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Labor and Employment Law

by W. Melvin Haas III*

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I. INTRODUCTION

This Article surveys revisions to the Official Code of Georgia Annotated (O.C.G.A.)¹ and decisions interpreting Georgia law from June 1, 2018 to May 31, 2019,² that affect labor and employment relations for Georgia employers.

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1. For an 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*, 70 MERCER L. REV. 125 (2018).

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., 7th ed. 2017); BARBARA

II. RECENT LEGISLATION

A. *Georgia's Hope Act*

Effective July 1, 2019, Georgia's Hope Act (the Act)³ amends Chapter 12 of Title 16 of the O.C.G.A., providing for the production, manufacturing, and dispensing of low THC oil. The Act now also provides an exception to possession and purchase of certain quantities of low THC oil.⁴ Patients in the registry were permitted to possess up to twenty ounces of the oil, but they were required to purchase this oil from out of state.⁵ In-state production and sale of low THC, coupled with the expansion of individuals qualified for the registry,⁶ could mean a greater number of employees using low THC oil. While the passage of this legislation may raise questions for Georgia employers, the carve-out provision for employers in O.C.G.A. § 16-12-191(g)⁷ remains intact.⁸ Employers are not required to:

permit or accommodate the use, consumption, possession, transfer, display, transportation, purchase, sale, or growing of marijuana in any form, or to affect the ability of an employer to have a written zero tolerance policy prohibiting the on-duty, and off-duty, use of marijuana, or prohibiting any employee from having a detectable amount of marijuana in such employee's system while at work.⁹

In a nut shell, the new legislation seems designed to expand the network of dispensaries, expand the business opportunities for the manufacturing of the oil, and expand the list of illnesses that would

LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* (C. Geoffrey Weirich et al. eds., 5th ed. 2012); W. Jonathan Martin II et al., *Labor and Employment Law, Eleventh Circuit Survey*, 69 *MERCER L. REV.* 1223 (2018); *Daily Labor Report*, BLOOMBERG BNA, <https://news.bloomberglaw.com/daily-labor-report/> (last visited Oct. 9, 2019). Accordingly, this Article is not intended to cover the latest developments in federal labor and employment law. Rather, this Article is intended only to cover legislative and judicial developments arising under Georgia state law during the survey period.

3. Ga. H.R. Bill 324, Reg. Sess. (2019).

4. *Id.* It is now "lawful for any person to possess, purchase, or have under his or her control 20 fluid ounces or less of low THC oil if such substance is in a pharmaceutical container labeled by the manufacturer indicating the percentage of tetrahydrocannabinol therein . . ." O.C.G.A. § 16-12-191(a)(1) (2019).

5. See Ga. H.R. Bill 324, Reg. Sess. § 2 (2019).

6. Those with Post Traumatic Stress Disorder (PTSD) now qualify for the registry. O.C.G.A. § 31-2A-18(a)(O) (2019).

7. O.C.G.A. § 16-12-191(g) (2019).

8. See W. Melvin Haas III et al., *Labor and Employment Law, Annual Survey of Georgia Law*, 67 *MERCER L. REV.* 91, 92-94 (2015).

9. O.C.G.A. § 16-12-191(g).

authorize use of the oil. However, it does not appear to have the effect of (and specifically disavows) the accommodation of THC at work.¹⁰

B. Changes in Unemployment Weekly Benefit Amounts

Effective May 6, 2019, Georgia House Bill 373¹¹ revises subsections (b) and (c) of O.C.G.A. § 34-8-193,¹² relating to the determination of weekly benefits amounts. Beginning on July 1, 2019, when the weekly amount “would be more than \$26.00 but less than \$55.00, the individual’s weekly benefit amount will be \$55.00, and no weekly benefit amount shall be established for less than \$55.00.”¹³ Also, “[f]or claims filed on or after July 1, 2019, the maximum weekly benefit amount shall not exceed \$365.00.”¹⁴

C. Changes in Workers’ Compensation Rates

Senate Bill 135¹⁵ amended subsection (a) of O.C.G.A. § 34-9-200¹⁶ relating to compensation for medical care, treatment, and supplies, among others. For non-catastrophic injuries occurring after July 1, 2013, the maximum period of 400 weeks shall not be applicable to certain durable medical equipment (DME) and prosthetic devices.¹⁷

10. Under the Drug Enforcement Agency’s Final Rule establishing a new drug code for marijuana extract, if a product, such as oil from cannabis seeds, consisted solely of parts of the cannabis plant excluded from the Controlled Substances Act definition of marijuana, such product would not be included in the new drug code or in the drug code for marijuana even if it contained trace amounts of cannabinoids. *Clarification of the New Drug Code (7350) for Marijuana Extract*, U.S. DEP’T OF JUSTICE DRUG ENF’T ADMIN. DIVISION CONTROL DIV., https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html (last visited Nov. 1, 2019).

11. Ga. H.R. Bill 373, Reg. Sess. (2019).

12. O.C.G.A. § 34-8-193(b)–(c) (2019).

13. O.C.G.A. § 34-8-193(b).

14. O.C.G.A. § 34-8-193(c)(4) (2019).

15. Ga. S. Bill 135, Reg. Sess. § 3 (2019).

16. O.C.G.A. § 34-9-200(a) (2019).

17. O.C.G.A. § 34-9-200(a)(3)(A)(i) & (iii) (2019).

III. WRONGFUL TERMINATION

A. Employment At-Will

Georgia's employers are protected from wrongful termination lawsuits by the doctrine of "employment at will."¹⁸ Whereas the doctrine of employment at will has been eroded in other jurisdictions by public policy exceptions,¹⁹ the doctrine of employment at will remains strong in Georgia.²⁰ It is protected by statute²¹ and contract provisions specifying "permanent employment," "employment for life," [and] "employment until retirement,"²² or contracts specifying an annual salary do alter the application of the doctrine.²³ Only employment contracts specifying a definite period of employment are actionable as a breach of contract, and any employment beyond that period becomes employment at-will.²⁴

Similarly, oral promises between an employer and employee will not modify the doctrine; absent a written contract, an employee's status remains at-will.²⁵

In *Shelnutt v. Mayor of Savannah*,²⁶ Christopher Shelnutt and twenty-one other firefighters challenged the trial court's grant of summary judgment for the City of Savannah (the City).²⁷ The

18. An "at-will employment" relationship is one "that may be terminated at any time" with or without cause by the employer or the employee. *Employment at Will*, BLACK'S LAW DICTIONARY (11th ed. 2019).

19. Haas et al., *supra* note 1, at 126 ("[E]mployment at-will in other jurisdictions may be weakening.").

20. *See, e.g.*, *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) (quoting *Jellico v. Effingham Cty.*, 221 Ga. App. 252, 253, 71 S.E.2d 36, 37 (1996)) ("The employer[] with or without cause and regardless of its motives may discharge the employee without liability."); *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)) ("[T]his bar to wrongful discharge claims in the at-will employment context 'is a fundamental statutory rule governing employer-employee relations in Georgia.'"); *see also* *Wilson v. City of Sardis*, 264 Ga. App. 178, 179, 590 S.E.2d 383, 385 (2003) (citing *Duck v. Jacobs*, 739 F. Supp. 1545, 1548 (S.D. Ga. 1990)).

21. O.C.G.A. § 34-7-1 (2019).

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

23. *Ikemiya v. Shibamoto Am.*, 213 Ga. App. 271, 273, 444 S.E.2d 351, 353 (1994).

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

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

26. 349 Ga. App. 499, 826 S.E.2d 379 (2019).

27. This trial court decision was on remand from the Georgia Court of Appeals case of *Shelnutt 1*, wherein the Georgia Court of Appeals had reversed the trial court's dismissal

firefighters claimed that the City was not honoring its contractual obligation because the City was not paying them in accordance with the terms of the pay policy.²⁸ Under the pay policy, agreed to by the firefighters at the beginning of employment, the firefighters would receive gradual increases in pay if they were promoted. This policy was amended throughout the years leading up to Shelnett's complaint, with different plaintiff firefighters being hired under different versions of the pay policy.²⁹ The trial court originally dismissed the firefighters' complaint because the court found them to be at-will employees of the City and promises of a future change in compensation were not enforceable.³⁰ *Shelnett 1* reversed this decision, holding that while future promises of "change in compensation are generally unenforceable—each firefighter 'may be able to point to the version of the pay policy in effect at the time he or she was hired and show that it provided for a definite percentage pay increase conditioned on promotion to a supervisory position.'"³¹ On remand, the trial court again sided with the City, granting summary judgment for the remaining twenty-one firefighters and finding that the City was in compliance with its pay policy with the firefighters.³² On appeal, the firefighters argued that the trial court erroneously interpreted the court's decision in *Shelnett 1* by finding that only the pay policy in effect at the time of a firefighter's hire could give rise to contractual rights in an at-will relationship.³³ The Georgia Court of Appeals disagreed, reaffirming its holding that "a promise of a future change in compensation generally is unenforceable since neither party is bound to continue performance under the contract at all, this rule does not apply to a promise of future compensation made at the beginning of the employment relationship. Such a promise is enforceable."³⁴

of Shelnett's complaint. *Shelnett v. Mayor of Savannah*, 333 Ga. App. 446, 454, 776 S.E.2d 650, 657 (2015).

28. *Shelnett*, 349 Ga. App. at 500, 826 S.E.2d at 381 (citing *Shelnett*, 333 Ga. App. at 446, 776 S.E.2d at 652).

29. *Id.* There was not a pay policy in place when twenty-two of the original forty-nine firefighters were hired. *Id.* at 501, 826 S.E.2d at 382.

30. *Id.* at 501, 826 S.E.2d at 382.

31. *Id.* (quoting *Shelnett*, 333 Ga. App. at 451–52, 776 S.E.2d at 656).

32. *Id.* at 499, 826 S.E.2d at 381.

33. *Id.* at 501, 826 S.E.2d at 382. The firefighters had an interest in the court holding that their claims arose at each pay period, and not when they were initially promoted, so as to avoid having the statute of limitations run. *See id.*

34. *Id.* at 502, 826 S.E.2d at 383 (quoting *Shelnett*, 333 Ga. App. at 451, 776 S.E.2d at 655).

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

For an employment agreement to be enforceable, it must include all traditional elements of a contract: offer, acceptance, and consideration.³⁵ Additionally, it must include all necessary terms, and the terms must be definite.³⁶

In *Phillips v. Adams, Jordan & Herrington, P.C.*,³⁷ the Georgia Court of Appeals upheld a trial court's grant of summary judgment in favor of the defendant, a law firm (the firm), holding that the employment agreement between the plaintiff and the firm was too indefinite to be enforced.³⁸ In December 2013, when hired, the plaintiff entered into an employment agreement with the firm. The agreement outlined that following successful resolution of the case, the plaintiff "would be paid a 'portion of the fee,' 'on a case by case basis,' based on 'the extent' of his work on the case."³⁹ In addition, either party could terminate the agreement "upon thirty (30) days written notice."⁴⁰

In 2014, the plaintiff requested to be switched to a salary with the understanding that his pay from cases as outlined in the December 2013 agreement would be reduced as a result.⁴¹ As the plaintiff began to successfully resolve cases, he perceived that his compensation was not in line with the December 2013 agreement. The firm responded to his concerns in writing, stating that the plaintiff requested to be paid on a salary as opposed to the pay structure under the December 2013 agreement. The plaintiff subsequently sued the firm claiming breach of contract and *quantum meruit*.⁴²

The court of appeals held the December 2013 agreement to be unenforceable.⁴³ For an employment contract to be enforceable, "the promise of future compensation must . . . be for an exact amount or based upon a formula or method for determining the exact amount of the [payment]."⁴⁴ The court went on to state that where future compensation is based "at least in part" by "future exercise of

35. See generally JAMES W. WIMBERLY, *GEORGIA EMPLOYMENT LAW* §§ 1–2 (3d ed. 2000).

36. *Id.*

37. 350 Ga. App. 184, 828 S.E.2d 414 (2019).

38. *Id.* at 184, 828 S.E.2d at 415.

39. *Id.* at 185, 828 S.E.2d at 415.

40. *Id.* at 185, 828 S.E.2d at 416.

41. *Id.* at 185–86, 828 S.E.2d at 416.

42. *Id.* at 186, 828 S.E.2d at 416.

43. *Id.* at 187, 828 S.E.2d at 417.

44. *Id.* at 186, 828 S.E.2d at 416 (quoting *Arby's, Inc. v. Cooper*, 265 Ga. 240, 241, 454 S.E.2d 488, 489 (1995)).

discretion” then that is essentially a promise to change compensation in the future, which is unenforceable.⁴⁵ The court focused on the firm’s ability to change the plaintiff’s compensation in the future based on arbitrary terms, such as “the extent” of his work “fairly determined by the partners,” in declining to find the employment contract enforceable.⁴⁶ The court noted, and the plaintiff also admitted in his testimony, there was no formula to determine his compensation between himself and the firm.⁴⁷ In other words, there was no way to value his contributions to the firm and therefore the agreement was too vague to be enforceable.⁴⁸ While the court granted summary judgment on the breach of contract claim, it allowed the *quantum meruit* claim to proceed to trial to determine if the December 2013 agreement was terminated and, if not, if the plaintiff was entitled to compensation for the benefit provided to the firm.⁴⁹

C. Whistleblower Act

Georgia’s Whistleblower Act (GWA) provides: “No public employer shall retaliate against a public employee for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency”⁵⁰ A public employee establishes a prima facie violation of the GWA by proving four elements: “(1) [the plaintiff] was employed by a public employer; (2) [the plaintiff] made a protected disclosure or objection; (3) [the plaintiff] suffered an adverse employment action; and (4) there is some causal relationship between the protected activity and the adverse employment action.”⁵¹ The establishment of a prima facie case creates a presumption of retaliation which the employer rebuts by producing a legitimate, non-retaliatory

45. *Id.* at 187, 828 S.E.2d at 416–17 (quoting *Cooper*, 265 Ga. at 242, 454 S.E.2d at 489).

46. *Id.* at 187, 828 S.E.2d at 417.

47. *Id.*

48. *Id.*

49. *Id.* at 188, 828 S.E.2d at 417–18.

50. O.C.G.A. § 45-1-4(d)(2) (2019).

51. *Albers v. Ga. Bd. of Regents of Univ. Sys. of Ga.*, 330 Ga. App. 58, 61, 766 S.E.2d 520, 523 (2014); *see Forrester v. Ga. Dep’t of Human Servs.*, 308 Ga. App. 716, 722, 708 S.E.2d 660, 666 (2011).

reason for the employment action.⁵² “The burden then returns to the plaintiff to prove that the employer’s reasons are pretextual.”⁵³

In *Franklin v. Pitts*,⁵⁴ the Georgia Court of Appeals overruled in part its decision in *Freeman v. Smith*,⁵⁵ holding that “adverse employment action” in the GWA means action similar to “discharge, suspension, or demotion.”⁵⁶ The plaintiff, a county employee whose job included the handling of patient records, filed a grievance expressing concerns that when she was moved from a private office to a cubicle, the county was violating confidentiality requirements under the Health Insurance Portability and Accountability Act (HIPAA)⁵⁷ by exposing patient information to the general public. The plaintiff claimed that she was retaliated against as a result of her grievance because some of her work duties were reassigned, she had difficulties obtaining leave that did not exist pre-grievance, and she was not selected for two separate promotions.⁵⁸

The Georgia Court of Appeals held that the plaintiff failed to show that she suffered a serious and material change in the terms, conditions, or privileges of her employment.⁵⁹ During its analysis, the court concluded that its previous decision in *Freeman*, regarding the standard for determining whether a public employee met the burden of proving “adverse employment action” under the GWA, was incorrect.⁶⁰ In *Freeman*, the court applied the *Burlington Northern and Santa Fe Railway Co. v. White*⁶¹ standard to the GWA.⁶² The standard for retaliation under *Burlington* is “viewed from the perspective of a reasonable employee, when previously courts looked to concrete changes in the employee’s status, such as firings, demotions, or withheld pay

52. *Forrester*, 308 Ga. App. at 721–22, 708 S.E.2d at 665–66 (adopting the burden-shifting analysis applied in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

53. *United States ex rel. Parato v. Unadilla Health Care Ctr., Inc.*, 787 F. Supp. 2d 1329, 1342 (M.D. Ga. 2011).

54. 349 Ga. App. 544, 826 S.E.2d 427 (2019).

55. 324 Ga. App. 426, 750 S.E.2d 739 (2013).

56. *Franklin*, 349 Ga. App. at 546, 826 S.E.2d at 431 (quoting O.C.G.A. § 45-1-4(a)(5) (2019)).

57. 42 U.S.C. § 1320d-6 (2019).

58. *Franklin*, 349 Ga. App. at 544–45, 826 S.E.2d at 430–31.

59. *Id.* at 557 n.17, 826 S.E.2d at 438 n.17.

60. *Id.* at 552, 826 S.E.2d at 435.

61. 548 U.S. 53 (2006).

62. *Franklin*, 349 Ga. App. at 552, 826 S.E.2d at 435.

raises.”⁶³ The court held that *Freeman* misapplied this standard to the GWA:

Although the [GWA] does not define “adverse employment action,” the definition of “retaliate” or “retaliation” makes clear that an “adverse employment action” must be “taken by a public employer against a public employee in the terms or conditions of employment for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or government agency.”⁶⁴

Instead, the court held that *Freeman* should have interpreted the phrase “any other adverse employment action” in the GWA “to mean employment action analogous to or of a similar kind or class as ‘discharge, suspension, or demotion.’”⁶⁵

In making this determination, the court relied on the standard used in federal decisions, which is that “an employee must show that [he] suffered a serious and material change in the terms, conditions, or privileges of [his] employment.”⁶⁶ Also, “[t]he employee’s subjective perception of the seriousness of the change is not controlling;” the issue of whether or not adverse employment action took place should be viewed from the eyes of a reasonable employee under the same circumstances.⁶⁷ Here, because the plaintiff only offered evidence of “busy work” being imposed on her in retaliation for her grievance, the court held it was the type of subjective characterization that “should not be considered when determining whether an adverse employment action . . . occurred.”⁶⁸

IV. RESPONDEAT SUPERIOR

A. Vicarious Liability

Under Georgia law, an employer may be held vicariously liable for the negligence or intentional torts of its employees under the doctrine of *respondeat superior*.⁶⁹ A plaintiff establishes liability by proving the following two elements: (1) the employee was acting in furtherance of

63. *Id.* at 551–52, 826 S.E.2d at 434 (quoting *Brathwaite v. School Bd. of Broward Cty., Fl.*, 763 F. App’x 856, 860 (11th Cir. 2019)).

64. *Id.* at 551, 826 S.E.2d at 435 (quoting O.C.G.A. § 45-1-4(a)(5) (2019)).

65. *Id.* at 554, 826 S.E.2d at 436 (quoting O.C.G.A. § 45-1-4(a)(5) (2019)).

66. *Id.* at 555, 826 S.E.2d at 437 (quoting *Walker v. Indian River Transp. Co.*, 741 F. App’x 740, 749 (11th Cir. 2018)).

67. *Id.*

68. *Id.* at 556, 826 S.E.2d at 437.

69. See CHARLES R. ADAMS III, *GEORGIA LAW OF TORTS* § 7:2 (2017–2018 ed.).

the employer's business; and (2) the employee was acting within the scope of the employer's business.⁷⁰

In *Duvall v. Cronic*,⁷¹ the Georgia Court of Appeals addressed liability in the context of a fraudulent vehicle sale by an employee.⁷² Kerrie Bundy and Jon Cronic, president of K&J, an internet car sales business, entered into a business venture, and Cronic agreed to provide Bundy with the use of a luxury vehicle. Bundy then sold, without Cronic's authorization, the luxury vehicle to Duvall Ford Company (Duvall). Cronic and K&J subsequently brought action against Duvall for conversion, and Duvall brought counterclaims against Cronic and K&J for vicarious liability related to Bundy's acts. The trial court denied summary judgment for Cronic and K&J on the vicarious liability claims.⁷³

The court of appeals held that Cronic was entitled to summary judgment while K&J was not.⁷⁴ The court noted there was not enough evidence to support a finding that a principal-agent relationship existed between Bundy and Cronic.⁷⁵ "The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf."⁷⁶ Here, Duvall failed to present evidence that Bundy was employed by Cronic, that Cronic authorized Bundy to act on his behalf, or that Cronic later ratified her actions.⁷⁷ Therefore, summary judgment was appropriate for Cronic.⁷⁸

This, however, was not the case with K&J. The court held that Bundy was an employee of K&J because she was managing K&J's internet car sales at the time she sold the luxury car to Duvall.⁷⁹ For K&J to be vicariously liable for Bundy's tortious acts against Duvall, "[she] must have been acting in furtherance of and within the scope of K&J's business."⁸⁰ The court held that this is typically a question of fact, and the mere fact that the tort was intentional does not mean it

70. *Id.*

71. 347 Ga. App. 763, 820 S.E.2d 780 (2018).

72. *Id.* at 763-64, 820 S.E.2d at 783.

73. *Id.*

74. *Id.* at 772, 820 S.E.2d at 789.

75. *Id.*

76. *Id.* (quoting O.C.G.A. § 10-6-1 (2019)).

77. *Id.*

78. *Id.*

79. *Id.* at 772-73, 820 S.E.2d at 789.

80. *Id.* at 772, 820 S.E.2d at 789 (citing *Chorey, Taylor & Feil, P. C. v. Clark*, 273 Ga. 143, 144, 539 S.E.2d 139, 140 (2000)).

was not “in furtherance of and within the scope of K&J’s business.”⁸¹ Because the court was not able to determine as a matter of law if Bundy’s acts were entirely disconnected from her employer’s internet car sales business,⁸² summary judgment was not appropriate for K&J.⁸³

In *Lucas v. Beckman Coulter, Inc.*,⁸⁴ on remand from the Georgia Supreme Court,⁸⁵ the Georgia Court of Appeals adopted the judgment of the supreme court.⁸⁶ The court held that an employer is not liable for firearm-related tort liability under O.C.G.A. § 16-11-135(e)⁸⁷ when an employee negligently discharges their firearm.⁸⁸

In *Manners v. 5 Star Lodge and Stables, LLC*,⁸⁹ the Georgia Court of Appeals held that a lodge employee was not acting within the scope of his employment when he accidentally shot a customer on the lodge premises.⁹⁰ Manners, a visitor of 5 Star Lodge, brought a *respondeat superior* claim under O.C.G.A. § 51-2-2 against the lodge and its owner when she was accidentally shot by the manager’s boyfriend, Sisson, while on the premises.⁹¹ Manners claimed that Sisson was a lodge employee and that he was engaged in lodge business when the shooting occurred because she was there to discuss lodge business with the manager and Sisson. However, the shooting occurred before the discussion began, which Manners believed would be enough that a jury could find that Sisson was engaged in lodge business when he shot Manners.⁹²

The court affirmed the trial court’s grant of summary judgment for the lodge.⁹³ Under O.C.G.A. § 51-2-2, “[e]very person shall be liable for torts committed by his wife, his child, or his servant by his command or in the prosecution and within the scope of his business, whether the

81. *Id.*; see O.C.G.A. § 51-2-2 (2019).

82. *Duwall*, 347 Ga. App. at 773, 820 S.E.2d at 789. The tortious act involved selling a vehicle, and internet vehicle sales were Bundy’s responsibility at K&J. *Id.* at 772, 820 S.E.2d at 789.

83. *Id.* at 773, 820 S.E.2d at 789.

84. 348 Ga. App. 505, 823 S.E.2d 826 (2019).

85. *Lucas v. Beckman Coulter, Inc.*, 303 Ga. 261, 811 S.E.2d 369 (2018). For an analysis of this supreme court decision, see Haas et al., *supra* note 1, at 136–37.

86. *Lucas*, 348 Ga. App. at 506, 823 S.E.2d at 828.

87. O.C.G.A. § 16-11-135(e) (2019).

88. *Lucas*, 348 Ga. App. at 510–11, 823 S.E.2d at 831.

89. 347 Ga. App. 738, 820 S.E.2d 754 (2018).

90. *Id.* at 740, 820 S.E.2d at 757.

91. *Id.* at 738, 820 S.E.2d at 755.

92. *Id.* at 740, 820 S.E.2d at 756–57.

93. *Id.* at 740, 820 S.E.2d at 757.

same are committed by negligence or voluntarily.”⁹⁴ Also, “[w]hen a servant causes an injury to another, the test to determine if the master is liable is whether or not the servant was at the time of the injury acting within the scope of his employment and on the business of the master.”⁹⁵ Therefore, the court held that because there was no lodge business being discussed at the time of the shooting, regardless of Manners’ purpose for being there, Sisson was not acting within the scope of his employment, so the lodge could not be held liable under *respondeat superior*.⁹⁶

V. BUSINESS TORTS

A. Breach of Fiduciary Duty

In *Department of Labor v. McConnell*,⁹⁷ the Georgia Supreme Court held that Georgia Department of Labor (GDOL) employees did not owe Georgia citizens a fiduciary duty to protect their personal information under the trustee clause of the Georgia Constitution.⁹⁸ GDOL employees had inadvertently disclosed the personal information of over 1,000 citizens of Cherokee, Cobb, and Fulton counties.⁹⁹ McConnell argued that GDOL employees owed them a fiduciary duty under the trustee clause, “[p]ublic officers are the trustees and servants of the people and are at all times amenable to them;”¹⁰⁰ and the clause applies “when a public officer ha[s] definitely benefitted financially (or definitely stood to benefit financially) as a result of simply performing [his or her] official duties.”¹⁰¹

The plaintiffs’ complaint not did not allege that there was any financial gain or benefit by these public officers, and the plaintiffs also failed to show “a special relationship of trust or mutual confidence with the [GDOL or its employees].”¹⁰² Because the exchange of personal information between citizens and a government agency is a common

94. *Id.* at 739, 820 S.E.2d at 756 (quoting O.C.G.A. § 51-2-2).

95. *Id.* (quoting *Hicks v. Heard*, 286 Ga. 864, 865, 692 S.E.2d 360, 361 (2010)).

96. *Id.* at 740, 820 S.E.2d at 757.

97. 305 Ga. 812, 828 S.E.2d 352 (2019).

98. *Id.* at 817, 828 S.E.2d at 358; see GA. CONST. art. I, § 2, para. 1.

99. *McConnell*, 305 Ga. at 812–13, 828 S.E.2d at 356.

100. *Id.* at 816–17, 828 S.E.2d at 358–59 (quoting GA. CONST. art. I, § 2, para. 1).

101. *Id.* at 817, 828 S.E.2d at 359 (quoting *City of Columbus v. Ga. Dep’t of Transp.*, 292 Ga. 878, 882, 742 S.E.2d 728, 732 (2013)).

102. *Id.*

occurrence and necessary for citizens to receive benefits, the court held this was insufficient to show a fiduciary relationship.¹⁰³

B. Negligent Hiring, Retention, and Supervision

Employers in Georgia may be held liable for negligent hiring, retention, and supervision. That is, “[t]he employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency.”¹⁰⁴ Accordingly, the employer has a duty to “warn other employees of dangers incident to employment that ‘the employer knows or ought to know but which are unknown to the employee.’”¹⁰⁵ The successful plaintiff must prove the employer hired an employee whom “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.”¹⁰⁶ Negligent hiring, retention, and supervision are ordinarily issues for a jury,¹⁰⁷ except “where the evidence is plain, palpable[,] and undisputable.”¹⁰⁸

In *New Star Realty, Inc. v. Jungang PRI USA, LLC*,¹⁰⁹ the court of appeals held “that a franchisor [may] be held liable for the negligent training and supervision of franchisee employees under certain [conditions].”¹¹⁰ In this case, New Star Georgia was a franchisee of New Star California, a residential and commercial real estate business. After the owner and president of New Star Georgia misappropriated escrow funds in a real estate transaction, Jungang PRI USA, LLC (Jungang), brought suit against New Star California for negligent hiring, training, or supervision of its franchisee. The trial court entered judgment in favor of Jungang.¹¹¹

On appeal, New Star California argued it could not be held liable for negligent hiring because New Star Georgia’s owner and president was not an employee of New Star California.¹¹² The court of appeals agreed

103. *Id.* at 817–18, 828 S.E.2d at 359.

104. O.C.G.A. § 34-7-20 (2019).

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

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

107. *Tecumseh*, 250 Ga. App. at 741, 552 S.E.2d at 912.

108. *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)).

109. 346 Ga. App. 548, 816 S.E.2d 501 (2018).

110. *Id.* at 562, 816 S.E.2d at 513.

111. *Id.* at 548–49, 816 S.E.2d at 504.

112. *Id.* at 561, 816 S.E.2d at 512.

and noted that normally “there can be no claim for negligent hiring,” retention, or supervision when the defendant is not the employer of the individual in question.¹¹³ However, “a franchisor can be held liable for negligent training and supervision of franchisee employees under certain circumstances if the franchisor undertook a duty to involve itself in the day-to-day operations of the franchisee or assumed the right to control the manner in which the franchisee executed its work.”¹¹⁴ For Jungang to succeed on its negligent training and supervision claims, it would have to produce evidence that “New Star California exercised control over New Star Georgia’s daily operations”¹¹⁵ Here, New Star Georgia’s owner and president was not subjected to day-to-day control by New Star California; thus, New Star California could not be held liable as a franchisor for negligent training and supervision.¹¹⁶

C. Restrictive Covenants

In 2011, the Georgia Constitution was amended to provide courts with greater flexibility in analyzing and enforcing covenant restrictions.¹¹⁷ Specifically, the amendment allows courts to blue pencil agreements made after 2011 rather than invalidate the entire agreement.¹¹⁸ Agreements predating the amendment may not be blue penciled;¹¹⁹ instead, they are strictly interpreted and upheld only when the restrictive covenant is specific—and reasonable—as to duration, geographic restriction, and scope of the activities prohibited.¹²⁰

113. *Id.* at 562, 816 S.E.2d at 513 (citing *Cobra 4 Enters. v. Powell-Newman*, 336 Ga. App. 609, 615 n.4, 785 S.E.2d 556, 562 n.4 (2016)).

114. *Id.* See *Hyde v. Schlotzsky’s, Inc.*, 254 Ga. App. 192, 194, 561 S.E.2d 876, 878 (2002).

115. *New Star Realty, Inc.*, 346 Ga. App. at 562–63, 816 S.E.2d at 513; see *Hyde*, 254 Ga. App. at 194, 561 S.E.2d at 878 (holding that a restaurant franchisor could not be held liable for alleged negligence in training, supervision, and inspection of franchisee, where there was no evidence the franchisor “undertook a duty to involve itself in the day-to-day operation of the restaurant or that it assumed the right to control the manner of executing the work in the restaurant.”).

116. *New Star Realty, Inc.*, 346 Ga. App. at 562–63, 816 S.E.2d at 513.

117. GA. CONST. art. III, § 6, para. 5(c)(3); see also O.C.G.A. § 13-8-50 (2019). For a more in-depth legislative and political history of the restrictive covenant constitutional amendment, see Haas et al., *supra* note 1, at 137–38.

118. See *Cox v. Altus Healthcare & Hospice, Inc.*, 308 Ga. App. 28, 31, 706 S.E.2d 660, 664 (2011).

119. *Vulcan Steel Structures, Inc. v. McCarty*, 329 Ga. App. 220, 220, 764 S.E.2d 458, 459 (2014).

120. *Cox*, 308 Ga. App. at 31, 706 S.E.2d at 664; see also *W.R. Grace & Co., Dearborn Div. v. Mouyal*, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992).

Continued employment is sufficient consideration for employers to enforce new agreements¹²¹ except when the employers are already obligated to a specific term; then, employers must offer additional consideration (monetary payment or other benefits) to support new restrictive covenants.¹²²

In *CarpetCare Multiservices, LLC v. Carle*,¹²³ the court of appeals held that in order for a non-compete covenant to be enforceable, it is statutorily required to contain geographical restrictions.¹²⁴ Carpetcare Multiservices, LLC (Carpetcare) sued a former independent contractor for violating the terms of a non-compete covenant. The trial court found that the covenant was void and unenforceable because it failed to specify a geographical restriction.¹²⁵ The court of appeals affirmed.¹²⁶ Under O.C.G.A. § 13-8-53(a), “[e]nforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted.”¹²⁷ Also, for non-competes:

The phrase “the territory where the employee is working at the time of termination” or similar language shall be considered sufficient as a description of geographic areas if the person or entity bound by the restraint can reasonably determine the maximum reasonable scope of the restraint at the time of termination.¹²⁸

The court also held that geographic restrictions in a non-compete covenant are reasonable provided:

- (A) The total distance encompassed by the provisions of the covenant also is reasonable; (B) The agreement contains a list of particular competitors as prohibited employers for a limited period of time after the term of employment or a business or commercial relationship; or
- (C) Both subparagraphs (A) and (B)¹²⁹

121. See *Thomas v. Coastal Indus. Servs., Inc.*, 214 Ga. 832, 832, 108 S.E.2d 328, 329 (1959).

122. See *Glisson v. Global Sec. Servs., LLC*, 287 Ga. App. 640, 641–42, 653 S.E.2d 85, 87 (2007).

123. 347 Ga. App. 497, 819 S.E.2d 894 (2018).

124. *Id.* at 500, 819 S.E.2d at 897 (citing O.C.G.A. § 13-8-53(a) (2019)).

125. *Id.* at 497, 819 S.E.2d at 895; see O.C.G.A. § 13-8-53(a).

126. *CarpetCare Multiservices, LLC*, 347 Ga. App. at 497, 819 S.E.2d at 895.

127. *Id.* at 498, 819 S.E.2d at 896 (quoting O.C.G.A. § 13-8-53(a)).

128. *Id.* (quoting O.C.G.A. § 13-8-53(e)(2) (2019)).

129. *Id.* at 499, 819 S.E.2d at 896 (quoting O.C.G.A. § 13-8-56(2) (2019)).

The court also noted the requirement for non-compete covenants to contain geographical restrictions does not apply to non-solicitation covenants under Georgia law.¹³⁰

In *Kennedy v. Shave Barber Co., LLC*,¹³¹ the court of appeals held that Shave Barber Co., LLC's (the Shave) non-compete covenant (the covenant) with Kennedy, a former employee, was not unreasonable or too broad to be enforced.¹³² The covenant contained a geographic restriction of a three-mile radius from the Shave, prohibitions on soliciting its customers and employees for one year after employment, and prohibitions on selling grooming products and services in competition with the Shave for two years after employment. Kennedy entered into the non-compete covenant with the Shave at the beginning of her employment as a stylist in 2016. In 2017, Kennedy left the Shave and opened a salon located within three miles from the barbershop. The trial court granted the Shave an injunction enjoining Kennedy from further violating the provisions of the non-compete covenant.¹³³

The court of appeals held that a covenant not to compete is enforceable against an employee “in possession of selective or specialized skills, learning, or abilities or customer contacts, customer information, or confidential information . . .”¹³⁴ who “[c]ustomarily and regularly solicit for the employer customers or prospective customers.”¹³⁵

The court also held that the geographical restriction was not unreasonable and uncertain because “[w]henver a description of activities, products, or services, or geographic areas, is required by this Code section, any description that provides fair notice of the maximum reasonable scope of the restraint shall satisfy such requirement . . .”¹³⁶ In this case, the Shave had a clear definition of the geographic restriction the non-compete covenant covered, a three-mile radius from the Shave's Virginia Highlands location; therefore, the geographic restriction was reasonable.¹³⁷

The court also held that the Shave had a legitimate business interest in justifying the extent of the non-compete provision.¹³⁸ When an

130. *Id.* at 499, 819 S.E.2d at 897 (citing O.C.G.A. § 13-8-53(b) (2019)).

131. 348 Ga. App. 298, 822 S.E.2d 606 (2018).

132. *Id.* at 309, 822 S.E.2d at 615.

133. *Id.* at 299–301, 822 S.E.2d at 609–10.

134. *Id.* at 303, 822 S.E.2d at 611 (quoting O.C.G.A. § 13-8-51(5)(C) (2019)).

135. *Id.* (quoting O.C.G.A. § 13-8-53(a)(1)).

136. *Id.* at 304, 822 S.E.2d at 612 (quoting O.C.G.A. § 13-8-53(c)(1) (2019)).

137. *Id.* at 304, 822 S.E.2d at 612.

138. *Id.* at 305, 822 S.E.2d at 612.

employer is seeking the enforcement of a restrictive covenant, it has to “plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant.”¹³⁹ This includes “[s]ubstantial relationships with specific prospective or existing customers . . . or clients’ and ‘client good will.’”¹⁴⁰ The court held that because the Shave had invested a considerable amount of time and energy into establishing a client base and maintaining their goodwill, they had a legitimate business interest in protecting it.¹⁴¹

As for the types of activities restricted, selling men’s grooming services and products within a three-mile radius of the Shave was a restricted activity only if, in so doing, Kennedy competed with the Shave; the court held these restrictions were reasonable.¹⁴² Because the non-compete covenant did not prevent Kennedy from working in a retail establishment selling grooming products or from working as a stylist outside of a three-mile radius from the Shave, the scope of the prohibited activities was not unreasonable.¹⁴³

In *Blair v. Pantera Enterprises, Inc.*,¹⁴⁴ the Georgia Court of Appeals held that, under Georgia’s Restrictive Covenants Act,¹⁴⁵ a backhoe operator was not a “key employee” of an industrial contractor.¹⁴⁶ Blair worked as a backhoe operator for Pantera and was known for having a good work ethic, having a positive attitude, and for being reliable. One of Pantera’s customers was Norfolk Southern, who quickly caught on to Blair’s positive attitude and the work he did while working for Pantera.¹⁴⁷ “In 2012, Pantera required Blair to sign a non-compete agreement in order to continue being assigned to Norfolk Southern.”¹⁴⁸ “Under the terms of the non-compete agreement, Blair agreed that he would not operate a backhoe on railways owned or leased by Norfolk Southern in its Georgia Operating Division for any entity or person for a two-year period after ending his employment with Pantera.”¹⁴⁹ In 2017, Blair left Pantera for Southern Design Materials, Inc. (SDM), and as a result, Norfolk Southern transferred its business over to SDM so

139. *Id.* (quoting O.C.G.A. § 13-8-55 (2019)).

140. *Id.* (quoting O.C.G.A. § 13-8-51(9)(C)–(D) (2019)).

141. *Id.*

142. *Id.* at 305–06, 822 S.E.2d at 613.

143. *Id.*

144. 349 Ga. App. 846, 824 S.E.2d 711 (2019).

145. O.C.G.A. §§ 13-8-50–13-8-59 (2019).

146. *Blair*, 349 Ga. App. at 846–47, 824 S.E.2d at 712.

147. *Id.* at 848, 824 S.E.2d at 713.

148. *Id.* at 848, 824 S.E.2d at 712.

149. *Id.* at 848, 824 S.E.2d at 712–13.

they could continue to work with Blair and because Norfolk did not believe Pantera had a suitable replacement for Blair once he left.¹⁵⁰ Pantera filed a complaint “seeking to enjoin Blair from operating a backhoe for Norfolk Southern in its territory for the two-year period provided in the non-compete agreement.”¹⁵¹ “The trial court granted Pantera the requested injunctive relief.”¹⁵² Blair argued that the trial court erred in finding he was a “key employee” under the Act.¹⁵³

On appeal, the court examined whether both sentences in O.C.G.A. § 13-8-51(8) had to apply in order for an employee to be considered a “key employee,” which would have subjected Blair to coverage under the Act.¹⁵⁴ Under this section a “key employee” is:

an employee who, by reason of the employer’s investment of time, training, money, trust, exposure to the public, or exposure to customers, vendors, or other business relationships during the course of the employee’s employment with the employer, has gained a high level of notoriety, fame, reputation, or public persona as the employer’s representative or spokesperson or has gained a high level of influence or credibility with the employer’s customers, vendors, or other business relationships or is intimately involved in the planning for or direction of the business of the employer or a defined unit of the business of the employer. Such term also means an employee in possession of selective or specialized skills, learning, or abilities or customer contacts or customer information who has obtained such skills, learning, abilities, contacts, or information by reason of having worked for the employer.¹⁵⁵

The court held that both sentences in the section must apply in order to be considered a “key employee.”¹⁵⁶ Pantera claimed that Blair had “a high level of notoriety, fame, reputation, or public persona as the employer’s representative.”¹⁵⁷ However, the court noted:

[E]ven if Blair’s good reputation with one customer [was] sufficient for him to have a “high level of notoriety, fame, reputation, or public persona as the employer’s representative,” he would be a key employee only if his “high level of notoriety, fame, reputation, or

150. *Id.* at 848, 824 S.E.2d at 713.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 848–49, 824 S.E.2d at 713; O.C.G.A. § 13-8-51(8) (2019).

155. *Blair*, 349 Ga. App. at 850, 824 S.E.2d at 714 (quoting O.C.G.A. § 13-8-51(8)).

156. *Id.* at 851, 824 S.E.2d at 714.

157. *Id.* at 851, 824 S.E.2d at 715.

public persona as the employer's representative" was gained "by reason of the employer's investment of time, training, money, trust, exposure to the public, or exposure to customers, vendors, or other business relationships during the course of the employee's employment with the employer" ¹⁵⁸

The court held that Blair's reputation was a result of his own doing, not Pantera's; therefore, he was not a "key employee" under the Act. ¹⁵⁹

VI. CONCLUSION

As Georgia grows so do the challenges that Georgia's employers face. The increasingly complex web of federal labor and employment laws, and their Georgia corollaries require the practitioner to keep abreast of latest developments.

158. *Id.* (citing O.C.G.A. § 13-8-51(8)).

159. *Id.* at 852, 824 S.E.2d at 715.

