite another. Thus, distinguishing between breaking a promise to allow one to work and the termination of an individual after he or she has entered into the contractual relationship of employment seems entirely reasonable. In the latter instance, the individual's understanding of the risks involved is greater.<sup>210</sup> As Judge Gaidry explained in *May*, "the line must be drawn somewhere."<sup>211</sup> Further, if a prospective employee is never given the benefits of employment, allowing the employer the full benefits and protections of the at-will employment doctrine is inequitable. The counterargument that this will undermine the at-will employment doctrine cannot be correct because the doctrine's goal, from the employer's perspective, is to permit the easy removal of employees who are not performing or are compromising the workplace.<sup>212</sup> Thus, this justification does not apply when the prospective employee has yet to commence work.

### *C. Civilian Considerations Make a Difference*

Courts should also be careful when adopting common law approaches and applying them in Louisiana. A prospective employee's reliance on an employer's offer of employment is more reasonable in Louisiana when compared to the state's common law brethren. One reason is the inherent

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208. See *May v. Harris Mgmt. Corp.*, 928 So. 2d 140, 150 (La. Ct. App. 1st 2005) (Gaidry, J., dissenting) ("[A]pplying the at-will employment principle . . . to a *prospective* employee . . . is an unwarranted extension of the at-will principle to a classic factual scenario of detrimental reliance governed by [Louisiana Civil Code article] 1967." (emphasis in original)).

209. See *supra* Part I.A.

210. *May*, 928 So. 2d at 150–51 (Downing, J., concurring) ("Common sense and experience demonstrate that people seeking new employment for whatever reason know that risk is involved in the employment, but not in acceptance of the employment. . . . [W]hile the 'at-will' doctrine precludes damages for actual lost employment, the 'at-will' doctrine does not apply to a party who is not yet an employee.").

211. *Id.* at 150 (Gaidry, J., dissenting).

212. Devlin, *supra* note 6, at 1514; see also *LaBove v. Raftery*, 802 So. 2d 566, 582 (La. 2001).

difference between the common law theory of consideration and the civil law theory of cause.<sup>213</sup> The civil law “purports to recognize that a person may bind himself merely by expressing a will to do so and for that reason it regards a promise as enforceable merely because it is a promise.”<sup>214</sup> There is no strict requirement of something being given in exchange for something else.<sup>215</sup> At least generally speaking, a binding obligation can come into being simply by one expressing a will to be bound. Thus, for someone in a civil law jurisdiction like Louisiana to act in reliance on a promise is much more reasonable than it is for someone in a common law jurisdiction, where a bargained-for exchange must exist.

Regarding at-will employment in Louisiana, one can make a solid argument that the Civil Code requires the termination of the relationship to be carried out in good faith.<sup>216</sup> But this is a position that has not had much success in Louisiana courts.<sup>217</sup> Just because Louisiana courts have not required good faith in the termination of at-will employment generally, however, does not mean that they should continue to ignore the duty of good faith in the distinct context of withdrawal of an offer of employment. Barring these reliance claims by aggrieved prospective employees simply by saying that the at-will employment doctrine should control is nonsensical, particularly when the employer may have been, for whatever reason, leading the prospective employee on in bad faith. Under the current approach, a wronged prospective employee would never get a chance to prove this deception in court. As Judge Downing noted in *May*, “[w]hen we say that it is unreasonable as a matter of law for an employee to rely on a promise of employment, we say that it is reasonable for employees to expect employers to breach their promises and act in reckless disregard of the prospective employees’ welfare.”<sup>218</sup> No set definition exists of what constitutes good faith in every scenario;<sup>219</sup> however, leading an employee to believe they are gainfully employed just to fire them on the first day

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213. See *supra* Part II.C.1.

214. Sutherland, *supra* 175, at 88.

215. See LA. CIV. CODE art. 1967 cmt. c (2015) (“The reason why a party binds himself need not be to obtain something in return or to secure an advantage for himself. An obligor may bind himself by a gratuitous contract, that is, he may obligate himself for the benefit of another party without obtaining any advantage in return.”).

216. See *supra* Part II.A.2.

217. *But see* Allbritton v. Lincoln Health Sys., Inc., 51 So. 3d 91, 96 (La. Ct. App. 2010) (“Although Louisiana is an at-will employment state, [the employer has] a duty of good faith.”).

218. *May v. Harris Mgmt. Corp.*, 928 So. 2d 140, 151 (La. Ct. App. 1st 2005) (Downing, J., concurring).

219. See LITVINOFF, *supra* note 133, at 17 (The words good faith “are used on the general assumption that everybody understands what they mean.”).

violates good faith behavior.<sup>220</sup> Thus, because courts have failed to inquire into the good faith of the employer in any way, employers are given benefits and protections that they are not entitled to under the Civil Code.

Further, the overall spirit of the Civil Code supports a prospective employee's recovery when he or she was misled with an offer of employment. The Civil Code contains numerous articles that provide protection to an individual's interests when another has allegedly damaged those interests.<sup>221</sup> Some may argue that an employer should not be liable when they make an honest mistake like having a sudden budget shortfall or not actually having as much work available as originally thought, but the Civil Code in another context does not allow a party to avail himself of his error when the other party is ready to perform.<sup>222</sup> The employee in most instances will be free from fault and will suffer great loss due to his or her reliance. The employer will generally be in a much better position, however, to assess costs, make decisions, and potentially bear the losses. Therefore, protecting the interests of the prospective employee who is free from fault reinforces the underlying theme of the Louisiana Civil Code.

#### *D. Public Policy Favors Recovery*

Finally, from a policy standpoint, finding reliance on a promise of employment to be per se unreasonable is incorrect. For example, in *Bains*, the CEO of the company told Bains on at least three occasions that she had been offered the job.<sup>223</sup> Some of the offers were in writing, she was given a starting salary figure, and she was given a start date.<sup>224</sup> Taking this all into account, relying on these assurances would be reasonable for someone in her situation. By not allowing her any sort of recourse, Louisiana courts are essentially encouraging irresponsible and reckless behavior by employers that will face no consequences.<sup>225</sup>

Also, common sense would indicate that employers do not just fire an employee who is doing his or her job adequately. Thus, it follows that

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220. Also, one would think that an employer would be naturally deterred from this type of behavior, as bringing someone into the workplace only to fire that individual on the same day would be disruptive to the work environment and other employees' states of mind.

221. See *supra* Part II.C.2.

222. LA. CIV. CODE art. 1951 (2015) ("A party may not avail himself of his error if the other party is willing to perform the contract as intended by the party in error.?).

223. *Bains v. Young Men's Christian Ass'n of Greater New Orleans*, 969 So. 2d 646, 647 (La. Ct. App. 4th 2007).

224. *Id.*

225. See *May v. Harris Mgmt. Corp.*, 928 So. 2d 140, 151 (La. Ct. App. 1st 2005) (Downing, J., concurring).

employees adequately performing their duties will maintain their employment unless they act in a way that would give their employer a reason to terminate them. From a purely practical standpoint, allowing an outside employer to induce a current model employee to join their organization, and then not coming through with the job, is allowing someone who otherwise would be employed become unemployed for no real fault of his or her own. By not offering any consequences for an employer, one could imagine a situation as extreme as a competing employer luring a key employee away from their competition only to renege on the offer and leave their competitor in a compromised position. The employee would just be collateral damage. An employer in bad faith could severely damage a potential employee's professional career and come away unscathed. Therefore, it is unjust to not allow an individual any sort of protection when they have to leave current employment to accept a new job offer.<sup>226</sup>

This Comment does not argue for recovery in all instances in which an employer withdraws an offer of employment. Article 1967 requires that the reliance be reasonable and that the employer know or should know that the prospective employee will act to his or her detriment.<sup>227</sup> Surely an employer telling a prospective employee "we need a guy like you around here" or something similar would not be a reasonable basis for taking action. Likewise, an employer would not be liable if an individual saw a job posting from an employer and then immediately left his or her current job to pursue that opportunity, as the employer in that situation would not have known that the individual would have acted in that manner. Often, though, the employer is aware that the prospective employee must resign from current employment to accept the prospective job; thus, reliance in this common circumstance is foreseeable and should be expected by the employer.<sup>228</sup>

Therefore, the individual circumstances that the factfinder considers would limit the cause of action to only those situations in which recovery is reasonable. Some considerations could include the extent of the offer, who made the offer, by what medium the offer was made, the apparent firmness of the offer, the amount of stability apparent in the business of the offering employer, and unique factors dealing with the particular industry.<sup>229</sup>

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226. *Id.* at 150 ("It seems to me patently absurd that we could find it patently unreasonable for an employee to rely on an offer of at-will employment when the employee cannot accept the offer without leaving secure employment and incurring expenses.").

227. LA. CIV. CODE art. 1967.

228. ROTHSTEIN ET AL., *supra* note 7, at 83.

229. Although these factors are in many ways common sense, Louisiana courts have utilized similar considerations in other detrimental reliance contexts. *See*,

## IV. RETURNING TO BOB: THE APPLICATION OF JUSTICE

If Bob's reliance was no longer unreasonable as a matter of law, Bob could bring suit under Civil Code article 1967 for his reliance on Kirk's promise of employment. He would be required to show by a preponderance of the evidence three elements: (1) representation by conduct or word by Kirk; (2) a justifiable reliance on Kirk's representation; and (3) a change in position to his detriment because of that reliance.<sup>230</sup>

Bob could satisfy the first element because Kirk made a clear representation to Bob that he had a job available for him. The second element is where Bob's burden is the heaviest. A finder of fact could come to the conclusion that his reliance was reasonable by looking to the facts surrounding Bob's situation. First, Kirk was the one who originally contacted Bob about the employment. Second, Kirk was the CEO of the company, not a low-level manager. This is an important fact, as a CEO or other upper-level manager is generally understood by a reasonable person to carry a certain level of responsibility within the business; thus making his or her words particularly authoritative and reliable on an issue. Third, Kirk went as far as discussing starting salaries with Bob. This discussion of starting salaries would lead a reasonable person to believe that the employer has analyzed its current financial position, and has made an offer that is within its current means. Bob displayed concern about losing his current job, and because of this, he contacted Kirk on multiple occasions to confirm that he would be given the job. Bob was given a starting date after Kirk reassured Bob that the position would be his. All of these factors would seem to indicate that Bob's reliance on the offer was reasonable. Finally, the third element of his claim is satisfied as well because Bob had a change in his position to his detriment because of his reliance on Kirk's

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*e.g.*, *Water Craft Mgmt., L.L.C. v. Mercury Marine*, 361 F. Supp. 2d 518, 556 (M.D. La. 2004) ("Under Louisiana law, reasonableness is determined by examining factual circumstances like the commercial sophistication of the party claiming detrimental reliance and the negotiations and/or documents the party relied on."); *Academy Mortg. Co. v. Barker, Boudreaux, Lamy & Foley*, 673 So. 2d 1209, 1212 (La. Ct. App. 1996) ("[A] promisee's business acumen is properly considered when determining reasonableness of the claimed reliance."); *Amitech U.S.A., Ltd. v. Nottingham Constr. Co.*, 57 So. 3d 1043, 1052 (La. Ct. App. 2010) ("Nottingham's reliance was unreasonable given Hick's acknowledgement that Cormier was required to obtain approval from the overseas manager prior to entering into transactions."). Also, similar factors are considered by some jurisdictions when attempting to establish the terms of an employment contract implied by the conduct and relationship of the parties. *See ROTHSTEIN ET AL.*, *supra* note 7, at 831.

230. *May*, 928 So. 2d at 145; *see also* *Murphy Cormier Gen. Contractor, Inc. v. Dep't of Health & Hosps.*, 114 So. 3d 567, 596 (La. Ct. App. 2013); *Amitech U.S.A., Ltd.*, 57 So. 3d at 1052.

promise. Bob was once employed, and his reliance on Kirk's promise has left him unemployed with no current job prospects.

After having successfully established his claim under Louisiana Civil Code article 1967, Bob then would be entitled to reliance damages. Based on the facts, Bob should receive compensation for lost wages from his original employment along with any other expenses that Bob incurred as a direct result of Kirk's actions. Because Bob's damages are limited to his actual and reasonable reliance, Kirk is not being held liable for any more damage than what he directly caused. Bob also has the duty to mitigate his damages by seeking other employment opportunities. Thus, this solution provides much needed relief for Bob but does not cause any undue burden for Kirk.

#### CONCLUSION

This Comment has shown the deficiencies in Louisiana's current approach relating to reliance on an offer of at-will employment. Further, this Comment has argued that categorically barring detrimental reliance claims for withdrawn offers of employment is an improper solution. Rather, a prospective employee who has had his or her offer of employment revoked after relying on the promise should be able to bring a claim for damages under article 1967. The reasonableness of a prospective employee's reliance should be decided by looking to the particular facts and circumstances surrounding the offer of employment. Allowing these claims is necessary to promote fairness and avoid injustice to a wronged prospective employee. Offering protection only to employers has led to undesirable and inequitable outcomes in Louisiana.

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