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Labor and Employment Law

by **W. Melvin Haas III***
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W. Jonathan Martin II***
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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, 2010 to May 31, 2011.¹ This Article also

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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*,

includes highlights of certain revisions to the Official Code of Georgia Annotated (O.C.G.A.).²

II. RECENT LEGISLATION

A. *Modification of Restrictive Covenants*

On May 11, 2011, Georgia Governor Nathan Deal signed into law Georgia House Bill 30,³ which became effective on that date.⁴ The express purpose of House Bill 30, together with the previous amendment to the Georgia Constitution,⁵ is to clarify the law on restrictive covenants.⁶ House Bill 173,⁷ a 2009 legislative action, significantly changed Georgia law on covenants not to compete.⁸ House Bill 173 authorizes

62 MERCER L. REV. 181 (2010).

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); BARBARA T. LINDEMAN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (C. Geoffrey Weirich et al. eds., 4th ed. 2007 & Supp. 2009); W. Christopher Arbrey et al., *Labor and Employment, 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 Aug. 13, 2011). 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 30, Reg. Sess. (codified at O.C.G.A. §§ 13-8-2, 13-8-50 to -59 (Supp. 2011)).

4. *Id.*

5. Ga. H.R. Res. 178 § 1, Reg. Sess., 2010 Ga. Laws 1260, 1260-61 (amending GA. CONST. art. III, § 6, para. 5(c)(3)).

6. Ga. H.R. Bill 30 § 1 ("During the 2010 legislative session the General Assembly enacted HR 178 (Ga. L. 2010, p. 1260), the constitutional amendment necessary for the statutory language [T]here may be some question about the validity of that legislation."); *see also* 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>. *See* discussion in further detail *infra* Part VII(A).

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

8. *Id.* § 3, 2009 Ga. Laws at 243 (codified at O.C.G.A. § 13-8-54(b) (2010)). The bill stated,

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

Id.

courts to “blue-pencil” otherwise unenforceable covenants rather than invalidate them entirely.⁹ House Bill 30 was enacted to remove any ambiguity following House Bill 173.¹⁰

House Bill 30, like House Bill 173, permits a court to modify a covenant so long as the modification is not more restrictive than the original.¹¹ In determining relief, a court must consider what is reasonable and the parties’ original intent.¹² This legislation allows enforcement of a restrictive covenant by third party beneficiaries or assignees.¹³

B. Employment Eligibility Verification

On May 13, 2011, Governor Deal signed House Bill 87, also known as The Illegal Immigration Reform and Enforcement Act of 2011 (Act).¹⁴ The Act became effective on July 1, 2011, and amends Chapter 60 of Title 36 of the O.C.G.A.¹⁵ The Act requires most private employers to use the federal work authorization program,¹⁶ also known as “E-verify.”¹⁷ Prior to the Act, only those employers who conducted work

9. *Id.* Previously in Georgia, all covenants within an agreement were unenforceable where any one covenant was unenforceable. *See 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. Ga. H.R. Bill 30 § 1 (“It is the intention of this Act to remove any such uncertainty by substantially reenacting the substantive provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), but the enactment of this Act should not be taken as evidence of a legislative determination that HB 173 (Act No. 64, Ga. L. 2009, p. 231) was in fact invalid.”).

11. *Id.* § 4 (codified at O.C.G.A. § 13-8-54) (“[T]he court may modify the restraint provision and grant only the relief reasonably necessary to protect such interest or interests and to achieve the original intent of the contracting parties to the extent possible.”).

12. *Id.* § 4.

13. *Id.* (codified at O.C.G.A. § 13-8-58) (“A court shall not refuse to enforce a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract.”).

14. Ga. H.R. Bill 87, Reg. Sess. (codified in relevant part at O.C.G.A. §§ 13-10-90, 36-60-6 (Supp. 2011)).

15. *Id.* pmb1., § 22.

16. The Act applies to private employers with more than ten employees, requiring them to use E-verify for all newly hired employees. *Id.* § 12 (codified at O.C.G.A. § 36-60-6).

17. *Id.* § 2 (codified at O.C.G.A. § 13-10-90).

on federal projects were required to use E-verify.¹⁸ Private employers will be phased into compliance over a period of a year and a half.¹⁹

III. PENDING LEGISLATION

Although not enacted in the 2011 Georgia legislative session, the following public laws represent potential trends for employer-employee legislation in coming years.

A. *Parent Protection Act*

Georgia House Bill 311,²⁰ still in committee, proposes an amendment to Chapter 1 of Title 34 of the O.C.G.A.²¹ if enacted.²² This legislation will provide a twenty-four hour paid or unpaid leave for employees to attend school conferences and medical appointments of a spouse or child.²³ The employee must give reasonable notice to the employer.²⁴ An employer with three or fewer employees may limit such leave.²⁵ Also, eligible employees should take leave under the federal Family Medical Leave Act of 1993,²⁶ if possible.²⁷

18. Exec. Order No. 13465, 3 C.F.R. 192 (2008), *amending* Exec. Order No. 12989, 3 C.F.R. 163 (1996). Since 2008, federal contractors and subcontractors have been required to use E-Verify. *See generally* UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem> (last visited Aug. 4, 2011).

19. Ga. H.R. Bill 87 § 12 (codified at O.C.G.A. § 36-60-6). Employers will be phased in according to their size: 1) By January 1, 2012, employers with 500 or more employees must comply; 2) By July 1, 2012, employers with more than 100 but fewer than 500 employees; 3) By July 1, 2013, employers with more than 10 but fewer than 100 will be required to comply. *Id.*

20. Ga. H.R. Bill 311, Reg. Sess. (2011) (unenacted).

21. O.C.G.A. tit. 34, ch. 1 (2008 & Supp. 2010).

22. Ga. H.R. Bill 311 § 2.

23. *Id.* § 2(b).

24. *Id.* § 2(d)(1) (“An eligible employee requesting leave under subsection (b) of this Code section shall provide reasonable notice to the employer prior to the absence and make reasonable effort to plan the absence so as not to unduly disrupt the operations of the employer.”).

25. *Id.* § 2(d)(3) (“An employer with three or fewer employees at the same location may reasonably limit the number of employees allowed to take a planned absence on the same calendar day.”).

26. 29 U.S.C. §§ 2601-2654 (2006 & Supp. 2008).

27. Ga. H.R. Bill 311 § 2(g).

B. Sick Leave for Immediate Family Care

Georgia House Bill 432²⁸ also proposes changes to Chapter 1 of Title 34.²⁹ This legislation would require an employer to allow sick leave for employees to care for immediate family members.³⁰ If a sick leave policy exists, the employee must comply.³¹

C. Collective Bargaining by Public Employees

Georgia House Bill 416,³² still in committee, would amend Chapter 6 of Title 34³³ if enacted.³⁴ This legislation would prohibit contracts between public employers or employees and labor organizations.³⁵ Any contract with a labor organization would be void.³⁶

IV. WRONGFUL TERMINATION

A. Employment-at-Will

At-will employment refers to employment that either an employer or an employee may terminate at any time with or without cause.³⁷ Employment at-will in other jurisdictions may be weakening,³⁸ but in Georgia, the presumption remains that all employment is at-will unless a statutory or contractual exception exists.³⁹ “[T]his bar to wrongful discharge claims in the at-will employment context ‘is a fundamental statutory rule governing employer-employee relations in Georgia.’”⁴⁰

28. Ga. H.R. Bill 432, Reg. Sess. (2011) (unenacted).

29. *Id.* § 1.

30. *Id.* § 1(b).

31. *Id.* § 1(c) (“Any employee who uses such sick leave shall comply with the terms of the employer’s employee sick leave policy.”).

32. Ga. H.R. Bill 416, Reg. Sess. (2011) (unenacted).

33. O.C.G.A. tit. 34, ch. 6 (2008).

34. Ga. H.R. Bill 416 § 1.

35. *Id.* § 2(b).

36. *Id.* (“Any contract or agreement between a public employee and a labor organization or between a public employer and a labor organization shall be void.”); see O.C.G.A. §§ 34-6-20 to -28 (2008) (regarding labor unions and employment contracts in Georgia).

37. BLACK’S LAW DICTIONARY 604 (9th ed. 2009).

38. Haas, *supra* note 1, at 186 & n.37 (“[T]he employment-at-will doctrine is weakening in many jurisdictions.”).

39. See, 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 . . .”).

40. *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)).

Particularly, O.C.G.A. § 34-7-1⁴¹ provides that “[a]n indefinite hiring” is at-will employment.⁴² The definition of an indefinite hiring includes contract provisions specifying “permanent employment, employment for life, [and] employment until retirement.”⁴³ Further, a contract specifying an annual salary does not create a definite period of employment.⁴⁴ 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.⁴⁵

Regardless of an employer’s motives, the general rule in Georgia allows the discharge of an at-will employee “without acquiring a cause of action for wrongful termination.”⁴⁶ Oral promises between an employer and employee will not modify the relationship between the two; absent a written contract, an employee’s status remains at-will.⁴⁷

B. *Elements of Employer-Employee Contracts*

During the survey period, the Georgia Court of Appeals addressed the strict interpretation of employment-at-will in Georgia. In *Tackett v. Georgia Department of Corrections*,⁴⁸ the court addressed the requirements to demonstrate a valid employment contract and overcome the default employment-at-will doctrine.⁴⁹ In *Tackett*, following an internal group grievance regarding the compensation paid to investigators, the Georgia Department of Corrections (DOC) instituted a “new salary schedule to be applied equally to all investigators.”⁵⁰ Tackett was one of two investigators who had their annual salary reduced. Tackett claimed that the DOC violated his employment contract and he brought suit to obtain relief. To establish that an employment contract existed, Tackett introduced three documents to be read in concert with one another: a letter from Tackett stating he would take a demotion in title

41. O.C.G.A. § 34-7-1 (2008).

42. *Id.*

43. *Ga. Power Co. v. Busbin*, 242 Ga. 612, 613, 250 S.E.2d 442, 443-44 (1978) (internal quotation marks omitted).

44. *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)).

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

46. *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)); see also *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.”).

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

48. 304 Ga. App. 310, 696 S.E.2d 359 (2010).

49. *Id.* at 312-13, 696 S.E.2d at 361-62.

50. *Id.* at 311, 696 S.E.2d at 361.

as long as he was paid the same salary as his previous job, an internal DOC memorandum stating that Tackett's experience and qualifications justified the higher salary, and portions of the DOC employee manual stating that salaries may be reduced for disciplinary, budgetary, or voluntary reasons.⁵¹

The court of appeals, however, did not share Tackett's reading of the documents. First, the court held that Tackett's letter and the subsequent memorandum justifying his salary did not constitute a contract because the documents did not guarantee a salary over the course of Tackett's employment.⁵² Second, the court held that an employee manual does not necessarily constitute an employment contract.⁵³ Because none of these documents amounted to an employment contract between the parties, Tackett lacked an actionable claim against the DOC.⁵⁴

C. *Exceptions to the At-Will Doctrine*

The statute creating the at-will doctrine accounts for specific exemptions.⁵⁵ When employment is not at-will, a termination of employment suit typically requires a breach of contract.⁵⁶ However, during the survey period, the Georgia Supreme Court, in *City of McDonough v. Campbell*,⁵⁷ examined whether an employment contract binds a successor municipal council in violation of Georgia law.⁵⁸ In August of 2005, McDonough's city council passed a resolution authorizing employment contracts with several city employees. These contracts would renew automatically, contained generous severance packages, and required that any vote authorizing termination of employment be made prior to October 30th of that calendar year. Less than a year later, a new city council declared the previous employment contracts null and void. Campbell, the city's chief building inspector, brought suit for breach of contract to recover severance pay.⁵⁹

51. *Id.* at 310-12, 696 S.E.2d at 361.

52. *Id.* at 313, 696 S.E.2d at 362.

53. *Id.* at 312, 696 S.E.2d at 362 (quoting *Doss v. Savannah*, 290 Ga. App. 670, 677, 660 S.E.2d 457, 463 (2008)).

54. *Id.* (quoting *Brown v. Rader*, 299 Ga. App. 606, 611, 683 S.E.2d 16, 21 (2006)) (explaining that the doctrine of promissory estoppel did not apply to Tackett's claim because there can be no application "to a promise that is vague, indefinite, or of an uncertain duration").

55. See O.C.G.A. § 34-7-1.

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

57. 289 Ga. 216, 710 S.E.2d 537 (2011).

58. *Id.* at 216, 710 S.E.2d at 538.

59. *Id.* at 217, 710 S.E.2d at 538.

In examining the validity of the employment contracts, the supreme court applied O.C.G.A. § 36-30-3(a)⁶⁰ to the facts.⁶¹ That statute provides that “[o]ne council may not, by an ordinance, bind itself or its successors so as to prevent free legislation in matters of municipal government.”⁶² The court acknowledged that while municipalities may enter into valid employment contracts, the contract must “continue for a *reasonable* time beyond the official term of the officers entering into the contract.”⁶³ However, the court held that the onerous financial obligations had “the effect of binding the hands of successor councils.”⁶⁴ The court held that because of the automatic renewal and the unreasonable financial terms, the contract itself was *ultra vires* and void.⁶⁵

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

The basic rules of contract law apply in creating a valid employment contract: competency to contract, offer, acceptance, and valid consideration.⁶⁶ 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.⁶⁷ In addition, an employment contract’s enforceability requires sufficient definitiveness in the terms of the contract.⁶⁸

During the survey period, the court of appeals affirmed that basic contract rules, including parol evidence, apply to the formation of an employment contract. In *McKinley v. Coliseum Health Group, LLC*,⁶⁹ the court examined whether additional evidence could be used to explain portions of the agreement.⁷⁰ The employee, McKinley, and the employer, Coliseum Health Group, LLC (Coliseum), entered into an employment contract, which addressed the calculation of McKinley’s salary and allowable monthly draw. When the contract ended, Coliseum claimed that McKinley had received excess compensation and sent demand letters to recover the full amount. McKinley failed to comply and

60. O.C.G.A. § 36-30-3(a) (2006).

61. *Campbell*, 289 Ga. at 217, 710 S.E.2d at 538.

62. O.C.G.A. § 36-30-3(a).

63. *Campbell*, 289 Ga. at 219, 710 S.E.2d at 539 (quoting *Jonesboro Area Athletic Ass’n v. Dickson*, 227 Ga. 513, 518, 181 S.E.2d 852, 856 (1971)).

64. *Id.* at 218, 710 S.E.2d at 539.

65. *Id.* at 219, 710 S.E.2d at 540.

66. See WIMBERLY, *supra* note 56, at 6.

67. *Id.*; see *supra* Part IV(A).

68. See WIMBERLY, *supra* note 56, at 6.

69. 308 Ga. App. 768, 708 S.E.2d 682 (2011).

70. *Id.* at 770-71, 708 S.E.2d at 684-85.

counterclaimed for compensation based on the assessment of unauthorized fees.⁷¹

The court held that the contract was partially integrated and allowed parol evidence to explain ambiguities.⁷² Under Georgia law, contract construction involves three steps:

First the trial court must decide whether the contract language is clear and unambiguous. If it is, the trial court simply enforces the contract according to its clear terms; the contract alone is looked to for meaning. Next, if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity. Finally, if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.⁷³

A contract is partially integrated where there is ambiguity, so a court can use parol evidence to resolve the confusion.⁷⁴ In this case, the contract language was extremely broad, and the court used the conduct of the employer to conclude that the contract intended fees to be charged.⁷⁵ As a result, the parol evidence resolved the ambiguity, and the court affirmed summary judgment.⁷⁶

V. NEGLIGENT HIRING OR RETENTION

Under O.C.G.A. § 34-7-20,⁷⁷ “[t]he employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency.”⁷⁸ The Georgia 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.’”⁷⁹ For a plaintiff to sustain an action for negligent hiring or retention, the plaintiff must show that the employer hired an individual who “the employer knew or should have known posed a risk of harm to others

71. *Id.* at 768-70, 708 S.E.2d at 683-84.

72. *Id.* at 770-71, 708 S.E.2d at 684-85.

73. *Id.* at 770, 708 S.E.2d at 684 (quoting *Record Town, Inc. v. Sugarloaf Mills Ltd. P'ship*, 301 Ga. App. 367, 368, 687 S.E.2d 640, 642 (2009)).

74. *Id.* at 770-71, 708 S.E.2d at 684 (quoting *Andrews v. Skinner*, 158 Ga. App. 229, 230, 279 S.E.2d 523, 525 (1981)).

75. *Id.* at 771, 708 S.E.2d at 685.

76. *Id.*

77. O.C.G.A. § 34-7-20 (2008).

78. *Id.*

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

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."⁸⁰ Typically, "the determination of whether an employer used ordinary care in hiring an employee is a jury issue"⁸¹ and is only a question of law "where the evidence is plain, palpable and undisputable."⁸²

During the survey period, the United States Court of Appeals for the Eleventh Circuit affirmed in *Doe v. Fulton DeKalb Hospital Authority*⁸³ that to sustain a negligent hiring action, the plaintiff must demonstrate that the employer knew or should have known that the employee "was not suited for the particular employment."⁸⁴ In *Fulton DeKalb*, three female patients receiving treatment in Grady Hospital's methadone clinic claimed they were sexually harassed by a male substance abuse counselor.⁸⁵ An internal investigation conducted by Grady Hospital revealed that the counselor made inappropriate sexual comments outside the standard regimen of treatment. The investigation also revealed the counselor's similar misconduct at other facilities. The counselor was terminated by Grady Hospital upon the close of the investigation.⁸⁶

The trial court granted Grady Hospital's motion for summary judgment on the negligent hiring and retention claims, and the patients appealed.⁸⁷ The Eleventh Circuit affirmed the trial court and held that preemployment background screening did not indicate that the counselor had any propensity to commit acts of sexual misconduct.⁸⁸ Therefore, the "plain, palpable and undisputable" evidence demonstrated that Grady Hospital was not liable to the plaintiffs for damages.⁸⁹

VI. RESPONDEAT SUPERIOR

Under the doctrine of respondeat superior, an employer may be held vicariously liable for the negligence or intentional torts committed by his

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

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

82. *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).

83. 628 F.3d 1325 (11th Cir. 2010).

84. *Id.* at 1337 (quoting *Munroe*, 277 Ga. at 862, 596 S.E.2d at 605).

85. *Id.* at 1327.

86. *Id.* at 1330.

87. *Id.* at 1332.

88. *Id.* at 1338.

89. *Id.* (quoting *Munroe*, 277 Ga. at 862, 596 S.E.2d at 605) (internal quotation marks omitted).

or her employee within the scope of employment.⁹⁰ 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.⁹¹

A. *Private Enterprise*

Under Georgia law,

If 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.⁹²

In the survey period, the Georgia Court of Appeals determined, in *BT Two, Inc. v. Bennett*,⁹³ that an employee was not acting within the scope of his employment when he assaulted another person.⁹⁴ Several individuals hosted a fundraising event at a private home for a BT Two, Inc. (Buffalo's) manager. Multiple Buffalo's employees were in attendance, but there was no evidence that Buffalo's had itself financially supported the event in any way. The party had a bartender, who was married to a Buffalo's employee named Justin King. Hunter Bennett, a cousin of a Buffalo's employee, arrived at the party and convinced an individual leaving the party to give him the required wristband for free. Bennett subsequently demanded unlimited beer from the bartender, King's wife. After a minor confrontation, Bennett received the beer, but King later assaulted Bennett, who sustained serious injuries. Bennett claimed that Buffalo's was liable for King's actions under the theory of respondeat superior. The trial court denied Buffalo's motion for summary judgment.⁹⁵

The court of appeals reversed the trial court upon determining that liability could not be imputed to the employer.⁹⁶ The true test of an employee acting within the scope of employment is "whether it was done

90. CHARLES R. ADAMS III, *GEORGIA LAW OF TORTS* 270 (2010-2011 ed.).

91. *Id.* at 272.

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

93. 307 Ga. App. 649, 706 S.E.2d 87 (2011).

94. *Id.* at 649-50, 706 S.E.2d at 88-89.

95. *Id.* at 650-51, 706 S.E.2d at 89-90.

96. *Id.* at 653, 706 S.E.2d at 91.

within the scope of the actual transaction of the master's business for accomplishing the ends of his employment."⁹⁷ In this case, the evidence was clear and indisputable; even if Buffalo's had sponsored the event, the assault on Bennett was not "within the scope of [King's] employment or in furtherance of Buffalo's business."⁹⁸ The court affirmed precedent, holding that assaults generally are not in furtherance of the master's business, even when the place and time would likely be considered within the scope of employment.⁹⁹

B. *Employer-Owned Vehicle*

Generally, an employee is not acting within the scope of employment when commuting to and from work.¹⁰⁰ Therefore, an employer is typically not vicariously liable for the actions of a commuting employee.¹⁰¹ 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.¹⁰²

The presumption may "be overcome by uncontroverted evidence."¹⁰³

In *Farzaneh v. Merit Construction Co.*,¹⁰⁴ the Georgia Court of Appeals held that an employer could not be held liable for the negligence of an employee driving a vehicle that was previously owned by the employer.¹⁰⁵ Merit Construction Company (Merit) employed laborers

97. *Id.* at 652, 706 S.E.2d at 90 (quoting *Brownlee v. Winn-Dixie Atlanta*, 240 Ga. App. 368, 369, 523 S.E.2d 596, 597-98 (1999)).

98. *Id.*

99. *Id.* at 653, 706 S.E.2d at 90-91; *see, e.g., Drury v. Harris Ventures, Inc.*, 302 Ga. App. 545, 547, 691 S.E.2d 356, 358 (2010); *Dowdell*, 291 Ga. App. at 470-71, 662 S.E.2d at 153; *Worstell Parking, Inc. v. Aisida*, 212 Ga. App. 605, 606, 442 S.E.2d 469, 470 (1994).

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

101. *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)).

102. *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).

103. *Id.* at 778, 257 S.E.2d at 189 (quoting *F.E. Fortenberry & Sons, Inc. v. Malmberg*, 97 Ga. App. 162, 165, 102 S.E.2d 667, 671 (1958)).

104. 309 Ga. App. 637, 710 S.E.2d 839 (2011).

105. *Id.* at 640, 710 S.E.2d at 843.

who would travel from home to various job sites. Redic purchased a company truck from Merit at a reduced price with favorable payment terms. While Redic had paid in full and maintained insurance on the truck, Merit occasionally paid for repairs and issued a cell phone. While on his way to work, Redic struck and injured Farzaneh, who brought suit against Merit.¹⁰⁶

Under Georgia law, an employer is only liable for the torts of an employee when the action is in furtherance of the master's business and not a personal matter.¹⁰⁷ While an employer is not liable for the actions of a commuting employee,¹⁰⁸ an employer-owned vehicle shifts the burden to the employer to overcome this presumption.¹⁰⁹ However, "special circumstances" may impute liability, even when the employee is engaged in a personal matter.¹¹⁰ Also, liability may attach to an employer when the act involved was a special mission.¹¹¹ The special mission exception requires "that the errand or mission itself be a special or uncustomary one, made at the employer's request or direction."¹¹²

In *Farzaneh* the court of appeals affirmed the trial court in finding the vehicle was not employer owned.¹¹³ Because Merit no longer owned the vehicle, the burden remained on the plaintiff to show ownership.¹¹⁴ The Merit-issued cell phone and possible vehicle repair allowance were not enough to establish ownership or a special circumstance.¹¹⁵ In addition, there was no special mission exception, as the commute to work was customary.¹¹⁶ Therefore, the court held that no liability could be imputed to the employer since the vehicle was not employer-owned.¹¹⁷

106. *Id.* at 637-38, 710 S.E.2d at 841-42.

107. *Id.* at 639, 710 S.E.2d at 842 (quoting *Clo White Co.*, 263 Ga. App. at 840, 590 S.E.2d at 383).

108. *Id.* (quoting *Riel v. Paulding County Bd. of Educ.*, 206 Ga. App. 230, 231, 425 S.E.2d 305, 307 (1992)).

109. *Id.* at 640, 710 S.E.2d at 843 (citing *Allen Kane's Major Dodge*, 243 Ga. App. at 777, 257 S.E.2d at 188).

110. *Id.* at 640-41, 710 S.E.2d at 843-44 (citing *Hunter*, 287 Ga. App. at 691, 652 S.E.2d at 584).

111. *Id.* at 643, 710 S.E.2d at 845.

112. *Id.* (quoting *Patterson v. Se. Newspapers, Inc.*, 243 Ga. App. 241, 242, 533 S.E.2d 119, 121 (2000)).

113. *Id.* at 643-44, 710 S.E.2d at 845.

114. *Id.* at 640, 710 S.E.2d at 843.

115. *Id.* at 641, 710 S.E.2d at 843.

116. *Id.* at 643, 710 S.E.2d at 845.

117. *Id.* at 643-44, 710 S.E.2d at 845.

C. *Independent Contractor or Employee*

Vicarious liability under respondeat superior generally does not apply to the acts of independent contractors.¹¹⁸ Therefore, in determining vicarious liability, a court must initially resolve whether an individual is an independent contractor or an employee.¹¹⁹

In *Yancey v. Watkins*,¹²⁰ the Georgia Court of Appeals considered whether a crop-duster was an independent contractor and whether the employer could be held liable for his negligence.¹²¹ Ussery and Watkins were neighboring farmers. Ussery hired Bloodsworth to spray his crops. After Bloodsworth had aerielly applied the chemical, Watkins claimed that the excess drifted onto his farm and destroyed his crop.¹²²

To determine liability, the court examined whether Bloodsworth was an independent contractor.¹²³ O.C.G.A. § 51-2-4¹²⁴ states that an employer is generally not liable for the torts of his employee when the employee exercises an independent business.¹²⁵ The chief test to determine independent contractor status is “whether the contract gives, or the employer assumes, the right to control the time, manner, and method of performance of the work, as distinguished from the right merely to require certain definite results in conformity with the contract.”¹²⁶ In this case, Bloodsworth was an independent contractor and operated an independent business.¹²⁷ Ussery had limited control over Bloodsworth’s crop-dusting plane, hired him on a one-time basis, and designated no specific time for the crop-dusting.¹²⁸ Also, Bloodsworth operated his crop-dusting business as a separate entity.¹²⁹

Notwithstanding the general rule, this case shows an exception to independent contractor liability. Even though the court determined that

118. 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 is not subject to the immediate direction and control of the employer.”).

119. See *id.*; see also ADAMS, *supra* note 90, at 295 (“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.”).

120. 308 Ga. App. 695, 708 S.E.2d 539 (2011).

121. *Id.* at 697, 708 S.E.2d at 542.

122. *Id.* at 695, 708 S.E.2d at 541.

123. *Id.* at 697, 708 S.E.2d at 542.

124. O.C.G.A § 51-2-4 (2000).

125. *Yancey*, 308 Ga. App. at 697, 708 S.E.2d at 542; see also O.C.G.A. § 51-2-4.

126. *Yancey*, 308 Ga. App. at 697, 708 S.E.2d at 542.

127. *Id.* at 698, 708 S.E.2d at 543.

128. *Id.*

129. *Id.*

Bloodsworth was an independent contractor, the employer could still possibly be held liable for his negligence.¹³⁰ Citing O.C.G.A. § 51-2-5(2),¹³¹ the court noted that an employer is still liable for negligence “[i]f according to the employer’s previous knowledge and experience, the work to be done is in its nature dangerous to others however carefully performed.”¹³² The court determined that there was substantial evidence as to the danger of crop-dusting and Ussery’s knowledge of that danger.¹³³ As a result, there were material issues of fact, and the court affirmed the denial of summary judgment.¹³⁴

VII. RESTRICTIVE COVENANTS

A. *Covenants Not to Compete*

On November 2, 2010, voters ratified an amendment to the Georgia Constitution that authorizes enforcement of covenants that restrain in a reasonable manner.¹³⁵ Prior to this constitutional amendment, agreements that placed general restraints on trade were void as against public policy.¹³⁶ Courts disfavored noncompete agreements on contractual relations because any restriction on trade reduces competition.¹³⁷ Pursuant to the 2010 amendment to the Georgia Constitution, a judge has “the power to limit the duration, geographic area, and scope of prohibited activities provided in a contract or agreement restricting or regulating competitive activities”¹³⁸ During the 2011 regular session, the Georgia General Assembly passed House Bill 30,¹³⁹ which amended Chapter 8 of Title 30 of the O.C.G.A. to authorize the use of reasonable restrictive covenants.¹⁴⁰ Prior to these changes in the law, covenants were valid as a partial restraint on trade if the agreement was

130. *Id.* at 699-700, 708 S.E.2d at 544.

131. O.C.G.A. § 51-2-5(2) (2000).

132. 308 Ga. App. at 698, 708 S.E.2d at 543 (internal quotation marks omitted); O.C.G.A. § 51-2-5(2).

133. *Yancey*, 308 Ga. App. at 699-700, 708 S.E.2d at 544.

134. *Id.* at 700, 708 S.E.2d at 544.

135. Ga. H.R. Res. 178 § 1, Reg. Sess., 2010 Ga. Laws 1260, 1260-61 (amending GA. CONST. art. III, § 6, para. 5(c)(3)); *see supra* Part II(A).

136. *See* O.C.G.A. § 13-8-2(a)(2) (2010), *amended by* O.C.G.A. § 13-8-2(a)(2) (Supp. 2011).

137. WIMBERLY, *supra* note 56, at 115.

138. GA. CONST. art. III, § 6, para. 5(c)(3).

139. Ga. H.R. Bill 30, Reg. Sess. (codified at O.C.G.A. §§ 13-8-2 13-8-50 to -59 (Supp. 2011)).

140. *Id.* § 4 (codified at O.C.G.A. § 13-8-50).

specific and reasonable in duration, territorial coverage, and scope of activities prohibited.¹⁴¹

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.”¹⁴² A questionable restriction, if not void on its face, may require the introduction of additional facts to determine whether it is reasonable.¹⁴³ However, depending on the type of contract, courts apply different levels of scrutiny in determining the reasonableness of the contract.¹⁴⁴ If a noncompete agreement is ancillary to an employment agreement, a stricter standard applies; if any portion of the agreement is considered overbroad or unreasonable, the entire agreement becomes invalid.¹⁴⁵ 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 the agreement are deemed overbroad or unreasonable, the court may “blue-pencil” the agreement, rewriting or severing the overly broad provisions.¹⁴⁶ However, “in restrictive covenant cases strictly scrutinized as employment contracts, Georgia does not employ the ‘blue pencil’ doctrine of severability.”¹⁴⁷

141. *Cox v. Altus Helathcare & Hospice, Inc.*, 308 Ga. App. 28, 31, 706 S.E.2d 660, 664 (2011) (quoting *Orkin Exterminating Co. v. Walker*, 251 Ga. 536, 537, 307 S.E.2d 914, 916 (1983)); see also O.C.G.A. § 13-8-2.1(a) (2010), *repealed by* Ga. H.R. Bill 30 § 3; *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992).

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

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

144. See *WIMBERLY*, *supra* note 56, at 115.

145. *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”).

146. *Id.*

147. *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 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, Arzeti & Wynne, P.C. v. Baggett*, 231 Ga. App. 289, 289-90, 498 S.E.2d 346, 349 (1998)). However, the recent amendment to the Georgia Constitution permits courts to blue-pencil restrictive covenants ancillary to employment contracts. See *supra* Part II(A); see also *supra* text accompanying note 11.

B. Scope of Prohibited Activities

During the survey period, the Georgia Court of Appeals held, in *Cox v. Altus Healthcare & Hospice, Inc.*,¹⁴⁸ that restrictive covenants which contain neither geographical, temporal, nor personnel contact limitations constitute an unlawful restraint on trade.¹⁴⁹ In *Altus Healthcare*, Edwin Cox began negotiations to purchase a hospice care facility. During these negotiations, Altus and Cox entered into non-disclosure and non-solicitation restrictive covenants. The parties broke off negotiations, and Cox purchased a different hospice provider. Altus moved to enforce the covenants, and the trial court issued an interlocutory injunction.¹⁵⁰ In determining the reasonableness of the restraints, the court of appeals examined “the nature and extent of the trade or business, the situation of the parties, and all the other circumstances.”¹⁵¹ Because the particular covenants lacked a terminable time period to be enforced, the covenants were invalid and unenforceable.¹⁵²

Because the covenants were conditional upon employment, the court rejected any arguments that an agreement may be blue-penciled.¹⁵³ A strict scrutiny standard is applied to covenants that are conditional on employment.¹⁵⁴ Even if the covenants were not conditional upon Cox’s employment, the court would have rejected blue-penciling the agreement because the sale was never consummated.¹⁵⁵

C. Specification with Particularity

During the survey period, the Georgia Court of Appeals continued to apply a four-part test to determine the enforceability of a restrictive covenant: whether “(1) the restraint is reasonable; (2) founded upon valuable consideration; (3) is reasonably necessary to protect the party in whose favor it is imposed; and (4) does not unduly prejudice the interests of the public.”¹⁵⁶ In *Gordon Document Products, Inc. v.*

148. 308 Ga. App. 28, 706 S.E.2d 660 (2011).

149. *Id.* at 31, 706 S.E.2d at 664.

150. *Id.* at 29, 706 S.E.2d at 662-63.

151. *Id.* at 31, 706 S.E.2d at 664 (quoting *Habif*, 231 Ga. App. at 292, 498 S.E.2d at 350).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Gordon Document Prods., Inc. v. Serv. Tech., Inc.*, 308 Ga. App. 445, 447, 708 S.E.2d 48, 52 (2011) (quoting *Hostetler v. Answerthink, Inc.*, 267 Ga. App. 325, 328, 599 S.E.2d 271, 274 (2004)).

Services Technology, Inc.,¹⁵⁷ two employees left Gordon Document Products (GDP) to work for a competitor, Services Technology, Inc. (STI). During their employment with GDP, the employees signed agreements that contained non-compete restrictive covenants.¹⁵⁸ The court of appeals held that the agreements were overly broad because the covered territory represented the entire GDP sales area.¹⁵⁹ One employee assisted in sales, and the other was a sales representative that only worked in a portion of the covered area.¹⁶⁰ The court held that a territory where the employer does business, but an employee does not, is overly broad, absent a specific business justification from the employer.¹⁶¹

D. Choice of Law Provisions

The Georgia Court of Appeals held in *Bunker Hill International, Ltd. v. Nationsbuilder Insurance Services, Inc.*¹⁶² that the question of venue is a procedural issue to be determined by the rule of *lex fori*.¹⁶³ In *Bunker Hill*, Kevin Cunningham entered into an employment agreement with Nationsbuilder that contained a non-compete clause. Cunningham left his position with Nationsbuilder and began work for a direct competitor, Bunker Hill. In Georgia, Bunker Hill moved for a declaratory judgment that the covenants were unenforceable. Nationsbuilder claimed that, due to a choice of law provision in the contract, Illinois, not Georgia, was the proper venue for this litigation.¹⁶⁴ Forum-selection clauses in Georgia “are *prima facie* valid and should be enforced unless the opposing party shows that such enforcement would be unreasonable under the circumstances.”¹⁶⁵ The court of appeals stated that a party could overcome the forum-selection clause by showing “at least one of the covenants violate[d] Georgia public policy and . . . such a covenant would likely be enforced against him [or her] by an Illinois court.”¹⁶⁶ The

157. 308 Ga. App. 445, 708 S.E.2d 48 (2011).

158. *Id.* at 445, 708 S.E.2d at 50.

159. *Id.* at 447, 708 S.E.2d at 51-52.

160. *Id.* at 446 n.2, 448, 708 S.E.2d at 51 n.2, 52.

161. *Id.* at 448, 708 S.E.2d at 52 (quoting *Dent Wizard Intl. Corp. v. Brown*, 272 Ga. App. 553, 556, 612 S.E.2d 873, 876 (2005)).

162. 309 Ga. App. 503, 710 S.E.2d 662 (2011).

163. *Id.* at 506, 710 S.E.2d at 665 (quoting *Brinson v. Martin*, 220 Ga. App. 638, 638, 469 S.E.2d 537, 538 (1996)) (“Under the rule of *lex fori*, procedural or remedial questions are governed by the law of the forum, the state in which the action is brought.”).

164. *Id.* at 503, 710 S.E.2d at 664.

165. *Id.* at 506, 710 S.E.2d at 665 (quoting *Iero v. Mohawk Finishing Prods., Inc.*, 243 Ga. App. 670, 671, 534 S.E.2d 136, 138 (2000)).

166. *Id.* at 507, 710 S.E.2d at 665-66.

court's examination of recent Illinois precedent regarding restrictive covenants revealed that Illinois courts invalidate only the most broad covenants and will sustain covenants lacking certain restrictions.¹⁶⁷ Cunningham demonstrated that Illinois courts would enforce the agreement, which would be unenforceable under Georgia law for public policy reasons.¹⁶⁸ Thus, under the rule of *lex fori*, the court applied Georgia law and invalidated the restrictive covenants.¹⁶⁹

E. Non-disclosure Agreements

In *Fine v. Communication Trends, Inc.*,¹⁷⁰ the Georgia Court of Appeals examined the enforceability of nondisclosure agreements.¹⁷¹ Lynette Fine worked for Communication Trends (CTI), and her contract contained several restrictive covenants. During a meeting with the CEO of Allscope, a competitor, Fine discussed the possibility of employment and demonstrated projected earnings based on that employment. Fine used competitive research and her knowledge of billing rates charged to CTI's clients to show potential earnings. Fine left CTI and joined Allscope.¹⁷² CTI brought action against Fine for disclosing confidential client and billing information to a competitor.¹⁷³ Because Georgia had not yet adopted the blue-pencil theory of restrictive covenants, the court rejected CTI's argument.¹⁷⁴ Additionally, CTI introduced no evidence that confidential information was released.¹⁷⁵

F. Non-solicitation Agreements

The court of appeals held in *Fine* that a restrictive covenant is overly broad when former employees are barred from accepting business without active solicitation, regardless of which party initiated contact.¹⁷⁶ The day after Fine left employment with CTI, she distributed business cards at an industry dinner to former clients, informing them that she could not actively solicit their business. Furthermore, Fine told former clients that, to continue a business relationship, a statement that

167. *Id.* at 507, 710 S.E.2d at 666 (quoting *Eichmann v. Nat. Hosp. & Health Care Servs., Inc.*, 719 N.E.2d 1141, 1144, 1148 (Ill. App. Ct. 1999)).

168. *Id.* at 508, 710 S.E.2d at 666.

169. *Id.* at 508, 710 S.E.2d at 667.

170. 305 Ga. App. 298, 699 S.E.2d 623 (2010).

171. *Id.* at 298, 699 S.E.2d at 627.

172. *Id.* at 299-300, 699 S.E.2d at 627-28.

173. *Id.* at 307, 699 S.E.2d at 633.

174. *Id.* at 307, 699 S.E.2d at 632.

175. *Id.* at 307, 699 S.E.2d at 633.

176. *Id.* at 306, 699 S.E.2d at 632.

Fine did not solicit their business would be necessary. Later, CTI found that several clients switched their accounts.¹⁷⁷

CTI commenced an action to enforce the non-solicitation restrictive covenant. The trial court found that the restrictive covenant was overbroad because it prohibited Fine from merely accepting business from former clients.¹⁷⁸ The court of appeals held that “a covenant prohibiting a former employee from merely accepting business, without any solicitation, is not reasonable” and, therefore, was not reasonably limited in the scope of activities prohibited.¹⁷⁹

Additionally, CTI failed to establish that Fine breached her fiduciary duty and loyalty by accepting business from CTI’s former clients or destroying CTI client files.¹⁸⁰ There is no breach of fiduciary duty when an employee makes plans to work for a competitor so long as the employee does not engage in direct competition before the original employment relationship ends.¹⁸¹ The court found no evidence that Fine engaged in direct competition prior to leaving CTI’s employment.¹⁸² However, the court of appeals remanded the issue of destroyed client files to the trial court because of circumstantial evidence.¹⁸³

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 relations between employer and employee.

177. *Id.* at 300, 699 S.E.2d at 628.

178. *Id.* at 306, 699 S.E.2d at 632.

179. *Id.* (quoting *Waldeck v. Curtis 1000, Inc.*, 261 Ga. App 590, 592, 583 S.E.2d 266, 268 (2003)) (internal quotation marks omitted).

180. *Id.* at 309, 699 S.E.2d at 634.

181. *Id.*

182. *Id.*

183. *Id.* at 311, 699 S.E.2d at 635.