

LOUISIANA

FOR MORE INFORMATION:

LEAKE & ANDERSSON, LLP
New Orleans, Louisiana
www.leakeandersson.com

George D. Fagan
gfagan@leakeandersson.com

Patrick M. Wartelle
pwartelle@leakeandersson.com

I. AT-WILL EMPLOYMENT

A. Statute

At-will employment is deeply embedded in Louisiana law and jurisprudence. “The employer-employee relationship is a contractual relationship. As such, an employer and employee may negotiate the terms of an employment contract and agree to any terms not prohibited by law or public policy. When the employer and employee are silent on the terms of the employment contract, the civil code provides the default rule of employment-at-will.” *Quebedeaux v. Dow Chem. Co.*, 01-2297 (La. 06/21/02), 820 So.2d 542, 545.

Article 2747 of the Louisiana Civil Code is Louisiana’s recognition of the at-will employment relationship:

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.

Under Article 2747, an employer is generally “at liberty to dismiss an employee at any time, for any reason, without incurring liability for the discharge,” provided the termination does not violate any statutory or constitutional provision. *Quebedeaux*, 820 So.2d at 545-46. An employer has the right to fire an at-will employee “for any reason - good, bad or indifferent - or for no reason at all.” *Johnson v. Delchamps, Inc.*, 897 F.2d 808, 810 (5th Cir. 1990); *see also Square v. Hampton*, 2013-1680 (La. App. 4 Cir. 06/04/14); 144 So. 3d 88. Likewise, “an at-will employee is free to quit at any time without liability to his or her employer.” *Martin v. Sterling Assocs.*, 46461 (La. App. 2 Cir. 08/10/11); 72 So. 3d 411, 416.

Louisiana Civil Code Article 2024 provides that an employment “contract of unspecified duration may be terminated at the will of either party by giving notice, reasonable in time and form, to the other party.” *Brannan v. Wyeth Laboratories, Inc.*, 87-2667 (La. 1988), 526 So.2d 1101, 1103-04 (citing La. C.C. art. 2024). “[W]hen the notice to terminate is unreasonable, the result is that the employment contract simply remains valid until properly terminated by one of the parties.” *Harrison v. CD Consulting, Inc.*, 05-1087, (La. App. 1 Cir. 05/05/06), 934 So.2d 166, 171. “Any ambiguity will be construed in favor of employment-at-will.” *Wallace v. Shreve Mem’l. Library*, 79 F.3d 427, 429 (5th Cir. 1996) (citing *Thorne v. Monroe City Sch. Bd.*, 542 So.2d 490, 492 (La. 1989)).

However, in *Deon Danna v. The Ritz-Carlton Hotel Company, L.L.C.*, 2020-0116 (La. App. 4 Cir. 3/24/21), 2021 WL 1131541, the Louisiana Fourth Circuit Court of Appeal recently affirmed a trial court decision in which the jury found that the plaintiff’s employment, which was subject to a contract of unspecified duration, was not at-will due to the existence of an “employee promise” that the employee

LOUISIANA

would only be terminated for “cause,” and after a “fair and complete investigation.” Appeals are still pending in this matter.

A contract including a definite initial term with varying options to renew becomes “at-will” employment once the initial term expires. *Seals v. Calcasieu Parish Council on Aging*, 99-1269 (La. App. 3 Cir. 03/01/00), 758 So.2d 286, 291. “Absent special considerations,” a contract for employment for an indefinite term is deemed to be employment at-will. *Id.*; see also *Clark v. Christus Health N. La.*, 47 So. 3d 1135, 1140 (La.App. 2 Cir. 2010).

“Any contract for permanent employment is void as against public policy and is unenforceable in Louisiana.” *May v. Harris Mgmt. Corp.*, 04-2657 (La. App. 1 Cir. 12/22/05), 928 So.2d 140, 146. “Such a contract must be read as having an indefinite term, and is therefore, terminable at will by either party.” *Id.* (citing *Pitcher v. United Oil & Gas Syndicate*, 139 So. 760, 761 (La. 1932); *Romaguera v. Prudential Ins. Co. of Am.*, 1995 WL 747464, at *2 (E.D. La. Dec. 15, 1995)). “The only exception to this rule is when the contract for permanent employment is supported by some special consideration given by the employee over and above the rendering of services.” *Id.* (citing *Pitcher*, 139 So. at 761; *Simmons v. Westinghouse Elec. Corp.*, 311 So.2d 28, 31 (La. App. 2 Cir. 1975)).

An employee’s at-will status, however, does not preclude him from having certain employment rights. An at-will employee may have vested rights to benefits, which are not mere gratuities. An employer is required to honor such provisions even when terminating an at-will employee. *Knecht v. Bd. of Tr. for State Coll. & Univ.*, 91-0751 (La. 1991), 591 So.2d 690, 695 (such as accumulated overtime wages, vacation benefits, or sick leave); see also, *Granger v. Christus Health Cent. La.*, 2012-1892 (La. 06/28/13); 144 So. 3d 736, 762 n. 29. Wages include accrued vacation pay or other similar benefits, which must be paid to an employee who quits or resigns in accordance with LA. REV. STAT. §§ 23:631-634 (this statute is discussed in more detail below in Section X.V.). *Beard v. Summit Inst. of Pulmonary Med. & Rehab., Inc.*, 97-1784 (La. 1998), 707 So.2d 1233.

B. Case Law

In *Mendonca v. Tidewater Inc.*, 03-1015 (La. App. 4 Cir. 2006), 933 So.2d 233, the plaintiff brought a suit against his former employer alleging he was wrongfully discharged based on “race discrimination and retaliation for whistle-blowing.” *Mendonca*, 933 So.2d at 234. Plaintiff brought claims for breach of contract and intentional tortious interference with employment contract. The employer filed a motion for summary judgment asserting that “Mendonca lacked any evidence to establish the existence of a limited contract or a legally protected interest between him and his employer (a necessary element to maintain a claim for intentional interference with contract under the seminal case of *9 to 5 Fashions, Inc. v. Spurney*, 538 So.2d 228 (La.1989)).” *Id.* Although it was undisputed that Mendonca had a written employment contract, that contract did not contain a fixed term of employment as required by Louisiana Civil Code articles 2024 and 2747. “Instead, the contract stated [only] that his employment would be “unlimited.” As such, “Mendonca was an employee at-will with no legally protected interest in his employment.” *Id.* The court upheld the trial court’s granting of the motion for summary judgment finding that plaintiff was an at-will employee who, consequently, could not maintain a claim for intentional tortious interference. *Id.* at 235.

In *Harrison v. CD Consulting, Inc.*, 05-1087 (La. App. 1 Cir. 05/05/06), 934 So.2d 166, plaintiff was the sole instrumentation and controls engineer working on a project in the United Arab Emirates. When he was hired, plaintiff signed an agreement setting forth his wages and his work schedule, but the

LOUISIANA

“employment agreement was for an indefinite term and made no reference to any notice requirements should Harrison decide to resign.” *Harrison*, 934 So.2d at 168. As such, plaintiff was an at-will employee. Plaintiff eventually walked off the job and advised his employer of his resignation after he returned to the United States. The employer refused to pay plaintiff his final two weeks’ wages despite his demand for payment. Plaintiff filed suit seeking to collect unpaid wages, attorney fees, and penalty wages. The employer countersued asserting claims for breach of contract, breach of fiduciary duty, and intentional interference with contractual relations. The employer argued it was entitled to set off Harrison's claim for unpaid wages against the damages it incurred when he walked off the job without notice, and alternatively contended that it should not be liable for statutory penalty wages since it had a good faith belief that it was entitled to such a set-off. *Id.* at 168-170.

The court eschewed the employer’s theory of breach of fiduciary duty, finding that the plaintiff had a statutory right to receive his unpaid wages and that the plaintiff did not breach the fiduciary duty. *Id.* at 171. As the court noted, “historically, an employee's breach of his fiduciary duty to his employer [is limited] . . . to instances when an employee has engaged in dishonest behavior or unfair trade practices for the purpose of his own financial or commercial benefit.” *Id.* at 170. “[T]he fact that an employee quits a job abruptly or without notice to the employer does not justify withholding payment of the employee's earned wages.” *Id.* (citing *Blankenship v. S. Beverage Co. Inc.*, 520 So.2d 440, 442 (La. App. 1 Cir. 1988), writ dismissed, 522 So.2d 574 (La. 1988); *Soday v. Mall Snacks, Inc.*, 374 So.2d 138, 140-41 (La. App. 1 Cir. 1979)). Rather, at most, unreasonable notice results in continuation of the employment contract. *Id.* at 171. The *Harrison* court noted that the employer could have chosen to contract with plaintiff for a definite term or established notice requirements but chose not to do so. As such, the court upheld the trial court’s imposition of penalty wages based on its finding that the employer’s refusal to pay plaintiff’s wages did “not constitute a good faith, non-arbitrary defense to liability for unpaid wages.” *Id.* at 172.

In *Davis v. Jazz Casino Co. LLC*, 03-0005 (La. App. 4 Cir. 01/14/04), 864 So.2d 880, the court granted class certification for at-will employees who filed a class action based on alleged promises of continued employment at the land-based casino in New Orleans if the employees performed certain activities to lobby or facilitate the lowering of the taxes for the casino. The court granted such certification on the grounds that the parties had met the commonality, numerosity, typicality, and adequacy of representation prerequisites for such class action. The court’s ruling is of limited precedent because the certification of a class action is nothing more than a procedural device and confers no substantive rights; it is not a judgment on the merits of the claims.

In *Williams v. Touro Infirmary*, 90-1377 (La. App. 4 Cir. 04/16/91), 578 So.2d 1006, 1009, the court held that an employee's participation in a retirement plan did not transform at-will employment into a fixed term of employment.

In *Chauvin v. Tandy Corp.*, 984 F.2d 695, 698 (5th Cir. 1993), the court found the employee to be an at-will employee even though he signed an agreement conveying any intellectual property rights to his employer and agreeing not to disclose confidential information or to compete against his employer. See also *Brannan v. Wyeth Lab., Inc.*, 87-2667 (La. 1988), 526 So.2d 1101.

In *Jones v. Physicians Mut. Ins. Co.*, 2000 U.S. Dist. LEXIS 12059 (E.D. La. Aug. 14, 2000), the court declined to consider a “novel public policy exception” to the employment at-will doctrine asserted by the plaintiff (whether the plaintiff was an employee or an independent contractor), acknowledging that “broad policy considerations creating exceptions to employment at-will and affecting relations between

LOUISIANA

employer and employee should not be considered by [the] court[s]." *Id.* at *8 (citing *Wusthoff v. Bally's Casino Lakeshore Resort, Inc.*, 709 So.2d 913, 915 (La. App. 4 Cir. 1998)).

In *Saacks v. Mohawk Carpet Corp.*, 03-0386 (La. App. 4 Cir. 09/03/03), 855 So.2d 359, the court found that an employment contract was for a fixed-term rather than an at-will contract, since the earlier, more specific letter confirming a guaranteed salary for a fixed period of time controlled over the later general form letter setting forth an employment at-will relationship. As a result, because the employment contract was for a fixed term, the monetary award sought by plaintiff constituted "wages" under La. Rev. Stat. Ann. §§ 23:631 and 23:632 and, as such, the employer would be liable for failure to pay wages within the statutory time periods. *Saacks*, 855 So.2d at 368-370. Moreover, the plaintiff was entitled to mandatory attorney's fees for filing a "well-founded suit" for wages. *Id.* at 371.

Regarding the timeframe as to which an aggrieved at-will employee has to assert a cause of action for wrongful termination against his former employer, Louisiana courts have concluded that such an action is delictual in nature and thus subject to the one-year prescriptive period applicable to delictual actions, which commences the day the injury or damage is sustained. La. C.C. art. 3492. *Eastin v. Entergy Corp.*, 03-1030 (La. 02/06/04), 865 So.2d 49, 53.

In determining when an action for wrongful termination accrues, Louisiana follows the two seminal United States Supreme Court cases, *Chardon v. Fernandez*, 454 U.S. 6, 102 S. Ct. 28, 70 L.Ed.2d 6 (1981), and *Del. State Coll. v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L.Ed.2d 431 (1980), and their progeny. Thus, in Louisiana, it is well settled that the cause of action accrues when the damage is sustained, which is the earlier of: "the date an employee is informed of his termination or his actual separation from employment. . . . These courts have correctly reasoned that the discriminatory act and, hence, the damages occur upon the employee's first notice of the adverse employment action." *Eastin*, 865 So.2d at 53-54 (citations omitted).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

A policy manual which provides general guidelines and employment procedures generally should not constitute an implied contract of employment under Louisiana law. *McPherson v. Cingular Wireless, LLC*, 07-0462 (La. App. 3 Cir. 10/03/07); 967 So. 2d 573, 577; *Keller v. Sisters of Charity*, 23,363 (La. App. 2 Cir. 04/08/92), 597 So.2d 1113, 1116-17; *Leger v. Tyson Foods, Inc.*, 95-1055 (La. App. 3 Cir. 01/31/96), 670 So.2d 397, 401-402, writ denied, 671 So.2d 920 (La. 1996); *Wallace v. Shreve Mem'l Library*, 79 F.3d 427, 430-31 (5th Cir. 1996); *Schwarz v. Admin. of Tulane Educ. Fund*, 97-0222 (La. App. 4 Cir. 09/10/97), 699 So.2d 895; *Walker v. Air Liquide Am. Corp.*, 113 F.Supp.2d 983, 985 (M.D. La. 2000).

Louisiana courts have consistently held that employee manuals as well as company policies and procedures neither confer any contractual rights upon employees nor do they create any exceptions to the "employment at will" doctrine. See *Square v. Hampton*, 2013-1680 (La. App. 4 Cir. 06/04/14); 144 So. 3d 88, 98 *Mix v. Univ. of New Orleans*, 91-2720 (La. App. 4 Cir. 11/24/92), 609 So.2d 958, 964, writ denied, 612 So.2d 83 (La. 1993). *Blakemore v. Town of Grambling*, 53,135, p. 10 (La. App. 2 Cir. 1/15/20); 289 So.3d 681, 688 ("It is well settled that an employee manual does not negate an employee's at-will status.").

LOUISIANA

2. Provisions Regarding Fair Treatment

In *Miceli v. Universal Health Serv., Inc.*, 606 So.2d 908 (La. App. 5 Cir. Sept. 29, 1992), a terminated crisis counselor brought an action against the hospital's owner and related parties for breach of contract and defamation. Although the hospital's employee manual stated that discipline and dismissal procedures "have been established to ensure that all employees are given fair treatment and an opportunity to improve their performance and conduct," the handbook noted that dismissal without warning is the right of the hospital in certain cases of unacceptable conduct on the part of the employee. The court held that the hospital discharged plaintiff for cause, even assuming cause had to be shown, based upon plaintiff's "practical jokes," consisting of his composing a fake letter of rejection, at bottom of which, in his handwriting, he inserted language calling his supervisor a bitch and threatening her, and complaining about a habitual caller to a crisis line stating that he was not paid enough to put up with people like her and that he might consider committing suicide. *Id.* at 910.

In *Deon Danna v. the Ritz-Carlton Co., L.L.C.*, 2020-0116 (La. App. 4 Cir. 3/24/21, 2021 WL 1131541, the Louisiana Fourth Circuit affirmed a jury verdict finding that the plaintiff, whose employment as hotel engineer was subject to an employment contract with an indefinite term, could nevertheless only be fire for cause, after a "fair and complete investigation." The court further affirmed the jury's finding that the Ritz-Carlton failed to provide a fair and complete investigation into the escape of carbon monoxide onto the guest floors of the hotel, which defendant used as its basis for terminating the plaintiff. The court found that the Ritz's investigation was inadequate because, while Ritz-Carlton relied on contemporaneous incident reports from the fire department and plaintiff himself that indicated Plaintiff's actions caused the leak, it did not consult the individual who repaired the hotel's boilers (the source of the carbon monoxide leak). The appeal of this matter is currently pending.

3. Disclaimers

Disclaimers in an employment policy or manual which state that the document does not constitute a contract of employment and does not interfere with an employer's right to terminate an employee at-will have generally been upheld in Louisiana. *Thebner v. Xerox Corp.*, 84-0824 (La. App. 3 Cir. 12/12/86), 480 So.2d 454, writ denied, 484 So.2d 139 (La. 1986); *Keller v. Sisters of Charity*, 23,363 597 (La. App. 2 Cir. 04/08/92), So.2d 1113; *Leger v. Tyson Foods, Inc.*, 95-1055 (La. App. 3 Cir. 01/31/96), 670 So.2d 397, 401-402, writ denied, 671 So.2d 920 (La. 1996); *Adams v. Autozoners, Inc.*, 1999 U.S. Dist. LEXIS 14999 (E.D. La. Sept. 23, 1999); *Walker v. Air Liquide Am. Corp.*, 113 F.Supp.2d 983, 985 (M.D. La. Sept. 15, 2000).

Even policies or manuals without disclaimers have been held not to constitute implied contracts of employment. *Wallace v. Shreve Mem'l Library*, 79 F.3d 427, 431 (5th Cir. 1996) (Louisiana courts are quite reluctant to find that employment manuals create contractual rights); *Keller, supra*. An at-will employee's expectation that his employer will adhere to a company grievance procedure does not give rise to any legal rights. *Mix v. Univ. of New Orleans*, 91-2720 (La. App. 4 Cir. 11/24/92), 609 So.2d 958, 964, writ denied, 612 So.2d 83 (La. 1993); *Stanton v. Tulane Univ. of La.*, 00-0403 (La. App. 4 Cir. 01/10/01), 777 So.2d 1242 (Louisiana recognizes a presumption favoring at-will employment). Thus, neither the presence nor absence of a disclaimer provision appears to be dispositive in Louisiana in deciding whether an employment manual creates an implied contract of employment. Rather, in Louisiana, this issue appears to be determined on a case-by-case basis. *See, e.g., Wallace*, 79 F.3d at 431.

LOUISIANA

4. Implied Covenants of Good Faith and Fair Dealing

Generally, Louisiana implies a requirement of good faith performance of all contracts. La. Civil Code Art.1759. *Wiley v. Missouri Pac. R.R. Co.*, 82-0229 (La. App. 3 Cir. 10/22/82), 430 So.2d 1016, writ denied, 431 So.2d 1055 (La. 1983), is evidently Louisiana's only state appellate court decision which addresses the implied contractual duty to perform in good faith in an employment context. In dicta, that court recognized that a contract terminable at-will is nevertheless subject to limitation on the exercise of that requirement, i.e., that such termination not be arbitrary and capricious. *Id.* at 1020.

In *Deus v. Allstate Ins. Co.*, 15 F.3d 506 (5th Cir. 1994), Deus was an insurance sales agent employed under a written contract. Because the contract was for life but was not supported by any extra consideration, the court found the contract invalid and determined that Deus was terminable at-will. Deus claimed that Allstate breached an implied obligation of good faith in executing its part of an employment agreement. The court dismissed the claim because Deus failed to produce evidence that any of Allstate's actions were motivated by bad faith.

In *Adams v. Autozoners, Inc.*, 1999 U.S. Dist. LEXIS 14999 (E.D. La. Sept. 22, 1999), the plaintiff argued that his termination without cause violated a covenant of good faith and fair dealing implied in the terms of the employee handbook. The court correctly observed that under Louisiana law, the covenant of good faith and fair dealing is implied in every contract. *Id.* at *20. See LA. CIV. CODE art. 1983; *Grisaffi v. Dillard Dep't Stores, Inc.*, 43 F.3d 982, 983 (5th Cir. 1995); *Brill v. Catfish Shaks of America, Inc.*, 727 F. Supp. 1035, 1039 (E.D. La. 1989). Nonetheless, the court granted summary judgment in favor of the employer on that claim based on its conclusion that because the subject employee handbook did not create a contract between plaintiff and defendant, there no covenant of good faith and fair dealing can be implied. *Id.* at *20.

Perhaps the lack of jurisprudence in Louisiana expounding on employee claims alleging that an employer's termination decision breached the implied covenant of good faith is due to the fact that such claims appear to be inconsistent with well-established Louisiana jurisprudence holding that employer terminations of at-will employees can be for any reason. *Stevenson v. Lavalco, Inc.*, 28,020 (La. App. 2 Cir. 02/28/96), 669 So.2d 608, 610, writ denied, 673 So.2d 611 (La. 1996) ("Reasons for termination need not be accurate, fair or reasonable"). See also *Johnson v. Delchamps, Inc.*, 897 F.2d 808, 811 (5th Cir. 1990) ("If Delchamps was at liberty to discharge Johnson for no reason, it was equally at liberty to discharge her for a reason based on incorrect information, even if that information was carelessly gathered").

Nonetheless, some courts have considered arguments regarding the application of Louisiana's abuse of rights doctrine to the termination of at-will employees, but thus far no reported case has applied the doctrine to allow a discharged at-will employee to file suit for wrongful termination. One of the following must exist for the abuse of rights doctrine to be applied: "(1) the exercise of rights exclusively for the predominant purpose of harming another or with the predominant motive to cause harm; (2) the non-existence of a serious and legitimate interest that is worthy of judicial protection; (3) the use of the right in violation of moral rules, good faith or elementary fairness; or (4) the exercise of the right for a purpose other than that for which it was granted." *Ballaron v. Equitable Shipyards, Inc.*, 521 So.2d 481, 483 (La. App. 4 Cir. 1988), writ denied, 522 So.2d 571 (La. 1988) (citing *Ill. Cent. R.R. Co. v. Int'l. Harvester*, 368 So.2d 1009, 1014-15 (La. 1979)). The Fifth Circuit in *Johnson v. Delchamps, Inc.*, 897 F.2d 808, 811 (5th Cir. 1990), concluded that an employer's decision to terminate an at-will employee based on the results of a polygraph examination, or the employee's refusal to undergo a polygraph examination, is insufficient state a claim for relief under Louisiana law for wrongful termination or an abuse of rights.

LOUISIANA

B. Public Policy Exceptions

Aside from federal and state statutory exceptions, there are no broad public policy considerations creating exceptions to employment at-will and affecting relationships between an employer and employee under Louisiana law. *Quebedeaux v. Dow Chem. Co.*, 820 So.2d 542, 546 (La. 2002).

1. General

Numerous intermediate appellate courts have held that statutory or constitutional protections afford exceptions to the employment-at-will doctrine, but general public policy protections do not. *See, e.g., Tolliver v. Concordia Waterworks Dist. No. 1*, 98-0449 (La. App. 3 Cir. 02/10/99), 735 So.2d 680, 682, writ denied, 747 So.2d 23 (La. 1999); *see also Page v. Grambling State Univ.*, 31,240 (La. App. 2 Cir. 12/09/98), 722 So.2d 329 (holding that statutory and constitutional protections are the only public policy exceptions to employment at-will); *Sharp v. Melton*, 53,508, p. 6 (La. App. 2 Cir. 5/20/20), 296 So.3d 1135, 1140 (holding that, because the plaintiff's petition failed to allege an employment contract with a term or that her termination violated any statutory or constitutional provisions, she failed to allege that she was not an at-will employee). The Louisiana Supreme Court has never expressly addressed this issue.

2. Exercising a Legal Right

In *Wusthoff v. Bally's Casino Lakeshore Resort, Inc.*, 97-1386 (La. App. 4 Cir. 02/25/98), 709 So.2d 913, writ denied, 718 So.2d 413 (La. 1998), the plaintiff was an at-will employee working as a valet at a casino. Plaintiff was fired after reporting that he was forced to drive a parked car from the casino at gunpoint, which was the second incident where the plaintiff claimed he was a victim of a crime. The casino fired the plaintiff based on its belief that the plaintiff was at fault for his own "kidnapping." Plaintiff filed suit based on his claim he was wrongfully fired for reporting a safety breach which violated OSHA's requirement that employees be provided with a safe place to work. Finding no basis for asserting an actionable claim based on a violation of any such public policy, the court of appeals affirmed the dismissal of plaintiff's claims.

3. Refusing to Violate the Law

In *Gil v. Metal Serv. Corp.*, 412 So.2d 706 (La. App. 4 Cir. 1982), writ denied, 414 So.2d 379 (La. 1982), Gil was employed by Metal Service for 10 years in a management-supervisory capacity. Metal Service instituted a practice of removing identification marks from foreign steel and delivering it to their customers who had requested domestic steel. Gil refused to engage in this practice and claimed that he was fired as a result. The trial court issued a judgment for Metal Service and Gil appealed. The Louisiana Court of Appeals held that refusing to commit an illegal act is protected only if supported by a specific constitutional or statutory provision. This narrow interpretation resulted in a finding that Gil was without recourse because no such authority existed. The Court acknowledged decisions of other states recognizing a public policy exception to the at-will doctrine even in the absence of a statute but declined to follow suit. *Id.* at 708.

However, in *Cheremie Servs. v. Shell Deepwater Prod.*, the Louisiana Supreme Court subsequently overruled *Gil v. Metal Ser. Corp.* to the extent it held that the illegal act complained of was not supported by a specific statute. 2009-1633 (La. 04/23/10); 35 So. 3d 1053, 1056 n.3 (holding that the protections of

LOUISIANA

Louisiana's Unfair Trade Practices and Consumer Protection Law are not solely afforded to consumers and business competitors).

4. Exposing Illegal Activity (Whistleblowers)

La. Rev. Stat. § 23:967 provides protection to a plaintiff who reports what he or she believes in good faith is a violation of law. La. Rev. Stat. § 23:967 provides, in pertinent part, the following:

A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:

- (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
- (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.
- (3) Objects to or refuses to participate in an employment act or practice that is in violation of law.

* * * *

D. If suit or complaint is brought in bad faith or if it should be determined by a court that the employer's act or practice was not in violation of the law, the employer may be entitled to reasonable attorney fees and court costs from the employee.

This Whistleblower Statute provides protection to employees against reprisal from employers for reporting or refusing to participate in illegal work practices. *Hale v. Touro Infirmary*, 04-0003 (La. App. 4 Cir. 2004), 886 So.2d 1210, 1214, writ denied, 05-0103 (La. 2005), 896 So.2d 1036. Although the Louisiana Supreme Court has not addressed whether a plaintiff must prove an actual violation of state law to establish a Louisiana Whistleblower claim, the Louisiana Fourth and Fifth Circuit Courts of Appeal have addressed this issue and determined that a whistleblower plaintiff under § 23:967 must prove an actual violation of state law. In *Puig v. Greater New Orleans Expressway Comm'n*, 00-924 (La. App. 5 Cir. 2000), 772 So.2d 842, writ denied, 00-3531 (La. 2001), 786 So.2d 731, the Fifth Circuit compared two different Louisiana whistleblower statutes and concluded that "R.S. 23:967 is clearly distinct [from the other whistleblower statute, La. Rev. Stat. § 42:1169], in that it specifies that the employer must have committed a 'violation of state law' for an employee to be protected from reprisal," while La. Rev. Stat. § 42:1169 does not require a violation of state law, "merely an 'alleged act of impropriety' under the Code of Government Ethics for the public employee to be protected from discipline or reprisal." *Puig*, 772 So.2d at 845. In a subsequent Fifth Circuit Louisiana Whistleblower Statute case, the court cited *Puig* stating, "[t]he Louisiana Whistleblower Statute targets serious employer conduct that violates the law." *Fondren v. Greater New Orleans Expressway Comm'n*, 03-1383 (La. App. 5 Cir. 2004), 871 So.2d 688, 691.

While the *Puig* court did not provide a detailed analysis for its ruling, it did note that the triggering mechanism for § 23:967 is "conduct which does violate state law." *Puig*, 772 So.2d at 845 (emphasis added). See also *Goldsby v. State Dep't of Corr.*, 03-0343 (La. App. 1 Cir. 2003), 861 So.2d 236, 238, writs denied, 04-0328, (La. 2004), 870 So.2d 271 (the statute prohibits an employer from taking reprisals "against an employee for reporting, or refusing to participate in, a violation of state law").

LOUISIANA

In *Hale v. Touro Infirmary*, 886 So.2d 1210 (La. App. 4 Cir. 2004), The Fourth Circuit considered the claim of an employee under the Whistleblower Statute, La. Rev. Stat. Ann. § 23:967. Examining the language of the statute, the court held that a plaintiff can succeed on a claim that reprisal was taken for the employee's refusal to participate in "an employment act or practice that is in violation of law" only by establishing that it would have been an actual violation of law; the employee's good faith belief that the practice would violate the law is not adequate. The court listed the elements of a claim as follows: 1) the employer "violated the law through a workplace act or practice;" 2) the employee advised the employer of the violation; 3) the employee "refused to participate in the prohibited practice and threatened to disclose it;" and 4) the employee "was fired as a result of [the] refusal to participate . . . or [the] threat to disclose." *Id.* at 1216.

Consequently, "in order to qualify for whistleblower protection under this statute, the plaintiff must prove an actual violation of a state law, not just a good faith belief that a law was broken." *Mabry v. Andrus*, 45,135 (La.App. 2 Cir. 04/14/10), 34 So.3d 1075, 1081, writs denied, 2010-1368 (La. 09/24/10), 45 So.3d 1079. "Moreover, the employee must first 'advise the employer of the violation of law before the statutory remedies take effect. R.S. 23:967(A)." *Id.*; *Lightell v. Walker*, CV 20-672, 2021 WL 1063066, at *19 (E.D. La. Mar. 19, 2021).

An employee against whom retaliatory action is taken may recover damages and attorney's fees; however, if the employer prevails, the employer may recover attorney's fees against the employee. Although § 23:967 does not define "employer," several federal courts have applied the definition contained in La. Rev. Stat. Ann. § 23:302. *Jones v. JCC Holding Co.*, 2001 WL 537001 (E.D. La. May 21, 2001); *Dronet v. Lafarge Corp.*, 2000 WL 1720547 (E.D. La. Nov. 17, 2000).

La. Rev. Stat. § 30:2027 bars employment discrimination or retaliation against an employee who in good faith reports or threatens to disclose any violation of environmental laws or regulations, and allows any person disciplined or terminated in retaliation for such actions to recover triple damages and attorney's fees. See *Bear v. Pellerin, Inc.*, 806 So.2d 984 (La. App. 4 Cir. 2002) (applying the statute).

III. CONSTRUCTIVE DISCHARGE

Constructive discharge occurs when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. *Ned v. Opelousas Gen. Hosp.*, 2007 WL 952072 at *9 (W.D. La. March 26, 2007); see also *Kelleher v. Flawn*, 761 F.2d 1079, 1086 (5th Cir. 1985). To establish a claim for constructive discharge, an employee must prove that his or her working conditions were so difficult or unpleasant that a reasonable person placed in that position would have felt compelled to resign. *Vallecillo v. U.S. Dep't of Hous. & Urban Dev.*, 155 Fed. Appx. 764 (5th Cir. Nov. 22, 2005); *Bannister v. Dep't of Streets*, 666 So.2d 641, 648 (La. 1996); *Davis v. Hibernia Nat'l Bank*, 732 So.2d 61, 65 (La. App. 4 Cir. 1999), writ denied, 747 So.2d 536 (La. 1999). This follows the standard used and applied in federal employment discrimination cases. *Meyer v. Foti*, 720 F.Supp. 1234, 1241 (E.D. La. 1989).

In *Chandler v. La Quinta Inns, Inc.*, 264 Fed.Appx. 422, 425 (5th Cir.2008), the court held that a constructive discharge occurs when an employer makes working conditions so intolerable that a reasonable person in the employee's situation would feel compelled to resign. The court noted that the test is objective, and the courts consider a variety of factors. The Fifth Circuit considers the following factors relevant, singly or in combination: (1) demotion; (2) reduction in salary; (3) reduction in job responsibility; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger

LOUISIANA

(or less experienced/qualified) supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not. *Keelan v. Maiesco Software, Inc.*, 407 F.3d 332, 342 (5th Cir. 2005). The most important factor is assessing the effect of the conditions on a reasonable employee, not the employer's intentions. *Meyer*, 720 F.Supp. at 1241.

Allegations of mere harassment, alone, are not sufficient to prevail on a claim for constructive discharge. Rather, a plaintiff must show "aggravating factors," which may include assignment to menial/degrading work, badgering, harassment, or humiliation calculated to encourage the employee's resignation. *Hockman v. Westward Communications, LLC*, 407 F.3d 317, 331 (5th Cir. 2004); *Carrington v. Vertex Aerospace, LLC*, 2006 WL 504196 at *4 (W.D. Tex. Jan. 19, 2006) (noting plaintiff need not prove specific intent but must nonetheless make a greater showing of harassment than that required for hostile work environment); *Robinson v. Bd. of Supervisors for Univ. of Louisiana Sys.*, 2016-2145, p. 11 (La. 6/29/17); 225 So.3d 424, 433 (finding constructive discharge where, in addition to being stripped of job responsibilities, the employee was subjected to embarrassing and demeaning behavior such as his superior calling him names in front of coworkers); *but see Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428 (5th Cir. 2005) (requiring conduct to be "severe and pervasive").

IV. WRITTEN AGREEMENTS

The terms of an employment contract may be negotiated and agreed upon as long as not prohibited by law or public policy. A provision in an employment contract which allows the employee the unilateral right to terminate his or her employment upon notice to the employer during a fixed term is enforceable even though the employer may only terminate for "just cause." *Seals v. Calcasieu Parish Voluntary Council on Aging, Inc.*, 758 So.2d 286, 291 (La. App. 3 Cir. 2000), writ denied, 761 So.2d 1292 (La. 2000).

Article 1947 of the Louisiana Civil Code states that if the parties contemplate putting a contract in written form, "it is presumed that they do not intend to be bound until the contract is executed in that form." La. Civil Code Ann. art. 1947. Louisiana courts have consistently recognized this rule. *See, e.g., Breaux Bros. Constr. Co. v. Assoc. Contractors, Inc.*, 77 So.2d 17, 20 (La. 1954) (observing that where negotiations between the parties contemplate contract in writing, no party is bound until writing is perfected and signed); *Waldhauser v. Adams Hats*, 20 So. 423 (La. 1944) (under the general rule where parties contemplate their final agreements are to be reduced to writing, and the existence of the contract between them shall depend on its final reduction to writing, the reduction to writing is necessary to the perfection of the contract upon the theory that in such cases the final agreements are held in suspense until the written contract is signed); *Knipmeyer v. Diocese of Alexandria*, 492 So.2d 550, 555 (La. App. 3 Cir. 1986). Until the written contract is drawn up and signed, the contract is inchoate, incomplete, and either party, before signing, may recant, retract, recede, withdraw, decline to go further, refuse to consummate. *Fredericks v. Fasnacht*, 30 La. Ann. 117 (La. 1878); *Bloeker v. Tillman*, 4 La. 77, 80 (La 1832); *Wolf v. Mitchell*, 24 La. Ann. 433, 434 (La 1872); *Fernandez v. Soulie*, 28 La. Ann. 31 (La. 1876).

Contracts for indefinite or permanent terms of employment are not enforceable absent special considerations in addition to the services that the employee has agreed to perform. *Seals*, 758 So.2d at 290. "An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his conditions; indeed, in this land of opportunity, it would be against public policy and the spirit of our institutions that any man should thus handicap himself; and the law will

LOUISIANA

presume almost *juris et de jure* that he did not so intend.” *Pitcher v. United Oil Gas Syndicate*, 174 La. 66, 69, 139 So. 760, 761 (La. 1932).

Employment contracts, however, do not necessarily have to be written. Like any contract, an oral contract for employment involving more than \$500 may be proved by the testimony of "one witness and other corroborating circumstances." La. Civ. Code art. 1846. While the requirement of "one witness" may be met by the plaintiff's own testimony, the "other corroborating evidence" must come from a source *other than* the person urging the existence of the contract. *Kilpatrick v. Kilpatrick*, 27,241 (La. App. 2 Cir. 1995), 660 So.2d 182, writ denied, 95-2579 (La. 1995), 664 So.2d 444; *Suire v. Lafayette City-Parish Consol. Gov't*, 04-1459 (La. 2005); 907 So.2d 37; *Hilliard v. Yarbrough*, 488 So.2d 1038 (La. App. 2 Cir. 1986); *Pennington Constr., Inc. v. R A Eagle Corp.*, 94-0575 (La. App. 1 Cir. 1995), 652 So.2d 637; *Woodard v. Felts*, 573 So.2d 1312 (La. App. 2 Cir. 1991). The fact that the plaintiff left a secure position to work for the new employer can be proof of "other corroborating evidence". See *Higgins v. Smith Int'l*, 716 F.2d 278, 283 n. 3 (5th Cir. 1983), disavowed on other grounds by *Overman v. Fluor Constructors, Inc.*, 797 F.2d 217, 219 n. 8 (5th Cir. 1986); *Lanier v. Alenco*, 459 F.2d 689, 692 (5th Cir. 1972).

A. Standard "For Cause" Termination

La. Civ Code art. 2749 allows an employer to terminate an employee with a written contract of employment for cause. La. Civ Code art. 2024 requires that reasonable notice be provided to an employee who is terminated for cause. The failure to terminate a contract employee for cause allows the employee to recover the amount he would have been paid for the balance of the term of his employment contract. La. Civ. Code Ann. art. 2749. An employee with a written contract who leaves his employment without cause before the end of the contract term forfeits any right to recover any wages due him and he may be compelled to refund any money he has received. La. Civ. Code Ann. art. 2750.

1. Who Has the Burden of Proof

The burden of proof in an action for breach of contract is on the party claiming rights under the contract. *Bond v. Allemand*, 632 So.2d 326, 329 (La. App. 1 Cir. 1993), writ denied, 637 So.2d 468 (La. 1994). The existence of the contract and its terms must be proven by a preponderance of the evidence. *Id.* at 329.

2. What Constitutes "Cause"

Where there is an employment contract for a fixed term, an employer can discharge the employee only for serious ground of complaint, or just cause. See *Higgins v. Smith Int'l*, 716 F.2d 278, 283 n. 3 (5th Cir. 1983), disavowed on other grounds by *Overman v. Fluor Constructors, Inc.*, 797 F.2d 217, 219 n. 8 (5th Cir. 1986); *Lanier v. Alenco*, 459 F.2d 689, 692 (5th Cir. 1972). Whether a cause for termination constitutes a serious ground of complaint is a question of fact. *Id.* at 284, citing *Laneville v. Majestic Indus. Life Ins. Co.*, 66 So.2d 786 (La. 1953).

A company's policies, written procedures or employee manual are relevant in determining whether a serious ground of complaint exists. *Higgins*, 716 F.2d at 284.

However, Louisiana courts have given some guidance as to what will constitute cause for termination. *Huddleston v. Dillard Dep't. Stores, Inc.*, 638 So.2d 383, 385 (La. App. 5 Cir. 1994) (holding

LOUISIANA

that a false answer on employment application constituted cause for discharge where the employee handbook gave notice that dishonesty would be grounds for termination); *Brannan v. Wyeth Lab., Inc.*, 526 So.2d 1101, 1104 (La. 1988) (holding that employer had just cause to terminate pharmaceutical salesman who failed to make an adequate number of calls, falsified call reports, and failed to adequately supply employer's products to regular customers); *Chauvin v. Tandy Corp., Inc.*, 984 F.2d 695, 699 (5th Cir. 1993) (failing to promptly deposit company funds in violation of written policy constitutes cause).

In *Voitier v. Church Point Wholesale Beverage Co. Inc.*, 760 So.2d 451 (La. App. 3 Cir. 2000), the court held that, for an employee's improper conduct to provide the reason for his termination, the employer must be aware of the improper conduct at the time of termination. Because the employer was not aware of the unauthorized loan made by the employee at the time of his termination, the court held that the employee's termination was without just cause.

In *Danna v. The Ritz-Carlton Hotel Co., L.L.C.*, 2020-0116 (La. App. 4 Cir. 3/24/21), 2021 WL 1131541, the Louisiana Fourth Circuit Court of Appeal found that the plaintiff was not an at-will employee, despite being employed under an employment contract of unspecified duration. The Ritz-Carlton Hotel fired the plaintiff based on his alleged negligence, which the Ritz believed caused a carbon monoxide leak within the hotel that resulted in the hospitalization of multiple hotel guests. The court found that this event implicated the "employee promise" to the plaintiff, under which the plaintiff could only be terminated for cause after a fair and complete investigation. Despite the Ritz's reliance on contemporaneous reports from the fire department and plaintiff himself, which indicated the leak occurred due to plaintiff's own actions, the court found that the investigation was inadequate, and the Ritz-Carlton breached its obligation to only fire plaintiff for cause. The appeal of this matter is currently pending.

B. Status of Arbitration Clauses

La. Rev. Stat. §§ 9:4201 through 9:4217 contain the Louisiana Arbitration Law ("LAL"). The LAL is virtually identical to the Federal Arbitration Act, 9 U.S.C. §§ 1-14 ("FAA"). For that reason, Louisiana courts have turned to federal jurisprudence under the FAA for guidance in construing the LAL. *Lakeland Anesthesia, Inc. v. United Healthcare of La., Inc.*, 871 So.2d 380, 388, (La. App. 4 Cir. 2004); *Blount v. Smith Barney Shearson, Inc.*, 695 So.2d 1001, 1003 (La. App. 4 Cir. 1997).

Both the federal and state jurisprudence hold that any doubt as to whether a controversy is arbitrable should be resolved in favor of arbitration. La. Rev. Stat. § 9:4201 favors and upholds arbitration agreements except upon such grounds as exist at law or in equity for the revocation of any contract. Louisiana law favors an interpretive effort toward upholding arbitration.

Where there is doubt over arbitrability of a claim the general rule is that the doubt should be resolved in favor of, not against, arbitration. *Cajun Elec. Power Co-Op., Inc. v. La. Power & Light Co.*, 324 So.2d 475, 478 (La. App. 4 Cir. 1975). Arbitration awards are presumed valid because of a strong public policy favoring arbitration in Louisiana. A reviewing court cannot review the merits of an arbitrator's decision; the grounds for judicial inquiry under arbitration law are whether a valid arbitration agreement exists, and whether it has been complied with. *Orleans Parish Sch. Bd. v. United Teachers of New Orleans*, 689 So.2d 645, 647 (La. App. 4 Cir. 1997). The party seeking to enforce arbitration has the burden of showing the existence of a valid contract to arbitrate. *Johnson's, Inc. v. GERS, Inc.*, 778 So.2d 740, 743 (La. App. 2 Cir. 2001).

LOUISIANA

Except for claims by seaman, railroad employees and other transportation workers engaged in interstate or foreign commerce, arbitration clauses contained in employment contracts are enforceable with respect to Title VII claims. *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1399 (2001); *Mouton v. Metro. Life Ins. Co.*, 147 F.3d 453, 455-57 (5th Cir. 1998). However, claims that the EEOC asserts on behalf of an employee are *not* subject to the arbitration clause in the charging party's employment contract, since (1) the EEOC is not a party to the arbitration agreement and (2) the statutory text authorizes the EEOC to proceed in a judicial forum. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2001).

In *Rogers v. Brown*, 986 F. Supp. 354 (M.D. La. 1997), the court upheld the enforcement of an arbitration clause contained in the employee's application as to the employee's Title VII claims against the employer; however, the court refused to compel the plaintiff to arbitrate her state law tort claims against the employee defendant who allegedly sexually harassed her. The judge nonetheless stayed all proceedings pending the outcome of the arbitration.

In *Walker v. Air Liquide Am. Corp.*, 113 F. Supp.2d 983 (M.D. La. 2000), the court refused to enforce an arbitration clause contained in an alternate dispute resolution provision in an employment manual which the employee signed where: the policy stated it was not a contract and did not impair the employee's at-will status; and the acknowledgment form signed by the employee made no reference to the arbitration requirement.

In *Jones v. Tenet Health Network*, 1997 WL 180384 (E.D. La. Apr. 7, 1997), the court enforced an arbitration provision in an employment manual where the acknowledgment form signed by the employee specifically referenced and adopted the arbitration clause as a condition of employment.

In *Miller v. Am. Gen. Fin. Corp.*, 2002 WL 2022536 (E.D. La. Sept. 4, 2002), the court held that the acceptance of an arbitration agreement must be in writing in order to be enforceable under Louisiana law. The employment policy in this case was contained in a company bulletin, and the employer failed to offer any evidence that the plaintiff had bargained for the arbitration provisions as a condition of her continued employment. The court refused to enforce the arbitration clause under Louisiana law based on the employer's unilateral policy statements even though the plaintiff had attended seminars on the arbitration policy.

In *Ochsner Health Plan, Inc. v. Advanced Med. Sys., Inc.*, 846 So.2d 1286 (La. App. 5 Cir. 2003), the court upheld a written, signed, arbitration clause even though the name of one of the parties to the clause had changed. The court reasoned that only the party's name had changed, it was still owned by the same person, run by the same person, in the same location, with the same equipment, and with the same employees.

In *McBride v. Mursimco*, 2004 WL 1459565 (E.D. La. June 28, 2004), the court held that, under Louisiana law, the right to demand arbitration is strong. To determine whether parties should be compelled to arbitrate, a court should consider first, whether the parties agreed to arbitrate the dispute; and, second, if so, whether any statute or policy renders the claims nonarbitrable. Because the parties did agree to arbitrate, and the Fifth Circuit Court of Appeals held that Title VII claims are arbitrable in *Mouton v. Metro. Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998), the *McBride* court determined that the parties were compelled to arbitrate the dispute. *Id.* at 4. See also *Lakeland Anesthesia, Inc. v. United Healthcare of La., Inc.*, 871 So. 2d 380 (La. App. 4 Cir. 2004) (holding that once a court finds an arbitration agreement and a failure to comply with such agreement, the court must compel the parties to arbitrate).

LOUISIANA

unless it may be demonstrated that such arbitration agreement is not susceptible of an interpretation that covers the asserted dispute).

In *Anderson v. Waffle House, Inc.*, et al., 2013 U.S. Dist. LEXIS 11630 (E.D. La. January 29, 2013), the court compelled arbitration of the employee's Title VII discrimination claims expressly rejecting the plaintiff-employee's contentions that the arbitration agreement at issue was void due to the fact that she had been separated and re-hired multiple times by Waffle House since she had signed the original arbitration agreement. *Id.* * 3-6.

In *Usie v. Sunshine Homes, Inc.*, 2016-780, p. 10 (La.App. 3 Cir. 5/24/17); 222 So.3d 171, 178, writ denied, 2017-1536 (La. 11/13/17); 229 So.3d 927, and writ denied, 2017-1500 (La. 11/13/17); 230 So.3d 209, the court held that an agreement to arbitrate any claims arising out of the sale of a home, which was signed after the parties had already executed the written purchase agreement, was not a valid part of the purchase agreement. The parties had agreed to the thing and the price prior to the signing of the arbitration agreement, and the signing of this agreement was not a pre-requisite to the sale. Analyzing whether the agreement was valid independently of the purchase agreement, the court found that the purchasers were under the incorrect impression that signing the agreement was a pre-requisite to gaining possession of the home. This "understanding was error under the law," and the court therefore found the purchaser's consent to the arbitration agreement was vitiated, thus invalidating the arbitration.

V. ORAL AGREEMENTS

In Louisiana, verbal contracts are valid unless the law specifically requires a writing. *State of La. v. Louis*, 645 So.2d 1144, 1149 (La. 1994). *See also Meredith v. La. Fed'n of Teachers*, 209 F.3d 398, 403 (5th Cir. 2000); La. Civ. Code Ann. art. 1927.

Where a contract is not required to be in writing to be valid, verbal testimony is admissible to show that a subsequent parole agreement modified, altered, or abrogated a written contract. Where a verbal agreement is entered into and later a written agreement is entered into on the same subject matter, the verbal agreement becomes merged into the written agreement and cannot be proved by parole if it varies or contradicts the subsequent written agreement. *State ex rel. Tager v. Boagni*, 27 So.2d 921, 924 (La. App. 1 Cir. 1946); *see also Omnitech Int'l, Inc. v. Clorox Co.*, 11 F.3d 1316, 1328 (5th Cir. 1994).

Louisiana Civil Code article 1846 (formerly article 2277) requires the testimony of one credible witness and other corroborating circumstances to prove an oral contract having a value of more than \$500. This may be satisfied by the testimony of the employee and the submission of proof, which generally corroborates the oral contract. *Higgins v. Smith Int'l, Inc.*, 716 F.2d 278, 283 (5th Cir. 1983). Whether the evidence corroborates the employee's claim is a finding to be made by the trier of fact. *Id.*; *see also Samuels v. Firestone Tire & Rubber Co.*, 342 So.2d 661, 662 (La. 1977). "The requirement of 'one witness' may be met by the plaintiff's own testimony, and the corroborating evidence may be the fact that the plaintiff left a secure position to work for the new employer." *Meredith v. La. Fed'n of Teachers*, 209 F.3d 398, 403 (5th Cir. 2000); *see also Smith v. Dishman & Bennett Specialty Co., Inc.*, 805 So.2d 1220, 1223 (La. App. 2 Cir. 2002) (holding that "other corroborating circumstances" means general corroboration, not independent proof of every detail); *Lanier Implements, Co., Inc. v. G&H Seed, Inc.*, 756 So.2d 569, 575 (La. App. 3 Cir. 2000).

LOUISIANA

In *Crowe v. Homesplus Manufactured Hous., Inc.*, 2004 WL 1375742 (La. App. 2 Cir. June 21, 2004), the court determined that the evidence was sufficient to establish that an oral employment contract existed between the seller of a business and the buyer. Even though the agreement did not specify detail matters such as travel expenses, credit cards, and cell phone use, and there were negotiations concerning such matters, the parties agreed as to the essential elements of the employment contract (term and compensation). Further, the seller was not informed that the employment contract had to be in writing to be valid; he was never told that there would not be an employment contract, and the parties conducted themselves as though an employment relationship was in effect.

A. Promissory Estoppel

Promissory estoppel is referred to as detrimental reliance in Louisiana. Article 1967 of the Louisiana Civil Code provides a separate cause of action for detrimental reliance:

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. Reliance on a gratuitous promise made without a required formality is not reasonable.

The Louisiana Supreme Court has held that La. Civ. Code art. 1967 incorporates into the law of Louisiana a new basis for enforcement of obligations. *Morris v. Friedman*, 663 So.2d 19, 23 (La. 1995). Article 1967 means that 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. *Carter v. Huber & Heard, Inc.*, 657 So.2d 409, 411 (La. App. 3 Cir. 1995).

The doctrine of detrimental reliance is designed to prevent injustice by barring a party from taking a position contrary to his prior acts, admissions, representations, or silence. *Suire v. Lafayette City-Parish Consol. Gov.*, 04-1459 (La. 2005), 907 So.2d 37, 58-59. To establish detrimental reliance, a party must prove three elements by a preponderance of the evidence: (1) a representation by conduct or word; (2) justifiable reliance; and (3) a change in position to one's detriment because of the reliance. *Id.* at 59. The basis of detrimental reliance is "the idea that a person should not harm another person by making promises that he will not keep." *Id.*

Even so, Louisiana cases have held it to be patently unreasonable as a matter of law to have relied on the at-will employment. See *Robinson v. Healthworks Int'l, L.L.C.*, 36,802 (La. App. 2 Cir. 2003), 837 So.2d 714, 722, writ not considered, 03-0965 (La. 2003), 843 So.2d 1120 (reasons for an at-will employment contract encompassed the parties' mutual understanding that the employee would no longer work at her former business/job but would change her position and become employed for wages with the employer; thus, no detrimental reliance). In *Stevenson v. Lavalco, Inc.*, 28,020 (La. App. 2 Cir. 1996), 669 So.2d 608, 612, writ denied, 96-0828 (La. 1996), 673 So.2d 611, an at-will employee relocated his family from Connecticut to Louisiana, incurring numerous expenses, and was later terminated. Plaintiff should have understood the inherent risks in accepting employment without securing protection for himself through an employment contract with specific terms and thus any claimed reliance on representations that the employment would be permanent was misplaced. See also *Romaguera v. Prudential Ins. Co. of Am.*, 1995 WL 747464, at *2 (E.D. La. Dec. 15, 1995) (at-will employee who reluctantly gave up stable position for higher position with more responsibility and pay was patently unreasonable to assume that he had a valid contract for a permanent position); *Hughes v. Muckelroy*, 97-

LOUISIANA

0618 (La. App. 1 Cir. 1997), 700 So.2d 995, 1001-02 (an employee's resignation from his previous position and relocation to a different city was not shown to be a change in position to the employee's detriment even though the employee was arguably led to believe that he would be eligible for a specific-term employment contract following a probationary period); *Ivory v. M.L. Smith, Jr. L.L.C.*, CV 15-2022, 2015 WL 9074730, at *4 (W.D. La. Oct. 14, 2015), report and recommendation adopted, CV 15-2022, 2015 WL 9009050 (W.D. La. Dec. 15, 2015)(promises regarding the “magnitude and consistency” of future work was insufficient to support a claim of detrimental reliance when employer failed to hire employee for future work).

B. Fraud

Fraud is one of the exceptions to the parol evidence rule pursuant to Louisiana Civil Code article 1848. However, contemporaneous oral agreements or understandings between parties, which are not made part of the written contract, do not qualify as an exception to the parol evidence rule. See *Bernard v. Iberia Bank*, 832 So.2d 355, 357 (La. App. 4 Cir. 2003); *First Nat’l Bank of Jefferson Parish v. Campo*, 537 So.2d 268 (La. App. 4 Cir. 1988); see also *Crochet v. Pierre*, 646 So.2d 1222, 1225 (La. App. 5 Cir. 2005); *Pope v. Khalaileh*, 905 So.2d 1149 (La. App. 4 Cir. 2005).

C. Statute of Frauds

Louisiana does not follow the common law statute of frauds. In Louisiana, oral contracts are generally enforceable upon adequate proof of competent evidence so long as the value of the thing in question is not in excess of \$500. La. Civ. Code Art. 1846.

VI. DEFAMATION

A. General Rule

“Defamation is a tort which involves the invasion of a person's interest in his or her reputation and good name.” *Cyprien v. Bd. of Supervisors for the Univ. of La. Sys.*, 08-1067 (La. 01/21/09), 5 So.3d 862, 866 (citations omitted). “Four elements are necessary to establish a defamation cause of action: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury.” *Id.* “[I]n order to prevail on a defamation claim, a plaintiff must prove ‘that the defendant, with actual malice or other fault, published a false statement with defamatory words which caused plaintiff damages.’” *Id.* “[E]ven when a plaintiff makes a prima facie showing of the essential elements of defamation, recovery may be precluded if the defendant shows either that the statement was true, or that it was protected by a privilege, absolute or qualified.” *Id.* at 867.

By definition, a statement is defamatory if it tends to harm the reputation of another so as to lower the person in the estimation of the community, deter others from associating or dealing with the person, or otherwise expose the person to contempt or ridicule. *Costello v. Hardy*, 03-1146 (La. 2004), 864 So.2d 129, 140. In Louisiana, defamatory words are divided into two categories: those that are defamatory *per se* and those that are susceptible of a defamatory meaning. *Id.* Words which expressly or implicitly accuse another of criminal conduct, or which by their very nature tend to injure one's personal or professional reputation, without considering extrinsic facts or circumstances, are considered defamatory *per se*. *Costello*, 864 So. 2d at 140; *Cangelosi v. Schwegmann Bros. Giant Super Markets*, 390 So.2d 196, 198 (La. 1980). When a plaintiff proves publication of words that are defamatory *per se*, falsity

LOUISIANA

and malice (or fault) are presumed, but may be rebutted by the defendant. *Costello*, 864 So. 2d at 140. Injury may also be presumed in cases of *per se* defamation. *Id.* When the words at issue are not defamatory *per se*, then the plaintiff must prove malice, and that the words or statements were made with reckless disregard for whether or not they are false. *Fourcade v. City of Gretna*, 598 So.2d 415, 419 (La. App. 5 Cir. 1992); *see also Davis v. Borskey*, 660 So.2d 17 (La. 1995); *Kennedy v. Sheriff of E. Baton Rouge*, 05-1418 (La. 2006), 935 So.2d 669.

Publication refers to any non-privileged communication of defamatory words, written or oral, and it renders a defendant liable for all repudiation that is the natural and probable consequence of the author's act. *Landrum v. Bd. of Commissioners of the Orleans Levee Dist.*, 685 So.2d 382 (La. App. 4 Cir. 1996), citing *Martin v. Lincoln Gen. Hosp.*, 588 So.2d 1329 (La. App. 2 Cir. 1991), *writ denied*, 592 So.2d 1302 (La. 1992). The communication of a defamatory communication to one person constitutes a publication. *Farria v. LaBonne Terrebonne of Houma*, 476 So.2d 474, 475 (La. App. 1. Cir. 1985).

1. Libel

In *Madison v. Bolton*, 102 So.2d 433 (1958) (abrogated as stated in *Schaefer v. Lynch*, 406 So. 2d 185 (La. 1981)), the Louisiana Supreme Court listed three valid "defenses" in a libel case: (1) truth; (2) fair comment and criticism (concerning persons in public life); and (3) privilege. In *Corcoran v. New Orleans Fire Fighters Ass'n Local 632*, 379 So.2d 829 (La. App. 1980), the court held that plaintiffs stated a cause of action for libel where a union publication listed them as "freeloaders" and "slackers," resulting in damage to their reputations among their co-workers. The firefighter's petition, however, could not be defeated via an exception of no cause of action that the statements were true or that it was protected by privilege. Such averments are affirmative defenses at a trial on the merits and are not properly raised in an exception. *Id.*; *see also* La. Code Civ. P. art. 931, 2315.

2. Slander

In *Williams v. Touro Infirmary*, 578 So.2d 1006 (La. App. 4 Cir. 1991), the discharged employees stated cause of action in slander based on the employer's statement to the Department of Employment Security that they were terminated due to "mis-appropriation of property belonging to another" because such allegation imputes a crime. Although Touro argued that if plaintiffs' slander claims could be dismissed on the basis of qualified privilege, the court held that only affirmative defenses that may be so asserted are those which are disclosed by the petition itself, *e.g.*, absolute privilege. *Id.* at 1009; *see also Goldstein v. Serio*, 496 So.2d 412 (La. App. 4 Cir.1986), *writ denied*, 501 So.2d 208, 209 (La.1987); *see also Haskins v. Clary*, 346 So.2d 193 (La.1977).

B. References

La. Rev. Stat. § 23:291 provides a qualified privilege to employers providing, and potential employers seeking and relying on, accurate information about a former or current employee's job performance and reasons for separation. To demonstrate bad faith, it must be shown that the information disclosed was knowingly false and deliberately misleading. This statute applies to verbal and written communications.

Prior to the enactment of this statute, Louisiana recognized a qualified privilege in favor of employers providing information about former employers on the basis that an employer should not be

LOUISIANA

unreasonably restricted when furnishing information. *Williams v. Touro Infirmary*, 578 So.2d 1006, 1010 (La. App. 4 Cir. 1991).

In *Kadlec Med. Ctr. v. Lakeview Anesthesia Associates*, 527 F.3d 412 (5th Cir. 2008), the court addressed whether Louisiana law recognizes a claim for intentional or negligent misrepresentation in employment references. In *Kadlec*, an anesthesiologist made a mistake, giving a patient too much morphine during surgery, and the patient almost died. The anesthesiologist had been terminated by a previous employer for drug use and reporting to work in impaired condition and thus endangering patients. No one reported his drug problems to any of the appropriate boards or authorities. A medical center in Washington received his application and sent letters out to credential the applicant. Rather than completing the detailed questionnaire, the previous employer sent a letter providing dates of employment and position, but did not provide any information about his drug use or termination. Two of the doctors who had worked with him at the previous employer submitted very positive referral letters. These same doctors had fired him for drug use and endangering patients. The family of the patient who was the victim of the malpractice sued the previous employer medical center and the doctors for intentional and negligent misrepresentations and negligence in federal district court in Louisiana. The jury returned a verdict for plaintiffs on the intentional and negligent misrepresentation claims, and the court entered judgment on the verdict. The court found the defendants had a legal duty not to make affirmative misrepresentations in their referral letters. Although a party does not incur liability every time it casually makes an incorrect statement, if an employer makes a misleading statement in a referral letter about the performance of its former employee, the former employer may be liable for its statements if the facts and circumstances warrant. *Id.* at 419. The court held that the former employer's reference letter did not contain any affirmatively misleading statements, but the letters written by the doctors did. Turning to the issue of whether the former employer committed a misrepresentation by failing to disclose negative information, the court explained the Louisiana law as follows: "In Louisiana, a duty to disclose does not exist absent special circumstances, such as a fiduciary or confidential relationship between the parties, which, under the circumstances, justifies the imposition of the duty." *Id.* at 420.

Louisiana cases suggest that the defendant must have a pecuniary interest in the transaction in order to impose a duty to disclose. The court found no pecuniary interest of the defendants in the referral letters and no special relationship. The Fifth Circuit in *Kadlec* cited *Louviere v. Louviere*, 839 So.2d 57 (La. App. 5 Cir. 2002), for the proposition that no Louisiana court has imposed a duty on an employer to disclose information about a former employee to a prospective employer. Moreover, the court said it had found no case in the nation imposing an affirmative duty on an employer to disclose information about a former employee.

C. Privileges

In *Kennedy v. Sheriff of E. Baton Rouge*, 05-1418 (La. 2006), 935 So.2d 669, 681, the Louisiana Supreme Court noted that an absolute privilege exists in a limited number of situations, such as statements by judges and legislators in judicial and legislative proceedings, whereas a conditional or qualified privilege arises in a broader number of instances. In *Williams v. Touro Infirmary*, 578 So.2d 1006, 1010 (La. App. 4 Cir. 1991), the court explained the qualified privilege as a defense and protection from liability for certain statements that might otherwise be deemed defamatory because the circumstances of the communication show an underlying public policy incentive for protection. In effect, assertion of a qualified privilege amounts to rebuttal of the allegation of malice. For example, the public's interest and social necessity mandate that an employer not be unreasonably restricted when required to provide information for a state agency to determine in a quasi-judicial proceeding whether a terminated

LOUISIANA

employee should receive unemployment benefits. *Id.* The employer must be free to make a complete and unrestricted communication without fear of liability in a defamation suit even if the communication is shown to be inaccurate, subject to the requisites that the communication is in good faith, is relevant to the subject matter of the inquiry and is made to a person (or agency) with a corresponding legitimate interest in the subject matter. *Boyd v. Cmty. Ctr. Credit Corp.*, 359 So.2d 1048 (La. App. 4 Cir. 1978).

"A person may enjoy a qualified or conditional privilege in making a statement if it is made in good faith, on a subject in which he has an interest or a duty, and to a person having a corresponding interest or duty." *White v. Baker Manor Nursing Home, Inc.*, 400 So.2d 1168, 1169 (La. App. 1 Cir. 1981); *see also Simon v. Variety Wholesalers, Inc.*, 788 So.2d 544, 549 (La. App. 1 Cir. 2001). Good faith means that the employer honestly believed, and had reasonable grounds for believing, the truth of the communication. *White*, 400 So.2d at 1170; *see also Fourcade v. City of Gretna*, 598 So.2d 415 (La. App. 5 Cir. 1992). Some Louisiana appellate courts have required actual malice to be proven. *See Saluto v. Gonzales*, 646 So.2d 1225, 1227 (La. App. 5 Cir. 1994). However, one appellate court allowed a defamation cause of action based upon negligent acts. *Williamson v. Historic Hurtsville Ass'n*, 556 So.2d 103 (La. App. 4 Cir. 1990).

La. Rev. Stat. § 23:291 allows a qualified privilege to employers providing, and potential employers seeking and relying on, accurate information about a former or current employee's job performance and reasons for separation. Such communications are not actionable when made in good faith for legitimate purposes. *Butler v. Folger Coffee Co.*, 524 So.2d 206 (La. App. 4 Cir. 1988); *Alford v. Georgia-Pacific Corp.*, 331 So.2d 558 (La. App. 1 Cir. 1976), writ denied, 334 So.2d 427 (La. 1976). To demonstrate bad faith, it must be shown that the information disclosed was knowingly false and deliberately misleading. La. Rev. Stat. § 23:291 applies to both verbal and written communications.

In *Chapman v. Ebeling*, 41,710 (La. App. 2 Cir. 2006); 945 So.2d 222, plaintiff sued her former employer and his medical clinic for defamation after the former employer allegedly made unfavorable statements about plaintiff's work performance to a reference checker. The court dismissed her claims, finding the employer's statements to the prospective employer about plaintiff's professional performance were not defamatory *per se* and enjoyed qualified privilege because the statements assessed plaintiff's observed weaknesses and described in medical terms her emotional conduct which occasionally disrupted the workplace.

Statements made in the course of a judicial proceeding are also subject to a qualified privilege if the statements are material to the proceeding and are made with probable cause and without malice. *Vincent v. Miller*, 03-0759 (La. App. 3 Cir. 2004); 867 So.2d 780. In *Vincent*, the court granted summary judgment in favor of defendants for successfully rebutting the presumption of falsity. The plaintiff alleged defamation when the defendants asserted that such plaintiff was stalking them. The plaintiff argued falsity because he was never arrested on the charge. The court found that to be a meritless distinction when the plaintiff openly admitted that he was charged with stalking, even though a formal arrest had not been made. *Id.* at 783.

Statements made in the context of an unemployment hearing are subject to a qualified privilege. *Melder v. Sears, Roebuck & Co.*, 98-0939 (La. App. 4 Cir. 1999), 731 So.2d 991; *Wright v. Bennett*, 04-1944 (La. App. 1 Cir. 2005), 924 So.2d 178; *Fisher v. ASI Federal Credit Union*, 17-292 (La. App. 5 Cir. 6/29/17), 223 So.3d 779, 784; 241 So.3d 471, 476 (communications by employers to the Louisiana Workforce Commission are protected by a conditional or qualified privilege as a statement to a state agency with a legitimate interest in the subject matter (determining whether the employee should receive

LOUISIANA

unemployment benefits) and relevant to the subject matter of the agency's inquiry regarding the employee's claim for benefits).

D. Other Defenses

1. Truth

Defenses to defamation include truth or substantial truth and justification or privilege. *Maggio v. Liztech Jewelry*, 912 F. Supp. 216, 220 (E.D. La. 1996); see also *Fourcade v. City of Gretna*, 598 So.2d 415, 422 (La. App. 5 Cir. 1992) (truth and privilege).

2. No Publication

Publication refers to any non-privileged communication of defamatory words, written or oral, and renders a defendant liable "for all republication that is the natural and probable consequence of the author's act." *Landrum v. Board of Comm'r of the Orleans Levee Dist.*, 685 So.2d 382, 390 (La. App. 4 Cir. 1996) (citing *Martin v. Lincoln Gen. Hosp.*, 588 So.2d 1329, 1333 (La. App. 2 Cir. 1991)). However, "statements between employees, made within the course and scope of their employment, are not statements communicated or publicized to third persons so as to constitute a publication." *Bell v. Rogers*, 698 So.2d 749, 756 (La. App. 2 Cir. 1997) (citing *Marshall v. Circle K Corp.*, 715 F. Supp. 1341, 1343 (M.D. La. 1989). *Morice v. Hosp. Serv. Dist. #3*, 430 F.Supp.3d 182, 215 (E.D. La.2019), reconsideration denied, CV 18-7945, 2020 WL 730323 (E.D. La. Feb. 13, 2020)

In *Doe v. Grant*, 839 So.2d 408, (La. App. 4 Cir. 2003), a cardiologist suspended by the hospital brought a claim for defamation and other claims against the hospital and two physicians who had participated in peer review process. The civil district court entered judgment notwithstanding the verdict (JNOV) for defendants after a jury returned a verdict for plaintiff in the amount of six million dollars. Although Dr. Zamanian argued publication between employees who discussed his summary suspension, the communication was the direct outcome of the peer review process, and necessary to ensure not only the safety of patients at the hospital, but to ensure that the doctors and nurses on Mercy's staff were aware that Dr. Zamanian's privileges had been suspended. On appeal, the court held that while the statements made about plaintiff during peer review process were defamatory per se they were not published for the purposes of a defamation claim because they were made within the course and scope of employment, and so the claim failed.

3. Self-Publication

"Where a plaintiff relies on self-publication, he must produce evidence showing that he published the alleged defamatory statements without an awareness of the defamatory nature of the matter." *Florence v. Frontier Airlines, Inc.*, 149 Fed.Appx. 237 (N.D. Tex. 2005). In *Florence*, a terminated employee brought an action against his former employer, alleging wrongful termination and defamation. Plaintiff alleged that he was required to publish his termination letter to prospective employers that contained statements that plaintiff's failure to submit a valid W-4 "cast significant doubt on his ability to follow Frontier directives and to safely and effectively operate aircraft." *Id.* at 239-240. Because plaintiff contended that he "was aware of the purported defamatory nature of the statements at the time he provided the letters to prospective employers," his defamation claim was correctly dismissed. *Id.* at 240.

4. Invited Libel

LOUISIANA

There is no case law addressing this issue in Louisiana.

5. Opinion

“Expressions of pure opinion cannot [form] the basis for a defamation action because they are neither true nor false.” *Maggio v. Liztech Jewelry*, 912 F.Supp. 216, 220 (E.D. La. 1996) (citing *Mashburn v. Collin*, 355 So.2d 879, 885 (La. 1977)). Good faith refers to a statement made in the honest belief that it is a correct statement and there are reasonable grounds for believing it to be true. *Id.* “[T]he crucial difference between statement of fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact.” *Tingle v. Hebert*, 305 F.Supp.3d 678, 693 (M.D. La. 2018) (quoting *Bussie v. Lowenthal*, 535 So.2d 378, 381 (La. 1988)).

Article 971 of the Louisiana Code of Civil Procedure was enacted in 1999 and creates a special motion to strike lawsuits based on the exercise of free speech on a public issue unless the court by preliminary motion determines that the plaintiff has a “probability of success” on the merits. *See Stern v. Doe*, 806 So.2d 98 (La. App. 4 Cir. 2001); *Lee v. Pennington*, 830 So.2d 1037 (La. App. 4 Cir. 2002), *rev'd* on other grounds, 836 So.2d 52 (La. 2003). Although not yet determined, this provision may be a “special law” affecting civil actions in a manner prohibited by Article III, Section 12, of the 1974 Louisiana Constitution. *See Kimball v. Allstate Ins. Co.*, 712 So.2d 46 (La. 1998).

E. Job Reference and Blacklisting Statutes

La. Rev. Stat. § 23:963 states that no person shall require any of his employees to deal with any person, nor will he exclude from work, punish or blacklist any employees for their failure to deal with another or to purchase items from another place, except for uniforms. Violation of this statute will result in a fine of no less than \$50 nor more than \$100, or imprisonment for not less than 30 days or more than 90 days. The goal of this statute is to prohibit employers from coercing employees to purchase goods or services from persons or companies designated by the employer.

F. Non-Disparagement Clauses

There is no relevant law in Louisiana on this topic.

VI. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

“Although recognizing a cause of action for intentional infliction of emotional distress in a workplace setting, this state’s jurisprudence has limited the cause of action to cases which involve a pattern of deliberate, repeated harassment over a period of time.” *Nicholas v. Allstate Ins. Co.*, 765 So.2d 1017, 1026 (La. 2000). “The distress suffered by the employee must be more than a reasonable person could be expected to endure. Moreover, the employer’s conduct must be intended or calculated to cause severe emotional distress, not just some lesser degree of fright, humiliation, embarrassment or worry.” *Id.* at 1027. *Nicholas* summarizes and comments on several cases addressing whether employment-related conduct is extreme and outrageous and thus actionable. *Id.* at 1027-28; *see also Labove v. Raftery*, 802 So.2d 566 (La. 2001) (citing cases where no intentional infliction of emotional

LOUISIANA

distress was found). Claims for intentional infliction of emotional distress are frequently used as state law adjuncts to federal employment discrimination or harassment claims. *Walters v. Rubicon, Inc.*, 96-2274 (La. App. 1 Cir. 1997), 706 So.2d 503; *White v. Monsanto*, 585 So.2d 1205 (La. 1991).

To recover damages for such a claim, a plaintiff must prove (1) the conduct was extreme and outrageous, (2) the emotional stress of the plaintiff was severe, and (3) the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. *White*, 585 So.2d at 1205. The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community. *Id.* In the employment setting, workplace conduct amounting to an intentional infliction of emotional distress is usually limited to cases involving a pattern of deliberate, repeated harassment over time. *Id.* at 1210. Therefore, this exempts mere insults, indignities, threats, annoyances, petty oppressions, and other trivialities. *Id.* at 1209; *see also Bustamento v. Tucker*, 607 So.2d 532, 539-540 (La. 1992) (holding that systematic sexual harassment at the workplace gives rise to a claim for intentional infliction of emotional distress). The cumulation of individual acts and conduct can transform individual incidents of sexual harassment into an actionable tort.

In *Stevenson v. Lavalco, Inc.*, 669 So. 2d 608, 611 (La. App. 2 Cir. 1996), writ denied, 673 So. 2d 611 (La. 1996), the court held that a terminated employee has no claim for intentional infliction of emotional distress as a result of his termination.

In *Smith v. Ouachita Parish Sch. Bd.*, 702 So.2d 727 (La. App. 2 Cir. 1997), writ denied, 706 So.2d 978 (La. 1998), the court held that the wrongful demotion and transfer of a teacher did not constitute extreme and outrageous conduct even though it may have caused emotional and psychological distress.

In *Davis v. Hibernia Nat'l Bank*, 732 So.2d 61, 65 (La. App. 4 Cir. 1999), writ denied, 747 So.2d 536 (La. 1999), the court held that an employee's claims that she treated differently from other employees regarding breaks, working hours, working conditions, salaries and promotions did not give rise to a claim for intentional infliction of emotional distress.

In *Northern v. State, ex rel. Louisiana Dep't of Revenue*, 2015-0226 (La. App. 1 Cir. 11/6/15), the court held that the assignment of difficult and stressful tasks, disciplinary review, and the assigning of an employee to more stressful positions, despite the employee's reported seizure disorder, did not rise to the level of behavior necessary to support a claim of intentional infliction of emotional distress. Furthermore, the employee's termination (or threat of termination) "cannot be construed as IIED, as at-will employment has a strong presence in Louisiana law and jurisprudence."

Systematic and continuous sexual harassment of an employee may constitute a continuous tort and suspend the running of Louisiana's one-year statute of limitations for tort actions for so long as the conduct is ongoing. *Bustamento v. Tucker*, 607 So.2d 532, 542 (La. 1992); *Brown v. Vaughn*, 589 So.2d 63 (La. App. 1 Cir. 1991). Prescription begins to run on the date that the conduct abated. *Bustamento*, 607 So.2d at 542.

B. Negligent Infliction of Emotional Distress

Louisiana recognizes recovery for negligent infliction of emotional distress in cases involving the "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which

LOUISIANA

serves as a guarantee that the claim is not spurious." *Moresi v. State Through Dep't of Wildlife & Fisheries*, 567 So.2d 1081 (La.1990). There is a concern that fraudulent claims will arise if liability is imposed for merely negligent conduct that results in mental distress without accompanying physical injury. Cases cited in *Moresi* that have met these legal criteria have included the performance of an unauthorized autopsy, the accidental burning of a corpse trapped in wreckage, a funeral home unlawfully retaining a body until payment for services, the exposure of remains from a car crashing into a cemetery, and a car hitting a home. *Id.* at 1096.

The basis of liability for negligent infliction of emotional distress is La. Civ. Code Ann. art. 2315. Whether a defendant's conduct is a cause-in-fact of a plaintiff's injury is the initial inquiry in any negligence action. *Weaver v. Valley Elec. Membership Corp.*, 615 So.2d 1375, 1382 (La. App. 2 Cir. 1993).

In *Smith v. Ouachita Parish Sch. Bd.*, 702 So.2d 727 (La. App. 2 Cir. 1997), a tenured teacher who served as guidance counselor and was demoted in violation of law suffered depression as a direct result of the unlawful demotion. She sued the school board for negligent infliction of emotional distress. The court found that the board was a cause-in-fact of Ms. Smith's depression. If the board had not wrongfully removed Ms. Smith from her guidance counselor position contrary to the requirements of La. Rev. Stat. Ann. §17:444 and then placed her in various non-teaching positions, Ms. Smith would not have been humiliated, embarrassed and ashamed to such an extent that she would seek psychiatric help. La. Rev. Stat. Ann. § 17:444 imposed a duty on the board to employ Ms. Smith by a written contract and to only remove her from her promoted position in accord with that statute. *Smith*, 702 So.2d at 737.

VIII. PRIVACY RIGHTS

A. Generally

The Louisiana Constitution protects against "unreasonable" invasions of privacy as well as "unreasonable" searches and seizures by government officials. *Anderson v. Dep't of Pub. Safety & Corr.*, 07-1603 (La. App. 1 Cir. 2008); 985 So.2d 160; *Taylor v. Hixson Autoplex of Alexandria, Inc.*, 00-1096 (La. App. 3 Cir. 2001), 781 So.2d 1282, writ not considered, 01-1539 (La. 2001), 796 So.2d 670; *Razor v. New Orleans Dep't of Police*, 04-2002 (La. App. 4 Cir. 2006); 926 So.2d 1. Article 1, § 5 of the Louisiana Constitution, entitled "Right to Privacy," states:

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court. *Id.*

"Damages to an individual for injuries or loss caused by a violation of LSA Const. art. 1, § 5 are recoverable." *Varnado v. Dep't of Employment & Training*, 687 So.2d 1013 (La. App. 1 Cir. 1996). "In the area of invasion of privacy by unreasonable searches and seizures, [Louisiana] courts have interpreted the right of privacy to afford a broader and even more stringent protection of individual liberty than the Fourth Amendment [of the United States Constitution]. *Id.* (citing *State v. Perry*, 610 So.2d 746, 755-756 (La. 1992)).

LOUISIANA

“The right to privacy may be invaded in any one of four ways: (1) the appropriation of a person's name or likeness for the use or benefit of the defendant; (2) unreasonable intrusion upon the plaintiff's physical solitude or seclusion, when the activity intruded upon is private; (3) publicity which unreasonably places the plaintiff in a false light before the public; and (4) the unreasonable public disclosure of embarrassing private facts.” *Ballaron v. Equitable Shipyards, Inc.*, 521 So.2d 481, 483 (La. App. 4 Cir. 1988), writ denied, 522 So.2d 571 (La. 1988) (citing *Jaubert v. Crowley Post-Signal, Inc.*, 375 So.2d 1386 (La. 1979)); see also *Sapia v. Regency Motors of Metairie, Inc.*, 276 F.3d 747, 751-52 (5th Cir. 2002).

Violation of the right of privacy is actionable only when the defendant's conduct is unreasonable and seriously interferes with another's privacy interest. *Melder v. Sears, Roebuck & Co.*, 731 So.2d 991, 1000 (La. App. 4 Cir. 1999). Louisiana law does not allow a claim for attempted invasion of privacy. *Meche v. Wal-Mart Stores, Inc.*, 692 So.2d 544, 547 (La. App. 3 Cir. 1997), writ denied, 693 So.2d 760 (La. 1997).

B. New Hire Processing

1. Eligibility Verification and Reporting Procedures

La. R.S. § 23:995 prohibits employers from hiring any person not entitled to lawfully reside or work in the United States, but provides that such persons shall not be subject to penalties and will be entitled to a presumption of good faith upon a showing that “the citizenship or work authorization status of every employee has been verified by the United States Citizenship and Immigration Services E-Verify system, hereinafter referred to as E-Verify.”

Pursuant to La. R.S. § 38:2212.10, any private employer wishing to bid on a public contract is required to submit a sworn affidavit attesting that they participate and will continue to participate in an immigration status verification system.

2. Background Checks

There are no Louisiana laws restricting an employer's use of criminal records. However, pursuant to La. R.S. § 9:3571.1, “any consumer who is denied credit, insurance, or employment on the whole or partial basis of information provided by a credit reporting agency shall be entitled to a copy of his credit report without charge, provided that he requests such report in writing from the agency within sixty days of being denied credit by a third party. The third party shall upon request by the consumer provide the name of the credit reporting agency which provided information used in the credit denial decision.”

C. Specific Issues

1. Workplace Searches

Louisiana does not have any specific case law addressing workplace searches. However, requiring an employee to undergo a polygraph examination in the context of a company-wide investigation where the employer discovered that an employee had embezzled funds did not constitute an invasion of privacy. *Melder v. Sears, Roebuck & Co.*, 731 So.2d 991, 1000 (La. App. 4 Cir. 1999).

In *Razor v. New Orleans Dep't of Police*, 04-2002 (La. App. 4 Cir. 2006), 926 So.2d 1, a police officer was terminated after testing positive for cocaine use following a non-random, “reasonable

LOUISIANA

suspicion" drug test. The officer did not challenge the positive results of the test or his termination, but rather, challenged whether reasonable suspicion exists to warrant a non-random drug test in the first place such that his civil rights were violated. In *Razor*, the plaintiff participated in an arrest of a drug user, but the drugs found on the arrestee at the scene were not found at the station. The arrested individual indicated that the heroin fell out of his pants and that plaintiff picked it up and told him not to tell. Based on these statements, a search warrant was issued, and drug residue was found in the glove box of Razor's car. As a result of these findings, Razor was ordered to undergo a "reasonable suspicion" drug test. The court found that reasonable suspicion existed to justify Razor's non-random drug testing because it was not based solely on the admittedly questionable accusations of the arrested individual, but rather on the fact that those accusations were corroborated by the finding of cocaine residue in his car. *Id.* at 11. The standard for ordering a non-random drug test is merely "reasonable suspicion." Reasonable suspicion is a lesser standard than probable cause. *Id.* at 12; *see also State v. Washington*, 99-1111 (La. App. 4 Cir. 2001), 788 So.2d 477; *State v. Cooper*, 37-472 (La. App. 2 Cir. 2002), 830 So.2d 440; *State v. Jones*, 01-177 (La. App. 5 Cir. 2001), 800 So.2d 958. Thus, the court held that neither plaintiff's federal nor state constitutional rights were violated when he was ordered to submit to a non-random drug test. The court noted that government encouragement, endorsement, and participation in the collection and analysis of biological samples for the purpose of drug testing constitutes Fourth Amendment searches, but such searches must also meet the reasonableness requirements of the Fourth Amendment. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L.Ed.2d 639 (1989); *George v. Dep't of Fire*, 93-2421 (La. App. 4 Cir. 1994), 637 So.2d 1097, 1102.

2. Electronic Monitoring

Use of electronic surveillance equipment, hidden from view by a consenting party to a conversation, does not "invade the privacy" of the other party or parties to the conversation within the meaning of the Louisiana constitutional provision which protects a person's communications from unreasonable invasions of privacy. La. Const. art. 1, § 5.

In *State v. Reeves*, 427 So.2d 403 (La.1982), the Louisiana Supreme Court was called upon to decide whether eavesdropping by state government agents on conversations between the plaintiff and a fellow employee who had permitted investigators to conceal an electronic transmitter on his person violated Article 1, § 5 of the 1974 Louisiana Constitution. The court found that electronic surveillance must be conducted in full compliance with the warrant requirement.

A person's "communications" are specifically protected by the state constitution against unreasonable searches, seizures or "invasions of privacy." La. Const. 1974, art. 1, § 5. Consequently, antecedent justification before a magistrate is a precondition of lawful electronic interception of private communications just as it is essential to the lawful search of a house or the seizure of papers and effects. This constitutional safeguard and its warrant requirement protect each person's private communications and privacy regardless of whether his communicatee has consented to an interception or invasion. *Reeves*, 427 So.2d at 404.

In *Reeves*, the court agreed with the rationale of *United States v. White*, 401 U.S. 745 (1971), that consensual electronic surveillance involved different privacy considerations than non-consensual electronic surveillance, stating, "we believe that the "invasion of privacy" provision in Article 1, § 5 of the 1975 Louisiana Constitution does not prohibit warrantless consensual surveillance. However, we choose not to adopt the analysis of the Supreme Court in *White*. Rather, we prefer to follow our previous decisions and examine the effect of the constitutional guarantee against 'invasions of privacy' on

LOUISIANA

consensual electronic surveillance in light of the test articulated by Justice Harlan in *Katz*.” *Reeves*, 427 So.2d at 416; *see also State v. Lamartiniere*, 362 So.2d 526 (La. 1978). Justice Harlan's approach for measuring a person's expectation of privacy is:

My understanding of the rule that has emerged from prior decisions is that there is a two-fold requirement; first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' . . .” *United States v. Katz*, 389 U.S. 361 (1967).

As such, the court found that *Reeves*, a victim of consensual electronic surveillance, did not exhibit a subjective expectation of privacy and could not prevail on an invasion of privacy claim. *Reeves*, 427 So.2d at 416.

3. Social Media

The Louisiana Personal Online Account Privacy Protection Act, La. R.S. §§ 51:1951 *et seq.* prohibits employers from requesting or requiring an employee or applicant for employment to disclose any username, password or any other authentication information that allows access to the employees personal online account. The law, however, specifically does not prohibit employers from viewing, accessing, or utilizing information about an employee or applicant that can be obtained without the information specified in Paragraph (A)(1) of this Section [i.e., login information] or that is available in the public domain.

4. Taping of Employees

In 1980, Louisiana enacted an electronic surveillance statute entitled, Louisiana Electronic Surveillance Act, La. Rev. Stat. § 15:1301, *et seq.* The language used in the Electronic Surveillance Act is taken directly from the federal version in 18 U.S.C. § 2510, *et seq.* Section 1303(4) of the Louisiana Act provides in pertinent part that it shall be unlawful for any person to: “[w]illfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection.” *Id.* The first section, La. Rev. Stat. § 15:1303, prescribes specific remedies, which consist of fines and imprisonment. The second section, La. Rev. Stat. § 15:1307, prohibits the publication or use of the information contained in the communication. Lastly, La. Rev. Stat. § 15:1312 provides the civil damages cause of action and allows a plaintiff to recover actual damages, punitive damages, attorney's fees, and costs if he is able to prove that his wire or oral communication has been unlawfully intercepted, disclosed, or used in violation of the Act. While Louisiana law generally prohibits the interception of wire or oral communications, an exception is made where the interceptor is a party to the communication or where one of the parties consents to the interception (the “consent exception”). La. Rev. Stat. § 15:1303(C)(4), and (5).

In *Benoit v. Roche*, 657 So.2d 574 (La. App. 3 Cir. 1995), former employees of a grocery store brought suit against their former employer and management team asserting claims for invasion of privacy and violations of the Louisiana Electronic Surveillance Act because the store listened to employee conversations in the break room via a child’s nursery monitor. The employer had placed the electronic surveillance device in the employee break room as a means to deter employee theft and make it understood that employees were under surveillance and being watched. The defendant argued that the

LOUISIANA

monitor was used by a manager acting outside the course and scope of his employment and that they should not be vicariously liable.

The employees relied on two federal cases, *Malouche v. JH Mgmt. Co.*, 839 F.2d 1024 (4th Cir. 1988), and *Murphy v. City of Flagler Beach*, 761 F.2d 622 (11th Cir. 1985), to support the proposition that an employer cannot be found vicariously liable for an employee's unlawful surveillance activities unless the plaintiff proves that the employer also possessed "criminal willfulness" to violate the provisions of Louisiana's Electronic Surveillance Act by participating, encouraging, or procuring its employee to pursue these activities.

The Louisiana court, however, found defendant's argument unpersuasive because neither *Malouche* nor *Murphy* directly supported the proposition or addressed the distinct issue of an employer's vicarious liability pursuant to Louisiana law.

The appellate court reversed the trial court's dismissal of the surveillance issue, stating that "applying vicarious liability to an employer-employee relationship is an important public policy decision similar to the rigorous analytical method used in determining negligence pursuant to the duty-risk analysis." *Benoit*, 657 So.2d at 578; *see also Ermert v. Hartford Ins. Co.*, 559 So.2d 467 (La.1990).

5. Medical Information

An unauthorized disclosure between a medical provider and an employer gives rise to a cause of action for the intentional tort of invasion of privacy as well as for breach of contract under Louisiana's Medical Malpractice Act, La. Rev. Stat. § 13:3734. In *Leger v. Spurlock*, 589 So.2d 40, 41 (La. App. 1 Cir. 1991), the plaintiff, a police officer who was involuntarily committed to a chemical dependency unit, confided to his treating physician about the problems which were the basis for his commitment. Throughout his treatment, the patient believed that everything he communicated to his physician was protected by physician-patient confidentiality. The physician's subsequent unauthorized disclosure to the district attorney and another attorney resulted in damage to the patient's reputation and marriage; the patient's being fired from his job as a police officer; and the filing of criminal charges against the patient. The court held that the physician's disclosures went beyond the immunity provided under Louisiana's medical malpractice act and plaintiff's claim should not have been dismissed with prejudice. *Id.* at 43.

In *Charles v. Faust*, 487 So.2d 612 (La. App. 4 Cir. 1986), a discharged hotel dishwasher brought an action against several defendants for invasion of privacy, tortious interference with his employment contract, and abuse of rights after one employer sent a medical report about when plaintiff could return to work to his second employer, Sonesta Hotel, causing him to lose his job. Plaintiff injured his finger, which eventually caused its amputation. Plaintiff was placed on a medical leave of absence and provided the personnel manager at the Sonesta Hotel with a physician's note stating that he would be out of work for four to six weeks. After 10 weeks, plaintiff had not yet returned to work or provided any additional information. The manager at the Sonesta contacted plaintiff's other employer and requested any other medical information that the Hilton may have in its possession concerning plaintiff's condition. In response thereto, Hilton forwarded a copy of a medical report stated that plaintiff was no longer required to remain on leave. Plaintiff was terminated for being a no-show. In upholding the trial court's grant of summary judgment, the court found that the basis for plaintiff's termination was other than the information contained in the report. *Id.* at 613.

LOUISIANA

The exclusive method for obtaining medical, hospital, or other records relating to a person's medical treatment is pursuant to La. Rev. Stat. §§ 13:3715.1 and 40:1299.96. When a party puts his health at issue in litigation, he waives all privileges related to his health records. La. Code. Evid. Art. 510 (B)(2)(c).

Article 510 of the Louisiana Code of Evidence sets forth the physician-patient privilege applicable to communications made on and after January 1, 1993. The article also provides for exceptions to the privilege. One such exception exists when "the communication is relevant to an issue of the health condition of the patient in any proceeding in which the patient is a party and relies upon the condition as an element of his claim or defense. . ." La. Code Evid. art. 510(B)(2)(c). Under Louisiana Revised Statutes §13:3715.1, a health care provider shall disclose records of a patient who is a party to litigation after receiving an affidavit from the party issuing a subpoena for the records along with an attestation that the subpoena request for records has also been mailed by registered or certified mail to the patient whose records are sought. *Id.* La. Rev. Stat. § 40:1299.96 (A)(1) states that a health care provider must furnish a patient, upon request, a copy of any information the health care provider has transmitted to any company, or any public or private agency.

IX. WORKPLACE SAFETY

A. Negligent Hiring

According to Louisiana Civil Code article 2320, "masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." La. Civ. Code art. 2320. The Louisiana Supreme Court has held that, for an employer to be vicariously liable for the tortious acts of its employee, the "tortious conduct of the [employee must be] so closely connected in time, place, and causation to his employment duties as to be regarded as a risk of harm fairly attributable to the employer's business, as compared with conduct instituted by purely personal considerations entirely extraneous to the employer's interest." *Baumeister v. Plunkett*, 673 So.2d 994, 996 (La. 1996); *see also Lee v. Delta Air Lines*, 778 So.2d 1169, 1174 (La. App. 5 Cir. 2001); *Ventola v. Hall*, 861 So.2d 677 (La. App. 5 Cir. 2003); *Conner v. Lemelle*, 2019-843, p. 6 (La.App. 3 Cir. 5/13/20); 298 So.3d 361, 366, writ denied, 2020-00723 (La. 10/6/20); 302 So.3d 528.

B. Negligent Supervision/Retention

In *Devillier v. Fld. & Deposit Co. of Maryland*, 709 So.2d 277 (La. App. 3 Cir. 1998), former employees brought action against their former employer, its president, members of board of directors, and the employer's liability insurers claiming negligent and/or intentional infliction of emotional distress based on the president's allegedly abusive behavior toward female employees, and retaliation. The district court granted defense motions for summary judgment in part and sustained in part peremptory exceptions that plaintiff did not have a cause of action against the board for negligent supervision. The court of appeals held that the president was not considered an "employer" under the state employment discrimination statute and was thus personally immune from liability, and that any liability incurred as a result of his alleged actions was incurred in his capacity as "agent." If plaintiffs' allegations prove true, the employer would be liable for its agent's actions as well as the actions of the board under the doctrine of respondeat superior, but there was no cause of action against the board for negligent supervision. *But see Miller v. Am. Gen. Fin. Corp.*, 2002 WL 2022536 (E.D. La. Sept. 04, 2002) (holding that supervisors and co-workers can be individually liable under La. Rev. Stat. § 51:2256 following the 1997 amendments to the statute).

LOUISIANA

C. Interplay with Worker's Comp. Bar

The Louisiana Worker's Compensation Act "provides that an employee's exclusive remedy against an employer for a work-related injury is the right to worker's compensation benefits." *Jackson v. Cockerham*, 2005-0320 (La. App. 4 Cir. 05/10/06); 931 So. 2d 1138. "The 'intentional act' loophole is the only exception to the Workers Compensation Act, and courts interpret this exception narrowly." *Broussard*, 999 So.2d at 1173. Where the allegations of a plaintiff's complaint show the action to fall within the exclusive remedy provision of the LWCA, an exception of no cause of action should be sustained and the action dismissed. *Walls v. Am. Optical Corp.*, 98-0455 (La. 09/08/99); 740 So.2d 1262, 1274-1275 (reversing trial court and holding that where allegations showed claims to be barred by La. R.S. 23:1032 "exception of no cause of action... should have been sustained."); *Hodges v. Bossier Med. Ctr. Healthcare Found.*, 33461 (La. App. 2 Cir. 06/21/00); 764 So. 2d 245 (reversing trial court decision denying exception of no cause of action where allegations showed the claim fell within the exclusive remedy provision of the Louisiana Workers Compensation Act.).

D. Firearms in the Workplace

Pursuant to La. R.S. 32:292.1, "except as provided in Subsection D of this Section, a person who lawfully possesses a firearm may transport or store such firearm in a locked, privately-owned motor vehicle in any parking lot, parking garage, or other designated parking area." Limited exceptions apply when an employer provides an alternate parking lot or a gun storage area.

X. TORT LIABILITY

A. Respondeat Superior Liability:

According to Louisiana Civil Code article 2320, "masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." La. Civ. Code art. 2320. The Louisiana Supreme Court has held that, for an employer to be vicariously liable for the tortious acts of its employee, the "tortious conduct of the [employee must be] so closely connected in time, place, and causation to his employment duties as to be regarded as a risk of harm fairly attributable to the employer's business, as compared with conduct instituted by purely personal considerations entirely extraneous to the employer's interest." *Baumeister v. Plunkett*, 673 So.2d 994, 996 (La. 1996); *see also Lee v. Delta Air Lines*, 778 So.2d 1169, 1174 (La. App. 5 Cir. 2001); *Ventola v. Hall*, 861 So.2d 677 (La. App. 5 Cir. 2003); *Conner v. Lemelle*, 2019-843, p. 6 (La.App. 3 Cir. 5/13/20); 298 So.3d 361, 366, writ denied, 2020-00723 (La. 10/6/20); 302 So.3d 528.

B. Tortious Interference with Business/Contractual Relations

Generally speaking, Louisiana does not recognize a claim for tortious interference with a contract or contractual relations and "this cause of action has been viewed by Louisiana courts with disfavor." *Brown v. Romero*, 05-1016 (La. App. 3 Cir. 2006), 922 So.2d 742, 747 (citing *JCD Mktg. Co. v. Bass Hotels & Resorts, Inc.*, 01-1096 (La. App. 4 Cir. 2002), 812 So.2d 834). "Louisiana courts have limited this cause of action by imposing a malice element, which requires that the plaintiff show the defendant acted with actual malice." *JCD*, 812 So.2d at 841.

LOUISIANA

Louisiana will, however, permit limited claims for intentional interference with contractual relations. To the extent allegations constitute intentional interference with contract, this cause of action is very limited in its application and requires a showing that the actions complained of were intentional, as opposed to merely negligent. *See Spears v. Am. Legion Hosp.*, 00-865 (La. App. 3 Cir. 2001), 780 So.2d 493. The Louisiana Supreme Court recognized a narrowly defined cause of action against a corporate officer or director for unjustified actions in *9 to 5 Fashions, Inc. v. Spurney*, 538 So.2d 228 (La. 1989). Notably, however, this “cause of action has been limited by this court to its facts.” *Id.* at 496 (*quoting Healthcare Mgmt. Services, Inc. v. Vantage Healthplan, Inc.*, 32,523 (La. App. 2 Cir. 1999), 748 So.2d 580, 582. Thus, as long as the officer or director does not exceed the scope of his or her authority or knowingly commits acts that are adverse to the interests of the corporation, he or she may induce the corporation to violate a contractual relationship or make the contract’s performance more burdensome. Where officers knowingly and intentionally act against the best interest of the corporation or outside of the scope of their authority, however, they can be held liable by the party whose contract right has been destroyed. *Spurney*, 538 So.2d at 231. Louisiana courts have refused to expand this narrow application of tortious interference with contractual relations. *See Accredited Sur. & Cas. Co., Inc. v. McElveen*, 631 So.2d 563, 568-69 (La. App. 3 Cir. 1994), writ denied, 637 So.2d 483 (La. 1994), and the cases cited therein. Additionally, the Louisiana Supreme Court has expressly declined to recognize a cause of action for negligent interference with contract. *Great Sw. Fire Ins. Co. v. CNA Ins. Cos.*, 557 So.2d 966 (La. 1990).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

La. Rev. Stat. § 23:921(A)(1) defines the limited circumstances when a non-competition clause may be valid in the context of employer/employee relationships, corporation/shareholder relationships, partnership/partner relationships, and franchise/ franchisee relationships. *Kimball v. Anesthesia Specialists of Baton Rouge, Inc.*, 00-1954 (La. App. 1 Cir. 2001), 809 So.2d 405, 410, writs denied, 01-3316 (La. 2002), 811 So.2d 883, and 01-3355 (La. 2002), 811 So.2d 886.

La. Rev. Stat. § 23:921(A) nullifies and voids every contract or agreement which restrains anyone from exercising a lawful, profession, trade, or business of any kind except as provided by the other provisions of Louisiana Revised Statutes § 23:921.

In *La. Smoked Products, Inc. v. Savoie's Smoked Sausage, Inc.*, 696 So.2d 1373 (La. 1997), the Louisiana Supreme Court clarified that the statute does not apply to arms-length contracts between corporations of equal standing where the business relationship is not essentially employer-employee. This is consistent with the purpose of the statute, which is applicable to essentially employer-employee relationships. *But see Terry F. Day, Inc. v. Moore*, 815 So.2d 335, 339 (La. App. 4 Cir. 2002) (holding that even if the lease and sale contract implied non-compete terms, such was not enforceable under Louisiana Revised Statutes § 23:921(A)).

In 1999, the Louisiana Legislature amended La. Rev. Stat. § 23:921(A) by Act No. 58 and added a provision which precludes the enforcement of choice of law or forum provisions in contracts of employment or collective bargaining agreements unless the choice of forum clause and/or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee *after* the occurrence of the incident which is the subject of the civil or administrative action. An employee may invalidate a choice of law or choice of forum clause by refusing to ratify or agree to same after the occurrence of the prohibited conduct.

LOUISIANA

The federalism interests under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and their counterparts in the Louisiana Constitution, §§ 2 and 3 of Article I of the Louisiana Constitution, may affect the enforcement of such choice of law provisions where the employee is involved in interstate commerce as part of his or her job duties, as opposed to strictly intra-state commerce. Likewise, the Contracts Clause found in Article 1, § 10 of the United States Constitution, also applies and states, “[n]o state shall . . . pass any . . . law impairing the Obligation of Contracts.” The Louisiana counterpart is § 23 of Article I of the Louisiana Constitution.

The Commerce Clause in Article 1, § 8, of the United States Constitution, gives Congress the power “to regulate Commerce . . . among the several States.” Section 3:921(A) of the Louisiana Revised Statutes may also be a prohibited “special law” affecting “civil actions” or “regulating labor” under § 12(3) and (6), of the 1974 Louisiana Constitution.

The choice of law provisions derive from Louisiana’s general rules on choice of law on contracts, which generally allow contracting parties to validly designate choice of law provisions absent a violation of public policy. See La. Civ. Code art. 14, §§ 3515 and 3537-3541.

La. Rev. Stat. § 23:921(B) through (F) allows corporations, shareholders of corporations, persons employed as an agent, servant or employee, independent contractors, partners of a dissolved partnership and franchisees to be subject to contracts which prohibit competition against the former employer, partnership and franchisor. Such contracts may also prohibit the solicitation of customers in a similar business of the employer or franchisor, but not with respect to partners of a dissolved partnership.

La. Rev. Stat. § 23:921(G) provides that a computer programmer may be subject to a non-competition clause regarding confidential computer programs owned, licensed, or marketed by a former employer. Such non-competition or non-solicitation clauses are strictly limited to two years in duration from the date of termination and must include and specifically itemize the parishes or counties, municipalities, or parts thereof, in order to be valid. *Swat 24 Shreveport Bossier, Inc. v. Bond*, 808 So.2d 294 (La. 2001) (superseded by statute as stated in *Lemoine v. Baton Rouge Physical Therapy, L.L.P.*, 2013-0404 (La. App. 1 Cir. 12/27/13); 135 So. 3d 771); *Newton & Assoc., Inc. v. Boss*, 772 So.2d 793, 795-96 (La. App. 5 Cir. 2000); compare *Petroleum Helicopters, Inc. v. Untereker*, 731 So.2d 965, 967 (La. App. 3 Cir. 1999) (reforming a contract where the parishes were identifiable, although not identified in the contract) with *Kimball*, 809 So.2d at 411 (holding that the statute requires at least some specific reference to the parish or municipality).

La. Rev. Stat § 23:921(H) allows the recovery of damages for breach of any such clause and permits the employer to obtain injunctive relief without the necessity of proving irreparable harm.

Conditioning continued employment upon the signing of a non-competition agreement does not constitute duress. *Litigation Reprographics v. Scott*, 599 So.2d 922 (La. App. 4 Cir. 1992); *Moore’s Pump & Supply, Inc. v. Laneaux*, 727 So.2d 695 (La. App. 3 Cir. 1999). Non-competition agreements are strictly construed in favor of the employee. *SWAT 24*, 808 So.2d at 298; *Summit Inst. for Pulmonary Med. & Rehab., Inc. v. Prouty*, 691 So.2d 1384, 1389 (La. App. 2 Cir. 1997), writ denied, 701 So.2d 983 (La. 1997); *LaFourche Speech & Language Serv., Inc. v. Juckett*, 652 So.2d 679, 680 (La. App. 1 Cir. 1995), writ denied, 654 So.2d 351 (La. 1995); *Heard, McElroy & Vestal, LLC v. Schmidt*, 52,783, p. 4 (La. App. 2 Cir. 9/25/19); 280 So.3d 806, 810, reh’g denied (Nov. 14, 2019).

LOUISIANA

On June 29, 2001, by a 4-3 majority, the Louisiana Supreme Court resolved a split among the intermediate courts of appeal regarding the interpretation of subsections (A) and (C) of La. Rev. Stat. § 23:921, both of which concern employer-employee relationships. *Swat 24*, 808 So.2d 294. Adopting the rationale of *Summit Inst. for Pulmonary Med. & Rehab, Inc.*, 691 So.2d at 1389, the Louisiana Supreme Court held that a non-competition clause which restrict a former employee from engaging in his former occupation is null and void and cannot be enforced unless: (1) the former employee opens his own business in competition with his former employer; or, (2) the former employee accepts employment with a new employer and solicits customers, thereby actually competing with the former employer. *Swat 24*, 808 So.2d at 305-307. The statute does not allow a flat prohibition of employment with a competitor, even if the former employee's new job duties are exactly the same as those performed for the former employer. *Id.* at 308. The court noted that "it is simply not reasonable to prevent an employee from accepting employment with a pre-existing competitor when the employee's new position involves no solicitation of the former employer's customers." *Id.* "Such results would curtail employees' ability to earn a living and offend the basic premise of Louisiana's doctrine of employment at-will." *Id.*

Swat 24 implicitly overrules *Scariano Bros., Inc. v. Sullivan*, 719 So.2d 131 (La. App. 4 Cir. 1998), and *Moreno & Assoc. v. Black*, 741 So.2d 91 (La. App. 3 Cir. 1999), both of which upheld non-competition clauses where the former employee worked in a similar position or field for a new employer but did not solicit or compete with the former employer. *Swat 24*, 808 So.2d 294.

In 2003, the Louisiana Legislature enacted Act No. 428 in an apparent attempt to judicially overrule *Swat 24* by amending § 23:921 of the Louisiana Revised Statutes. The Act became effective on June 18, 2003 and states: "For the purposes of subsections B and C, a person who becomes employed by a competing business, regardless of whether or not that person is an owner or equity interest holder of that competing business, may be deemed to be carrying on or engaging in a business similar to that of the party having a contractual right to prevent that person from competing." This new article must be viewed as substantive insofar as it establishes a new rule. *Sola Communications, Inc. v. Bailey*, 861 So.2d 822, 827-28 (La. App. 3 Cir. 2003). Therefore, even though it appears to overrule *SWAT 24*, it must be applied prospectively only. *Sola Communications, Inc.*, 861 So.2d at 828; see also *Hose Specialty & Supply Mgmt. Co. v. Guccione*, 865 So.2d 183 (La. App. 5 Cir. 2003).

Some courts have required non-competition clauses to specifically define the business of the employer and the duties of the employee in order to be enforceable. *Daiquiri's III on Bourbon, Ltd. v. Wandfluh*, 608 So.2d 222, 224 (La. App. 5 Cir. 1992), writ denied, 610 So.2d 801 (La. 1993); see also *LaFourche Speech & Language Servs.*, 652 So.2d at 679, 680; *Wechem, Inc. v. Evans*, 18-743, p. 15 (La. App. 5 Cir. 5/30/19); 274 So.3d 877, 889, writ denied, 2019-01176 (La. 10/15/19); 280 So.3d 600. Other cases have held that where the agreement tracks the statutory language (i.e., that the employee refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer, etc.) that there is no need to describe the employer's business because the statute requires no other description of the business. *Henderson Implement Co. v. Langley*, 707 So.2d 482, 486 (La. App. 3 Cir. 1998); *Cellular One, Inc. v. Boyd*, 653 So.2d 30, 33 (La. App. 1 Cir. 1995), writ denied, 660 So.2d 449 (La. 1995).

In *Frederic v. KBK Fin., Inc.*, 2000 U.S. Dist. LEXIS 9051 (E.D. La. June 21, 2000), the court recognized that non-solicitation of employees provisions are enforceable even under Louisiana law. See also *John Jay Esthetic Salon, Inc. v. Woods*, 377 So.2d 1363, 1366 (La. App. 4 Cir. 1979); *Wechem, Inc. v. Evans*, 18-743, p. 14 (La. App. 5 Cir. 5/30/19); 274 So.3d 877, 889, writ denied, 2019-01176 (La.

LOUISIANA

10/15/19); 280 So.3d 600. The Fifth Circuit Court of Appeals reached a similar conclusion in *Smith, Barney, Harris, Upham & Co. v. Robinson*, 12 F.3d 515, 516 (5th Cir. 1994).

B. Blue Penciling

Louisiana courts formerly nullified in its entirety any non-competition clause where the geographical description did not define the parish(es), municipality(ies) or parts thereof where the clause applied. *Medivision, Inc. v. Germer*, 617 So.2d 69, 72 (La. App. 4 Cir. 1993), writ denied, 619 So.2d 549 (La. 1993) (defining geographic scope as within 10 miles of any of the employer's locations held invalid). In *Dixie Parking Serv., Inc. v. Hargrove*, 691 So.2d 1316, 1320 (La. App. 4 Cir. 1997), the court found a geographical listing of parishes which included areas where the employer did no business was overly broad, but the court reformed the contract under *AMCOM* and limited the effect of the clause to only those parishes where the employer did business. *Accord Aon Risk Services of La. v. Ryan*, 807 So.2d 1058, 1061 (La. App. 4 Cir. 2002). *See also Heard, McElroy & Vestal, LLC v. Schmidt*, 52,783, p. 7 (La. App. 2 Cir. 9/25/19); 280 So.3d 806, 811, reh'g denied (Nov. 14, 2019) (allowing reformation of noncompetition agreement with overly broad geographical limitations in light of severability clause).

To draft an enforceable non-competition clause under Louisiana law, the recommended method is to specify and describe the business of the employer, the position and duties of the employee, and the type of work and duties that the employee would be prohibited from performing in any subsequent job. The clause should state that it applies to instances where the former employee starts a competing business on his own or with others, or where the former employee works for a competitor of the former employer and seeks to solicit the former employer's customers or employees. Louisiana courts will strike and refuse to enforce overbroad restrictions. *Summit Inst. for Pulmonary Med. & Rehab., Inc. v. Prouty*, 691 So.2d 1384, 1389 (La. App. 2 Cir. 1997), writ denied, 701 So.2d 983 (La. 1997); *Daiquiri's III on Bourbon, Ltd. v. Wandfluh*, 608 So.2d 222, 224 (La. App. 5 Cir. 1992), writ denied, 610 So.2d 801 (La. 1993).

Practitioners should consider including a severability clause in restrictive covenants, which states:

It is the parties' intention to enter into a non-competition clause that conforms with Louisiana law, including La. Rev. Stat § 23:921; it is the parties' mutual belief that the non-competition clause conforms with Louisiana law; any terms of the non-competition clause that are determined to violate Louisiana law shall be severed, and the other terms and conditions shall remain in full force and effect; and, the contract shall be reformed by the mutual agreement of the parties, whose consent shall not be unreasonably withheld, or by a court of competent jurisdiction, in accordance with the mutual intent of the parties and their reasonable expectations in order to define the scope of the business of the employer, or describe the conduct which is the subject of the non-competition clause, or state the geographical limitations of the clause, or state the term of the effective dates during which the non-competition clause is in effect, or to provide other details or provisions, in order to comply with Louisiana law.

C. Confidentiality Agreements

In Louisiana, confidentiality agreements have been held enforceable and not subject to the prohibition (and requirements) of § 23:921 of the Louisiana Revised Statutes. *Engineered Mech. Serv., Inc. v. Langlois*, 464 So.2d 329 (La. App. 1 Cir. 1984); *Nat'l Oil Serv. of La., Inc. v. Brown*, 381 So.2d at 1273;

LOUISIANA

see also *Comment, Agreements Not to Compete*, 33 La. L. Rev. 94 (1972); Johnson, *Developments in the Law*, 1979-1980: Obligations, 44 La. L. Rev. 358 (1981).

Even in the absence of a restrictive covenant not to disclose confidential information, trade secrets will be protected where a confidential relationship exists. *Wheelabrator Corp. v. Fogle*, 317 F. Supp. 633, 637 (W.D. La. 1970), aff'd, 438 F.2d 1226 (5th Cir.1971); *Standard Brands, Inc. v. Zumpe*, 264 F.Supp. 254, 262 (E.D. La. 1967); *Comment, Agreements Not to Compete*, 33 La. L. Rev. 94 (1972). This rule is based on the principle that unfair methods of competition are against public policy and the agency principle that an employee (agent) has a duty not to use or communicate information given to him in confidence in competition with or to the injury of the employer (principal) unless the information is a matter of general knowledge. *Standard Brands, Inc.*, 264 F. Supp. at 262; *Nat'l Oil Services of La., Inc.*, 381 So.2d at 1273. Such a wrongful disclosure or use of a trade secret is considered a breach of trust or confidence.

D. Trade Secrets Statute

La. Rev. Stat § 51:1431, *et seq.*, constitutes the Louisiana Trade Secrets Act. A trade secret is defined as information that derives independent economic value from not being known and not being readily accessible or ascertainable by parties who may obtain economic value from its disclosure and is the subject of reasonable efforts to maintain its secrecy.

La. Rev. Stat. § 51:1432 allows injunctions to issue for misappropriation of trade secrets, but only so long as the secret continues to exist or until such time that it is determined that no further commercial advantage can be derived from the misappropriation. Injunctive relief may also condition future use of misappropriated information upon payment of royalties.

La. Rev. Stat. § 51:1433 provides that in addition to injunctive relief, a complainant may recover damages for actual loss caused by misappropriation. A complainant may also recover for unjust enrichment.

La. Rev. Stat. § 51:1435 provides that in order to protect trade secrets, a court may grant protective orders in relation to discovery, hold in camera hearings, seal the records of the action, and order any person involved in the litigation to not divulge trade secrets without court approval.

La. Rev. Stat. § 51:1436 provides that an action for misappropriation must be brought within three years from the time the misappropriation is discovered.

To establish a claim for misappropriation of a trade secret, the following must be proven: (1) a legally protectable trade secret, (2) an express or implied contractual agreement prohibiting the party receiving information from disclosing same, and (3) the party receiving information breached its duty by disclosure or injury to plaintiff. *Pontchartrain Med. Labs, Inc. v. Roche Biomedical Lab., Inc.*, 95 2260 (La. App. 1 Cir. 1996), 677 So.2d 1086, 1090-1091.

To recover damages under Louisiana's Trade Secret Act, the plaintiff must prove (1) the existence of a trade secret, (2) a misappropriation of the trade secret, and (3) actual loss caused by the misappropriation. *Reingold v. Swiftships, Inc.*, 126 F.3d 645, 648 (5th Cir. 1997); *Sand Beach Properties, LLC v. City of Shreveport*, 52,436, p. 11 (La. App. 2 Cir. 1/16/19); 264 So.3d 1219, 1226. The Act adopts

LOUISIANA

the concept of relative secrecy rather than absolute secrecy. *Sheets v. Yamaha Motors Corp., U.S.A.*, 849 F.2d 179, 183 (5th Cir. 1988). Comment (f) to La. Rev. Stat. § 51:1431 states as follows:

Reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on a “need to know basis”, and controlling plant access. On the other hand, public disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection. . . . Reasonable use of a trade secret including control disclosure to employees and licensees is consistent with the requirement of relative secrecy.

Id. The efforts required to maintain secrecy are those reasonable under the circumstances, and courts do not require extreme and unduly expensive procedures to be taken to protect trade secrets. *Tubular Threading, Inc. v. Scandaliato*, 443 So.2d 712, 714 (La. App. 1983). “A disclosure of a trade secret to others who have no obligation of confidentiality extinguishes the property right in the trade secret.” *Sheets*, 849 F.2d 179, 183-184 (5th Cir. 1988); *see also Tubos De Acero De Mexico v. Am. Int’l Inv.*, 292 F.3d 471, 483 (5th Cir. 2002).

E. Fiduciary Duty and Other Considerations

1. Louisiana Unfair Trade Practices Act

The Louisiana Unfair Trade Practices Act (“LUTPA”), La. Rev. Stat. § 51:1401, *et seq.*, affords a cause of action to any natural or juridical person who suffers any ascertainable loss of money or moveable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by La. Rev. Stat. § 51:1405. *Monroe Med. Clinic v. Hosp. Corp. of Am.*, 622 So.2d 760, 763 (La. App. 2 Cir. 1993).

“Private actions are permitted by any person who suffers any ascertainable loss as a result of the use by another person of an unfair practice, and if the actions are successful, the trial judge shall award reasonable attorney’s fees to the prevailing party.” La. Rev. Stat. § 51:1409(A); *Roustabouts, Inc. v. Hamer*, 447 So.2d 543, 548 (La. App. 1 Cir. 1984). What constitutes an unfair trade practice is to be determined by the courts on a case-by-case basis. *Monroe*, 522 So.2d at 1365.

The reference to competition in the LUTPA includes potential as well as actual competition. *Morris v. Rental Tools, Inc.*, 435 So.2d 528, 533 (La. App. 5 1983). Under the LUTPA, a business transaction is deemed “unfair” when it offends established policy and when it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Omnitech Int’l, Inc. v. Clorox Co.*, 11 F.3d 1316, 1332 (5th Cir. 1994); *Computer Mgmt. Assistance Co. v. Robert F. DeCastro, Inc.*, 220 F.3d 396, 404 (5th Cir. 2000); *Green v. Garcia-Victor*, 2017-0695, p. 6 (La. App. 4 Cir. 5/16/18); 248 So.3d 449, 454. A business action is “deceptive” when it amounts to fraud, deceit, or misrepresentation. *Monroe*, 622 So.2d at 763.

The LUTPA prohibits unfair methods of competition and unfair or defective deceptive acts or practices in the conduct of any trade or commerce. La. Rev. Stat. § 51:1405(A). To recover under the Act, a plaintiff must “prove some element of fraud, misrepresentation, deception or other unethical conduct.” *Omnitech*, 11 F.3d at 1332; *see also Indus. Magromer Cueros y Pielas S.A. v. La. Bayou Furs, Inc.*, 293 F.3d 912, 922 (5th Cir. 2002); *Marshall v. Citicorp Mortgage, Inc.*, 601 So.2d 669, 670 (La. App. 1992). In *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633, p. 6 (La. 4/23/10); 35 So.3d 1053, 1057,

LOUISIANA

the Louisiana Supreme Court held that a right of action under LUTPA is available “to any person, natural or juridical, who suffers an ascertainable loss as a result of another person's use of unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”

The LUTPA “does not require an intent to obtain an advantage or to cause a loss.” *Indus. Magromer*, 293 F.3d at 922. “The opposite of ‘good faith,’ generally implying or involving actual or constructive fraud, or of a design to mislead or deceive another, or a neglect or a refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one’s rights or duties but by some interested or sinister motive. The term bad faith means more than mere bad judgment or negligence, it implies the conscious doing of a wrong for dishonest or morally questionable motives.” *Bond v. Broadway*, 607 So.2d 865, 867 (La. App. 1992); *see also Industrias v. La. Bayou Furs, Inc.*, 293 F.3d at 922; *Sutton v. Adams*, 2018-0196, p. 6 (La.App. 4 Cir. 12/19/18), 2018 WL 6683207; La. Civ. Code art. 1997.

Some courts have held that Louisiana law does not allow comparative fault allocations in LUTPA claims based on article 2323 of the Louisiana Civil Code. *Industrias*, 293 F.3d at 922; *Fromenthal v. Delta Wells Surveyors*, 776 So.2d 1, 17 (La. App. 2000).

2. Fiduciary Obligations

An employee may owe fiduciary duties to his employer. *Cenla Physical Therapy v. Lavergne*, 657 So.2d 175, 177 (La. App. 3 Cir. 1995). “An employee is bound not to act in antagonism or in opposition to his employer.” *ODECO Oil & Gas Co. v. Nunez*, 532 So.2d 453, 462 (La. App. 1 Cir. 1988) (citations and quotations omitted). A person under contract to represent or act for another must be loyal and faithful to such business or purpose and cannot lawfully serve or acquire any self-benefit or avail himself of an advantage by reason of his employment. *Id.* An employee may not use any information that he may have acquired by his employment for his own self-interest and to the disadvantage of his employer. *Id.* An employee may be liable in damages to an employer for breaching such duties. *Cenla Physical Therapy v. Lavergne*, 657 So.2d at 177. The breach of these duties may also constitute unfair trade practices under the LUTPA, La. Rev. Stat. § 51:1401, *et seq.* *ODECO Oil & Gas*, 532 So.2d at 463-64; *Dufau v. Creole Eng'g., Inc.*, 465 So.2d 752, 757-58 (La. App. 5 Cir. 1985).

XII. DRUG TESTING LAWS

The Louisiana Constitution's declaration of the right to privacy contains an affirmative establishment of a right of privacy that is not duplicative of the Fourth Amendment to the United States Constitution or merely co-extensive with it – it is one of the most conspicuous instances in which citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution. *State v. Hernandez*, 410 So.2d 1381 (La.1982) (overruled in part, as stated by *State v. Franklin*, 449 So. 2d 63 (La. App. 4 Cir. 1984)). However, both the Fourth Amendment and Article I, § 5 of the Louisiana Constitution protect only reasonable expectations of privacy. *State v. Harrington*, 430 So.2d 394 (La. App. 3d Cir. 1993), *writ denied*, 435 So.2d 433 (La. 1983).

A. Public Employers

It is reasonable for a governmental employer to order an employee to submit to a drug test on the basis of individualized suspicion in certain circumstances. *George v. Dep't of Fire*, 637 So.2d 1097 (La. App. 4 Cir. 1994); *Banks v. Dep't. of Pub. Safety & Corr.*, 598 So.2d 515, 518 (La. App. 1 Cir. 1992). The

LOUISIANA

factors to consider in determining whether an employer has reasonable suspicion that a particular employee is a user of illegal drugs was set forth in *Banks* as follows: (1) the nature of the tip or information; (2) the reliability of the informant; (3) the degree of corroboration; and (4) other facts contributing to suspicion or lack thereof. *Banks*, 598 So.2d at 519 (citing *Fraternal Order of Police, Lodge No. 5 v. Tucker*, 868 F.2d 74 (3d Cir. 1989)); see also *Razor v. New Orleans Dep't of Police*, 04-2002 (La. App. 4 Cir. 2006); 926 So.2d 1.

B. Private Employers

La. Rev. Stat. § 49:1011 is entitled “Employee Drug Testing; Rights of the Employee” and states:

A. Any employee, confirmed positive, upon his written request, shall have the right of access within seven working days to records relating to his drug tests and any records relating to the results of any relevant certification, review, or suspension/revocation-of-certification proceedings.

B. An employer may, but shall not be required to, afford an employee whose drug test is certified positive by the medical review officer the opportunity to undergo rehabilitation without termination of employment.

La. Rev. Stat. § 49:1012, “Employee Drug Testing; Responsibility of the Employer,” states that all information received by an employer in connection with its drug testing program is confidential and cannot be released for any reason unless to be used in an administrative or disciplinary proceeding or civil litigation where drug use by the tested individual is relevant.”

Further, under La. Rev. Stat. § 49:1012, an individual does not have a cause of action for defamation, libel, slander or damage to reputation or privacy against an employer or testing entity whose testing policy/procedure is in accordance with this statute unless (1) the results of the test were disclosed to an unauthorized party, (2) the information released was based on a false test result or failure to comply with this chapter, and (3) all elements of the aforementioned action, as established by statute or civil law, are satisfied.

An employer’s failure to follow the statutory requirements set forth in La. Rev. Stat. §§ 49:1001-1021 will not subject it to liability for wrongful termination nor will such failure prohibit an employer from terminating an at-will employee under those circumstances. *Sanchez v. Ga. Gulf Corp.*, 860 So. 2d 277 (La. App. 1 Cir. 2003) (employee terminated for allegedly testing positive for the presence of a cocaine metabolite brought breach of statutory duties action against employer); *Short v. Gusman*, 806 Fed.Appx. 264, 270 (5th Cir.2020) (violation of Louisiana’s drug testing laws did not provide police officer with private cause of action for an alleged wrongful discharge. As an at-will employee, he could be fired “for a variety of reasons, including misconduct, failing to satisfy job expectations, and financial prudence.”).

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

A. Employers/Employees Covered

The 1997 Louisiana Legislature amended and expanded the state’s anti-discrimination and harassment laws in Act No. 1123, which became effective on August 1, 1997. See La. Rev. Stat. § 23:301-354. Unless specifically stated otherwise, all employers were required to abide by the anti-discrimination

LOUISIANA

and employment practices and policies established by the cited provisions of the Louisiana Revised Statutes, regardless of size.

In 1999, the Louisiana Legislature enacted Act No. 1366, which narrowed the definition of an employer and made other changes. Act No. 1366 became effective on August 15, 1999. Section 23:302(4) of the Louisiana Revised Statutes was added to define an employer as any natural, juridical, or governmental person or entity which employs more than 20 persons for each working date in each of 20 or more calendar weeks in the current or preceding calendar year, and employer also includes an insurer with respect to the appointment of agents. *See Seal v. Gateway Companies*, 2002 U.S. Dist. LEXIS 279 (E.D. La. Jan. 3, 2002) (interpreting and applying the statutory definition). The term employer does not include: employment of an individual by a parent, spouse or child; domestic service employment; private educational or religious institutions; or, schools, colleges or universities with religious curriculum or owned or controlled by religious bodies or entities.

The anti-discrimination and harassment laws also apply to labor organizations and employment agencies.

Additionally, because La. Rev. Stat. § 51:2256 refers to a "person" or "persons," not "employers," the limitation on liability to employers under the Louisiana and federal anti-discrimination statutes does not apply to the anti-retaliation provision of the Louisiana Code of Human Rights Act. Thus, under the Louisiana Code of Human Rights Act, retaliation claims can be made against individual persons and not just a plaintiff's employer.

B. Types of Conduct Prohibited

La. Rev. Stat. § 23:312 prohibits age discrimination against employees aged 40 to 70 years old for employers with 20 or more employees. *Labove v. Raftery*, 802 So.2d 566 (La. 2001) (interpreting and applying the statute).

La. Rev. Stat § 23:323 prohibits disability discrimination by employers with 20 or more employees (15 employees under prior law).

La. Rev. Stat. § 23:332 prohibits discrimination based on race, color, religion, sex, and national origin by employers with 20 or more employees (15 employees under prior law).

Application and rejection of a qualified applicant is essential to plaintiff's burden of proof. *McGee v. DOTD*, 813 So.2d 625, 629 (La. App. 1 Cir. 2002). Even if a person possesses the proper training or education, the fact that he or she was not selected to fill an operator position is insufficient to meet his or her prima facie case. "Promotions do not take place automatically or as a matter of right." *Lawson v. DHH*, 618 So.2d 1002, 1004 (La. App. 4 Cir. 1993) (citations omitted).

An employer cannot be liable for not providing reasonable accommodation for an employee who is simply deemed to be disabled or handicapped. Such employee must still prove that the employer took adverse or discriminatory action against her, other than lack of reasonable accommodation. *Beaumont v. Exxon Corp.*, 868 So.2d 976 (La. App. 4 Cir. 2004) (employee did not adequately prove she was "substantially limited" in a major life activity so as to qualify as disabled).

1. Sex Discrimination/Harassment

LOUISIANA

Excluding female country club members and guests from the “men’s only” dining area violated their state constitutional right to be free from arbitrary, capricious, or unreasonable discrimination based on gender. *Albright v. S. Trace Country Club of Shreveport, Inc.*, 879 So.2d 121 (La. 2004) (women should not be excluded from dining with men in a public dining facility because such gender-discrimination does not pass constitutional muster under the “Freedom from Discrimination” provision of the Louisiana Bill of Rights).

In *St. Romain v. State*, 863 So.2d 577 (La. App. 1 Cir. 2003), the court determined that a genuine issue of material fact existed as to whether the plaintiff’s supervisor created a sexually hostile working environment, which the defendant allowed to continue. The court recognized that liability under both Louisiana’s Prohibited Discrimination Act and Title VII claims may be predicated on two types of sexual harassment: “quid pro quo” or “hostile environment.” “Quid pro quo” harassment exists when an employer places unwanted terms or conditions on employment, benefits, or other employment advantages in exchange for sexual favors. A “hostile environment” is harassment that creates a hostile or offensive working environment. Significantly, though, harassing conduct need not be motivated by sexual desire in order to be actionable. Moreover, a harassment claim does not prohibit all verbal or physical harassment in the workplace; rather, it is only directed at sexual discrimination. The dispositive inquiry, therefore, is whether the members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.

To prevail in a hostile environment harassment claim, the plaintiff must assert and prove that: (1) she belonged to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the sexual harassment and failed to take proper remedial action. *Lee v. Delta Air Lines, Inc.*, 00-1034 (La. App. 5 Cir. 2001), 778 So.2d 1169, 1173; *Newton v. Gross*, 06-596 (La. App. 5 Cir. 2006), 947 So.2d 67.

In *Newton v. Gross*, 06-596 (La. App. 5 Cir. 2006); 947 So.2d 67, an employer brought action against a former employee, seeking to enforce a non-competition agreement, and the employee reconvened with various claims, including a sexual harassment claim. Although the trial court found that the plaintiff’s sexual harassment claim had merit, the court of appeal overturned that decision finding that the plaintiff failed to meet her burden of proof for sexual harassment. At trial, Gross claimed she was subjected to sexual harassment repeatedly over the course of her 14-month tenure at Newton, but she described only a few incidents. Her claim stemmed from allegations that some male employees kept obscene photographs as screensavers on their computers, that on her first day a fellow employee stood uncomfortably close to her, forcing her up against the side of her cubicle, that this same employee would brush up against her when she tried to use the fax machine, that another co-worker once brushed up against her after urinating and/or defecating on his pants, and that a surprise birthday party was held in the office at lunchtime for a colleague, which included a female stripper who stripped to the nude while she and other employees allegedly participated in overtly sexual behavior. The plaintiff did not report or complain about these alleged incidents to management, except to complain on one occasion about the colleague who brushed up against her at the fax machine after purportedly having urinated/defecated on himself. By her own admission, it was established that within 10 to 15 minutes of complaining to her boss about her co-worker’s actions, he was sent home. Additionally, the undisputed testimony is that when Bill Newton, owner of the company, discovered what was going on involving the stripper, he put a stop to the party, sent the stripper away immediately, and later sent a memo to all employees forbidding any such events in the future. Significantly, the court noted that plaintiff’s complaint about the stripper

LOUISIANA

incident was not that it was sexual harassment, but rather that she was unable to perform her job because of the noise and distraction. As such, the court concluded that Gross failed to meet her burdens of proof. She failed to show that the alleged incidents at the fax machine were reported to management and the evidence showed that the reported incident with the soiled pants and the birthday party stripper incident were immediately redressed by management as soon as they were made aware of it. *Id.* at 70-71.

In *Lee v. Constar, Inc.*, 05-633 (La. App. 5 Cir. 2006); 921 So.2d 1240, several discharged employees brought gender discrimination and disparate impact claims against their former employer after their unskilled laborer jobs were eliminated in a reduction in force. Plaintiffs argued that the company's education or experience qualification criteria for more sophisticated jobs that were not being eliminated unfairly discriminated against them. Plaintiffs also alleged negligent and/or intentional misrepresentation, detrimental reliance, intentional infliction of emotional distress, and conspiracy to discriminate in connection therewith, under La. Rev. Stat. § 51:2256(2). La. Rev. Stat. § 51:2231, *et seq.*, provides for the execution of federal anti-discrimination laws in the State of Louisiana and creates the Louisiana Commission on Human Rights. This Commission has the power to adjudicate claims of employment discrimination pursuant to §§ 51:2231(C) and 51:2257. An individual alleging employment discrimination under La. Rev. Stat. § 23:301 may file a written complaint with the Commission and have the allegations investigated and resolved by the Commission. *See King v. Phelps Dunbar, L.L.P.*, 98-1805 (La. 1999), 743 So.2d 181, 187. The court found that the plaintiffs failed to prove that the employer's implementation of a policy making vocational education or prior experience the minimum qualifying criteria for semi-skilled laborer positions was pretext for gender discrimination. Additionally, the court found that the employer met its burden of articulating legitimate, neutral reasons for establishing a policy requiring education and training criteria for job applicants.

La. Rev. Stat. § 23:352 prohibits discrimination based on a person having Sickle Cell trait for employers with 20 or more employees.

La. Rev. Stat. §§ 23:822-824 and 23:883 contain Louisiana's right to work statutes.

La. Rev. Stat. § 23:964 prohibits discrimination or retaliation against employees for testifying at labor investigations or proceedings.

La. Rev. Stat. § 23:981 prohibits requiring union or labor organization membership as a condition of employment.

Louisiana Revised Statutes § 23:966 governs discrimination based on smoking or tobacco use, or non-use, so long as the person complies with the employer's smoking and tobacco use policy.

La. Rev. Stat. §§ 46:236.3(J) and (K) bar an employer's termination of, or taking retaliatory action against, an employee based on a support order issued by the Louisiana Department of Health & Human Resources.

C. Administrative Requirements

La. Rev. Stat. §§ 51:2231 through 51:2265, establish the Louisiana Commission of Human Rights and outlines various prohibitions against discrimination and set forth procedures for filing complaints and conducting investigations regarding discriminatory practices. The statutes allow an aggrieved individual

LOUISIANA

to seek injunctive relief and seek damages and attorneys' fees for any violation of the practices and policies set forth in the statutes. La. Rev. Stat. §§ 51:2257-2265. Relief may be obtained against persons, not just employers. La. Rev. Stat. § 51:2256; *Seal v. Gateway Co., Inc.*, 2001 U.S. Dist. LEXIS 14426 (E.D. La. Sept. 4, 2001).

Notwithstanding the administrative procedures outlined for the Louisiana Commission of Human Rights, La. Rev. Stat. §§ 23:313, 23:325, 23:333 and 23:353 (repealed and replaced with La. Rev. Stat. § 303) all stated that a plaintiff who has a cause of action against an employer, employment agency, labor organization or insurer for a violation may file suit in the district court for the parish in which the violation occurred. Interpreting the *previous* statutes governing employment discrimination (La. Rev. Stat. §§ 23:1006 through 1008 (repealed)), two courts have held that an employee claiming employment discrimination was not required to file a complaint with the Louisiana Commission on Human Rights as a prerequisite to filing a civil suit. *Salard v. Lowe's Home Ctrs, Inc.*, 904 F.Supp. 569 (W.D. La. 1995); *Coutcher v. La. Lottery Corp.*, 710 So.2d 259 (La. App. 1 Cir. 1997), writ denied, 709 So.2d 758 (La. 1997).

Section 23:303(C) of the Louisiana Revised Statutes requires the plaintiff to provide the employer with a detailed written notice describing the discrimination at least thirty (30) days prior to filing any lawsuit and requires both parties to make a good faith effort to resolve the dispute prior to initiating court action. See *also* discussion under "Remedies Available" below.

D. Remedies Available

The 1997 Louisiana Legislature enacted La. Rev. Stat. §§ 23:313, 23:325, 333 and 353 to establish the rights and procedures for a plaintiff to assert claims for discrimination or harassment and to recover compensatory damages, back pay benefits, reinstatement, reasonable attorney fees and court costs.

Act No. 1366 of the 1999 Louisiana Legislature, which became effective on August 15, 1999, repealed La. Rev. Stat. §§ 23:313, 23:325, 23:333 and 23:353, and replaced those statutes with a single statute, La. Stat. Rev. § 23:303, which governs claims for discrimination or harassment based on age, disability, race, color, religion, sex, national origin, and sickle cell trait.

La. Rev. Stat. § 23:303(A) requires the claimant to file suit in the parish [county] where the alleged violation occurred and allows the recovery of compensatory damages, back pay benefits, reinstatement, reasonable attorney fees and court costs.

Section 23:303(B) of the Louisiana Revised Statutes allows a court to award reasonable damages and reasonable attorney's fees and court costs if a court finds that the plaintiff's claim is frivolous. Section 23:303(C) requires the plaintiff to provide the employer with a detailed written notice describing the discrimination at least 30 days prior to filing suit and requires both parties to make a good faith effort to resolve the dispute prior to initiating court action.

Section 23:303(D) of the Louisiana Revised Statutes codified several holdings by Louisiana courts that causes of action for discrimination or harassment prohibited by La. Rev. Stat. § 23:301-354 (age, disability, race, color, religion, sex, national origin, pregnancy, and sickle cell trait) are subject to a prescriptive period of one year. Prior decisions held that suit must be filed within one year of the date of discharge, or the last date on which the plaintiff was discriminated against. *Davis v. Hibernia Nat'l Bank*, 732 So.2d 61, 63-65 (La. App. 4 Cir. 1999), writ denied, 747 So.2d 536 (La. 1999); *King, supra*; *Winbush v. Normal Life of La., Inc.*, 599 So.2d 489, 491 (La. App. 3 Cir. 1992).

LOUISIANA

Section 23:303(D) of the Louisiana Revised Statutes *suspends* this one-year prescriptive period for up to six months during the pendency of any administrative review or investigation conducted by the federal Equal Employment Opportunity Commission or the Louisiana Commission on Human Rights. The prior, and now repealed, laws allowed the suspension to last up to 18 months for discrimination or harassment claims based on race, color, religion, sex, or national origin; there was no provision for suspension of prescription for discrimination or harassment claims based on age, disability, pregnancy or sickle cell trait. La. Rev. Stat. §§ 23:313, 23:325, 23:333(C) and 23:353, repealed as of August 15, 1999.

Louisiana courts have held that the state discrimination laws do not require the exhaustion of administrative remedies before filing suit. *Coutcher v. La. Lottery Corp.*, 710 So.2d 259 (La. App. 1 Cir. 1997), writ denied, 709 So.2d 758 (La. 1998). Thus, in some instances, the prescriptive period for pursuing state law claims which are the same as claims under 42 U.S.C. § 1981 and Title VII may be subject to a longer prescriptive period than the 90-day period included in right to sue notices issued by the EEOC and allowed under federal law. Courts have generally held that Title VII does not preempt state laws on the same subject. *See Rains v. Criterion Sys., Inc.*, 80 F.3d 339 (9th Cir. 1996). Rather, any conflicting laws, such as the Title VII damages cap, can only be asserted as defenses to the state law claims. *Id.* States may thus evidently enact laws allowing additional periods for filing essentially federal-based claims and use copycat state law claims to avoid the stricter prescriptive periods imposed under federal law.

Louisiana's reflective state law remedies for employment discrimination and harassment pose problems for the removal of cases where the well-pleaded complaint is based strictly on state law claims. Even where the charging party initially filed a notice of charge with the EEOC or mentions a federal law, removal to federal court will be precluded if the petition or complaint is founded solely on state law. *See Stephens v. Cowles Media Co.*, 995 F. Supp 974 (D. Minn. 1998); *Butts v. Guardian Indus. Corp.*, 981 F. Supp. 1062, 1064-65 (N.D. Oh. 1997); *Green v. Deposit Guar. Nat'l Bank*, 966 F. Supp. 464, 468 (S.D. Miss. 1997).

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

Louisiana has a specific statute addressing jury duty. La. Rev. Stat. § 23:965 states:

A.(1) No employer shall discharge or otherwise subject to any adverse employment action, without cause, any employee called to serve or presently serving any jury duty and no employer shall make, adopt, or enforce any rule, regulation, or policy providing for the discharge of any employee who has been called to serve, or who is presently serving on, any grand jury or on any jury at any criminal or civil trial, provided the employee notifies his or her employer of such summons within a reasonable period of time after receipt of a summons and prior to his or her appearance for jury duty.

(2) Any employer violating the provisions of this Subsection shall be required to reinstate all discharged employees at the same employment, wages, salary, benefits, and other conditions of employment enjoyed by said employees before their discharge. The employer shall additionally be fined not less than one hundred nor more than one thousand dollars for each employee discharged.

LOUISIANA

B. (1) Any person who is regularly employed in the state of Louisiana shall, upon call or subpoena to serve on a state petit or grand jury, or central jury pool, be granted a leave of absence by his employer, of up to one day, for that period of time required for such jury duty. Such leave of absence shall be granted without loss of wages, or sick, emergency, or personal leave or any other benefit.

(2) Any employer who violates the provisions of this Subsection shall be required to pay the claimant employee his full wages for one day of that period required for jury duty, without reduction in sick, emergency, or personal leave or any other benefit. The employer shall additionally be fined not less than one hundred dollars nor more than five hundred dollars for each offense.

There have been no published decisions addressing § 23:965 of the Louisiana Revised Statutes.

B. Voting

La. Rev. Stat. §§ 23:961 and 23:962 prohibit discrimination against, or efforts to direct or influence, or termination of, employees based on political activities or voting.

In *Finkelstein v. Barthelemy*, 565 So.2d 1098 (La. App. 4 Cir. 1990), a terminated assistant city attorney sued the mayor of New Orleans, the city attorney, and the city alleging his termination was politically motivated in contravention of La. Rev. Stat. § 23:961 and the Louisiana Constitution of 1974. La. Rev. Stat. § 23:961 provides in pertinent part:

no employer having regularly in his employ twenty or more employees shall make, adopt, or enforce any rule, regulation or policy forbidding or preventing any of his employees from engaging or participating in politics, or from becoming a candidate for public office. No such employer shall adopt or enforce any rule, regulation or policy which will control, direct or tend to control or direct the political activities or affiliations of his employees, nor coerce or influence, or attempt to coerce or influence any of his employees by means of threats of discharge or of loss of employment in case such employees should support or become affiliated with any particular political faction or organization, or participant in political activities of any nature or character.

Because Article 10, § 2(B)(3), and (10) of the Louisiana Constitution of 1974 provides that city attorneys, and employees and deputies of mayors and city attorneys, are unclassified service personnel, they are not subject to civil service rules and regulations. As such, § 23:961 did not apply to plaintiff. The *Finkelstein* court further held that the plaintiff's termination was lawful, reasoning that "in promoting the efficiency of the services they perform for all of the citizens, it is essential to have Assistant City Attorneys who fully support the Administration's policies. These considerations far outweigh the appointee's interest in his right of free speech." *Finkelstein*, 565 So.2d at 1101.

In *Davis v. Louisiana Computing Corp.*, 394 So.2d 678, (La. App. 1981), a former employee sued after he was terminated for refusing to withdraw his candidacy for a political office where the opposing candidate was strongly supported by the employer's main client. Even though plaintiff's candidacy would antagonize persons who could withdraw business from plaintiff's employer, the court held that this was not an exemption from the legislative purpose. Even where a plaintiff, by his candidacy, made himself a detriment to his employer and was "disloyal" to his employer, the policy of the statute is unmistakable:

LOUISIANA

the employer may not control political candidacy of his employees. Therefore, plaintiff's firing violated the statute.

C. Family/Medical Leave

La. Rev. Stat. § 23:342 prohibits discrimination based on pregnancy, childbirth, and related medical conditions for employers with 25 or more employees. Section 23:342(2)(b) requires an employer to grant a pregnant employee a reasonable period of leave up to four months because of the employee's disability based on her pregnancy, childbirth, or related medical problems; however, § 23:341(B)(1) states that no employer shall be required to grant more than six weeks of leave on account of normal pregnancy, childbirth, or related medical problems. Upon the advice of her physician, an employer may be required to transfer a pregnant employee temporarily to a less strenuous or less hazardous position where such transfer can be reasonably accommodated.

In *Suire v. LCS Corr. Services, Inc.*, 05-1332 (La. App. 3 Cir. 2006); 930 So.2d 221, a female guard at the Basile Detention Center brought claims under Louisiana Revised Statute § 23:342 when she was fired five days after telling her supervisor she was pregnant. The employee was told that she needed a work excuse from her obstetrician, which she obtained the same day it was requested, stating she could work in "a prison environment" and in the "control room" – a post she theretofore had worked. Defendant contended that the physician note was a restricted work release, and that plaintiff was never released by her obstetrician for full duty work as required by LCS work guidelines. The court found that the excuse provided by plaintiff's treating physician should have been sufficient to meet the employer's policy requirements. Further, the employee testified that she had been assigned to control room duty for periods of months at a time prior to her pregnancy and no one testified that there was any reason plaintiff could not have worked in control room for the duration of her pregnancy. Moreover, the control room position was considered full duty, and no reason was given to explain why the defendant refused to accept the work release as a full duty release. As such, the court held that the pregnant employee established that she was wrongfully terminated from her employment because of her pregnancy; no evidence was introduced to indicate that employee failed to perform her duties prior to termination or that termination occurred for any purpose other than pregnancy, and employee proved that she was pregnant, that she was qualified for the position that she lost, that she suffered an adverse employment action in being fired, and that other pregnant employees were not fired.

In *Luke v. CPlace Forest Park SNF, LLC*, 2019-1326, p. 7 (La. App. 1 Cir. 5/11/20); 304 So.3d 441, the plaintiff, a certified nursing assistant, found out she was pregnant and could not lift over thirty pounds during her pregnancy, per her doctor's instructions. She admitted that she was unable to perform her duties with the lifting restriction in place, and she requested to be moved to a "nurse dispatch" position that required no lifting, but her employer denied the request. She filed suit alleging that she was not allowed to return to work, was forced to use FMLA leave and was eventually terminated. The court held that the plain language of Louisiana Revised Statute 23:342(4) requires only that an employer transfer a pregnant employee to a less strenuous or hazardous position where the transfer can be reasonably accommodated. However, the employer is not required to create additional positions, discharge any employee, transfer an employee with more seniority, or promote an employee who is not qualified to perform a job. Although the plaintiff's shift supervisor allowed her to work a few "light duty" shifts at the outset of her pregnancy, this "does not establish there were light duty positions available during her entire pregnancy." Because the employer had no obligation to create a new position for the plaintiff, the appellate court affirmed the dismissal of her claim on summary judgment.

LOUISIANA

D. Day of Rest Statutes

Louisiana does not have a separate statute pertaining to a day of rest. Because the Louisiana employment discrimination statute La. Rev. Stat. § 23:301, *et seq.*, is substantively similar to Title VII, Louisiana courts routinely interpret the Louisiana statute using federal law. *See, e.g., Nichols v. Lewis Grocer*, 138 F.3d 563, 566 (5th Cir.1998); *Hicks v. Cent. La. Elec. Co.*, 712 So.2d 656, 658 (La. App. 1 Cir. 1998).

In *George v. Home Depot, Inc.*, 2001 U.S. Dist. LEXIS 20627 (E.D. La. 2001), *aff'd*, 51 Fed. Appx. 482 (5th Cir. 2002), the plaintiff brought a religious discrimination claim under federal and state anti-discrimination statutes after she was fired for refusing to work on Sundays. Plaintiff, a Catholic, refused to work on Sunday stating that her religion required her to rest her mind and body on Sundays. Home Depot offered to schedule plaintiff's shifts around church services so that plaintiff could go to mass on Saturdays or Sundays, but plaintiff refused to work at all on Sunday. The court, following Title VII analysis, held that an employer need not accommodate fully a plaintiff's religious belief that she cannot work on a particular day and that Home Depot's suggested shifts provided reasonable accommodation to plaintiff's religious beliefs and that allowing plaintiff every Sunday off would result in an undue hardship. *Id.* at *17 (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

E. Military Leave

La. Rev. Stat. § 29:38 requires employers to re-hire any person called to active duty in the National Guard or state military without any loss of seniority for those honorably discharged veterans who report to their place of employment within 72 hours of their release from duty. The section requires discharge for cause only for one year after re-hire. La. Rev. Stat. § 29:38.3 allows the recovery of attorney's fees and damages for proceedings filed to enforce the provisions of this section.

La. Rev. Stat. § 29:38.1 prohibits employment discrimination based on an applicant or employee's status as a member of the Louisiana National Guard or any reserve unit of the U.S. Armed Forces. Louisiana Revised Statutes § 29:38.3 allows the recovery of attorney's fees and damages for proceedings filed to enforce the provisions of this section.

XV. STATE WAGE AND HOUR LAWS

La. Rev. Stat. § 23:631 provides, in part:

(1)(a) Upon the discharge of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, on or before the next regular payday or no later than fifteen days following the date of discharge, whichever occurs first.

For the purposes of § 23:631, wages are any amounts due under the terms of employment, which are earned during a pay period. *Tran v. Petroleum Helicopters*, 771 So.2d 673 (La. App. 3 Cir. 2000), writ denied, 776 So.2d 463 (La. 2000).

LOUISIANA

As of 2001, all employees, whether they quit or are fired, must be paid all amounts due on the next regular pay day, or within 15 days, whichever occurs first. La. Rev. Stat. § 23:631(A)(1)(a) & (b). The employee can be paid at the place of employment if that is the way employees are usually paid, or payment can be sent by mail. La. Rev. Stat. § 23:631(A)(2). Mailed payments are deemed made when the postage prepaid and correctly addressed letter with the check is sent. *Id.* If there is a dispute, the employer must pay the employee the undisputed portion of the amount due as set forth above. La. Rev. Stat. § 23:631(B).

La. Rev. Stat. §§ 23:631-634 govern an employer's duties to pay accrued wages and benefits to an employee who resigns or quits and imposes substantial penalties for non-compliance.

La. Rev. Stat. § 23:632 provides:

Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation.

For the employee to recover penalty wages, the employer must be found to have acted in an arbitrary or unreasonable manner. *Robinson v. Apria Healthcare, Inc.*, 874 So.2d 418 (La. App. 2 Cir. 2004). Only "a good-faith, non-arbitrary defense to liability for unpaid wages, *i.e.*, a reasonable basis for resisting liability" permits a court to excuse the employer from the imposition of penalty wages. *Keiser v. Catholic Diocese of Shreveport, Inc.*, 880 So.2d 230 (La. App. 2 Cir. 2004) (*citing Carriere v. Pee Wee's Equipment Co.*, 364 So.2d 555 (La. 1978)). Reasonable attorney fees are to be awarded in the event that the plaintiff files a well-founded suit for unpaid wages, even if penalty wages are not due. *Moore v. Fleming Subway Restaurants, Inc.*, 680 So.2d 78 (La. App. 2 Cir. 1996).

No penalties will be awarded if the employer has a good faith, reasonable basis for resisting payment. *Labadie v. Physician Network Corp. of La., Inc.*, 805 So.2d 1278 (La. App. 5 Cir. 2002). Attorney's fees may be awarded if the employee files suit to recover the amounts due no sooner than three days after making demand. *Beard v. Summit Inst.*, 707 So.2d 1233 (La. 1998), holds that an employer's ignorance of the law is not a good faith defense to the employee's right to recover penalties and attorney's fees. *Id.* at 1233.

Wages include *accrued* vacation pay or other similar benefits and written or other policies requiring the forfeiture of such accrued rights are not enforceable. *Beard, supra*; *see also Winkle v. Advance Prods. & Sys., Inc.*, 721 So.2d 983 (La. App. 3 Cir. 1998). Generally, "[v]acation pay is considered to be wages for the purposes of LSA-R.S. 23:631." *Picard v. Vermilion Parish Sch. Bd.*, 98-1933 (La. App. 3 Cir. 1999), 742 So.2d 589, writ denied, 99-2197 (La. 1999), 749 So.2d 675; *Fontenot v. Ryder Truck Rental, Inc.*, 03-1129 (La. App. 3 Cir. 2004), 869 So.2d 330. However, "where an employer has a clearly established policy that vacation time is not considered wages for the purposes of La. Rev. Stat. § 23:631(D)(2), an employee is not entitled to reimbursement for unused, accrued vacation time." *Picard*,

LOUISIANA

742 So.2d at 591 (*citing Huddleston v. Dillard Dep't Stores, Inc.*, 94-53 (La. App. 5 Cir. 1994), 638 So.2d 383). Nothing prohibits an employer from restricting an employee's right to accrue annual leave or vacation pay. *Wyatt v. Avoyelles Parish Sch. Bd.*, 2001-3180 (La. 12/04/02); 831 So. 2d 906; see also *Calamia v. Core Labs., LP*, 17-635, p. 14 (La. App. 5 Cir. 5/30/18); 249 So.3d 1038, 1047. Thus, employers are allowed to maintain "use it or lose it" vacation policies and any unused leave that is "lost" is not accrued. *Id.* at *17-18. However, any vacation that has not yet been "lost" at the time of the employee's resignation or discharge must be paid. *Id.* Any ambiguity will be interpreted against the employer. *Fontenot*, 869 So.2d 330 (*citing Baudoin v. Vermilion Parish Sch. Bd.*, 96-1604 (La. App. 3 Cir. 1997), 692 So.2d 1316, writ denied, 97-1169 (La. 1997), 695 So.2d 1358); see also *Kately v. Global Data Sys., Inc.*, 05-1227 (La. App. 3 Cir. 2006), 926 So.2d 145.

In *Smith v. Acadiana Mortgage of La.*, 42,795 (La. App. 2 Cir. 2008), 975 So.2d 143, the court addressed whether someone had to be paid wages for hours she was at work but did not perform work. Smith was hired, but she spent the majority of her time at work on the Internet, responding to personal e-mails, and engaging in many personal telephone calls. Plaintiff contended that despite her requests for work, she was not given any work to do. When plaintiff was fired after being employed about 11 days, she was asked how many days she actually had worked since she had been employed there. Plaintiff responded that, based on what she was given to do, about a day or a day and a half. At termination, plaintiff's time records indicated 67.5 hours worked. The employer adjusted her time records based on her admission and paid her only 15.1 hours. Plaintiff made a written demand for unpaid wages, and when the employer did not respond, she sued under the Louisiana Wage Payment statutes for unpaid wages, penalties, and attorney fees. La. Rev. Stat. 23:631-632. Because the Plaintiff "was present and available to work for 67.5 hours during the relevant time period" the employer had to pay her for that time. *Id.* at 148. The employer's remedy for an employee not working is established in the employment-at-will doctrine. "It would be grossly unfair to allow an employer to unilaterally determine the amount of time an employee has actually spent 'working,' then calculate wages based on that determination." *Id.* A claim for penalty wages under 23:632 may be defeated by an equitable defense. The court held that penalty wages were due under 23:632 because reliance on an unlawful company policy is not a good faith, nonarbitrary defense under 23:632.

In *Williams v. Dolgencorp, Inc.*, 888 So.2d 260, (La. App. 3 Cir. 2004), the court explored whether a bonus constituted wages due under § 23:631. The plaintiff, fired 10 months into the year, sued her former employer alleging that she was entitled to payment of her annual bonus and attorney fees pursuant to the Wage Payment Law. The court held that employer's bonus under its incentive program, which encouraged high performance and longevity, was considered "wages" due under the terms of her employment for purposes of the statute governing payment of wages after termination of employment. La. Rev. Stat. § 23:631.

"[W]hen an employer promises a benefit to employees, and employees accept by their actions in meeting the conditions, the result is not a mere gratuity or illusory promise but a vested right in the employee to the promised benefit. . . ." *Baudoin v. Vermilion Parish Sch. Bd.*, 692 So.2d 1316, 1319 (La. App. 3 Cir. 1997) (*quoting Knecht v. Bd. of Tr. for State Coll. & Univ. & N.W. State Univ.*, 591 So.2d 690 (La.1991)).

La. Rev. Stat. §§ 23:151 through 23:258 contain Louisiana's child labor laws.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

LOUISIANA

A. Smoking in Workplace

La. Rev. Stat. § 40:1291.11 prohibits, *inter alia*, “Smoke in any public place and in any enclosed area within a place of employment” with certain exceptions. The exceptions include bars, any retail tobacco business, outdoor areas of places of employment, and designated smoking areas in casinos.

B. Health Benefit Mandates for Employers

There is no state law in Louisiana requiring employers to offer group health care. Where healthcare coverage is provided the Network Adequacy Act, La. R.S. § 22:1019.1 “establish[es] standards for the creation and maintenance of networks by health insurance issuers... to ensure the adequacy, accessibility and quality of healthcare services offered to covered persons under a health benefit plan.”

C. Immigration Laws

La. Rev. Stat. § 23:992 prohibits the hiring of illegal aliens. Some exemptions exist in La. Rev. Stat. § 23:992.1, primarily for employers involved in agriculture or animal husbandry.

D. Right to Work Laws

Louisiana’s general right to work law is found at La. Rev. Stat. §§ 23:981 *et seq.* Section 981 declares it “to be the public policy of Louisiana that all persons shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist labor organizations or to refrain from any such activities. Section 985 provides for civil penalties for violation of the right to work law, and Section 986 authorizes injunctive relief.

A separate right to work law applicable to agricultural laborers is found at La. Rev. Stat. §§ 23:881 *et seq.*

E. Lawful Off-Duty Conduct (including lawful marijuana use)

Louisiana’s off-duty conduct law applies only to tobacco use. Specifically, La. Rev. Stat. § 23:966 provides that “As long as an individual, during the course of employment, complies with applicable law and any adopted workplace policy relating smoking, it shall be unlawful for an employer” to discriminate against the employee, and provides for a civil fine of \$250 for a first offense and up to \$500 for any subsequent offense.

While Louisiana does not have any laws specifically addressing discrimination based on marijuana use, as discussed above La. Rev. Stat. § 49:1011 “Employee Drug Testing; Rights of the Employee” sets forth some restrictions on employee drug testing.

F. Gender/Transgender Expression

Louisiana law does not provide for any specific prohibitions against discrimination on the basis of gender expression or sexual orientation.

G. Other Key State Statutes

LOUISIANA

La. Rev. Stat. § 23:291 discusses requirements for communication of employee job performance.

La. Rev. Stat. § 23:731(c) prohibits an employer from terminating an employee based on a voluntary wage assignment or a single garnishment of wages. An employer may discharge an employee whose wages are subject to three or more garnishments over a two-year period.

La. Rev. Stat. §§ 23:1001 through 23:1415 contain Louisiana's Workers' Compensation Laws. La. Rev. Stat. § 23:1361 bars an employer from refusing to employ a person or terminating an employee based on any workers' compensation claim made by any such person, and allows recovery up to one year's earnings and attorney's fees for any violation by an employer. *King v. Career Training Specialists, Inc.*, 795 So.2d 1223 (La. App. 2 Cir. 2001) (holding that timing of employee's dismissal is insufficient to carry his burden of proof that dismissal was in retaliation for asserting worker's compensation claim; however, issue of material fact as to plaintiff's termination existed where defendant asserted that plaintiff was terminated because of budget cuts, but evidence showed that defendant still had need for maintenance services after plaintiff's termination and it had to pay others to do these services).

La. Rev. Stat. §§ 23:1471 through 23:1750 contain Louisiana's Employment Security Law, governing unemployment compensation. La. Rev. Stat. § 23:1691 bars discrimination or retaliation against persons who made claims for unemployment compensation benefits.