

Labor and Employment Law

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I. INTRODUCTION

This Article surveys recent developments in state statutory law and state case law affecting Georgia employers.¹ Accordingly, it covers

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1. Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and case law. *See* BNA DAILY LABOR REPORTER; *THE DEVELOPING LABOR LAW* (Patrick Harden et al. eds., ABA/BNA 3d ed. Supps. 1992-2000); BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* (BNA/ABA 3d ed. & Supps. 1996-2000). However, an attorney representing businesses in labor and employment matters must also keep current with the overlapping state and local legislation and state case law applying to employer-employee relations. Unfortunately for the practitioner in Georgia, there are limited resources for this information. *See* FULTON COUNTY DAILY REPORTER; JAMES W. WIMBERLY, JR., *GEORGIA EMPLOYMENT LAW* (Harrison 3d ed. 2000). This Article is written as an aid to such practice. Accordingly, the purpose of this Article is not to cover the latest developments under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-2000e-6 (1995 & Supp. 1999)), the Fair Labor Standards Act (29 U.S.C. §§ 201-219 (1995 & Supp. 1999)), the National Labor Relations Act (29 U.S.C. §§ 141-188 (1995 & Supp. 1999)), the Age Discrimination in Employment Act (29 U.S.C. §§ 621-634 (1995 & Supp. 1999)), or the

significant cases decided during the survey period by the Georgia Appellate Courts, while highlighting certain revisions to the Official Code of Georgia Annotated ("O.C.G.A.").² Despite the fact federal laws and regulations govern the majority of employment-related issues, practitioners must also keep abreast of state laws affecting employers.

II. RECENT AMENDMENTS TO THE O.C.G.A.

During the 2001 legislative session, the Georgia General Assembly passed two significant acts affecting Georgia employers.³ First, the legislature revised Georgia's minimum wage requirements⁴ by increasing minimum wage in Georgia from \$3.25 per hour to \$5.15 per hour.⁵ With this change, the Georgia minimum wage standard conforms to the Fair Labor Standards Act.⁶ The legislature also amended the Code to exempt certain resident-workers of nonprofit facilities from minimum wage standards, as follows:

Any individual who is employed by a nonprofit child-caring institution or long-term care facility serving children or mentally disabled adults who are enrolled in such institution and reside in residential facilities of the institution, if such employee resides in such facilities, receives without cost board and lodging from such institution, and is compensated on a cash basis at an annual rate of not less than \$10,000.00.⁷

The General Assembly also made significant changes to the Georgia Drug-Free Workplace Act.⁸ Among the revisions, the General Assembly allowed certain on-site testing to qualify for the Act's testing requirements; it reduced the number of hours required for employee and

Americans with Disabilities Act (42 U.S.C. §§ 12101-12213 (1995 & Supp. 1999)). Rather, this Article is intended only to cover legislative and judicial developments arising under Georgia state law during the survey period.

2. This is the second article specifically devoted to labor and employment issues arising under Georgia law. The Georgia Supreme Court and Court of Appeals decided several important issues from June 1, 2001 through May 31, 2002. Because these cases have important implications for practitioners but were not surveyed in the *2001 Annual Survey of Georgia Law* of the *Mercer Law Review*, we have chosen to include these important cases for the practitioner's consideration.

3. The amendments are contained in the Georgia Labor and Industrial Relations Code, O.C.G.A. §§ 34-1-1 to -14-2 (1998 & Supp. 2001).

4. O.C.G.A. § 34-4-3 (1998 & Supp. 2001).

5. 2001 Ga. Laws 201, § 1.

6. 29 U.S.C. §§ 201-219 (1995 & Supp. 1999).

7. O.C.G.A. § 34-4-3 (Supp. 2001).

8. O.C.G.A. §§ 34-9-411 to -413, -415 to -418 (1998 & Supp. 2001).

supervisor training after the first year of certification; it redefined the term “employee assistance program”; and, it changed the provisions relating to the insurance premium discount.⁹

The first, and most practical, revision is the authorization of on-site testing for job applicants, which provides employers with greater flexibility in establishing their drug-free workplace programs.¹⁰ Originally, such a drug-testing method was not allowed by the Code.¹¹

Second, the legislature changed the requirements for qualifying education programs as defined in O.C.G.A. section 34-9-417.¹² Prior to the revision, employers were required to “provide all employees with a semiannual education program on substance abuse, in general, and its effects on the workplace, specifically.”¹³ Now, semiannual training is *only* required during the initial year of certification.¹⁴ The statute provides, “During the second and any consecutive subsequent years of certification, an employer must provide all employees with an annual education program.”¹⁵ Similarly, the requirements for supervisory training, as set forth in O.C.G.A. section 34-9-418, have been changed to provide that:

During the initial year of certification . . . an employer must provide all supervisory personnel with a minimum of two hours of supervisor training, which must include but is not limited to the following information:

- (1) How to recognize signs of employee substance abuse;
- (2) How to document and corroborate signs of employee substance abuse; and
- (3) How to refer substance abusing employees to the proper treatment providers.¹⁶

Like the amendment to O.C.G.A. section 34-9-417, this change to O.C.G.A. section 34-9-418 stipulates that such training of supervisory personnel must occur during the *initial year* of certification. Whereas, “During the second and any consecutive subsequent years of certifica-

9. 2001 Ga. Laws 800, §§ 1-8.

10. O.C.G.A. § 34-9-415(b)(1) (1998 & Supp. 2001) (“Testing at the employer worksite with on-site testing kits that satisfy testing criteria in this article shall be deemed suitable and acceptable post offer testing.”).

11. O.C.G.A. § 34-9-415(b)(1) (1998).

12. *Id.* § 34-9-417(a) (1998 & Supp. 2001).

13. *Id.* § 34-9-417 (1998).

14. *Id.* § 34-9-417(a) (1998 & Supp. 2001).

15. *Id.* § 34-9-417(b).

16. *Id.* § 34-9-418(a).

tion, an employer must provide all supervisory personnel with a minimum of one hour of such supervisory training.”¹⁷

The amendments in 2001 also redefine the term “Employee Assistance Program.” Previously, “Employee Assistance Program” was defined as:

a program designed to assist in the identification and resolution of job performance problems associated with employees impaired by personal concerns. A minimum level of core services must include consultation and training; professional, confidential, appropriate, and timely problem assessment services; short-term problem resolution; referrals for appropriate diagnosis, treatment, and assistance; follow-up and monitoring; employee education; and quality assurance.¹⁸

Under the new definition, “Employee Assistance Program” has been modified to mean:

a worksite focused program designed to assist: (i) Employer work organizations in addressing employee productivity issues; and (ii) Employee clients in the identification and resolution of job performance problems associated with employees impaired by personal concerns, including, but not limited to, health, marital, family, financial, alcohol, drug, legal, emotional, stress, or other personal issues that may affect job performance.¹⁹

The definition of “core services” has also been expanded as follows:

(B) A minimum level of core services must include consultation and training and assistance to work organization leadership in policy development, organizational development, and critical incident management; professional, confidential, appropriate, and timely problem assessment services; constructive intervention and short-term problem resolution; referrals for appropriate diagnosis, treatment, and assistance; follow-up, monitoring, and case management with providers and insurers; employee education and supervisory training; and quality assurance.²⁰

(C) An optimum level of core services must include, in addition to the minimum level core services, the designation of an individual who shall be responsible to administer the employer’s Employee Assistance Program and to certify that the employer work organization’s drug-free workplace program contains all elements of the drug-free workplace

17. *Id.* § 34-9-418(b).

18. *Id.* § 34-9-411(6) (1998).

19. *Id.* § 34-9-411(6)(A) (1998 & Supp. 2001).

20. *Id.* § 34-9-411(6)(B).

program required by Code [s]ection 34-9-413 and that such program satisfies the annual certification requirement of Code [s]ection 34-9-421; provided, however, that such individual shall have training and experience with Employee Assistance Programs in accordance with rules and regulations prescribed by the State Board of Workers' Compensation.²¹

The elements of a drug-free workplace, defined by O.C.G.A. section 34-9-413, reflect the addition of the newly defined "optimum core services" by providing that "[a] drug-free workplace program may offer and include the optimum level core services."²²

The amendments also revise the notice requirements for employers who fail to have an Employee Assistance Program. Prior to the amendment, O.C.G.A. section 34-9-416 merely required employers without an Employee Assistance Program to "post in a conspicuous place a listing of providers of employee assistance in the area."²³ The Code now requires:

Such listing of available providers shall be reviewed and updated by the employer during the month of July of each year at which time the employer shall, when necessary, correct and revise information on all providers listed. Employers shall take reasonable care to identify appropriate providers and supply accurate telephone and address information on the posted listing of providers at all times.²⁴

Lastly, the General Assembly recognized the needs of self-insured employers by adding the following to provide for insurance premium discounts under this section.²⁵

A self-insured employer or an employer member of a group self-insurance fund who implements a drug-free workplace program substantially in accordance with Code [s]ection 34-9-413 and who complies with all other provisions of this article required of employers in order to qualify for insurance premium discounts shall be certified by the State Board of Workers' Compensation as having a drug-free workplace program in compliance with this article.²⁶

21. *Id.* § 34-9-411(6)(C).

22. *Id.* § 34-9-413.

23. *Id.* § 34-9-416(b) (1998).

24. *Id.* § 34-9-416(b) (Supp. 2001).

25. *Id.* § 34-9-412 (1998 & Supp. 2001).

26. *Id.* § 34-9-412.1 (1998).

III. EMPLOYMENT LAW PRINCIPLES-CASE LAW

A. *Wrongful Termination*

1. Continuing Trends in Employment-at-Will. O.C.G.A. section 34-7-1 explicitly provides for the doctrine of employment-at-will.²⁷ Although the doctrine of employment-at-will is gradually deteriorating throughout the country,²⁸ Georgia courts have continued to zealously reaffirm the general principle of employment-at-will.

For example, in *Eckhardt v. Yerkes Regional Primate Center*,²⁹ the Georgia Court of Appeals reviewed employees' allegations of wrongful termination stemming from their whistle-blowing activities.³⁰ Specifically, the employees alleged defendant terminated them in retaliation for reporting the health risks associated with defendant's practice of transporting monkeys infected with the highly contagious Herpes B virus. The trial court granted the employer's motion to dismiss.³¹ On appeal, appellants contended that "because they were whistleblowers to the hazard involved in the handling of the monkeys, their terminations violated public policy in this state and that discharging employees for such actions discourages employees from reporting unsafe procedures."³² In response, the court of appeals noted:

In Georgia, the general rule is that "an employee, employed at will and not by contract, cannot bring an action against his employer for wrongful discharge from employment or wrongful interference with the employment contract when and where he is an at[-]will employee with no definite and certain contract of employment. The employer, with or

27. *Id.* § 34-7-1 (1998 & Supp. 2001).

28. See Mark A. Fahleson, *The Public Policy Exception to Employment at Will—When Should Courts Defer to the Legislature?* 72 NEB. L. REV. 956 (1993); Cortlan H. Maddux, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197 (1997); Kimberly Anne Huffman, *Salt v. Applied Analytical, Inc.: Clarifying the Confusion in North Carolina's Employment-at-Will Doctrine*, 70 N.C. L. REV. 2087 (1992); Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197 (1990); Melanie Robin Galberry, *Employers Beware: South Carolina's Public Policy Exception to the At-Will Employment Doctrine is Likely to Keep Expanding*, 51 S.C. L. REV. 406 (2000).

29. 254 Ga. App. 38, 561 S.E.2d 164 (2002).

30. *Id.* at 38, 561 S.E.2d at 164.

31. *Id.*

32. *Id.*, 561 S.E.2d at 165.

without cause and regardless of its motives[,] may discharge the employee without liability.”³³

The court then held that, even though legislatively created public policy exceptions to the doctrine of employment-at-will exist,³⁴ the exceptions did not apply in this case.³⁵ Because there was no express statutory provision excluding whistleblowers from employment-at-will, the court of appeals affirmed the trial court.³⁶

This case is significant because it demonstrates the courts’ reluctance to create public policy exceptions to employment-at-will. Rather, the court of appeals will defer to the legislature, notwithstanding the fact that other jurisdictions create such public policy exceptions.³⁷ Indeed, the court of appeals opined: “That the courts of other jurisdictions may have done so is of no consequence. . . .”³⁸ Thus, it appears that until the Georgia General Assembly creates a whistleblower exception, the doctrine of employment-at-will will prevail.

2. Employment-at-Will and Unemployment Benefits. In *Harrison v. Thurmond*,³⁹ the court of appeals held that when an employee resigns from one employer to seek employment elsewhere and the subsequent employer terminates the employee for reasons other than the employee’s fault, then the Department of Labor may require the first employer to contribute toward the unemployment payments.⁴⁰

In that case, Veronica Harrison quit her employment with Intellisource, Inc. to begin employment with Fletcher Martin Associates. Three weeks after beginning her new position, she was involuntarily terminated through no fault of her own. Following her termination, Ms. Harrison sought unemployment benefits, including contributions from Intellisource, the employer whom she voluntarily left. The Department of Labor, following Department Rule 300-2-9-.05, determined that Ms. Harrison was not entitled to contributions from Intellisource because her

33. *Id.* (quoting *Jellico v. Effingham County*, 221 Ga. App. 252, 253, 471 S.E.2d 36, 37 (1996)).

34. *See, e.g.*, O.C.G.A. § 18-4-7 (mandating that an employer cannot discharge an employee simply because his earnings are subject to garnishment); O.C.G.A. § 34-1-3 (providing that employers cannot discharge employees who are absent from work as a result of being required to attend a judicial proceeding in response to a court order).

35. *Eckhardt*, 254 Ga. App. at 38, 561 S.E.2d at 165.

36. *Id.*, 561 S.E.2d at 164.

37. *Id.* at 39, 561 S.E.2d at 165.

38. *Id.* (quoting *Jellico*, 221 Ga. App. at 253, 471 S.E.2d at 38).

39. 252 Ga. App. 402, 556 S.E.2d 490 (2001).

40. *Id.* at 404, 556 S.E.2d at 491.

reasons for leaving the employer were “personal.”⁴¹ The court of appeals, relying on the Georgia Supreme Court decision of *Caldwell v. Authority of Charlton County*,⁴² struck down the remedial rule described below because it conflicted with the earlier judicial interpretation.⁴³

According to the court of appeals, “the law was designed to provide benefits to involuntarily terminated employees even if their work history includes a position that the employee left voluntarily.”⁴⁴ Although the rule was written as a remedial measure to specifically address the issues raised by *Caldwell*, the court of appeals determined that the Department of Labor exceeded its authority.⁴⁵ Hence, the court of appeals struck down the rule promulgated by the Department of Labor to remedy the outcome, thereby forcing the employer to pay income benefits to its former employee who voluntarily left its employ.⁴⁶

3. Wrongful Termination—Timeliness of Legal Action. In *Lewis v. City of Atlanta*,⁴⁷ the Supreme Court of Georgia stressed the importance of prompt action for employment litigation.⁴⁸ In that case, the supreme court considered whether to grant injunctive relief in a wrongful termination case involving two former City of Atlanta employees.⁴⁹ The City abolished the employees’ jobs as part of its budget cuts. Subsequently, the Atlanta City Council reinstated those particular positions, but the Mayor used his veto authority to permanently abolish those jobs. The two former employees filed suit in U.S. District Court for the Northern District of Georgia pursuant to 42 U.S.C. § 1983.⁵⁰

Fifteen months after filing their federal lawsuit, the employees sought an injunction from the Superior Court of Fulton County, alleging the City improperly terminated their positions because they reported allegations of fraud, waste, and abuse within city government. The trial

41. *Id.* (citing GA. COMP. R. & REGS. R. 300-2-9.05 (1998)). Department Rule 300-2-9.05 states in pertinent part: “An employee who voluntarily quits is to be disqualified unless he/she can show that the employer had changed the terms and conditions of work in a manner that the employee, applying the judgment of a reasonable person, would not be expected to continue that employment.”

42. 248 Ga. 887, 287 S.E.2d 15 (1982).

43. *Harrison*, 252 Ga. App. at 403, 556 S.E.2d at 491.

44. *Id.* (citing *Caldwell*, 248 Ga. at 890, 287 S.E.2d at 19).

45. *Id.*

46. *Id.* at 404, 556 S.E.2d at 491.

47. 274 Ga. 296, 553 S.E.2d 611 (2001).

48. *Id.* at 297, 553 S.E.2d at 612.

49. *Id.* at 296, 553 S.E.2d at 612.

50. *Id.*, 553 S.E.2d at 611-12.

court denied injunctive relief, finding that the pending federal lawsuits provided adequate remedies and that the relief they sought was untimely. Plaintiffs appealed directly to the Supreme Court of Georgia.⁵¹

The supreme court held that appellants failed to demonstrate that the trial court abused its discretion by denying the injunction.⁵² In so holding, the court emphasized: “[T]he trial court correctly concluded that there was no threat of immediate or irreparable harm to substantiate the grant of temporary injunctive relief due to the extended length of time the parties had not been City employees.”⁵³ The court noted that injunctions are proper only in urgent cases when no alternate remedy is available.⁵⁴ The court’s holding demonstrates that injunctive relief sought fifteen months after termination is too late for equitable relief. Practitioners should be aware that employees seeking injunctive relief for wrongful discharge must act within a reasonable time frame.

B. Breach of the Employment Contract—Employee Agreements

1. At-Will Contracts. In *Hanne v. Mississippi Management, Inc.*,⁵⁵ the Georgia Court of Appeals considered whether a letter discussing various terms of employment constituted an employment contract.⁵⁶ Mississippi Management, Inc. (“MMI”) terminated Hanne after five months of employment. Hanne sued, claiming that MMI breached a two-year employment agreement. The trial court granted MMI’s motion for summary judgment, holding the agreement contained no definite term of employment. Thus, Hanne was employed at will. Hanne appealed the trial court’s holding.⁵⁷

To support his contention that a two-year term employment contract existed, Hanne offered two clauses contained in a letter agreement. One clause referred to the calculation of bonuses, and the other concerned the payment of moving expenses.⁵⁸ The bonus calculation clause provided: “After employment here for two years . . . you will receive a \$4,000 bonus for staying with us. If you leave for any reason before that time,

51. *Id.*

52. *Id.* at 296-97, 553 S.E.2d at 612.

53. *Id.* at 297, 553 S.E.2d at 612.

54. *Id.*

55. 255 Ga. App. 143, 564 S.E.2d 557 (2002).

56. *Id.* at 143, 564 S.E.2d at 557.

57. *Id.*

58. *Id.*

whether it is your choice or not, you will not be eligible to receive this bonus.”⁵⁹ The letter also stated:

This agreement is based on your working at least two years at [MMI]. If, for example, you leave on your own accord after 6 months and your total moving expenses were \$4,000, you will owe us a prorated amount of \$3,000. Your signature below authorizes us to deduct any amounts owed to us from your paycheck should you leave of your own accord before two years.⁶⁰

Affirming the trial court, the court of appeals held, “[N]one of these references in the agreement to a period of two years establishes a two[-]year term of employment. Rather, [these references] unambiguously refer to eligibility for a bonus and responsibility for payment of certain expenses.”⁶¹ In so holding, the court emphasized, “‘An employment contract containing no definite term of employment is terminable at the will of either party, and will not support a cause of action against the employer for wrongful termination.’”⁶²

Similarly, in *Edwards v. Central Georgia HHS, Inc.*,⁶³ the court of appeals held that an incentive bonus plan, allegedly promised to a new employee during salary discussions, was unenforceable in an employment-at-will relationship.⁶⁴ Donald Edwards began working for Central Georgia HHS (“HHS”) on October 7, 1997. He accepted the job by signing an offer letter drafted by the Director of Marketing for Care-South Homecare Professionals (the trade name of HHS).⁶⁵ The letter stated, “CareSouth offers . . . an incentive bonus plan for this position that is expected to provide between 15% and 25% of your base salary as additional compensation.”⁶⁶ Edwards also sent a separate letter to HHS informing them that he accepted the position based upon the terms contained in the offer letter. Edwards acknowledged, however, that he understood “the exact specifics of the incentive plan [were] still under consideration.”⁶⁷ Edwards resigned from his position with HHS in April 1999 after failing to receive any bonus payments.⁶⁸

59. *Id.*

60. *Id.* at 144, 564 S.E.2d at 557.

61. *Id.*, 564 S.E.2d at 558.

62. *Id.* (quoting *Barton v. Thurmond Constr. Co.*, 201 Ga. App. 10, 11, 410 S.E.2d 137, 138 (1991)).

63. 253 Ga. App. 304, 558 S.E.2d 815 (2002).

64. *Id.* at 305, 558 S.E.2d at 816.

65. *Id.* at 304, 558 S.E.2d at 816.

66. *Id.*

67. *Id.*

68. *Id.*

After his resignation, Edwards brought a breach of contract claim against HHS, seeking to recover incentive bonuses and damages for fraud. The trial court granted summary judgment to HHS. Edwards appealed, claiming the trial court erred because questions of fact remained to be answered.⁶⁹

Regarding the fraud claim, Edwards asserted that HHS did not intend to honor the promise of a bonus when it made the promise, thereby committing actionable fraud.⁷⁰ The court of appeals noted that, generally, a litigant may not base a fraud claim on statements and promises as to future events.⁷¹ The court stated, “[T]he promises made by [HHS] to [Edwards] were prospective in nature and therefore fall within the ambit of this rule.”⁷² Edwards argued the bad faith exception—that fraud exists when a promise is made with a present intent not to perform—applied.⁷³ The court disagreed based on Edwards’ status as an employee-at-will.⁷⁴ The court concluded that the bad faith exception did not apply “because the promises upon which [Edwards] claims he relied were unenforceable even absent any fraud at the time of their utterance because the underlying employment contract, being terminable at will, is unenforceable.”⁷⁵

On the breach of contract claim, Edwards argued that the employment agreement set out a sufficient formula for calculating his bonus, and HHS took steps to solidify the formula, including drafting a proposed bonus plan.⁷⁶ Edwards contended that, notwithstanding that the parties’ agreement was indefinite when formed, “the subsequent words and conduct of the parties made the bonus provisions of the employment contract definite.”⁷⁷

Relying on *Arby’s, Inc. v. Cooper*,⁷⁸ the court of appeals held, “[T]o be enforceable, a promise of future compensation must be made at the beginning of the employment . . . [and it] must also be for an exact amount or based upon a formula or method for determining the exact

69. *Id.*

70. *Id.* at 305, 558 S.E.2d at 817.

71. *Id.*

72. *Id.* (quoting *Ely v. Stratoflex, Inc.*, 132 Ga. App. 569, 571, 208 S.E.2d 583, 584 (1974)).

73. *Id.*

74. *Id.*

75. *Id.* (quoting *Kirkland v. Pioneer Mach., Inc.*, 243 Ga. App. 694, 695, 534 S.E.2d 435, 436-37 (2000)).

76. *Id.*

77. *Id.* at 306, 558 S.E.2d at 818.

78. 265 Ga. 240, 241, 454 S.E.2d 488, 489 (1995) (citing *Christensen v. Roberds of Atlanta, Inc.*, 189 Ga. App. 289, 291-92, 375 S.E.2d 267 (1988)).

amount of the bonus.”⁷⁹ The court concluded that because the offer letter did not expressly indicate the terms of the bonus, or specify a formula for determining the exact amount of the bonus, it was not enforceable.⁸⁰

Although the doctrine of employment-at-will prevailed in the foregoing cases, they demonstrate the problems and the unnecessary legal expenses associated with poorly written communications between employers and employees. Consequently, a practitioner should always include an unambiguous statement asserting employment-at-will and disclaiming the formation of a contract in any document defining the employer-employee relationship.

2. Other Contracts. In *Walker v. Board of Regents of the University System of Georgia*,⁸¹ the court of appeals considered whether a breach of contract claim existed when the employer altered the terms of an employment contract that had been renewed for many years.⁸² Fort Valley State University’s College of Agriculture employed Dr. Melvin Walker for twenty-five years with renewable twelve-month fiscal contracts, providing that Walker had teaching, administrative, or research duties. Walker was also Dean of the College of Agriculture and Director of the Agricultural Research Station.⁸³

In 1994 a female professor at the University reported that Walker had sexually harassed her and others. She filed suit against the University, the Board of Regents, and Walker, claiming gender discrimination and sexual harassment.⁸⁴ Subsequently, the University settled the suit and included a provision that “Walker was ‘to have no supervisory authority over [the plaintiff] for the duration of her employment at the institution, and that he [was] to refrain from making disparaging remarks about’ her.”⁸⁵ The chancellor also asked the University president to “investigate the facts of this case thoroughly and take appropriate management actions, including those that insure that there is no further liability to the institution from actions or comments by Dr. Walker.”⁸⁶

In response to this request, the University removed Walker from his positions as Dean and as Director of the Agricultural Research Station.

79. *Edwards*, 253 Ga. App. at 306, 558 S.E.2d at 817 (quoting *Arby’s, Inc.*, 265 Ga. at 241, 454 S.E.2d at 489 (quotation omitted)).

80. *Id.* at 305-07, 558 S.E.2d at 817-18.

81. 254 Ga. App. 15, 561 S.E.2d 178 (2002).

82. *Id.* at 15, 561 S.E.2d at 179.

83. *Id.* at 15-16, 561 S.E.2d at 179.

84. *Id.* at 16, 561 S.E.2d at 179.

85. *Id.*

86. *Id.*

Furthermore, rather than the twelve-month fiscal contract that the University had offered Walker for the preceding twenty-five years, the University offered him a nine-month academic contract, which included a lower salary. After failed attempts to have the Board of Regents review the action, Walker hesitantly signed the nine-month contract, reserving any appeal rights. Walker then filed suit against the Board of Regents, contending breach of contract. The trial court granted summary judgment to the defendant. Walker appealed.⁸⁷

Walker contended that the trial court erred because a jury question existed as to whether the Board breached the policies and bylaws incorporated into his employment contract.⁸⁸ Specifically, the contract clause provided that it was subject to “the statutes and regulations of [the] institution and to the bylaws and policies of the Board of Regents.”⁸⁹ Section 803.1402(c) provided that:

When a fiscal year administrative employee returns to an academic appointment as a faculty member, the salary shall be determined on the same basis as other faculty members with the similar rank and experience within the department to which he/she returns or in other similar positions within the institution.⁹⁰

Based upon this, Walker argued that the University should have offered him a twelve-month contract because every employee in his department had a twelve-month contract.⁹¹ The court of appeals concluded that the agreement did not obligate the University to base Walker’s contract on the other employees in his department because the clear language of section 803.1402(c) gave the University the right to base Walker’s contract on employees in “other similar positions within the institution.”⁹²

Walker also claimed that the University’s “repeated course of conduct in assigning fiscal year contracts to members of the agricultural science department” created an implied contract.⁹³ However, the court of appeals held that because Walker’s responsibilities changed as a result of losing his administrative and research duties, the University’s past offers of twelve-month contracts were not founded upon “similar surrounding circumstances.”⁹⁴ Therefore, the court stated the past

87. *Id.* at 15, 561 S.E.2d at 179.

88. *Id.* at 16, 561 S.E.2d at 179.

89. *Id.* at 17, 561 S.E.2d at 179.

90. *Id.* at 16, 561 S.E.2d at 179.

91. *Id.* at 17, 561 S.E.2d at 179.

92. *Id.*

93. *Id.*, 561 S.E.2d at 180.

94. *Id.* at 18, 561 S.E.2d at 180.

offers “cannot serve as a basis for implying an entitlement to continued [twelve]-month contracts.”⁹⁵

In *ServiceMaster Co. v. Martin*,⁹⁶ the court of appeals determined whether the trial court properly permitted plaintiff to recover under both contract and tort claims.⁹⁷ Because defendant defaulted, the court deemed, as admitted, that all well-pleaded allegations contained in plaintiff’s complaint and amended complaint were valid.⁹⁸ ServiceMaster was estopped from asserting any defenses that could defeat plaintiff’s right of recovery.⁹⁹ Even though a default judgment deems as admitted the factual allegations, the pleadings are not legally conclusive.¹⁰⁰ Therefore, the default did not preclude ServiceMaster from litigating whether plaintiff failed to assert a claim.¹⁰¹

The case proceeded to trial on the issue of damages. Plaintiff’s complaint included contract and tort claims. The amended complaint included a cause of action entitled “breach of duty” wherein Martin purported to pursue the torts of fraud and tortious interference of property. The trial court took all of the well-pleaded allegations as true and permitted the jury to consider both the tort and contract claims. The jury awarded \$1 million in compensatory damages, interest, and attorney fees, and \$135 million in punitive damages. The trial court reduced the awards and entered judgment for plaintiff. ServiceMaster appealed.¹⁰²

On appeal, ServiceMaster argued that, notwithstanding the allegations in the amended complaint, the sole cause of action was breach of contract. Thus, it argued that the jury should not have awarded punitive damages.¹⁰³ The court of appeals responded:

It is well settled that mere failure to perform a contract does not constitute a tort. A plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches an independent duty imposed by law. This is true even in situations where the contract is breached in bad faith, where the

95. *Id.*

96. 252 Ga. App. 751, 556 S.E.2d 517 (2001).

97. *Id.* at 754, 556 S.E.2d at 521.

98. *Id.*

99. *Id.* at 752, 556 S.E.2d at 520.

100. *Id.* at 752-53, 556 S.E.2d at 520.

101. *Id.*

102. *Id.* at 752, 556 S.E.2d at 520.

103. *Id.*

Courts have consistently held that punitive damages are not available because there has been no tort.¹⁰⁴

The court of appeals determined that other than its contractual duties, “ServiceMaster owed and breached no independent duty to Martin.”¹⁰⁵ Because the court recognized no independent duties beyond the contract, the court determined that Martin could not recover in tort.¹⁰⁶ The court stated, “The allegations of Martin’s amended complaint cannot serve to convert a claim in contract into a discrete claim in tort. They add nothing of substance to the breach of contract claim.”¹⁰⁷ Thus, the court reversed the award of punitive damages.¹⁰⁸

C. Harassment Claims

1. Negligent Retention. Although employees typically pursue harassment claims under federal statutes,¹⁰⁹ *H. J. Russell & Co. v. Jones*¹¹⁰ illustrates that state causes of action are available. In *Jones* the court of appeals held that an employer was liable for its negligent retention of an employee who continued to harass another employee after notification to the employer.¹¹¹ H. J. Russell hired Jones to be an on-site property manager. Her direct supervisor was Dwight Brown, who worked at the company’s headquarters. Jones alleged at their first meeting that Brown pulled up his pants to reveal the outline of his genitals and grabbed Jones around the waist, checking her hand for a wedding ring. Based upon these and similar acts, Jones reported Brown to the company.¹¹²

The company reprimanded Brown and removed him as Jones’s direct supervisor. Within months, however, Brown was *promoted* to a position of authority over Jones’s immediate supervisor. Following the promotion, Brown again made an unwarranted advance towards Jones. Jones

104. *Id.* at 754, 556 S.E.2d at 521 (citing *Wynn v. Arias*, 242 Ga. App. 712, 716, 531 S.E.2d 126, 131 (2000); *Brown v. Hilton Hotels Corp.*, 133 Ga. App. 286, 288-89, 211 S.E.2d 125, 128 (1974); *S & A Indus. v. Bank Atlanta*, 247 Ga. App. 377, 381, 543 S.E.2d 743, 748 (2000); *Hub Motor Co. v. Burdakin*, 192 Ga. App. 872, 874, 386 S.E.2d 854, 855-56 (1989)).

105. *Id.*, 556 S.E.2d at 522.

106. *Id.* at 757, 556 S.E.2d at 523.

107. *Id.*

108. *Id.* at 755-57, 556 S.E.2d at 522-23.

109. *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999) (sexual harassment lawsuit brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-6 (1995 & Supp. 1999)).

110. 250 Ga. App. 28, 550 S.E.2d 450 (2001).

111. *Id.* at 31, 550 S.E.2d at 454.

112. *Id.* at 29, 550 S.E.2d at 452.

resigned from the company in 1996, telling the human resource director that Brown's conduct caused her to leave. A year later, Jones filed suit, alleging that H. J. Russell negligently retained and supervised Brown. A jury found the company liable, finding specifically that retention was willful, wanton, or malicious and directed at Jones. The jury awarded damages.¹¹³

H. J. Russell appealed, contending the law did not entitle Jones to damages because she proved no physical or pecuniary loss.¹¹⁴ The court of appeals disagreed, finding that although "[d]amages are generally not available for mental pain, suffering, or emotional distress unless accompanied by physical or pecuniary loss," they are available if they are "the result of malicious, wilful, and wanton action directed at the complainant."¹¹⁵ Because H. J. Russell knew Brown had sexually harassed Jones, it had not adequately protected Jones by allowing Brown to visit the property where Jones worked. As a result, the court found that "[t]he jury would be authorized to find that the actions taken by H. J. Russell to protect Jones from Brown were ineffective and that H. J. Russell knew they were ineffective but failed to act."¹¹⁶

H. J. Russell also contended that, even if it acted willfully and wantonly, Georgia law prohibited Jones from recovering damages unless it directed its actions at Jones.¹¹⁷ Affirming the jury's verdict, the court observed: "H. J. Russell knew that Brown was targeting Jones, and so a wanton failure by H. J. Russell in supervising Brown can fairly be seen as a wanton failure to fulfill its duty to Jones in particular."¹¹⁸

Despite the fact that H. J. Russell reprimanded and removed the employee from the direct supervision of the complainant, its actions were not enough to protect itself from suit for his continued advances. By allowing such an award to stand, even when the company took remedial action, the Georgia Court of Appeals reinforced the viability of state remedies in instances of employment discrimination.

2. Intentional Infliction of Emotional Distress. In *Miraliakbari v. Pennicooke*¹¹⁹ the Georgia Court of Appeals reviewed a post-resignation tort claim for intentional infliction of emotional distress.¹²⁰ In

113. *Id.* at 29-30, 550 S.E.2d at 452-53.

114. *Id.* at 30, 550 S.E.2d at 453.

115. *Id.* at 30-31, 550 S.E.2d at 453.

116. *Id.* at 31, 550 S.E.2d at 453.

117. *Id.* at 30, 550 S.E.2d at 453.

118. *Id.* at 31, 550 S.E.2d at 454.

119. 254 Ga. App. 156, 561 S.E.2d 483 (2002).

120. *Id.* at 156, 561 S.E.2d at 485.

that case, an employee sued because her manager threatened to fire her if she left work to care for her injured child.¹²¹

Miraliakbari, a single mother who spoke little English, worked as a cashier at a Burger King restaurant. The day before the incident underlying the lawsuit, Miraliakbari asked to leave work early to care for her son, who was sick. The following day, her son injured himself playing at school. The school called Miraliakbari to care for her child. Because it was during the lunchtime rush, Rita Pennicooke, Miraliakbari's manager, refused to allow Miraliakbari to leave. Additionally, the manager would not allow Miraliakbari to use the restaurant's phone line to make other arrangements for her child. Miraliakbari became visibly upset, shaking and crying, and after two hours, Miraliakbari left the restaurant despite threats of being fired.¹²²

Miraliakbari sued, claiming, *inter alia*, intentional infliction of emotional distress. The trial court granted summary judgment to defendant because the Georgia Workers' Compensation Act¹²³ was plaintiff's only remedy and the conduct by defendant was not sufficiently outrageous to sustain a claim of intentional infliction of emotional distress. Miraliakbari appealed.¹²⁴

First, the court of appeals observed that the Workers' Compensation Act "provides no remedy for a psychological injury unless 'it arises naturally and unavoidably . . . from some discernible physical occurrence.'"¹²⁵ Because Miraliakbari alleged only emotional injuries, the court held that the trial court erred in granting summary judgment based upon the Act's exclusivity provisions.¹²⁶

Regarding plaintiff's substantive claim, the court noted that "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."¹²⁷ While the court found Ms. Pennicooke's actions "rude" and legally wanton and reckless, "the supervisor's responsibilities to oversee the workplace and the employee's obligations

121. *Id.* at 158, 561 S.E.2d at 487.

122. *Id.* at 157-58, 561 S.E.2d at 486-87.

123. O.C.G.A. §§ 34-9-1 to 34-9-421 (1994).

124. 254 Ga. App. at 156, 561 S.E.2d at 485.

125. *Id.*, 561 S.E.2d at 486 (quoting *Southwire Co. v. George*, 226 Ga. 739, 741, 470 S.E.2d 865, 866 (1996)).

126. *Id.* at 157, 561 S.E.2d at 486.

127. *Id.* (quoting *Northside Hosp. v. Rustanen*, 246 Ga. App. 433, 435, 541 S.E.2d 66, 69 (2000)).

to perform her duties do not make such conduct so extreme as to go beyond all reasonable bounds of decency.”¹²⁸

D. Employment Policies—Drug-Free Policies

Employers often struggle with the issue of whether written employment policies are more harmful than beneficial. While such policies present guidelines for employee expectations, some employers fear that written employee policies may unintentionally provide employees with causes of action. In *Georgia-Pacific Corp. v. Ivey*,¹²⁹ the court of appeals considered whether an employee policy failing to conform with the Drug-Free Workplace Act¹³⁰ gives rise to a cause of action.¹³¹

Georgia-Pacific had a drug-free policy that did not conform to Georgia’s Drug-Free Workplace Act. Georgia-Pacific included the drug-free policy in the company’s employee handbook. Although the handbook did not specifically mention random drug testing, Georgia-Pacific had informed its employees it would randomly drug test employees sometime in 1998. It gave a drug test to all employees in July 1998.¹³²

Johnny Ivey was discharged from employment with defendant corporation because he tested positive for the presence of marijuana in his system. After his termination, Ivey argued that his discharge was unjust because Georgia-Pacific failed to provide adequate notice of its drug testing policy. The Georgia Department of Labor denied plaintiff’s request for unemployment compensation, and Ivey petitioned for review from the Warren County Superior Court.¹³³ The superior court overturned the Department of Labor’s decision on the basis that “Georgia-Pacific could not justify discharging Ivey based on a failed drug test because it had not complied with certain drug-free workplace program requirements.”¹³⁴

Georgia-Pacific appealed, arguing that Ivey’s failed drug test justified his termination notwithstanding the state’s drug-free workplace certification.¹³⁵ The court of appeals reversed the superior court, holding that an “employer can justify a discharge based on a failed drug test, even if the employer has not implemented a certified drug-free

128. *Id.* at 159-60, 561 S.E.2d at 487-88.

129. 250 Ga. App. 181, 549 S.E.2d 471 (2001).

130. O.C.G.A. §§ 34-9-411 to -418.

131. 250 Ga. App. at 182, 549 S.E.2d at 472.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 182-83, 549 S.E.2d at 473.

workplace program.”¹³⁶ However, an employer whose drug policy fails to conform to the Drug-Free Workplace Act must establish: (1) that the employer had a drug-free policy; (2) that the discharged employee had been informed of this policy; and (3) that the discharged employee violated this policy.¹³⁷

Although an employer’s failure to conform to the requirements of the Drug-Free Workplace Act eliminates the statutory presumption of justification for drug-related discharges,¹³⁸ an employer may still dismiss an employee for failure to act in accordance with the company’s drug policy, provided the employer gives proper justification for discharge.¹³⁹

E. Wage and Hour Issues

During the survey period, the Georgia Court of Appeals considered a case involving the Fair Labor Standards Act (“FLSA”).¹⁴⁰ In *SEC, Inc. v. Puckett*,¹⁴¹ the court of appeals determined whether SEC, Inc. owed back wages for overtime to a former employee.¹⁴²

SEC, Inc. manufactures chicken processing equipment and employed Puckett starting in the early 1990s. Before its incorporation in 1998, Lacy W. Simmons owned the sole proprietorship. In addition to fabricating metal, plaintiff’s normal duties consisted of random tasks such as cutting grass and feeding horses at Simmons’s home. These tasks continued after incorporation. Whether plaintiff worked at the plant or at Simmons’s residence, he was paid his regular hourly wage. Defendant would give plaintiff two paychecks each pay period—one for forty hours and one for any time over forty hours.¹⁴³

Plaintiff testified that following SEC’s incorporation, he saw a bulletin board at the plant displaying his overtime rights under the FLSA. Thereafter, plaintiff confronted both the plant manager and the company’s chief financial officer regarding overtime compensation. They insisted that SEC, Inc. was not required to pay him the overtime wage, and they initially refused to pay overtime compensation. After plaintiff’s continued complaints, SEC, Inc. paid him overtime for two weeks, but then discontinued paying overtime wages. Plaintiff eventually resigned

136. *Id.* at 184, 549 S.E.2d at 473.

137. *Id.* at 183, 549 S.E.2d at 473.

138. *Id.*

139. *Id.* at 183-84, 549 S.E.2d at 472-74.

140. 29 U.S.C. §§ 201-219 (1995 & Supp. 1999).

141. 252 Ga. App. 422, 555 S.E.2d 198 (2001).

142. *Id.* at 423, 555 S.E.2d at 201.

143. *Id.*

and filed suit, alleging the company violated the FLSA by failing to pay him overtime wages.¹⁴⁴

At trial, the jury returned a verdict in favor of plaintiff. SEC, Inc. appealed, contending that the trial court erred by denying its motions for directed verdict and judgment notwithstanding the verdict.¹⁴⁵ The court of appeals reversed, holding that plaintiff failed to show defendant was subject to the FLSA.¹⁴⁶ The court noted that the FLSA, which requires covered employers to pay time-and-a-half for hours worked in excess of forty hours per week, applies only to employers engaged in interstate commerce.¹⁴⁷ The court observed that “[a] plaintiff claiming overtime wages under the FLSA has the burden of proving that he was covered under the Act and must therefore show that either he or his employer, through other employees, was sufficiently engaged in interstate commerce or the production of goods for commerce.”¹⁴⁸ The court concluded that plaintiff did not meet this burden.¹⁴⁹

Although plaintiff provided evidence that defendant employer posted a bulletin board regarding overtime information, the company’s chief financial officer was familiar with the FLSA, the company had a policy of paying time-and-a-half, and plaintiff was paid time-and-a-half by the company for two weeks after complaining about his wages, the court of appeals held that this evidence did not meet the burden of proving that the FLSA applied to defendant.¹⁵⁰ In doing so, the court observed that employer’s pro-active measures did not constitute an admission that the employer was subject to the FLSA.¹⁵¹ Consequently, because plaintiff failed to demonstrate that either he or SEC, Inc. were engaged in interstate commerce or in the production of goods for interstate commerce, the court of appeals reversed.¹⁵²

This case is significant to practitioners because it emphasizes that a plaintiff employee claiming wages due to him under the FLSA must go

144. *Id.*

145. *Id.* at 422, 555 S.E.2d at 200.

146. *Id.* at 426, 555 S.E.2d at 203.

147. *Id.* at 423, 555 S.E.2d at 201. 29 U.S.C. § 207(a)(1) requires that:

[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such an employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

148. 252 Ga. App. at 424, 555 S.E.2d at 202.

149. *Id.* at 424-25, 555 S.E.2d at 202.

150. *Id.*

151. *Id.* at 424, 555 S.E.2d at 202.

152. *Id.* at 426, 555 S.E.2d at 203.

the extra mile to show that the defendant employer is subject to the FLSA. This case indicates that even when a plaintiff can demonstrate that an employer has a time-and-a-half overtime policy and that the employer has posted government overtime wage information, such evidence is insufficient for meeting this burden.¹⁵³

F. Management Liability for Employment Decisions

*Culpepper v. Thompson*¹⁵⁴ involved an employee who sued the president of a nonprofit business for tortious interference with his employment, resulting in his termination. The trial court granted summary judgment to defendant, and plaintiff appealed.¹⁵⁵

Plaintiff managed the Brooks County office of the Georgia Farm Bureau Mutual Insurance Company ("Georgia Farm Bureau"). Defendant was the president of Brooks County Farm Bureau ("BCFB"), a nonprofit corporation that leased office space, equipment, and secretaries to Georgia Farm Bureau. Brooks County Farm Bureau's board of directors sold Georgia Farm Bureau insurance. The relationship between Georgia Farm Bureau and BCFB required plaintiff to maintain the support of BCFB's board of directors.¹⁵⁶

Plaintiff began working as agency manager in Brooks County in 1993. During his employment, the acting president of BCFB and plaintiff met to discuss complaints concerning plaintiff's failure to return the phone calls of BCFB members. In August 1998, plaintiff met with defendant and representatives of both BCFB and Georgia Farm Bureau regarding additional complaints. In December 1998, plaintiff again met with defendant and a BCFB board member to discuss BCFB's concerns. In March 1999, the BCFB board of directors unanimously voted to request that the Georgia Farm Bureau transfer plaintiff from Brooks County because he had failed to adequately serve BCFB members. The BCFB board directed defendant, as president of the BCFB, to communicate this request to Georgia Farm Bureau. Georgia Farm Bureau transferred plaintiff at the BCFB's request. Following his transfer, plaintiff brought suit against BCFB's president for tortious interference with his employment. The trial court granted summary judgment for defendant, and plaintiff appealed.¹⁵⁷

The Georgia Court of Appeals affirmed the lower court decision, holding that defendant was entitled to immunity as an officer of a

153. *Id.* at 424-25, 555 S.E.2d at 202.

154. 254 Ga. App. 569, 562 S.E.2d 837 (2002).

155. *Id.* at 569, 562 S.E.2d at 838.

156. *Id.* at 569-70, 562 S.E.2d at 839.

157. *Id.* at 569, 562 S.E.2d at 838.

public, charitable, nonprofit organization “for any good faith acts or omissions, whether ministerial or discretionary, arising out of official actions and duties, when injury has not been caused by his willful or wanton misconduct.”¹⁵⁸ Additionally, the court noted that plaintiff failed to establish the elements required for tortious interference with contractual relations because defendant “at all times acted with privilege as president of BCFB in its ongoing, interrelated business relationship with [Georgia Farm Bureau].”¹⁵⁹ Further, the court of appeals held that “as a matter of public policy, . . . defendant had a right to involve himself in the contract.”¹⁶⁰ Most importantly, however, the court held that because plaintiff was an employee-at-will, he had no enforceable contract rights with which defendant could have interfered.¹⁶¹ Therefore, plaintiff had no basis for his tortious interference claim.¹⁶²

This case is significant to practitioners because it reinforces the importance of the doctrine of employment-at-will in such cases. The decision suggests that, even when no applicable statutory immunity exists, an employee who is an employee-at-will will have no basis for a tortious interference claim.

G. Restrictive Covenants

1. Noncompete. During the survey period, the Georgia Court of Appeals decided several cases involving covenants not to compete. In *Attaway v. Republic Services of Georgia*,¹⁶³ the court of appeals emphasized the distinction between covenants not to compete arising in the sale of a business and covenants not to compete arising under employment agreements.¹⁶⁴

Attaway owned Sinclair Disposal Service, Inc., a waste collection and disposal business with operations in Baldwin, Johnson, Washington, Jones, Wilkinson, Hancock, Putnam, Greene, and Laurens Counties. On March 28, 1997, plaintiff sold the company to defendant, Republic Services of Georgia.¹⁶⁵ The purchase agreement contained a covenant not to compete, providing that plaintiff would not:

158. *Id.* at 570, 562 S.E.2d at 839.

159. *Id.* at 571, 562 S.E.2d at 840.

160. *Id.* at 572, 562 S.E.2d at 840.

161. *Id.* at 571, 562 S.E.2d at 840.

162. *Id.*

163. 253 Ga. App. 322, 558 S.E.2d 846 (2002).

164. *Id.* at 322, 558 S.E.2d at 846.

165. *Id.*, 558 S.E.2d at 847.

directly or indirectly, for a period of five years following the Closing Date, (i) engage in (as an owner, partner, employee, agent, consultant, or otherwise) any business [that] would be competitive with the business conducted by the Seller or any of its Affiliates on the Closing Date in the counties of Johnson, Washington, Baldwin, Jones, Wilkinson, Hancock, Putnam, Greene, and Laurens. . . .¹⁶⁶

Attaway became employed with defendant concurrent with the sale of the company. He signed an employment agreement that also contained a covenant not to compete clause.¹⁶⁷ In relevant part the employment agreement provided: “In the event of any inconsistency between the provisions of the . . . [Asset Purchase Agreement] and this Covenant Not [t]o Compete, the terms of this Covenant Not [t]o Compete shall control.”¹⁶⁸

In March 1998 plaintiff and defendant’s other managers signed a document entitled “Confidentiality and Non-Compete [sic] Agreement,” containing a subsection entitled “Agreement Not to Compete.”¹⁶⁹ It contained the following language:

Employee agrees not to compete, “raid” other employees, or solicit any customers, suppliers, or employees of customers or suppliers within one (1) year of leaving the employment of the Company for any reason whatsoever. Furthermore, Employee agrees that at all times during his/her employment with the Company and for twelve (12) months thereafter, Employee shall not (i) engage in any business as, or own an interest in . . . any . . . business entity . . . if such entity is engaged in any business . . . competitive with any business conducted by the Company . . . in any place in the Territory. . . .¹⁷⁰

Plaintiff resigned from his position with defendant in July 1999. In January 2000 he formed Attaway Waste Services, and in August 2000 he began competing with defendant in the waste collection, disposal, and transportation business in the nine-county restricted area.¹⁷¹ Shortly thereafter, defendant sought and received an injunction prohibiting plaintiff from operating his newly formed business until March 28, 2002, the expiration date for the covenant not to compete contained in the 1997 purchase agreement. Plaintiff appealed.¹⁷²

166. *Id.*

167. *Id.*

168. *Id.* at 323, 558 S.E.2d at 847.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*, 558 S.E.2d at 846.

Plaintiff claimed that the trial court erred in finding that the covenant not to compete contained in the 1997 purchase agreement was valid. Plaintiff asserted that the noncompete covenant in the 1998 agreement superseded the one contained in the 1997 purchase agreement.¹⁷³ Plaintiff based this argument on a clause of the 1998 document, which provided:

The Agreement is ancillary to the employment of Employee with the Company and does not define all the terms and conditions of that engagement, including but not limited to compensation, but expresses the entire agreement between Employee and the Company with respect to the subject matter of the Agreement and supersedes all prior oral or written understandings or agreements regarding that subject matter.¹⁷⁴

Plaintiff contended that the drafter's inclusion of this language indicated that the longer terms of the restrictive covenant contained in the earlier agreement had been superseded by the more favorable terms contained in this later agreement.¹⁷⁵ The court of appeals rejected plaintiff's argument.¹⁷⁶ Rather, it found that the 1997 agreement related to plaintiff's obligations arising from the sale of his business and the 1998 agreement related to Attaway's employment.¹⁷⁷ Noncompete agreements pertaining to the sale of a company are entirely different from restrictive covenants regarding one's employment.¹⁷⁸ The court noted:

The vendor who signs a covenant not to compete when selling a business receives an equivalent for his partial abstention from that business, in the increased price paid him for it on account of his covenant. The covenant operates to his affirmative pecuniary benefit and against his impoverishment, in that, while being paid for desisting from the particular business in the locality covered by it, he may still enter upon other pursuits of gain in the same locality or upon this one in other localities.¹⁷⁹

The court also reasoned that such restrictions protect the purchaser's legitimate business interests.¹⁸⁰ In upholding the trial court's order,

173. *Id.* at 323-24, 558 S.E.2d at 847-48.

174. *Id.*, 558 S.E.2d at 848.

175. *Id.*, 558 S.E.2d at 847-48.

176. *Id.* at 322, 558 S.E.2d at 846.

177. *Id.* at 324, 558 S.E.2d at 848.

178. *Id.*

179. *Id.* (quoting *Carroll v. Ralston & Assoc.*, 224 Ga. App. 862, 864, 481 S.E.2d 900, 902 (1997)).

180. *Id.*

the court of appeals concluded that such a finding was consistent with Georgia's policy on the matter—the State provides considerable protection and leeway for restrictive covenants ancillary to the sale of a business because the covenants are a substantial part of the consideration for the purchase of the business.¹⁸¹

In *Ken's Stereo-Video Junction, Inc. v. Plotner*,¹⁸² the court of appeals considered the reasonableness of an "any capacity clause" in a covenant not to compete, finding it overly broad.¹⁸³ Plotner began working for Ken's Stereo-Video Junction in mid-1998, and he worked as an installer for approximately two years. During this time, defendant company trained plaintiff in the customized installation of car stereos and security systems. In September 2000 plaintiff became installation manager and entered into a written employment agreement.¹⁸⁴ The contract contained the following noncompete clause:

Employee agrees for a period of eighteen (18) months following termination of employment hereunder for any reason that he will not either directly or indirectly on his own behalf or as a partner, officer, employee, shareholder, or director of any person or entity, engage in or otherwise be interested in any business [that] consists of the sale and/or installation of consumer electronics (defined as audio, video, and car stereo) within twenty-five (25) miles of the store location of Employer at which Employee is employed at the time of termination.¹⁸⁵

Plaintiff left the company in December 2000 and filed an action seeking a declaratory judgment regarding the validity of the noncompete clause. The trial court found the clause overbroad and declared it unenforceable.¹⁸⁶

On appeal, defendant claimed that the trial court erred.¹⁸⁷ The court of appeals disagreed, affirming the trial court's declaratory judgment.¹⁸⁸ The court stated that, as a partial restraint on trade, a restrictive covenant will be upheld only if the restraint imposed is reasonable, is founded on a valuable consideration, is reasonably necessary to protect the interests of the employer, and does not unduly

181. *Id.* at 325, 558 S.E.2d at 848.

182. 253 Ga. App. 811, 560 S.E.2d 708 (2002).

183. *Id.* at 811, 560 S.E.2d at 709.

184. *Id.*

185. *Id.* at 811-12, 560 S.E.2d at 709.

186. *Id.* at 812, 560 S.E.2d at 709.

187. *Id.*

188. *Id.* at 811, 560 S.E.2d at 709.

prejudice the interests of the public.¹⁸⁹ The reasonableness of the covenant is determined by reviewing its (1) duration, (2) territorial coverage, and (3) scope of activity.¹⁹⁰

In this case, the court focused on the breadth of the scope of activity forbidden by the agreement, noting, "It is hard to imagine a broader restriction on the scope of prohibited activity, and it is clear that the contract imposes a greater limitation on Plotner than is reasonably necessary to protect the company's legitimate business interests in maintaining established customer relationships."¹⁹¹ Although defendant conceded that plaintiff "could not even be employed as a janitor at a competing store,"¹⁹² defendant contended that the training and money invested in plaintiff justified the restriction of his future employment.¹⁹³ The court was not persuaded. While the court acknowledged that some restrictions on employment could be justified on these grounds, the court concluded that, in this case, the harm imposed on plaintiff by this broad restriction outweighs any such investment interest on the part of his employer.¹⁹⁴ As a result, the over-breadth of the restrictions contained in the covenant rendered the entire covenant unenforceable.¹⁹⁵ Thus, the court of appeals affirmed.¹⁹⁶

In *New Atlanta Ear, Nose & Throat Associates, P.C. v. Pratt*,¹⁹⁷ the court of appeals enforced noncompete and nonsolicit covenants contained in both the employment agreement and the shareholder agreement of five doctors who left a medical group.¹⁹⁸

In February 1997 the five defendants entered into employment contracts with New Atlanta Ear, Nose & Throat, P.C.¹⁹⁹ The employment and shareholder agreement contained the following restrictive covenant:

Physician agrees that during Physician's employment by Medical Group and for a period of eighteen (18) months following the effective date of any termination of the Employment Term, . . . Physician will not, directly or indirectly, alone or in conjunction with any other Person:

189. *Id.* at 812, 560 S.E.2d at 709.

190. *Id.*

191. *Id.* at 812-13, 560 S.E.2d at 709-10.

192. *Id.* at 813, 560 S.E.2d at 710.

193. *Id.*

194. *Id.* at 812-13, 560 S.E.2d at 710.

195. *Id.* at 813, 560 S.E.2d at 710.

196. *Id.* at 814, 560 S.E.2d at 710.

197. 253 Ga. App. 681, 560 S.E.2d 268 (2002).

198. *Id.* at 681, 560 S.E.2d at 268.

199. *Id.* at 681-82, 560 S.E.2d at 269.

i. open or join a medical office within an eight (8) mile radius of a “Prohibited Office” and practice medicine at that office or practice medicine at any other medical clinic, ambulatory service center or hospital located within such eight (8) mile radius of a Prohibited Office in any of the Practice Specialties; and ii. see “Patients” for consultation or treatment within any of the Practice Specialties at any medical office located within an eight (8) mile radius of a Prohibited Office.

For purposes hereof a “Prohibited Office” is one or more of the offices listed in *Part Two of Exhibit A*, in which Physician saw Patients for Medical Group during the eighteen (18) months preceding the effective date of termination of the Employment Term, and “Patient” means any individual to whom services were provided by Physician at a Prohibited Office during the eighteen (18) month period prior to Physician’s date of termination.²⁰⁰

“Part Two of Exhibit A” contained the name of each doctor followed by a generalized geographic area such as “Marietta” or “Austell.”²⁰¹ One defendant, Dr. Pratt, however, amended the agreement to provide the specific locations, addresses, and zip codes of New Atlanta Ear, Nose & Throat’s existing locations prior to signing the agreement.²⁰² The contracts also restricted each shareholder from practicing medicine with any other physician who was employed by the medical group previously for a period of thirty-six months following termination of employment. The shareholder restrictive covenant specified no territory.²⁰³

Defendants terminated their employment four years into their employment contracts, informing the medical group that they intended to ignore the restrictive covenants. The medical group subsequently sought injunctive relief, which the trial court denied on the basis that the restrictive covenants were unenforceable. The medical group appealed.²⁰⁴ With the exception of the covenants contained in Dr. Pratt’s agreements, the appellate court affirmed.²⁰⁵

The court of appeals applied strict scrutiny to the interpretation of the covenants not to compete in the employment agreement.²⁰⁶ In doing so, the court held that, with the exception of Dr. Pratt’s contract, the restrictive covenant in the employment contract was too indefinite and vague to be enforceable because the territorial restrictions therein could

200. *Id.* at 682-83, 560 S.E.2d at 270.

201. *Id.* at 683, 560 S.E.2d at 270.

202. *Id.*

203. *Id.* at 687, 560 S.E.2d at 273.

204. *Id.* at 682, 560 S.E.2d at 270.

205. *Id.* at 681, 560 S.E.2d at 269.

206. *Id.* at 683-85, 560 S.E.2d at 270-71 (relying on *Habif, Arogeti & Wynne, P.C. v. Baggett*, 231 Ga. App. 289, 289-91, 498 S.E.2d 346, 349-50 (1998)).

shift, expand, or both.²⁰⁷ In this regard, the court explained that “a territorial restriction [that] cannot be determined until the date of the employee’s termination is too indefinite to be enforced . . . [The employee must be] able to forecast with certainty the territorial extent of the duty owing.”²⁰⁸ Because the noncompete covenant contained only general geographic regions in which the medical practice could add offices, the covenant was unenforceable as to four of the physicians.²⁰⁹ In contrast, however, Dr. Pratt’s employment contract was enforceable as a result of his amendment specifying the exact address and number of offices in the territorial restriction.²¹⁰ Thus, the court of appeals reversed the trial court’s decision only in regard to Dr. Pratt.²¹¹

Setting aside strict scrutiny, the court then re-analyzed the shareholder agreement using a lower scrutiny level.²¹² It still found that the covenant not to compete was fatally flawed.²¹³ Because the covenant specified no territory for restriction, the court found it unenforceable.²¹⁴ The court noted that “blue-penciling” could not cure this defect because a court cannot rewrite a definite territorial limitation in a contract it finds void for vagueness.²¹⁵

In contrast, in *Mathis v. Orkin Exterminating Co.*,²¹⁶ the Georgia Court of Appeals found restrictive covenants to be narrowly tailored enough to pass strict scrutiny.²¹⁷ Orkin employed Mathis as a Branch Account Manager where his duties involved soliciting mainly commercial accounts.²¹⁸ Mathis signed a covenant not to compete and an anti-piracy clause that provided:

The Employee hereby expressly covenants and agrees that he/she will not, during the term of his/her employment and for a period of two (2) years immediately following termination of his/her employment by the Company within the [below listed counties], for any reason whatsoever, directly or indirectly, for himself/herself or on behalf of, or in conjunc-

207. *Id.* at 686-87, 560 S.E.2d at 272-73.

208. *Id.* at 685, 560 S.E.2d at 272 (quoting *Koger Properties, Inc. v. Adams-Cates Co.*, 247 Ga. 68, 68, 274 S.E.2d 329, 331 (1981)).

209. *Id.* at 686, 560 S.E.2d at 272.

210. *Id.*

211. *Id.*

212. *Id.* at 684, 560 S.E.2d at 270-71 (relying on *Habif, Arogeti & Wynne, P.C.*, 231 Ga. App. at 289-91, 560 S.E.2d at 270-71).

213. *Id.* at 687, 560 S.E.2d at 273.

214. *Id.*

215. *Id.*

216. 254 Ga. App. 335, 562 S.E.2d 213 (2002).

217. *Id.* at 337, 562 S.E.2d at 215.

218. *Id.* at 335, 562 S.E.2d at 213.

tion with, any other person, persons, company, partnership or corporation:

(a) Call upon any customer or customers of the Company for the purpose of soliciting or selling any pest control, exterminating, fumigating, or termite control service for the eradication or control of, without limitation, rats, mice, roaches, bugs, vermin, termites, beetles, or other insects, rodents and birds, within the territory stated in [(c) below].

(b) Directly or indirectly, alone or in any capacity, solicit or in any manner attempt to solicit or induce any person or persons employed by the Company or any parent, subsidiary or affiliated corporation to leave such employment for purposes of engaging in such prohibited activities.

(c) Engage in the pest control, exterminating, fumigating or termite control business in any capacity identical with or corresponding to the capacity or capacities in which employed by the Company, anywhere within the following jurisdictions or territories: THE COUNTIES OF BANKS, JACKSON, MADISON, ELBERT, CLARKE, BARROW, OCONEE, OGLETHORPE, GREENE, WILKES, LINCOLN, BARROW [SIC], AND TALIAFERRO ALL IN THE STATE OF GEORGIA[] or within any jurisdiction or territory in which the Employee worked for the Company at anytime during the six (6) calendar months preceding termination of employment, and identified in an employment agreement with the Company in effect during such six (6) month period.²¹⁹

While an Orkin employee, Mathis solicited business for Orkin from all the counties listed in the agreement.²²⁰ Within two years of being terminated by Orkin, Mathis and a former Orkin co-worker established their own pest control business selling pest control services to former Orkin customers in the prohibited counties. Orkin sought immediate injunctive relief. The trial court enforced the restrictive covenant and anti-piracy clause, granting the injunction. Mathis appealed.²²¹

The court of appeals concluded that the covenants were enforceable,²²² basing their decision on *Nunn v. Orkin Exterminating Co.*,²²³ wherein the Georgia Supreme Court found the *exact same language* enforceable.²²⁴ Mathis attempted to distinguish *Nunn* by asserting that his unique factual situation made the restrictions unreasonable. Specifically, Mathis argued that because he worked mostly with Orkin's

219. *Id.* at 335-36, 562 S.E.2d at 213-14.

220. *Id.* at 336, 562 S.E.2d at 214.

221. *Id.*

222. *Id.*

223. 256 Ga. 558, 350 S.E.2d 425 (1986).

224. *Id.* at 560-61, 350 S.E.2d at 472.

commercial clients, it was unreasonable to enjoin him from soliciting both commercial *and* residential clients.²²⁵ Although the evidence showed that Mathis worked *primarily*, but not *exclusively*, with commercial clients during his tenure at Orkin, the court found the restrictions were not unreasonable.²²⁶

Mathis also argued that the anti-piracy clause was unenforceable.²²⁷ Analyzing the anti-piracy clause separately,²²⁸ the court of appeals, nonetheless, found it to be enforceable.²²⁹ The court based this conclusion on the clause's reasonable duration and specificity.²³⁰

2. Nonsolicitation. In *Riddle v. Geo-Hydro Engineers, Inc.*,²³¹ the court of appeals considered the validity of restrictive covenants, including a nonsolicitation clause.²³² Riddle had been an employee with Geo-Hydro Engineers, Inc. ("Geo-Hydro") for over ten years at the time he entered into an employment agreement.²³³ The agreement contained the following clause:

(a) For and during a period of two years commencing immediately following Termination, the Employee shall not within [a defined] Territory:

(i) individually or for or on behalf of any other person engage, directly or indirectly, in the business of providing, performing or rendering [certain soil-testing] Services;

(ii) directly or indirectly for himself or on behalf or in connection with any other person solicit, divert, or attempt to take away any of the clients of the Company with whom the Employee had Material Contact during the twelve (12) month period preceding Termination. . . .²³⁴

Riddle left his position at Geo-Hydro in November 2000 and subsequently started his own business with another former employee. Their business was within the defined territory and focused on providing geotechnical and environmental engineering, as well as testing construction materials. Geo-Hydro sought injunctive relief, alleging that

225. 254 Ga. App. at 336-37, 562 S.E.2d at 214.

226. *Id.* at 337, 562 S.E.2d at 214.

227. *Id.*

228. *Id.*; *see also* *Sunstates Refrigerated Servs. v. Griffin*, 215 Ga. App. 61, 62, 449 S.E.2d 858, 859 (1994).

229. 254 Ga. App. at 337, 562 S.E.2d at 215.

230. *Id.*

231. 254 Ga. App. 119, 561 S.E.2d 456 (2002).

232. *Id.* at 119, 561 S.E.2d at 457.

233. *Id.*

234. *Id.*, 561 S.E.2d at 457-58.

Riddle violated the restrictive covenants. Riddle counterclaimed, seeking a declaratory judgment that the covenants were unenforceable. The trial court found that the restrictive covenants were reasonable and thus enforceable. Riddle appealed.²³⁵

The court of appeals reversed, holding that neither restrictive covenant could be enforced.²³⁶ Specifically, the appellate court found that the nonsolicitation covenant was overbroad because it did not limit the purposes for which Riddle may not solicit Geo-Hydro clients.²³⁷ Because the agreement contained a covenant not to compete in the same clause as the unenforceable nonsolicitation agreement, the court of appeals found all restrictive covenants unenforceable on the basis that Georgia does not “blue-pencil” restrictive covenants.²³⁸ Thus, this holding suggests that when drafting employment agreements employers should contain each nonsolicitation clause, covenant not to compete, and other other restrictive covenants in separate clauses to avoid striking the remaining covenants when one may exceed reasonable restriction.

IV. CONCLUSION

As this survey demonstrates, the issues arising under state law are becoming progressively more challenging with each passing year. Adding to the challenge is the growing overlap between state and federal issues. Regardless of whether a practitioner professes to specialize in state, federal, administrative, or other matters pertaining to labor and employment law, it is important to recognize that any one law or legal proceeding can and does impact other relations between employer and employee.

235. *Id.* at 120, 561 S.E.2d at 458.

236. *Id.* at 121, 561 S.E.2d at 458.

237. *Id.* at 120, 561 S.E.2d at 458.

238. *Id.* at 120-21, 561 S.E.2d at 458.