

Labor and Employment Law

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I. INTRODUCTION

This Article surveys recent developments in the state statutory and common law that affect labor and employment relations of Georgia employers. Accordingly, it surveys published decisions interpreting Georgia law from June 1, 2009 to May 31, 2010.¹ This Article also includes highlights of certain revisions to the Official Code of Georgia Annotated (O.C.G.A.).²

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1. For analysis of Georgia labor and employment law during the prior survey period, see W. Melvin Haas III et al., *Labor and Employment Law, Annual Survey of Georgia Law*, 61 *MERCER L. REV.* 213 (2009).

2. Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and case law. *See generally* *THE DEVELOPING LABOR LAW* (John E. Higgins Jr. et al. eds., 5th ed. 2006 & Supp. 2009);

II. RECENT LEGISLATION

A. *Modification of Covenants Not to Compete*

On April 29, 2009, former Georgia Governor Sonny Perdue signed into law Georgia House Bill 173,³ amending existing law regarding employment contracts that restrict competition.⁴ This legislation became effective on November 2, 2010, after Georgia voters passed an amendment to the Georgia Constitution.⁵ House Bill 173 authorizes a court to modify and limit the relief of otherwise unenforceable covenants⁶ rather than invalidate them entirely.⁷ The bill also provides specific

BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (C. Geoffrey Weirich et al. eds., 4th ed. 2007 & Supp. 2009); W. Christopher Arbrey et al., *Labor and Employment, 2008 Eleventh Circuit Survey*, 60 MERCER L. REV. 1281 (2009); Bureau of Nat'l Affairs, *Daily Labor Report*, BNA.COM, <http://www.bna.com/products/labor/dlr.htm> (last visited Nov. 11, 2010). Accordingly, this Article is not intended to cover the latest developments in federal labor and employment law. Rather, this Article only covers legislative and judicial developments arising under Georgia state law during the survey period.

3. Ga. H.R. Bill 173, Reg. Sess., 2009 Ga. Laws 231 (codified at O.C.G.A. §§ 13-8-2, -50 to -59 (2010)).

4. *Id.* ("To amend Chapter 8 of Title 13 of the Official Code of Georgia Annotated . . . ; to provide for the enforcement of contracts that restrict or prohibit competition in certain commercial agreements; to provide for the judicial enforcement of such provisions; [and] to provide for the modification of such provisions . . .").

5. Carl Cannon, W. Wright Mitchell & Alyssa Peters Morris, *Client Bulletin #427: Georgians Vote to Make Restrictive Covenants Easier to Enforce*, CONSTANGY.COM (Nov. 5, 2010), <http://www.constangy.com/communications-305.html>.

House Bill 173 states,

This Act shall become effective on the day following the ratification at the time of the 2010 general election of an amendment to the Constitution of Georgia providing for the enforcement of covenants in commercial contracts that limit competition and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date. If such amendment is not so ratified, then this Act shall stand automatically repealed.

Ga. H.R. Bill 173 at § 4, 2009 Ga. Laws at 246.

6. This method of severing certain covenants that are found to be unreasonable while still enforcing reasonable covenants "is known as 'blue penciling.'" R. Robin McDonald, *Ga. Non-Compete Law Is Upheld*, FULTON COUNTY DAILY REPORT, June 4, 2010, at 1, available at www.dailyreportonline.com.

7. Ga. H.R. Bill 173 at § 3, 2009 Ga. Laws at 243 (codified at O.C.G.A. § 13-8-54 (2010)). House Bill 173 provides in part,

[I]f a court finds that a contractually specified restraint does not comply with [certain provisions of the O.C.G.A.], then the court may modify the restraint

guidelines for determining such covenants' enforceability.⁸ Currently, while Georgia law recognizes covenants not to compete in employment contracts, if any covenant in a contract is unenforceable, then all remaining covenants in the same contract are unenforceable.⁹

In 1991 the Georgia Supreme Court invalidated a statute that allowed judicial modification of covenants not to compete on the ground that the statute defeated or lessened competition or encouraged monopolies in violation of the Georgia Constitution.¹⁰ To prevent House Bill 173 from encountering similar constitutional problems, Georgia voters voted on a referendum to amend the constitution, which provides for the enforcement of restrictive covenants in commercial contracts.¹¹ Since the amendment was ratified on November 2, House Bill 173 became effective the following day on November 3, 2010, as opposed to being automatically repealed.¹²

provision and grant only the relief reasonably necessary to protect [legitimate business interests established by the person seeking enforcement] and to achieve the original intent of the contracting parties to the extent possible.

Id.

8. *See id.* at § 3, 2009 Ga. Laws at 242, 244-45 (codified at O.C.G.A. §§ 13-8-53, -55 to -58 (2010)).

9. *Ward v. Process Control Corp.*, 247 Ga. 583, 584, 277 S.E.2d 671, 673 (1981) ("If any covenant not to compete within a given employment contract is unreasonable either in time, territory, or prohibited business activity, then all covenants not to compete within the same employment contract are unenforceable.").

10. *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 372, 405 S.E.2d 253, 254 (1991) (invalidating O.C.G.A. § 13-8-2.1(g)(1) (Supp. 1990), *repealed by* Ga. H.R. Bill 173 at § 2, 2009 Ga. Laws at 232). The statute provided as follows:

Every court of competent jurisdiction shall enforce through any appropriate remedy every contract in partial restraint of trade that is not against the policy of the law or otherwise unlawful. In the absence of extreme hardship on the part of the person or entity bound by such restraint, injunctive relief shall be presumed to be an appropriate remedy for the enforcement of contracts described in subsections (b) through (d) of this Code section. If any portion of such restraint is against the policy of the law in any respect but such restraint, considered as a whole, is not so clearly unreasonable . . . as to be unconscionable, the court shall enforce so much of such restraint as it determines by a preponderance of the evidence to be necessary to protect the interests of the parties that benefit from such restraint. Such a restraint shall be subject to partial enforcement, whether or not it contains a severability or similar clause and regardless of whether the unlawful aspects of such restraint are facially severable from those found lawful.

O.C.G.A. § 13-8-2.1(g)(1) (Supp. 1990). In 1991 the supreme court invalidated O.C.G.A. § 13-8-2.1(g)(1) (Supp. 1990). *Hart*, 261 Ga. at 372, 405 S.E.2d at 254. However, O.C.G.A. § 13-8-2.1(g)(1) remained codified, *see* O.C.G.A. § 13-8-2.1(g)(1) (Supp. 2009), until it was repealed by House Bill 173. Ga. H.R. Bill 173 at § 2, 2009 Ga. Laws at 232.

11. *See* Ga. H.R. Bill 173 at § 4, 2009 Ga. Laws at 246.

12. *See id.*

B. Alterations to Self-Insurers Guaranty Trust Fund

On May 20, 2010, the Georgia General Assembly passed an Act that makes a number of alterations to the Self-Insurers Guaranty Trust Fund (Fund) for workers' compensation.¹³ The Act amends chapter 9 of title 34 of the O.C.G.A.¹⁴ in numerous ways,¹⁵ including the consequential changes discussed below.

New participants in the Fund will be assessed \$8000 as opposed to \$4000 for their enrollment year.¹⁶ Additional changes for Fund participants include a heightened threshold for maximum annual assessments,¹⁷ heightened minimums of surety bonds or lines of credit that self-insurers must carry,¹⁸ and a reduction in the benchmark amount when a self-insured employer becomes subject to special assessment by the State Board of Workers' Compensation.¹⁹

13. Ga. H.R. Bill 1101, Reg. Sess., 2010 Ga. Laws 126 (codified at O.C.G.A. §§ 34-9-12, -106, -127, -380 to -389 (Supp. 2010)).

14. O.C.G.A. tit. 34, ch. 9 (2008 & Supp. 2010).

15. *Id.* House Bill 1101 states that its purpose is

[t]o amend Chapter 9 of Title 34 of the [O.C.G.A.] . . . ; to provide for the entry and execution of judgment upon final orders and decisions regarding the Self-insurers Guaranty Trust Fund; to modify the notification period for revocation of a certificate of self-insurance; to revise provisions relative to the Self-insurers Guaranty Trust Fund; . . . to provide for related matters; to repeal conflicting laws; and for other purposes.

Id.

16. *Id.* at § 4, 2010 Ga. Laws at 128 (codified at O.C.G.A. § 34-9-386(a)(2) (Supp. 2010)).

17. *Id.* (codified at O.C.G.A. § 34-9-386(a)(3) (Supp. 2010)) ("The maximum amount of annual assessments under this paragraph . . . in any calendar year against a participant shall be \$8,000.00—an increase from \$4000).

18. *Id.* (codified at O.C.G.A. § 34-9-386(b)(2) (Supp. 2010)) ("All active participants shall be required to maintain surety bonds or the board of trustees may, in its discretion, accept any irrevocable letter of credit or other acceptable forms of security in the amount of no less than \$250,000—an increase from \$100,000).

19. *Id.* (codified at O.C.G.A. § 34-9-386(a)(4) (Supp. 2010)) ("If the fund is reduced to an amount below \$5 million [—down from \$7 million—] net of all liabilities as the result of the payment of claims, the administration of claims, or the costs of administration of the fund, the board of trustees may levy a special assessment against participants upon approval by the board . . .").

III. PENDING LEGISLATION

A. Random Drug Testing of Unemployment Insurance Recipients

Georgia House Bill 1389,²⁰ which has yet to be brought to a vote in the House, proposes an amendment to chapter 8 of title 34 of the O.C.G.A.²¹ to allow random drug testing of recipients of unemployment benefits.²² If enacted, the law would require those who apply for unemployment benefits to “submit at least once per year to the Commissioner’s random drug testing program.”²³ The law would deny unemployment insurance benefits to any claimant who fails a drug test and upon failure of a second drug test would bar the recipient from any further receipt of benefits for two years.²⁴

B. Use of Credit Score in Hiring and Retention Decisions

Georgia House Bill 1277,²⁵ which also has yet to be brought before the House for a vote, proposes an amendment to chapter 1 of title 34 of the O.C.G.A.²⁶ prohibiting an employer’s use of a credit score or report in the hiring and discharge of employees.²⁷ There is an exemption outlined in the bill for occupations in which credit information “directly relates to a bona fide occupational qualification.”²⁸

C. Unemployment Insurance Credit for Hiring of Unemployment Benefit Recipient

If approved by the U.S. Department of Labor, Georgia House Bill 1023²⁹ will enact the Jobs, Opportunity, and Business Success Act of 2010.³⁰ The bill will amend title 34 of the O.C.G.A.³¹ to provide employers with a credit against employer contributions to unemployment

20. Ga. H.R. Bill 1389, Reg. Sess. (2010) (unenacted).

21. O.C.G.A. tit. 34, ch. 8 (2008 & Supp. 2010).

22. Ga. H.R. Bill 1389.

23. *Id.* at § 1.

24. *Id.*

25. Ga. H.R. Bill 1277, Reg. Sess. (2010) (unenacted).

26. O.C.G.A. tit. 34, ch. 1 (2008).

27. Ga. H.R. Bill 1277 at § 1 (“It shall be unlawful for an employer to fail or refuse to hire, bar, discharge from employment, or otherwise discriminate against an individual because of the individual’s credit history or credit report . . .”).

28. *Id.*

29. Ga. H.R. Bill 1023, Reg. Sess. (2010) (as passed by House, Mar. 26, 2010, and the Senate, Apr. 1, 2010).

30. *Id.*

31. O.C.G.A. tit. 34 (2008 & Supp. 2010).

insurance if the employer hires an eligible recipient of unemployment insurance.³² This credit will be known as the Georgia Works Tax Credit.³³ An employer is eligible for credit when an individual who is hired is a recipient of weekly unemployment insurance benefits, has been profiled by the Georgia Department of Labor as one who is likely to exhaust benefits, has no prospect or promise of future employment, and “[h]as at least eight weeks of benefit eligibility remaining on his or her current claim at the time” of employment.³⁴ However, the bill was vetoed on June 4, 2010, so it must now undergo the process for reconsideration.³⁵

IV. WRONGFUL TERMINATION

A. *Employment at Will*

1. Overview. At-will employment refers to employment that either an employer or an employee may terminate at any time with or without cause.³⁶ Employment at will in other jurisdictions may be weakening,³⁷ but in Georgia the presumption remains that all employment is at will unless a statutory or contractual exception exists.³⁸ “[T]his bar to wrongful discharge claims in the at-will employment context ‘is a fundamental statutory rule governing employer-employee relations in Georgia.’”³⁹ Particularly, O.C.G.A. § 34-7-1⁴⁰ provides that “[a]n

32. Ga. H.R. Bill 1023.

33. *Id.* at § 1.

If this paragraph becomes effective, . . . there shall be a credit to be known as the Georgia Works Tax Credit. The amount of the credit shall be not less than \$25.00 and not more than \$125.00 per individual employee per calendar quarter The credit may be claimed by an employer for up to four calendar quarters for each individual hired by that employer for services to be performed in this state

Id.

34. *Id.*

35. Georgia General Assembly, *HB 1023*, LEGIS.GA.GOV. (Oct. 13, 2010), 1:45 AM), http://www.legis.ga.gov/legis/2009_10/sum/hb1023.htm. For the status of House Bill 1023, see http://www.legis.ga.gov/legis/2009_10/sum/hb1023.htm.

36. BLACK'S LAW DICTIONARY 604 (9th ed. 2009).

37. Haas, *supra* note 1, at 216 & n.14 (“[T]he employment-at-will doctrine is weakening in many jurisdictions.”).

38. *E.g.*, *Wilson v. City of Sardis*, 264 Ga. App. 178, 179, 590 S.E.2d 383, 385 (2003) (“In the absence of a contractual or statutory ‘for cause’ requirement, . . . the employee serves ‘at will’ and may be discharged at any time for any reason or no reason . . .”).

39. *Reid v. City of Albany*, 276 Ga. App. 171, 172, 622 S.E.2d 875, 877 (2005) (quoting *Reilly v. Alcan Aluminum Corp.*, 272 Ga. 279, 280, 528 S.E.2d 238, 240 (2000)).

indefinite hiring” is at-will employment.⁴¹ The definition of an indefinite hiring includes contract provisions specifying “‘permanent employment,’ ‘employment for life,’ [and] ‘employment until retirement.’”⁴² Further, a contract specifying an annual salary does not create a definite period of employment.⁴³ However, if an employment contract does specify a definite period of employment, any employment beyond that period becomes employment at will subject to discharge without cause.⁴⁴

Regardless of an employer’s motives, the general rule in Georgia allows the discharge of an at-will employee without creating a cause of action for wrongful termination.⁴⁵ Oral promises between an employer and an employee will not modify the relationship between the two; absent a written contract, an employee’s status remains at will.⁴⁶

2. Elements of Employer-Employee Contracts. During the survey period, the United States Court of Appeals for the Eleventh Circuit addressed just how strictly courts construe the employment-at-will doctrine in Georgia. In *H&R Block Eastern Enterprises, Inc. v. Morris*,⁴⁷ the Eleventh Circuit addressed the requirements necessary to transcend the default employment-at-will doctrine.⁴⁸ In *Morris* the plaintiff received a letter on October 31, 2005, addressed “Dear Associate,” inviting her to attend orientation for the 2006 tax season.⁴⁹ *Morris*’s previous employment periods with Block were governed by separate agreements.⁵⁰ *Morris* argued that the letter constituted an employment contract for the 2006 tax season.⁵¹

The Eleventh Circuit held that the letter’s language was not sufficient to create an employment contract, stating, “Employment contracts are

40. O.C.G.A. § 34-7-1 (2008).

41. *Id.*

42. Ga. Power Co. v. Busbin, 242 Ga. 612, 613, 250 S.E.2d 442, 443-44 (1978).

43. Ikemiya v. Shibamoto Am., Inc., 213 Ga. App. 271, 273, 444 S.E.2d 351, 353 (1994) (quoting Gatins v. NCR Corp., 180 Ga. App. 595, 597, 349 S.E.2d 818, 820 (1986)).

44. Schuck v. Blue Cross & Blue Shield, Inc., 244 Ga. App. 147, 148, 534 S.E.2d 533, 534 (2000).

45. *H&R Block E. Enters., Inc. v. Morris*, 606 F.3d 1285, 1294 (11th Cir. 2010) (quoting *Nida v. Echols*, 31 F. Supp. 2d 1358, 1376 (N.D. Ga. 1998)); *Fink v. Dodd*, 286 Ga. App. 363, 365, 649 S.E.2d 359, 362 (2007) (alteration in original) (“The employer[] with or without cause and regardless of its motives may discharge the employee without liability.”).

46. *Balmer v. Elan Corp.*, 278 Ga. 227, 228-29, 599 S.E.2d 158, 161 (2004).

47. 606 F.3d 1285 (11th Cir. 2010).

48. *Id.* at 1294.

49. *Id.* at 1289 (internal quotation marks omitted).

50. *Id.* at 1288.

51. *See id.* at 1294.

enforceable under Georgia law only if they include “[t]he nature and character of the services to be performed, the place of employment[,] and the amount of compensation to be paid.”⁵² In Morris’s case, the letter established none of these factors; the letter even failed to address the employee specifically, as it was addressed “Associate.”⁵³ The Eleventh Circuit held, therefore, that the letter did not create an enforceable contract and that the employment-at-will doctrine controlled Morris’s employee status, invalidating her wrongful termination claim.⁵⁴

In *Goddard v. City of Albany*,⁵⁵ the Georgia Supreme Court elaborated on the policy enunciated in *Morris*. In *Goddard* a city employee filed wrongful termination charges based on the presumption that the employer’s progressive disciplinary policy created an implied contract.⁵⁶ The supreme court held that the progressive disciplinary policy was insufficient to establish that her employment was not at will.⁵⁷ Further, nothing else in the record showed that the employee had been hired “for a definite term of employment and, as such, her employment was at-will.”⁵⁸

Goddard, the city employee, also argued that an oral promise giving her “a year to prove herself” established a contract under the doctrine of promissory estoppel.⁵⁹ In addition to holding that Goddard failed to establish an essential element of promissory estoppel,⁶⁰ the supreme court stated that “at-will employees cannot enforce oral promises.”⁶¹ Accordingly, the supreme court rejected the wrongful termination claim.⁶²

3. Exceptions to the At-Will Doctrine. The statute creating the at-will doctrine does account for specific exceptions.⁶³ When employ-

52. *Id.* (alterations in original) (quoting *Farr v. Barnes Freight Lines, Inc.*, 97 Ga. App. 36, 37, 101 S.E.2d 906, 907 (1958)).

53. *Id.*

54. *Id.*

55. 285 Ga. 882, 684 S.E.2d 635 (2009).

56. *Id.* at 885, 684 S.E.2d at 640.

57. *Id.* (“[P]ersonnel policies and practices are legally insufficient to create an implied contract for a definite term of employment.”).

58. *Id.*

59. *Id.* at 886, 684 S.E.2d at 640.

60. *See id.*; *see also* O.C.G.A. § 13-3-44(a) (2010) (“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”).

61. *Id.*

62. *See id.* at 885-86, 684 S.E.2d at 640.

63. *See* O.C.G.A. § 34-7-1.

ment is not at will, the most typical way to sue an employer for termination of employment requires a breach of contract.⁶⁴ However, during the survey period, the United States District Court for the Southern District of Georgia assessed in *Hamilton v. Carecore National, LLC*,⁶⁵ whether a claim could be brought under the theory of quantum meruit.⁶⁶ In *Hamilton* the plaintiffs filed suit for wages and overtime pay that the plaintiffs claimed their employer owed for work completed under an employment contract.⁶⁷ Carecore, the employer, responded that at-will employees cannot enforce a promise by the employer.⁶⁸ In determining whether to allow the plaintiffs to amend their complaint, the district court noted that “[w]here a plaintiff has completed work pursuant to an at-will employment contract, a defendant can be sued to enforce promises made concerning completed work.”⁶⁹ However, at-will employees may only sue for work completed at the time of the breach, not for future compensation owed under the promise.⁷⁰

B. Breach of Contract (Other than At-Will Contracts)

1. Overview. The basic rules of contract law apply in creating a valid employment contract: competency to contract, offer, acceptance, and valid consideration.⁷¹ Further, for an employment contract to be valid, the terms must define the nature and character of the services to be performed, the place of employment, the time period for which the employee is to work, and the compensation to be owed to the employee.⁷² In addition, an employment contract’s enforceability requires sufficient definitiveness in the terms of the contract.⁷³

64. See JAMES W. WIMBERLY, JR., *GEORGIA EMPLOYMENT LAW* 45 (4th ed. 2008).

65. No. CV409-116, 2010 WL 768179 (S.D. Ga. Mar. 4, 2010).

66. See *id.* at *1.

67. *Id.*

68. *Id.* at *2.

69. *Id.*

70. *Id.* (quoting *Yearwood v. S. Life Sys., Inc.*, 243 Ga. App. 348, 350, 531 S.E.2d 741, 743 (2000)) (“It is true an employee cannot sue to enforce future performance of a terminable-at-will employment agreement. However, an employee may sue . . . for the amount of compensation due him, based upon services actually performed by him up to the time of his discharge.”).

71. WIMBERLY, *supra* note 64, at 6.

72. *Id.* For a discussion of elements of employer-employee contracts, see *supra* Part IV.A.2 of this Article.

73. WIMBERLY, *supra* note 64, at 6.

2. Continued Employment As Consideration Supporting Subsequent Agreement. In *BDI Laguna Holdings, Inc. v. Marsh*,⁷⁴ the Georgia Court of Appeals considered the question of if and when an individual might be additionally compensated for work that he or she already contracted to perform.⁷⁵ BDI Distributors (BDI) approached and hired Marsh to help grow the business. BDI and Marsh executed a contract for renewable five-year terms in exchange for specified compensation.⁷⁶ The agreement additionally provided “that BDI Distributors, ‘in the sole and absolute discretion of the Chief Executive Officer . . . , may pay additional incentive compensation or bonuses.’”⁷⁷ After acquiring a new company and consolidating, BDI management orally promised to provide Marsh with stock. Subsequently, Marsh received a letter to similar effect.⁷⁸

Following the merger, BDI restructured and replaced its CEO. The new CEO decided not to give Marsh the stock that was initially promised both orally and by letter. After the date the stock was to be delivered, BDI failed to provide Marsh with his 2% of the shares, and Marsh sought damages for breach of contract. The superior court ruled in Marsh’s favor on the breach of contract claims and awarded him the value of the stock.⁷⁹ BDI appealed, contending that the agreement “was unenforceable due to a lack of consideration.”⁸⁰

BDI primarily contended that “Marsh was already obligated under his [original] employment contract to perform duties allegedly supporting the promise of stock.”⁸¹ The court of appeals held that in circumstances when two parties agree to the terms of a contract, any additional compensation will be considered a gift.⁸² Had the stock promise been incorporated into the original agreement, the promise would have been enforceable.⁸³

74. 301 Ga. App. 656, 689 S.E.2d 39 (2009).

75. *See id.* at 656, 689 S.E.2d at 41.

76. *Id.* at 656-57, 689 S.E.2d at 41.

77. *Id.* at 657, 689 S.E.2d at 41.

78. *Id.* at 657, 689 S.E.2d at 41-42 (explaining that Marsh received a letter notifying him that the merger had been completed and that the shareholders agreed to provide Marsh with 2% of the stock of the company).

79. *Id.* at 657-58, 689 S.E.2d at 42.

80. *Id.* at 658, 689 S.E.2d at 42.

81. *Id.*

82. *Id.* (quoting *Mgmt. Search, Inc. v. Morgan*, 136 Ga. App. 651, 653, 222 S.E.2d 154, 157 (1975)).

83. *Id.* at 659, 689 S.E.2d at 42 (assuming that all other elements of a valid contract have been met and that the language is acceptably definitive).

Marsh argued that his continued service and willingness to take on additional duties and responsibility provided a sufficient basis for the superior court's holding.⁸⁴ However, the court looked to the plain language of the contract.⁸⁵ The contract required Marsh to

devote his entire working time, attention, skill and energies exclusively to the Business of the Company [BDI]. . . . If Marsh is elected as a director of the Company or as a director or officer of any of its affiliates, the Employee will fulfill his duties as such director or officer without additional compensation.⁸⁶

Because the court perceives additional compensation to be a "mere gratuity,"⁸⁷ and because the plain language of the contract reinforced the position that Marsh received all that BDI promised through the originally agreed-upon compensation,⁸⁸ the court held that Marsh's continued service constituted "part of his original employment contract."⁸⁹

In *Marsh* the court also discussed the doctrine of merger.⁹⁰ Marsh claimed that the former CEO of BDI made oral representations to give him the stock.⁹¹ However, the court stated that "it has long been the law in Georgia that if the parties have reduced their agreement to writing, all oral representations made antecedent to execution of the written contract are merged into and extinguished by the contract."⁹² When a contract incorporates a merger clause, all "prior and contemporaneous" assertions and promises are incorporated as well.⁹³ Therefore, the original agreement bound Marsh to his initial compensation, and the

84. *Id.* at 659, 689 S.E.2d at 43.

85. *Id.* at 659, 689 S.E.2d at 42-43 (quoting *First Data POS, Inc. v. Willis*, 273 Ga. 792, 794, 546 S.E.2d 781, 784 (2001)) ("Whenever the language of a contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required or even permissible, and the contractual language used by the parties must be afforded its literal meaning.").

86. *Id.* at 659, 689 S.E.2d at 43 (alteration in original) (internal quotation marks omitted).

87. *Id.* at 658, 689 S.E.2d at 42.

88. *Id.* at 659, 689 S.E.2d at 43.

89. *Id.* at 658-60, 689 S.E.2d at 42-43.

90. *See id.* at 661, 689 S.E.2d at 44.

91. *Id.* at 657, 662, 689 S.E.2d at 45.

92. *Id.* at 663, 689 S.E.2d at 45 (quoting *First Data POS, Inc. v. Willis*, 273 Ga. 792, 794, 546 S.E.2d 781, 784 (2001)) (internal quotation marks omitted).

93. *See id.* (quoting *First Data POS, Inc. v. Willis*, 273 Ga. 792, 794-95, 546 S.E.2d 781, 784 (2001)) (internal quotation marks omitted) ("In written contracts containing a merger clause, prior or contemporaneous representations that contradict the written contract cannot be used to vary the terms of a valid written agreement purporting to contain the entire agreement of the parties . . .").

letter failed to amend the agreement by promising him additional compensation in stock.⁹⁴

3. Material Terms—Severability of Contract Provisions. To form a valid contract, the parties must assent to all the terms of the contract.⁹⁵ In Georgia, “[i]t is well settled that an agreement between two parties will occur only when the minds of the parties meet at the same time, upon the same subject-matter, and in the same sense.”⁹⁶ However, a meeting of the minds is necessary only if the provision in question is material to the contract.⁹⁷

In *Murphy v. Hosanna Youth Facilities, Inc.*,⁹⁸ the United States District Court for the Northern District of Georgia considered whether the parties’ agreement to enter into a separate noncompetition agreement, as provided in the parties’ written employment contract, was a material term of that contract.⁹⁹ Hosanna Youth Facilities, Inc.’s (Hosanna) CFO hired his daughter and her husband, Zuri and Jeric Murphy, to manage a new location. From the outset, the Murphys requested employment agreements securing their positions. A month after the Murphys signed and submitted what they believed to be their final contracts with Hosanna, they were demoted and soon resigned their positions.¹⁰⁰ Although the exact terms of the contract were disputed, both parties agreed that they did not enter into separate noncompetition agreements as provided in their employment contracts.¹⁰¹ The Murphys subsequently brought an action seeking damages for breach of contract.¹⁰²

94. *Id.* at 661, 689 S.E.2d at 44 (“Marsh’s compensation was governed by the language of his employment agreement The June 16 letter, to the extent that it was sufficiently definite, was not an amendment to the employment agreement . . .”).

95. O.C.G.A. § 13-3-2 (2010) (“The consent of the parties being essential to a contract, until each has assented to all the terms, there is no binding contract . . .”).

96. *Cox Broad. Corp. v. Nat’l Collegiate Athletic Ass’n*, 250 Ga. 391, 395, 297 S.E.2d 733, 737 (1982).

97. *See King v. Comfort Living, Inc.*, 287 Ga. App. 337, 339, 651 S.E.2d 484, 487 (2007) (quoting *Jerry Dickerson Presents, Inc. v. Concert/Southern Chastain Promotions*, 260 Ga. App. 316, 328, 579 S.E.2d 761, 771 (2003)) (emphasizing that “[i]f the parties have not agreed to an essential term, ‘no meeting of the minds . . . exists’”).

98. 683 F. Supp. 2d 1304 (N.D. Ga. 2010).

99. *See id.* at 1313.

100. *Id.* at 1306-09.

101. *Id.* at 1313 (noting that plaintiffs conceded they had not agreed to any restrictive covenants).

102. *Id.* at 1309.

Hosanna responded that absent a severability provision, a party's failure to agree to a material term renders the contract unenforceable.¹⁰³ As provided in O.C.G.A. § 13-1-8,¹⁰⁴

(a) A contract may be either entire or severable. In an entire contract, the whole contract stands or falls together. In a severable contract, the failure of a distinct part does not void the remainder. (b) The character of the contract in such case is determined by the intention of the parties.¹⁰⁵

The parties may express an intention for severability either directly or indirectly.¹⁰⁶ The district court concluded that when an agreement intends to have a provision separately drafted, that provision is severable, and the rest of the employment contract may be valid.¹⁰⁷ Thus, the district court held:

[I]n cases involving the issue of severability, where an instrument in writing, purporting to be a bilateral contract, contains mutual promises, which without more and when taken independently of certain subsidiary provisions in the instrument would render the instrument valid as a contract, such subsidiary provisions will not, unless their terms imperatively demand it, be given a construction that will nullify and completely destroy the entire obligations of either party under the instrument and thus render the instrument lacking in mutuality and void.¹⁰⁸

Failure to execute a nonmaterial ancillary agreement will not defeat a contract's validity if its severable promises, as well as consideration for those promises, are enforceable absent the clause or provision that the parties agreed to add.¹⁰⁹

103. *Id.* at 1313.

104. O.C.G.A. § 13-1-8 (2010).

105. *Id.*

106. *Murphy*, 683 F. Supp. 2d at 1313 (quoting *Grove v. Sugar Hill Inv. Assocs., Inc.*, 219 Ga. App. 781, 786, 466 S.E.2d 901, 906 (1995)) (internal quotation marks omitted) (noting that although a direct expression of an intent to make the provisions severable may be formed by including a severability clause, an indirect expression may be found "when [a] contract contains promises to do several things based upon multiple considerations").

107. *Id.* at 1314 (citing *Toncee, Inc. v. Thomas*, 219 Ga. App. 539, 541, 466 S.E.2d 27, 30 (1995)).

108. *Id.* at 1314-15 (alteration in original) (quoting *Toncee, Inc. v. Thomas*, 219 Ga. App. 539, 541, 466 S.E.2d 27, 30 (1995)) (internal quotation marks omitted).

109. *See id.* at 1315 (expressing that the contract called for the execution of a separate noncompetition agreement and that failure to formulate that agreement did not prove fatal to the intention to be bound by the rest of the agreement).

4. Termination for “Cause.” Under an employment agreement that requires cause for dismissal, an employer who terminates an employee without cause may incur liability for breach of contract.¹¹⁰ In the educational context, the employer is bound by the statutory definition of “cause” described in O.C.G.A. § 20-2-940¹¹¹ for dismissing an educational professional.¹¹²

In *Chattooga County Board of Education v. Searels*,¹¹³ the employer fired Searels, a special education teacher, for “insubordination, willful neglect of duties, and ‘other good and sufficient cause.’”¹¹⁴ The superior court reversed the State Board of Education’s affirmation of sufficient cause, and the local board appealed to the Georgia Court of Appeals.¹¹⁵ Georgia courts define the term “insubordinate conduct” as “willful disobedience” and the term “willful neglect” as “a flagrant act or omission, intentional violation of a known rule or policy, or a continuous course of reprehensible conduct.”¹¹⁶ Using these definitions, the court of appeals reversed the superior court and affirmed Searels’s dismissal.¹¹⁷ Even after warnings, Searels spoke derogatorily of her handicapped students,¹¹⁸ repeatedly violated the dress code,¹¹⁹ and discussed her opinion that another handicapped student did not have a future because “he would . . . be dead before he was 21.”¹²⁰ The court of appeals noted that while “good and sufficient cause” had not been defined, Searels’s actions violated all sections charged against her, justifying the dismissal of Searels as an employee.¹²¹

110. *Savannah Coll. of Art & Design, Inc. v. Nulph*, 265 Ga. 662, 662-63, 460 S.E.2d 792, 793 (1995) (“[W]hen . . . the employer fires the employee without cause, a substantive breach occurs, and the employee would be entitled to seek full compensatory damages.”).

111. O.C.G.A. § 20-2-940 (2009).

112. *Id.* § 20-2-940(a). (“[A] contract for a definite term may be terminated or suspended for . . . [i]nsubordination; . . . [w]illful neglect of duties; . . . or [a]ny other good and sufficient cause.”).

113. 302 Ga. App. 731, 691 S.E.2d 629 (2010).

114. *Id.* at 731-32, 691 S.E.2d at 630; *see also* O.C.G.A. § 20-2-940(a)(2)-(3), (8).

115. 302 Ga. App. at 732, 691 S.E.2d at 630.

116. *Id.* at 734, 691 S.E.2d at 632 (quoting *Brawner v. Marietta City Bd. of Educ.*, 285 Ga. App. 10, 12, 646 S.E.2d 89, 91 (2007); *Terry v. Houston Cnty. Bd. of Educ.*, 178 Ga. App. 296, 299, 342 S.E.2d 774, 776 (1986)) (internal quotation marks omitted).

117. *Id.*

118. *See id.* at 732, 691 S.E.2d at 631 (“Searels left a note . . . indicating that the teacher and another staff member ‘can put my students into ANY elective class—no matter how advanced—except PE—because they *cannot* do ANY of it anyway.’”).

119. *Id.* at 732-33, 691 S.E.2d at 631 (“[She] violated the dress code because the skirt’s length was too short. . . . Searels’s v-neck shirt exposed her bra and breasts.”).

120. *Id.* at 732, 691 S.E.2d at 631 (internal quotation marks omitted).

121. *Id.* at 734, 691 S.E.2d at 632.

C. Unemployment Insurance

An employee who is discharged from employment is generally eligible to temporarily receive unemployment insurance for the time during which the individual's unemployment persists.¹²² In Georgia, "unemployment through no fault of the unemployed individual remains the touchstone for eligibility for benefits."¹²³ The intention of the statute is to promote employment security by requiring employers to contribute to the fund, covering the expenses of the unemployed.¹²⁴

During the survey period, in *Davane v. Thurmond*,¹²⁵ the court of appeals considered what factors constituted a disqualification of benefits.¹²⁶ Eagle Creek Software Service, Inc. (Eagle Creek) terminated Davane's employment for failure to confirm her availability for an out-of-town assignment. Eagle Creek originally hired Davane for a position that required her to travel; however, after problems acquiring and keeping a nanny, the company reassigned her to a temporary position that allowed her to work from home. Subsequently, Eagle Creek informed Davane of an assignment in Kansas City, Missouri, but failed to provide a starting date, resulting in Davane's not becoming aware of the specific start date until five days before the project began.¹²⁷ Davane immediately attempted to acquire child care, but she failed to do so and was fired two days later.¹²⁸ Davane filed for unemployment insurance but was denied by the Department of Labor, and she appealed the decision.¹²⁹

According to Georgia law, an employee may be disqualified from unemployment insurance "after the individual has been discharged or suspended from work with the most recent employer for failure to obey orders, rules, or instructions or for failure to discharge the duties for which the individual was employed."¹³⁰ However, disqualification requires some form of intentional fault on behalf of the individual.¹³¹

122. See generally O.C.G.A. § 34-8-2 (2008) (declaring that state public policy is in favor of providing unemployment benefits).

123. WIMBERLY, *supra* note 64, at 308-09.

124. See O.C.G.A. § 34-8-150(a) (2008); see also O.C.G.A. § 34-8-2.

125. 300 Ga. App. 474, 685 S.E.2d 446 (2009).

126. *Id.* at 474-78, 685 S.E.2d at 447-50.

127. *Id.* at 474-76, 685 S.E.2d at 447-48.

128. *Id.* at 477, 685 S.E.2d at 449 ("She began the process of arranging for child care, but was terminated only two days after receiving notice of the project's start date.").

129. *Id.* at 474, 685 S.E.2d at 447.

130. O.C.G.A. § 34-8-194(2)(A) (2008).

131. *Davane*, 300 Ga. App. at 476, 685 S.E.2d at 449 (quoting *Jamal v. Thurmond*, 263 Ga. App. 320, 321, 587 S.E.2d 809, 811 (2003)) ("[D]isqualification is not appropriate unless

Because Davane made a “bona fide” attempt to comply with the wishes of her employer, the evidence conflicted with the finding of fault.¹³²

Additionally, the court required that to be disqualified for unemployment benefits, an employee must “reasonably expect, under all the circumstances of employment, that sanction would result from a violation.”¹³³ Because Davane was neither removed from her temporary position nor informed of a transition back to the permanent position that Eagle Creek originally hired her for, the court found it unconscionable to expect Davane to anticipate being sanctioned for failure to confirm her availability within two days of being informed of the date of the assignment.¹³⁴ Overall, “Georgia law allows [an employer] nearly free rein as far as the firing is concerned, but not as far as payment of unemployment compensation benefits . . . is concerned.”¹³⁵

V. NEGLIGENCE HIRING OR RETENTION

A. Overview

Under O.C.G.A. § 34-7-20,¹³⁶ “[t]he employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency.”¹³⁷ The court of appeals has held that this statute imposes a duty on the employer to “warn other employees of dangers incident to employment that ‘the employer knows or ought to know but which are unknown to the employee.’”¹³⁸ For a plaintiff to sustain an action for negligent hiring or retention, the plaintiff must show that the employer employed an individual who “the employer knew or should have known posed a risk of harm to others where it [was] reasonably foreseeable from the employee’s tendencies or propensities that the employee could cause the type of harm sustained by the plaintiff.”¹³⁹ Typically, “the determination of whether an employer

the employer shows the ‘discharge was caused by the deliberate, conscious fault of the claimant.’”).

132. *Id.* at 477, 685 S.E.2d at 449.

133. *Id.* (quoting *Barron v. Poythress*, 219 Ga. App. 775, 777, 466 S.E.2d 665, 667 (1996)) (internal quotation marks omitted).

134. *See id.* at 477-78, 685 S.E.2d at 449-50.

135. *Id.* at 478, 685 S.E.2d at 450.

136. O.C.G.A. § 34-7-20 (2008).

137. *Id.*

138. *Tecumseh Prods. Co. v. Rigdon*, 250 Ga. App. 739, 740, 552 S.E.2d 910, 912 (2001); *see also* O.C.G.A. § 34-7-20.

139. *Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004) (internal quotation marks omitted).

used ordinary care in hiring an employee is a jury issue¹⁴⁰ and is only a question of law “where the evidence is plain, palpable and undisputable.”¹⁴¹

B. *Lack of Evidence of Prior Misconduct*

During the survey period, the court of appeals held in *Georgia Messenger Service, Inc. v. Bradley*¹⁴² that for a defendant to be held responsible for claims of negligent hiring or retention, the plaintiff must show that the defendant knew or should have known of the dangerous propensities that allegedly caused the plaintiff’s injuries or damages.¹⁴³ In *Georgia Messenger Service*, an employee of defendant GMS, John Wise, parked his delivery truck in a restricted zone of the office park where plaintiff Vernetta Bradley worked as a security guard and ran inside to quickly deliver a package. When Wise returned to his truck, Bradley was in the process of placing a “boot” on his vehicle.¹⁴⁴ This action so enraged Wise that he “kicked Bradley into unconsciousness, removed the ‘boot,’ and presumably continued on his scheduled deliveries.”¹⁴⁵

The trial court denied GMS’s motion for summary judgment against Bradley, and GMS appealed.¹⁴⁶ In addressing the negligent hiring and retention and negligent entrustment claims, the court of appeals reversed the trial court’s summary judgment ruling, holding that “the undisputed evidence . . . is that GMS had no prior knowledge of any dangerous propensities of Wise, who had worked without incident for GMS for over nine years.”¹⁴⁷

C. *Unknown Medical Illness*

During the survey period, the court of appeals held in *Drury v. Harris Ventures, Inc.*¹⁴⁸ that under Georgia law, liability for negligent hiring or retention will not attach when an employer hiring temporary day laborers relies on information supplied by an employee on an employ-

140. *Tecumseh Prods. Co.*, 250 Ga. App. at 741, 552 S.E.2d at 912.

141. *Munroe*, 277 Ga. at 864, 596 S.E.2d at 607 (quoting *Robinson v. Kroger Co.*, 268 Ga. 735, 739, 493 S.E.2d 403, 408 (1997)) (internal quotation marks omitted).

142. 302 Ga. App. 247, 690 S.E.2d 888 (2010).

143. *Id.* at 250, 690 S.E.2d at 891 (quoting *S. Bell Tel. & Tel. Co. v. Sharara*, 167 Ga. App. 665, 666, 307 S.E.2d 129, 130 (1983)).

144. *Id.* at 247-48, 690 S.E.2d at 889 (internal quotation marks omitted).

145. *Id.* at 248, 690 S.E.2d at 889.

146. *Id.* at 248, 690 S.E.2d at 890.

147. *Id.* at 250, 690 S.E.2d at 891.

148. 302 Ga. App. 545, 691 S.E.2d 356 (2010).

ment application.¹⁴⁹ In *Drury* an employee of Harris Ventures (d/b/a Staff Zone), Reginald Holmes, attacked Teresa Drury while working in her yard. Before the incident, Drury's husband contacted Staff Zone, requesting two workers to pull weeds in his yard. Mr. Drury emphasized the need for the workers to be suitable to work with his wife while she was home alone. Holmes failed to disclose on his employment application that he suffered from schizophrenia and that he no longer took his doctor-recommended medication.¹⁵⁰

The court held that

the relevant question is whether [Staff Zone] knew or in the exercise of ordinary care should have known that [Holmes], the employee it hired and retained to perform duties involving personal contact with [Drury], was unsuitable for that position because he posed a reasonably foreseeable risk of personal harm to [people in Drury's position].¹⁵¹

Staff Zone required its applicants to fill out an application that inquired into the applicant's criminal history, mental illnesses, psychological treatment, and known disabilities. Holmes did not answer these questions truthfully.¹⁵² Accordingly, the court ruled that liability could not attach to his employer and reasoned that "[t]o require an employer to independently verify each area of possible error on the application would render employment decisions in even the most basic settings untenably fraught with potential liability."¹⁵³

VI. RESPONDEAT SUPERIOR

A. Overview

Under the doctrine of respondeat superior, an employer may be held vicariously liable for the negligence or intentional torts committed by his or her employee within the scope of employment.¹⁵⁴ To hold an employer vicariously liable for the torts of an employee, the court must find the following two elements: (1) the employee was acting in furtherance of the employer's business, and (2) the employee was acting within the scope of the employer's business.¹⁵⁵

149. *Id.* at 549, 691 S.E.2d at 360.

150. *Id.* at 545-46, 691 S.E.2d at 357-58.

151. *Id.* at 548, 691 S.E.2d at 359 (alterations in original) (quoting *Munroe*, 277 Ga. at 863, 596 S.E.2d at 606) (internal quotation marks omitted).

152. *Id.* at 546, 691 S.E.2d at 357.

153. *Id.* at 549, 691 S.E.2d at 359.

154. CHARLES R. ADAMS III, *GEORGIA LAW OF TORTS* 270 (2009-2010 ed.).

155. *Id.* at 272.

B. Private Enterprise

Under Georgia law,

[i]f a tort is committed by an employee not by reason of the employment, but because of matters disconnected therewith, the employer is not liable. Furthermore, [i]f a tortious act is committed not in furtherance of the employer's business, but rather for purely personal reasons disconnected from the authorized business of the master, the master is not liable.¹⁵⁶

During the survey period, the court of appeals held in *Leo v. Waffle House, Inc.*¹⁵⁷ that the employer was not liable for the actions of its employees because the employees' actions that led up to the tortious injury were not in furtherance of the business of the employer.¹⁵⁸ *Leo* involved an incident that occurred during the late night shift at an Atlanta area Waffle House restaurant. Rex Joseph Leo, a homeless customer of the restaurant, was drinking coffee as an invitee along with three other customers. Quinton Wilson was the server on duty while Crystal Sparks worked the grill.¹⁵⁹ While not a manager, Sparks "was the person considered to be in charge."¹⁶⁰ Leo, Wilson, and Sparks were all acquainted with each other through their interactions during the late shift.¹⁶¹ The incident in question arose when after much "joking around," Wilson mixed up a concoction of "juice, hot water, lemons, sugar, Ivory soap, and Score dishwashing detergent into an apple juice bottle he had purchased from a convenience store earlier that evening."¹⁶² Wilson told Leo the mixture was a milkshake and that he would pay Leo five dollars to drink the concoction in the apple juice bottle. Sparks said, "I wouldn't drink that, Leo, if I were you, but I'm not getting involved."¹⁶³ Unaware of the contents, Leo drank the concoction, collapsed on the floor, began foaming at the mouth, and was hospitalized because of internal injuries from the corrosive dishwasher detergent.¹⁶⁴

156. *Dowdell v. Krystal Co.*, 291 Ga. App. 469, 470, 662 S.E.2d 150, 153 (2008) (alteration in original) (citation omitted) (quoting *Piedmont Hosp., Inc. v. Palladino*, 276 Ga. 612, 613-14, 580 S.E.2d 215, 217 (2003)).

157. 298 Ga. App. 838, 681 S.E.2d 258 (2009).

158. *Id.* at 843, 681 S.E.2d at 263.

159. *Id.* at 839, 681 S.E.2d at 260-61.

160. *Id.* at 839, 681 S.E.2d at 261.

161. *Id.*

162. *Id.*

163. *Id.* (internal quotation marks omitted).

164. *Id.*

The court of appeals ruled on three issues,¹⁶⁵ two of which are of interest here. The first issue was whether Waffle House was negligent because its person in charge, Sparks, failed to intervene in the situation.¹⁶⁶ The trial court granted summary judgment to Waffle House regarding the cause of action.¹⁶⁷ The court of appeals ruled that these circumstances created an issue of fact for the jury and reversed the summary judgment.¹⁶⁸ The court reasoned that “[t]he proprietor of a business has a duty, when he can reasonably apprehend danger to a customer from the misconduct of other customers or persons on the premises, to exercise ordinary care to protect the customer from injury caused by such misconduct.”¹⁶⁹

The court of appeals also addressed the issue of whether the trial court erred in granting summary judgment to Waffle House based on liability for the incident under the doctrine of respondeat superior.¹⁷⁰ The question was whether Wilson acted within the scope of his employment and in furtherance of the business of Waffle House when he served Leo the corrosive mixture.¹⁷¹ Liability under respondeat superior is a question of fact “for determination by the jury, except in plain and indisputable cases.”¹⁷² The court of appeals held that in this case Waffle House indisputably lacked liability under respondeat superior: “Wilson’s act was clearly committed for purely personal reasons unconnected with his job. Wilson mixed a concoction while joking around with customers late at night, using his own container and then dared a customer, indeed offered the customer money, to drink the substance.”¹⁷³ Had Wilson not clearly indicated the dubious nature of the drink or served a drink in a Waffle House cup without any fanfare or coaxing, then liability would have most likely attached to Waffle House. However, Wilson acted in his own capacity in interacting with an acquaintance, and the fact that the interaction in question occurred at work was not enough to hold Waffle House liable under the doctrine of respondeat superior.

165. *Id.* at 838, 681 S.E.2d at 260.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 840, 681 S.E.2d at 261 (quoting *Shell Oil Co. v. Diehl*, 205 Ga. App. 367, 368, 422 S.E.2d 63, 64 (1992)).

170. *Id.* at 841-42, 681 S.E.2d at 263.

171. *Id.*

172. *Id.* at 842, 681 S.E.2d at 263 (quoting *Bacon v. News-Press & Gazette Co.*, 188 Ga. App. 703, 704, 373 S.E.2d 797, 799 (1988)) (internal quotation marks omitted).

173. *Id.* at 842-43, 681 S.E.2d at 263 (footnote omitted).

C. *Employer-Owned Vehicle*

Generally, an employee is not acting within the scope of employment when commuting to and from work.¹⁷⁴ Therefore, an employer is generally not vicariously liable for the actions of an employee traveling to or from work.¹⁷⁵ However, when an employer owns the vehicle involved in the tort, the general rule changes:

Where a vehicle is involved in a collision, and it is shown that the automobile is owned by a person, and that the operator of the vehicle is in the employment of that person, a presumption arises that the employee was in the scope of his employment at the time of the collision, and the burden is then on the defendant employer to show otherwise.¹⁷⁶

The presumption may be overcome by uncontroverted evidence.¹⁷⁷

In *Hicks v. Heard*,¹⁷⁸ the Georgia Supreme Court considered whether vicarious liability attaches when a vehicle owned by an employer is not being driven in furtherance of the employer's business.¹⁷⁹ Jessica Heard worked as a part-time clerical employee of her father Samuel Heard, co-owner of Mark Heard Fuel Company. Jessica collided with another automobile while on her way home from school, which caused injury to the plaintiff Hicks. Hicks contended that even though Jessica was driving between school and her home, Heard Fuel was vicariously liable under the doctrine of respondeat superior because Jessica worked for Heard Fuel "as needed" and was thus "on-call."¹⁸⁰ The trial court granted summary judgment in favor of Heard Fuel, and the court of appeals affirmed.¹⁸¹

In determining the validity of the summary judgment, the supreme court looked to the burden-shifting paradigm set forth in *Allen Kane's Major Dodge*:

174. *Hunter v. Modern Cont'l Constr. Co.*, 287 Ga. App. 689, 690-91, 652 S.E.2d 583, 584 (2007).

175. *Id.* at 691, 652 S.E.2d at 584 (quoting *Clo White Co. v. Lattimore*, 263 Ga. App. 839, 839, 590 S.E.2d 381, 383 (2003)).

176. *Allen Kane's Major Dodge, Inc. v. Barnes*, 243 Ga. 776, 777, 257 S.E.2d 186, 188 (1979) (quoting *W. Point Pepperell, Inc. v. Knowles*, 132 Ga. App. 253, 255, 208 S.E.2d 17, 19 (1974)) (internal quotation marks omitted).

177. *Id.* at 778, 257 S.E.2d at 188.

178. 286 Ga. 864, 692 S.E.2d 360 (2010).

179. *Id.* at 864, 692 S.E.2d at 361.

180. *Id.* at 864-65, 692 S.E.2d at 361 (internal quotation marks omitted).

181. *Id.* at 864, 692 S.E.2d at 361.

When the uncontradicted testimony of the defendant and/or of the employee shows that the employee was not acting within the scope of his employment at the time of the accident, the plaintiff must show . . . some other fact which indicates the employee was acting within the scope of his employment. If this “other fact” is . . . [c]ircumstantial evidence, it must be evidence sufficient to support a verdict in order to withstand the defendant’s motion for summary judgment.¹⁸²

For circumstantial evidence to meet this burden, the plaintiff must show that the conclusion proposed is reasonably supported by the facts and that those facts render all other conclusions less probable.¹⁸³ Since Jessica Heard was in fact driving a company car, and she worked for that company, there was a presumption of vicarious liability.¹⁸⁴ However, this presumption was rebutted through the uncontroverted testimony of Jessica and her father, an officer of Heard Fuel.¹⁸⁵ Mr. Hicks’s only evidence—that Jessica was perpetually on-call—was not sufficient to meet the burden of “render[ing] less probable all inconsistent conclusions.”¹⁸⁶ Accordingly, the supreme court upheld the trial court’s grant of summary judgment in favor of Heard Fuel.¹⁸⁷

D. Independent Contractor or Employee

Vicarious liability under respondeat superior generally does not apply to the acts of independent contractors.¹⁸⁸ Therefore, to determine whether an employer is vicariously liable, a court must initially determine whether an individual is an independent contractor or an employee.¹⁸⁹

For example, in *Adcox v. Atlanta Building Maintenance Co.*¹⁹⁰ the court of appeals considered whether Atlanta Building Maintenance Co. (ABM) could be held vicariously liable for the negligence of its subcon-

182. *Id.* at 865-66, 692 S.E.2d at 362 (quoting *Allen Kane’s Major Dodge*, 243 Ga. at 780, 257 S.E.2d at 190).

183. *Id.* at 866, 692 S.E.2d at 362.

184. *Id.* at 867, 692 S.E.2d at 362.

185. *Id.*

186. *Id.* at 867, 692 S.E.2d at 362-63.

187. *Id.* at 868, 692 S.E.2d at 363.

188. See O.C.G.A. § 51-2-4 (2000) (“An employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and in it is not subject to the immediate direction and control of the employer.”).

189. See *id.* “An ‘independent contractor’ is one who, in the pursuit of his own independent business, undertakes to perform a task for another, while retaining for himself the right to control the means, method, and manner of its accomplishment.” ADAMS, *supra* note 154, at 295.

190. 301 Ga. App. 74, 687 S.E.2d 137 (2009).

tractor J.M.S. Building Maintenance, Inc. (JMS). In *Adcox* ABM was hired to perform maintenance and janitorial services for ADT Security's offices. ABM subcontracted the janitorial services to JMS. Timothy Adcox, a service manager employed by ADT, alleged that after mopping the ADT facilities, a JMS employee dumped the used mop water down the stairs of the service entrance at the back of the facility.¹⁹¹ That night the temperature dropped below freezing, and Adcox slipped and fell on the ice from the mop water the next morning.¹⁹²

In determining if the subcontractor was in fact an independent contractor, the court of appeals used the standard test of "whether the contract gives, or the employer assumes, the right to control the time, manner, and method of executing the work as distinguished from the right merely to require certain definite results in conformity to the contract."¹⁹³ Applying this test, the court ruled that a claim of vicarious liability under the doctrine of respondeat superior failed to attach to ABM.¹⁹⁴ ABM did not attempt to direct or control JMS's activities to the extent necessary to establish a master/servant relationship.¹⁹⁵ The court held that "[i]nstructions such as giving a deadline for performance or requiring that work be completed at night or before the open of business each day do not amount to control over the . . . work because they do not purport to 'control specifically when any particular duties were to be performed.'"¹⁹⁶

VII. RESTRICTIVE COVENANTS

A. *Covenants Not to Compete*

1. Overview. Agreements that place general restraints on trade are void as against public policy.¹⁹⁷ Generally, courts disfavor noncompete

191. *Id.* at 75-76, 687 S.E.2d at 138-39.

192. *Id.* at 74-75, 687 S.E.2d at 138.

193. *Id.* at 76-77, 687 S.E.2d at 140 (quoting *Ross v. Ninety-Two W., Ltd.*, 201 Ga. App. 887, 891, 412 S.E.2d 876, 881 (1991)).

194. *Id.* at 78, 687 S.E.2d at 141.

195. *Id.*; see also O.C.G.A. § 51-2-5(5) (2000).

An employer is liable for the negligence of a contractor . . . [i]f the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relation of master and servant or so that an injury results which is traceable to his interference

O.C.G.A. § 51-2-5(5).

196. *Adcox*, 301 Ga. App. at 79, 687 S.E.2d at 141 (quoting *Feggans v. Kroger Co.*, 223 Ga. App. 47, 48, 476 S.E.2d 822, 824 (1996)).

197. O.C.G.A. § 13-8-2(a)(2) (2010).

agreements in contractual relations because they place restrictions on trade, thereby reducing competition.¹⁹⁸ Pursuant to the 1983 Georgia Constitution, if a judge finds a restrictive covenant to “defeat[] or lessen[] competition, or to encourag[e] a monopoly,” the covenant will be struck in its entirety.¹⁹⁹ Nonetheless, courts will uphold a noncompete agreement when the agreement merely places a partial restraint on trade.²⁰⁰ In general, a noncompete agreement is valid as a partial restraint on trade when the agreement is specific and is reasonable in regard to duration, territorial coverage, and the scope of activities prohibited.²⁰¹

Whether the terms of a noncompete agreement are reasonable is a question of law that takes into account “the nature and extent of the trade or business, the situation of the parties, and all other relevant circumstances.”²⁰² A questionable restriction, if not void on its face, may require the introduction of additional facts to determine whether it is reasonable.²⁰³ However, depending upon the type of contract, courts apply different levels of scrutiny in determining the reasonableness of the contract.²⁰⁴ If a noncompete agreement is ancillary to an employment agreement, a stricter standard applies;²⁰⁵ if any provision of that agreement is considered overbroad or unreasonable, the entire agreement becomes invalid.²⁰⁶ If the agreement is pursuant to a contract for the sale of a business, a less stringent standard permits broader provisions; even if provisions of that agreement are deemed overbroad or unreasonable, the court may “blue pencil” the agreement, rewriting or severing the overly broad provisions.²⁰⁷ However, “in restrictive covenant cases strictly scrutinized as employment contracts, Georgia does not employ the ‘blue pencil’ doctrine of severability.”²⁰⁸

198. WIMBERLY, *supra* note 64, at 75.

199. GA. CONST. of 1983, art. III, § 6, para. 5(c).

200. WIMBERLY, *supra* note 64, at 75.

201. *Id.*; see *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992).

202. *Sysco Food Servs., Inc. v. Chupp*, 225 Ga. App. 584, 585, 484 S.E.2d 323, 325 (1997).

203. *Koger Props., Inc. v. Adams-Cates Co.*, 247 Ga. 68, 69, 274 S.E.2d 329, 331 (1981).

204. See WIMBERLY, *supra* note 64, at 115.

205. See *id.* at 75.

206. *Drumheller v. Drumheller Bag & Supply, Inc.*, 204 Ga. App. 623, 626, 420 S.E.2d 331, 334 (1992) (quoting *Watson v. Waffle House, Inc.*, 253 Ga. 671, 672, 324 S.E.2d 175, 177 (1985)) (discussing that courts have held covenants not to compete “to be nonseverable and ha[ve] held that overbreadth of one portion of the covenant so taints the entire covenant as to make it unenforceable”).

207. See *supra* text accompanying note 6.

208. *Advance Tech. Consultants, Inc. v. RoadTrac, LLC*, 250 Ga. App. 317, 320, 551 S.E.2d 735, 737 (2001). The court in *Advance Technology* also stated that “Georgia courts

Despite a proposed constitutional amendment changing the way courts approach restrictive covenants ancillary to employment contracts,²⁰⁹ in *H&R Block Eastern Enterprises, Inc. v. Morris*,²¹⁰ the Eleventh Circuit recently reaffirmed the traditional interpretation. In *Morris* the Eleventh Circuit, while applying strict scrutiny,²¹¹ reversed the district court and held that the noncompete covenant in the employment contract in question was enforceable because it appropriately limited the actions of the former employee without imposing a restriction on trade.²¹² *Morris*, a tax professional with H&R Block, started her own tax service, Dreams Tax Service, Inc., after H&R Block informed her that she was ineligible for rehire. H&R Block filed suit against *Morris* for violating the terms of her employment agreement by soliciting H&R Block's current and former clients, providing those clients with tax-preparation services, and soliciting former employees of H&R Block. The district court judge ruled that the noncompetition covenant of the employment contract was unenforceable, rendering all other covenants unenforceable as well.²¹³ The Eleventh Circuit reversed.²¹⁴

The Eleventh Circuit did not hold any of the covenants in the employment contract to be unenforceable.²¹⁵ The Eleventh Circuit determined the covenant was reasonable in all respects, writing, "The non-competition covenant is limited to a specific geographic area, the types of activities performed by *Morris* at Block, the customers serviced by *Morris* at Block, and a two-year duration. . . . [A]fter applying the three-element analysis, we conclude this non-competition covenant is reasonable under Georgia law."²¹⁶

2. Franchise Agreements. At the beginning of this year's survey period, the Georgia Supreme Court affirmed the Georgia Court of

have traditionally divided restrictive covenants into two categories: 'covenants ancillary to an employment contract, which receive strict scrutiny and are not blue-penciled, and covenants ancillary to a sale of [a] business, which receive much less scrutiny and may be blue-penciled.'" *Id.* at 319, 551 S.E.2d at 736 (quoting *Habif, Arogeti & Wynne, P.C. v. Baggett*, 231 Ga. App. 289, 289-90, 498 S.E.2d 346, 349 (1998)). However, an amendment to the Georgia Constitution would permit courts to "blue pencil" restrictive covenants ancillary to employment contracts. *See supra* Part II.A.; *see also supra* text accompanying note 6.

209. *See supra* Part II.A.

210. 606 F.3d 1285 (2010).

211. *Id.* at 1290.

212. *See id.* at 1292-93.

213. *Id.* at 1287-88.

214. *Id.* at 1296.

215. *See id.* at 1294.

216. *Id.* at 1292-93.

Appeals decision in *Atlanta Bread Co. International v. Lupton-Smith*.²¹⁷ The supreme court held that to enforce a covenant not to compete in a franchise agreement, the covenant must contain definite territorial limitations and specify the restricted activities with sufficient particularity.²¹⁸ In *Atlanta Bread*, the plaintiff owned several franchises of the Atlanta Bread Company, and his franchise agreement contained restrictive covenants. The covenant restricted the franchisee or principal shareholder from directly or indirectly engaging in, or acquiring financial interest in, any bakery or deli business whose method of operation resembled that of the Atlanta Bread Company. While the plaintiff owned these franchises, Atlanta Bread learned that the plaintiff entered into a franchise agreement with PJ's Coffee, a competing business. Consequently, Atlanta Bread terminated the plaintiff's franchise agreement on the ground that his new PJ's Coffee franchise constituted a material breach of the restrictive covenant.²¹⁹

The supreme court held that the restrictive covenant was unenforceable because it lacked a territorial limitation.²²⁰ The supreme court noted that in a franchise agreement, if any part of a restrictive covenant is unreasonable, the entire agreement is unenforceable.²²¹ Although Atlanta Bread contended that the usual rules regarding restrictive covenants in the employment context should not apply to franchise agreements, the supreme court held that a covenant not to compete in a franchise agreement "receive[s] the same treatment as noncompetition covenants found in employment contracts."²²² The same measure of reasonableness applies to both contracts.²²³ However, although such was not the case in *Atlanta Bread*, had the franchise agreement specifically provided for the severability and survivability of restrictive covenants apart from the enforceability of the underlying agreement, "the covenants in the contract [would be] independent,' so that they [would have been] enforced despite the possible breach of the underlying agreement."²²⁴

217. 285 Ga. 587, 679 S.E.2d 722 (2009).

218. See *id.* at 590-91, 679 S.E.2d at 725.

219. *Id.* at 588, 679 S.E.2d at 723.

220. *Id.* at 591, 679 S.E.2d at 725.

221. *Id.*

222. *Id.* at 589, 679 S.E.2d at 724; see also *supra* Part VII.A.1.

223. See *Atlanta Bread*, 285 Ga. at 589, 679 S.E.2d at 724.

224. *Zampatti v. Tradebank Int'l Franchising Corp.*, 235 Ga. App. 333, 339, 508 S.E.2d 750, 756 (1998) (quoting *Orkin Exterminating Co. v. Harris*, 224 Ga. 759, 761, 164 S.E.2d 727, 729 (1968)).

3. Scope of Prohibited Activities. During the survey period, the supreme court held in *Coleman v. Retina Consultants, P.C.*²²⁵ that restrictive covenants in an employment contract that contain neither geographical nor temporal limitations constitute an unlawful restraint on trade.²²⁶ In *Coleman Retina Consultants (d/b/a The Retina Eye Center (TREC))* employed Coleman, a software engineer, to further develop a medical billing program previously created by Coleman. With the assistance of TREC personnel and doctors, Coleman developed his initial product into a more comprehensive program allowing for the integration of the storage of medical records with billing. Coleman and TREC entered into a Software Agreement that divided the rights to the new program between the parties.²²⁷ The agreement read in relevant part that Coleman would “not distribute, vend or license to any ophthalmologist or optometrist the . . . software or any computer application competitive with the . . . software without the written consent of TREC.”²²⁸ After his resignation, Coleman

attempted to distribute, vend, or license . . . the . . . software; failed and refused to disclose to TREC the passwords required to read and revise copies of the . . . software; refused to provide copies to TREC of all documentation . . . relating to the programming and use of the software; [and] attempted to use TREC’s proprietary information and trade secrets to compete with [TREC].²²⁹

The supreme court held the employment contract’s covenants unenforceable: “[T]he noncompete clause at issue in this appeal is unenforceable as a matter of law [T]he agreement contains no time limitation, as the contract purports to limit Coleman’s actions in perpetuity.”²³⁰ Furthermore, the supreme court held that the restrictive covenants were unenforceable as applied to Coleman’s use of the software absent applications and information that constitute trade secrets derived directly from TREC.²³¹

The court of appeals held in *Pittman v. Coosa Medical Group, P.C.*²³² that minor deviations in the restricted activities under a covenant not to compete that are of the same general type fall within the scope of

225. 286 Ga. 317, 687 S.E.2d 457 (2009).

226. *See id.* at 320, 687 S.E.2d at 461.

227. *Id.* at 317-18, 687 S.E.2d at 459.

228. *Id.* at 318, 687 S.E.2d at 459-60.

229. *Id.* at 318, 687 S.E.2d at 460.

230. *Id.* at 320, 687 S.E.2d at 461.

231. *Id.* at 321, 687 S.E.2d at 461-62.

232. 300 Ga. App. 529, 685 S.E.2d 753 (2009).

prohibited activities covered by the covenant.²³³ In *Pittman* a group of physicians, including Dr. Pittman, left another practice to form Coosa Medical Group (CMG). Six years after starting the practice, CMG began requiring its physicians to sign and enter into employment contracts containing restrictive covenants.²³⁴ The covenant prohibited the physician “for a period of one (1) year from . . . engag[ing] in the practice of medicine in [the professional medical specialty of neurosurgery] within a thirty (30) mile radius of [CMG’s] principal office.”²³⁵ Dr. Pittman informed CMG of his intent to leave CMG and join a competing neurosurgery practice. Dr. Pittman argued he was permitted to do so because CMG practices neurology, and he practices neurosurgery, and the two fields are complementary and not competitive.²³⁶ The court of appeals disagreed with Dr. Pittman’s contention “that CMG had no legitimate business interest in enforcing the covenant.”²³⁷

The court of appeals reasoned that because CMG built its business model around “an integration of the two specialties,” a legitimate business interest existed in enforcing the covenant.²³⁸ First, because of the relatively small community of doctors that practice neurological medicine, when a neurosurgeon leaves one practice to practice across town with another office, many questions are raised within the small neurological medicine community about the competency of the practice that the doctor abandoned.²³⁹ Second, the presence of competing physicians in the neurological field caused significant problems in recruiting a replacement for Dr. Pittman.²⁴⁰ The court of appeals held that these factors were a significant enough reason to enforce the noncompete agreement between CMG and Dr. Pittman.²⁴¹

Another issue addressed in *Pittman* was whether enforcement of the covenant not to compete had been waived.²⁴² CMG referred twelve patients to Dr. Pittman and the practice that he joined. Pittman argued that these referrals constituted a waiver.²⁴³ CMG’s representative said that a “‘patient’s care supersedes . . . this [contractual dispute],’ and Dr. Pittman was ‘going to render the best medical decision’ available in the

233. *See id.* at 530-31, 685 S.E.2d at 755-56.

234. *Id.* at 530, 685 S.E.2d at 755.

235. *Id.* (second and third alterations in original).

236. *Id.*

237. *Id.*

238. *Id.* at 531-32, 685 S.E.2d at 756.

239. *See id.*

240. *Id.* at 532, 685 S.E.2d at 756.

241. *Id.*

242. *See id.* at 534, 685 S.E.2d at 757.

243. *Id.* at 534, 685 S.E.2d at 757-58.

community.”²⁴⁴ The court of appeals stated, “CMG made it clear to Dr. Pittman that it did not consent to Dr. Pittman’s violation of the terms of the restrictive covenants. Dr. Pittman nevertheless made a choice to continue practicing neurosurgery within the restricted area even if this breached his contractual obligations to CMG.”²⁴⁵ The choice Dr. Pittman made to breach the covenant not to compete was his alone to make and was in the best interests of the patients; the actions that CMG took in the wake of Dr. Pittman’s decision lacked any bearing on Dr. Pittman’s violation of the restrictive covenants.²⁴⁶

4. Specification with Particularity. During the survey period, the court of appeals held in *Wachovia Insurance Services, Inc. v. Fallon*²⁴⁷ that a restrictive covenant prohibiting post-employment contact with customers was overly broad because it defined a customer as “any individual or entity that has purchased an insurance contract through [Wachovia Insurance Services].”²⁴⁸ Fallon was a partial owner of an insurance group that Wachovia Insurance Services (Wachovia) bought out. After the buy out, Wachovia employed Fallon as a senior vice president and gave him stock and cash as part of the sale. Three years after the buy out, Wachovia requested that Fallon sign a confidentiality and nonsolicitation agreement that essentially made Fallon an at-will employee. Two years later, Wachovia reduced Fallon’s bonus and commission structure, which induced Fallon to resign and form his own company, Fallon Benefits Group, Inc.²⁴⁹

The court considered whether the restrictive covenant in the nonsolicitation agreement constituted “an unreasonable restraint on trade” by adopting the pervasive definition of customer that Wachovia uses.²⁵⁰ By defining a customer as any person who has, at any time in the past, purchased an insurance contract through Wachovia, the covenant was held to be an unlawful restriction of trade.²⁵¹ The “employer ha[s] no legitimate business interest in preventing solicitation of clients who may have [previously] severed [their] relationship with [the] employer.”²⁵²

244. *Id.* at 534, 685 S.E.2d at 758 (alteration in original).

245. *Id.*

246. *Id.*

247. 299 Ga. App. 440, 682 S.E.2d 657 (2009).

248. *Id.* at 443, 682 S.E.2d at 661 (internal quotation marks omitted).

249. *Id.* at 440-41, 682 S.E.2d at 660.

250. *Id.* at 442-43, 682 S.E.2d at 661 (quoting *Trujillo v. Great S. Equip. Sales, LLC*, 289 Ga. App. 474, 476, 657 S.E.2d 581, 583 (2008)) (internal quotation marks omitted).

251. *See id.* at 443, 682 S.E.2d at 661; *see also* O.C.G.A. § 13-8-2.1(g)(1) (Supp. 2009).

252. *Fallon*, 299 Ga. App. at 444, 682 S.E.2d at 661 (citing *Gill v. Poe & Brown, Inc.*, 241 Ga. App. 580, 583, 524 S.E.2d 328, 331 (1999)).

In *Paramount Tax & Accounting, LLC v. H&R Block Eastern Enterprises, Inc.*,²⁵³ the court of appeals ruled that an employment contract that failed to specify a geographic limitation in a restrictive covenant was invalid.²⁵⁴ In most circumstances, if a noncompete agreement lacks a geographic limitation, Georgia courts will not enforce it²⁵⁵ because such covenants are per se unreasonable under the Georgia Constitution.²⁵⁶ The covenant prohibited Mary Squire, the employee at issue, from working for any employer providing tax services “if that employer is located, conducts business, or solicits business in Block’s Gainesville [Georgia] District or within ten miles of the district’s borders.”²⁵⁷ The court reasoned that the “language prevents Squire from accepting employment anywhere in the United States, if her prospective employer engages in the preparation and electronic filing of tax returns and also either has an office or advertises in, or within ten miles of, Block’s Gainesville District.”²⁵⁸ The court ruled that such a geographic limitation was unreasonable and rendered the entire employment contract unenforceable as a matter of law.²⁵⁹

B. Nondisclosure Agreements

Another issue at bar in *Fallon* was whether a former employee violated the Georgia Trade Secrets Act²⁶⁰ when the employee personally collected client information from a previous employer while employed by a subsequent employer and did not obtain the information through an employer-generated client list.²⁶¹ Wachovia accused the defendants of misappropriating trade secrets by failing to delete customer information they had compiled on their personal BlackBerries during their employment with Wachovia.²⁶² The Georgia Trade Secrets Act generally defines “[t]rade secret [as] information . . . which is not commonly known by or available to the public and which information: (A) [d]erives economic value . . . from not being generally known to . . . other persons who can obtain economic value from its disclosure or use; and (B) [i]s the subject of efforts . . . to maintain its secrecy.”²⁶³ Fallon and the other

253. 299 Ga. App. 596, 683 S.E.2d 141 (2009).

254. *Id.* at 601, 683 S.E.2d at 146.

255. *See, e.g.*, *Lane Co. v. Taylor*, 174 Ga. App. 356, 358, 330 S.E.2d 112, 116 (1985).

256. *See Barnes Group, Inc. v. Harper*, 653 F.2d 175 (1981).

257. *Paramount*, 299 Ga. App. at 601, 683 S.E.2d at 146.

258. *Id.* at 602, 683 S.E.2d at 146.

259. *Id.* at 602, 683 S.E.2d at 147.

260. O.C.G.A. §§ 10-1-760 to -767 (2009).

261. *Fallon*, 299 Ga. App. at 444-45, 682 S.E.2d at 662.

262. *Id.* at 444, 682 S.E.2d at 662-63.

263. O.C.G.A. § 10-1-761(4).

former Wachovia employees that he subsequently employed used client lists that they compiled while at Wachovia, but the court of appeals held that this information did not constitute a trade secret.²⁶⁴ The information that Wachovia claimed constituted protected information was obtainable from a free, public website where Wachovia reported its customer information.²⁶⁵ Thus, Wachovia's claim failed because of the public nature of the information on the client lists and Wachovia's failure to deliver proof that its information was intentionally misappropriated.²⁶⁶

Wachovia also claimed the use of this information stored on BlackBerries by Fallon and his employees constituted "computer theft."²⁶⁷ Under Georgia law, computer theft occurs when "[a]ny person . . . uses a computer . . . with knowledge that such use is without authority and with the intention of: (1) [t]aking or appropriating any property of another . . . ; (2) [o]btaining property by any deceitful means . . . ; or (3) [c]onverting property to such person's use in violation of an agreement or other known legal obligation."²⁶⁸ The court held this claim to be meritless because there was no evidence that a computer was used with "knowledge that such use [was] without authority."²⁶⁹ The court held that the requisite mental state did not exist because Fallon and his employees did not understand that they did not have the authority to access the information on their personal BlackBerries.²⁷⁰

In *Fallon* Wachovia also claimed that Fallon Benefits's employee Julie Mitzel (also a former Wachovia employee) misappropriated trade secrets when she kept examples of her work with Wachovia after she left Wachovia and joined Fallon Benefits.²⁷¹ Mitzel worked as a creative services manager with Wachovia before accepting employment with Fallon Benefits. As an artist, Mitzel took with her (after she terminated her employment with Wachovia) brochures that she designed for her personal professional portfolio while working at Wachovia.²⁷² These brochures failed to qualify as a trade secret because they were not

264. *Fallon*, 299 Ga. App. at 446, 682 S.E.2d at 663.

265. *Id.* (showing that the information acquired could be found at the website www.freeERISA.com).

266. *Id.*

267. *Id.* at 449-50, 682 S.E.2d at 665 (internal quotation marks omitted).

268. O.C.G.A. § 16-9-93(a) (2007).

269. *Fallon*, 299 Ga. App. at 450, 682 S.E.2d at 665; *see also* O.C.G.A. § 16-9-93(a).

270. *Fallon*, 299 Ga. App. at 450, 682 S.E.2d at 665.

271. *Id.* at 447, 682 S.E.2d at 663-64.

272. *Id.*

misappropriated; rather, they remained in storage at Mitzel's home and were not used to design competing literature.²⁷³

In *Paramount*, however, the court of appeals did hold that a violation of a nondisclosure agreement occurred when a former employee misappropriated privileged information.²⁷⁴ Although the court held the covenant not to compete to be unenforceable because its geographic scope was overly broad,²⁷⁵ the court ruled that Paramount, through H&R Block's former employee Mary Squire, misappropriated trade secrets of H&R Block.²⁷⁶ After Squire terminated her employment with Block and started working for Paramount, Paramount sent out over 5000 solicitations, which included a coupon for Paramount's services.²⁷⁷ H&R Block proved that Squire used her managerial access to obtain privileged client information because at least some of the addresses were taken directly from an H&R Block database.²⁷⁸ Because Squire had misappropriated trade secrets from H&R Block, the trial court issued an injunction that restricted Paramount from performing any work for any clients found in the H&R Block database.²⁷⁹ The court struck the injunction as an abuse of the trial court's discretion because the "injunction afforded Block far broader relief than it was entitled to."²⁸⁰ The court ruled that a more equitable injunction would have restricted Paramount from performing services for any client who tried to use the coupon that Paramount included in its unscrupulous solicitation.²⁸¹

C. Nonsolicitation Agreements

The court of appeals held in *Fallon* that hiring employees from a former employer does not violate a nonsolicitation agreement if the employees contact the new employer and begin working for that

273. See *id.* at 447, 682 S.E.2d at 664.

274. *Paramount*, 299 Ga. App. at 603-04, 683 S.E.2d at 148.

275. *Id.* at 601, 683 S.E.2d at 146.

276. *Id.* at 603-04, 683 S.E.2d at 148.

277. *Id.* at 598-99, 683 S.E.2d at 144-45.

278. *Id.* at 599-600, 683 S.E.2d at 145.

Block introduced evidence supporting the conclusion that at least some of the addresses . . . were taken directly from the Block client database One such [solicitation] was received by a couple living in Kansas, whose tax return was filed out of a Gainesville District office. . . .

[Another] Block employee . . . had filed a tax return for her then 94-year-old great aunt. . . . The employee . . . gave her own parents' address as that of the aunt, [and] . . . Paramount sent the great aunt a solicitation at that address.

Id.

279. *Id.* at 604-05, 683 S.E.2d at 148.

280. *Id.* at 605, 683 S.E.2d at 148.

281. *Id.* at 605-06, 683 S.E.2d at 149.

employer through their own volition.²⁸² While still employed at Wachovia, Fallon signed a nonsolicitation agreement that stated he would not “directly or indirectly . . . solicit or induce . . . any person employed by [Wachovia] . . . or . . . enter into an employment or agency relationship with the Employee” for a period of two years after termination of employment.²⁸³ Despite this agreement, Fallon Benefits employed two former Wachovia employees; however, the court held that because these employees approached Fallon for employment, Fallon’s lack of solicitation or inducement barred any claim for breach of the nonsolicitation agreement.²⁸⁴

Additionally, Wachovia attempted to establish that Fallon breached his fiduciary duties and duty of loyalty when he breached the nonsolicitation agreement. Wachovia accused Fallon of making an appointment with another Wachovia employee whom he later hired, scheduling business appointments with clients that Fallon kept after leaving Wachovia, and discussing his plans to go into business for himself with a golfing partner—all while still employed by Wachovia Insurance.²⁸⁵ In his role as senior vice president of employee benefits, Fallon “occup[ie]d a fiduciary relationship to the corporation and its shareholders, and [should be] held to the standard of utmost good faith and loyalty.”²⁸⁶ However, the court held the claims of soliciting employees and clients to be without merit because neither Fallon nor his company directly engaged in competition with Wachovia regarding those clients.²⁸⁷

VIII. CONCLUSION

Although labor and employment issues in Georgia law often are not as complex as their federal counterparts, the issues arising under state law are becoming more challenging with each passing year. Adding to this challenge is the growing overlap between state and federal issues. Regardless of whether a practitioner professes to specialize in state, federal, administrative, or trial law, it is important to recognize that any one law or legal proceeding can and does impact other relations between employer and employee.

282. *Fallon*, 299 Ga. App. at 444, 682 S.E.2d at 662; *see also supra* Part VII.A.4.

283. *Fallon*, 299 Ga. App. at 444, 682 S.E.2d at 661-62.

284. *Id.* at 444, 682 S.E.2d at 662.

285. *Id.* at 447-48, 682 S.E.2d at 664.

286. *Id.* at 448, 682 S.E.2d at 664 (quoting *Hilb, Rogal & Hamilton Co. v. Holley*, 295 Ga. App. 54, 57-58, 670 S.E.2d 874, 877 (2008)) (internal quotation marks omitted).

287. *Id.*