

12-2012

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Recommended Citation

Haas, W. Melvin III; Clifton, William M. III; Martin, W. Jonathan II; and Peters, Alyssa (2012) "Labor and Employment Law," *Mercer Law Review*: Vol. 64 : No. 1 , Article 12.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol64/iss1/12

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Labor and Employment Law

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The Authors would like to thank Thomas Allmond (J.D. candidate, Mercer University, Walter F. George School of Law, 2013) and Sarah Phaff (J.D. candidate, Mercer University, Walter F. George School of Law, 2013) for their outstanding work in helping to research for and write this Article.

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, 2011 to May 31, 2012.²

II. RECENT LEGISLATION: THE ILLEGAL IMMIGRATION REFORM AND ENFORCEMENT ACT

Beginning January 1, 2012, private employers with more than 500 employees were required to begin using the federal work authorization program,³ also known as "E-Verify."⁴ Effective July 1, 2012, private employers with more than 100 employees were required to use E-Verify.⁵ These new requirements have been gradually phased in pursuant to House Bill 87,⁶ also known as The Illegal Immigration Reform and Enforcement Act of 2011, which was signed by Governor Nathan Deal on May 13, 2011.⁷ The last remaining E-Verify provision, requiring compliance by employers with more than ten employees, takes effect on July 1, 2013.⁸

1. 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. 2011); BARBARA T. LINDEMAN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (C. Geoffrey Weirich et al. eds., 4th ed. 2007 & Supp. 2009); Patrick L. Coyle et al., *Labor and Employment, Eleventh Circuit Survey*, 63 MERCER L. REV. 1309 (2012); Bureau of Nat'l Affairs, *Daily Labor Report*, BNA.com, available at <http://www.bna.com> (last visited Aug. 4, 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.

2. 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*, 63 MERCER L. REV. 197 (2011).

3. O.C.G.A. § 36-60-6 (2012).

4. O.C.G.A. § 13-10-90 (2010 & Supp. 2012).

5. O.C.G.A. § 36-60-6.

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

7. *Id.*

8. O.C.G.A. § 36-60-6.

III. PENDING LEGISLATION: DRUG TESTING FOR CONTINUED UNEMPLOYMENT BENEFITS

Although not enacted in the 2012 Georgia legislative session, the following public law represents a potential trend for employer-employee legislation in coming years. Georgia House Bill 697,⁹ which is still in committee, would amend Article 7 of Chapter 8 of Title 34 of the O.C.G.A. if it is ultimately enacted.¹⁰ This legislation would institute a random drug testing program as a required condition for continuing to receive unemployment compensation benefits.¹¹ Recipients of unemployment compensation would lose their benefits for up to two years for either a failure to comply with the testing or for testing positive for a prohibited substance.¹²

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.¹³ While employment at-will in other jurisdictions may be weakening,¹⁴ in Georgia the presumption remains that all employment is at-will unless a statutory or contractual exception exists.¹⁵ “[T]his bar to wrongful discharge claims in the at-will employment context ‘is a fundamental statutory rule governing employer-employee relations in Georgia.’”¹⁶ Particularly, O.C.G.A. § 34-7-1¹⁷ provides that “[a]n indefinite hiring” is at-will employment.¹⁸ The definition of an indefinite hiring includes

9. Ga. H.R. Bill 697, Reg. Sess. (2012) (unenacted).

10. *Id.* § 1.

11. *Id.*

12. *Id.*

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

14. Haas et al., *supra* note 2, at 201 n.38 (“[T]he employment-at-will doctrine is weakening in many jurisdictions.”) (quoting W. Melvin Haas III et al., *Labor and Employment Law, Annual Survey of Georgia Law*, 62 MERCER L. REV. 181, 186 n.37 (2010) (alteration in original)).

15. *See, e.g.,* Wilson v. City of Sardis, 264 Ga. App. 178, 179, 590 S.E.2d 383, 385 (2003) (noting “[i]n 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 . . .”).

16. 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)).

17. O.C.G.A. § 34-7-1 (2008).

18. *Id.*

contract provisions specifying “‘permanent employment,’ ‘employment for life,’ [and] ‘employment until retirement.’”¹⁹ Further, a contract specifying an annual salary does not create a definite period of employment.²⁰ 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.²¹

Regardless of an employer’s motives, the general rule in Georgia allows the discharge of an at-will employee without creating a cause of action for wrongful termination.²² 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.²³

B. Wrongful Termination Based upon Allegations of Fraud

In *Bailey v. Urology Center of Columbus, LLC*,²⁴ the United States District Court for the Middle District of Georgia determined that an employer’s alleged assurance of an employee’s job security did not amount to fraudulent misrepresentation when the employee was later terminated.²⁵ Bailey alleged that a manager for her employer represented that Bailey’s “job was safe” in December 2009.²⁶ Following the alleged assurance, Bailey purchased a house. In March 2010, Bailey was terminated. She then claimed that her employer already had decided to terminate her at the time of the representation. Bailey brought suit against her former employer, claiming fraudulent misrepresentation.²⁷

Bailey’s claim was dismissed with prejudice for failure to state a claim upon which relief can be granted.²⁸ The court noted that “[a]n indefinite hiring may be terminated at will by either party.”²⁹ Bailey failed to allege that she had an employment contract with her employer for a

19. *Ga. Power Co. v. Busbin*, 242 Ga. 612, 613, 250 S.E.2d 442, 443-44 (1978) (quoting *Land v. Delta Air Lines*, 130 Ga. App. 231, 232, 203 S.E.2d 316, 317-18 (1973)).

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

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

22. *H&R Block E. Enters., Inc. v. Morris*, 606 F.3d 1285, 1294 (11th Cir. 2010) (citing *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) (noting “[t]he employer[] with or without cause and regardless of its motives may discharge the employee without liability”).

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

24. No. 4:11-CV-42, 2011 WL 3568144, at *1 (M.D. Ga. Aug. 15, 2011).

25. *Id.* at *4-5.

26. *Id.* at *1.

27. *Id.*

28. *Id.* at *4.

29. *Id.* at *5; *see also* O.C.G.A. § 34-7-1.

specified time period.³⁰ Consequently, Bailey could not rely on her employer's alleged representation because as an at-will employee the representation was unenforceable.³¹

C. *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.³² 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.³³ In addition, an employment contract's enforceability requires sufficient definitiveness in the terms of the contract.³⁴

During the survey period, the Georgia Court of Appeals affirmed that basic contract rules, including the statute of frauds, apply to the formation of an employment contract. In *Bithoney v. Fulton-DeKalb Hospital Authority*,³⁵ the court examined whether an oral agreement for a fifteen-month severance package was enforceable under the statute of frauds.³⁶ Bithoney engaged in multiple discussions about moving from New York to Georgia to take an executive position with Grady Hospital. Additionally, on multiple occasions, Bithoney met with members of the Board of Trustees of the Fulton-DeKalb Hospital Authority, the governing authority for Grady Hospital. At one of the meetings, the chair of the board told Bithoney, "Welcome to the Grady family, we are looking forward to your joining us."³⁷ Bithoney received a draft employment contract from Grady that provided for a fifteen-month severance pay package if he was terminated. Moreover, Grady provided Bithoney with an offer letter to confirm the initial employment status and to serve as a framework for a subsequent formal contract. However, the fifteen-month severance term was missing from the offer letter. Bithoney moved to Georgia without having a formal employment agreement in place. The night before he was to begin work, he was informed that the board of trustees blocked his employment and he

30. *Bailey*, 2011 WL 3568144, at *5.

31. *Id.*

32. JAMES W. WIMBERLY JR., *GEORGIA EMPLOYMENT LAW* § 2:1 (4th ed. 2008).

33. *Id.* For a discussion of elements of employer-employee contracts, see *infra* Part IV.A. of this Article.

34. WIMBERLY, *supra* note 32.

35. 313 Ga. App. 335, 721 S.E.2d 577 (2011).

36. *Id.* at 337-39, 721 S.E.2d at 579-80.

37. *Id.* at 337, 721 S.E.2d at 579.

would not be working for Grady. Bithoney filed suit alleging breach of contract pursuant to an oral contract for the fifteen-month severance package and negligent misrepresentation pursuant to the chair of the board's welcoming statement.³⁸

The court upheld the trial court's ruling that "enforcement of the oral severance agreement was barred by the Statute of Frauds."³⁹ Agreements that cannot be performed within one year of their making must be in writing and signed by the charged party.⁴⁰ The court noted that "[t]o fall within the ambit of this statutory provision, a contract must be incapable of being performed within a year."⁴¹ Bithoney's oral severance agreement was for fifteen months, and the statute of frauds was applicable.⁴² The court affirmed summary judgment in favor of the employer.⁴³

D. *The Georgia Whistleblower Act*

Under the Georgia Whistleblower Act,⁴⁴ "[n]o 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"⁴⁵ In *Caldon v. Board of Regents of the University System of Georgia*,⁴⁶ the Georgia Court of Appeals examined whether a close temporal proximity between a public employee's complaints and her termination was sufficient to create a genuine issue of material fact regarding whether the employer's motive was pretextual.⁴⁷ Caldton claimed that she engaged in whistleblowing activity in July and August of 2008 by discussing concerns that her boss was under-reporting leave time, reporting a conflict of interest, complaining of wasteful spending practices, and voicing concerns over her boss's ability to handle his job responsibilities. On September 24, 2008, Caldton verbally berated her boss in front of other employees. That same day, Caldton was given the option to resign or be terminated. Caldton initially resigned, but later withdrew her resignation and filed for a review.⁴⁸

38. *Id.* at 336-39, 721 S.E.2d at 579-81.

39. *Id.* at 343, 721 S.E.2d at 583.

40. *Id.* at 341, 721 S.E.2d at 582.

41. *Id.*

42. *Id.*

43. *Id.* at 336, 721 S.E.2d at 579.

44. O.C.G.A. § 45-1-4 (Supp. 2012).

45. *Id.*

46. 311 Ga. App. 155, 715 S.E.2d 487 (2011).

47. *Id.* at 159, 715 S.E.2d at 490.

48. *Id.* at 156-58, 715 S.E.2d at 488-89.

The court affirmed summary judgment for the employer.⁴⁹ The employer provided direct evidence that Caldron was fired for insubordination based on her September 24 exchange with her boss.⁵⁰ Other employees heard the exchange and another executive recommended that Caldron be terminated for insubordination without knowledge of the alleged whistleblowing activities.⁵¹ In some cases, “temporal proximity could be sufficient to establish a question of fact with regard to the stated reason for termination, in this case, however, it is not sufficient to overcome the Board’s direct evidence that Caldron was terminated for her insubordination.”⁵²

V. NEGLIGENT HIRING OR RETENTION

Under O.C.G.A. § 34-7-20,⁵³ “[t]he employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency”⁵⁴ 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.’”⁵⁵ 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 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.”⁵⁶ Typically, “the determination of whether an employer used ordinary care in hiring an employee is a jury issue”⁵⁷ and is only a question of law “where the evidence is plain, palpable and undisputable.”⁵⁸

49. *Id.* at 160, 715 S.E.2d at 491.

50. *Id.* at 159-60, 715 S.E.2d at 490-91.

51. *Id.* at 160, 715 S.E.2d at 491.

52. *Id.*; *See, e.g.*, *McNorton v. Ga. Dep’t of Transp.*, 619 F. Supp. 2d 1360, 1378 n.22 (N.D. Ga. 2007).

53. O.C.G.A. § 34-7-20 (2008).

54. *Id.*

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

56. *Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004).

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

58. *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)).

During the survey period, the Georgia Supreme Court affirmed in *Novare Group, Inc. v. Sarif*⁵⁹ that to sustain a negligent supervision claim, there must be “sufficient evidence to establish that the employer reasonably knew or should have known of an employee’s tendencies to engage in certain behavior relevant to the injuries allegedly incurred by the plaintiff.”⁶⁰ In *Novare*, condominium purchasers alleged that brokers, acting on behalf of developers, promised them “spectacular city views” and that any future development would not block the view from the condos in question. However, a new project was subsequently developed that blocked the condo purchasers’ view. The purchasers filed suit against the developers for negligent supervision of their brokers based on the brokers’ departure from the sales script that warned of the uncertainty of future developments.⁶¹ The court held that the plaintiffs failed to provide any specifically pled facts to support their legal conclusions that the developer had any actual knowledge of the brokers’ departure from the script or that the brokers had a tendency to do so.⁶² Accordingly, the negligent supervision claim was dismissed.⁶³

VI. RESPONDEAT SUPERIOR

A. Overview

Under the doctrine of respondeat superior, an employer may be held vicariously liable for the negligence or intentional torts of employees committed within the scope of his or her employment.⁶⁴ To hold an employer vicariously liable for the torts of an employee, the following two elements must be established: (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.⁶⁵

B. Independent Contractor or Employee

Vicarious liability under respondeat superior generally does not apply to the acts of independent contractors.⁶⁶ Therefore, in determining

59. 290 Ga. 186, 718 S.E.2d 304 (2011).

60. *Id.* at 190-91, 718 S.E.2d at 309 (quoting *Leo v. Waffle House, Inc.*, 298 Ga. App. 838, 841, 681 S.E.2d 258, 262 (2009)).

61. *Id.* at 186-87, 718 S.E.2d at 306-07.

62. *Id.* at 191, 718 S.E.2d at 310.

63. *Id.*

64. CHARLES R. ADAMS, III, *GEORGIA LAW OF TORTS* § 7-2 (2011-2012 ed.).

65. *Id.*

66. See O.C.G.A. § 51-2-4 (2000) (noting that “[a]n employer generally is not responsible for torts committed by his employee when the employee exercises an independent business

vicarious liability, a court must initially resolve whether an individual is an independent contractor or an employee.⁶⁷

In *Georgia Messenger Service, Inc. v. Bradley*,⁶⁸ the Georgia Court of Appeals considered whether a courier, who was classified as an independent contractor in the contract with the employer, was actually an employee, and whether the employer could be held liable for his negligence.⁶⁹ John W.S. Wise, Jr. (Wise), a courier for Georgia Messenger Service, was involved in an altercation with Bradley, a security guard, while attempting to make a delivery. Bradley sued Georgia Messenger Service under the doctrine of respondeat superior for Wise's conduct.⁷⁰

To determine liability, the court examined whether Wise's contractually designated status as an independent contractor precluded the employer's liability for his tortious conduct.⁷¹ The test for determining when an employer exercises sufficient control over an independent contractor's work to make the employer vicariously liable for the contractor's actions is

whether "the contract gives, or the employer assumes, the right to control the time, manner, and method of the performance of the work, as distinguished from the right to merely require certain definite results in conformity with the contract." Put another way, "the test is essentially whether the contractor has a bona fide existence apart from the employer or functions instead as the employer's alter ego."⁷²

Here, Wise's contract obligated him to perform duties on behalf of the employer as they were assigned to him, he had no choice as to which jobs he would perform, he could only work for Georgia Messenger Service, and the delivery vehicle could only be used by Georgia Messenger Service.⁷³ The terms of the contract created a genuine issue of material fact, and the court denied Georgia Messenger Service's motion for summary judgment.⁷⁴

and in it is not subject to the immediate direction and control of the employer").

67. See *id.*; see also ADAMS, *supra* note 64, at § 8-1 (noting that "[a]n '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").

68. 311 Ga. App. 148, 715 S.E.2d 699 (2011).

69. *Id.* at 150, 715 S.E.2d at 702.

70. *Id.* at 148-49, 715 S.E.2d at 701.

71. *Id.* at 150, 715 S.E.2d at 702.

72. *Id.* (quoting Slater v. Canal Wood Corp. of Augusta, 178 Ga. App. 877, 878, 345 S.E.2d 71, 72 (1986)).

73. *Id.*

74. *Id.* at 151-52, 715 S.E.2d at 703-04.

VII. RESTRICTIVE COVENANTS

A. Overview

Effective May 11, 2011, the Georgia Constitution was amended to authorize the enforcement of restrictive covenants that restrain in a reasonable manner.⁷⁵ In 2009, the General Assembly approved House Rule 178⁷⁶ to put the constitutional amendment on the November 2010 ballot, but the resolution did not specify an effective date.⁷⁷ The General Assembly then enacted House Bill 173⁷⁸ to authorize restrictive covenants, effective the day after the vote, since Georgia citizens were expected to approve the constitutional amendment.⁷⁹ Georgia voters approved the amendment on November 2, 2010, but pursuant to the state constitution, the effective date would be January 1, 2011, since the amendment lacked an effective date.⁸⁰ Conversely, House Bill 173 went into effect on November 3, 2010.⁸¹ The General Assembly passed House Bill 30⁸² to repeal House Bill 173 and to rectify the gap between the effective date and the constitutional amendment.⁸³ House Bill 30 was signed and became effective on May 11, 2011 and applies “to contracts entered into on and after [its effective date,] and [it] shall not apply in actions determining the enforceability of restrictive covenants entered into before such date.”⁸⁴

Prior to this constitutional amendment, courts upheld noncompete agreements that merely placed a partial restraint on trade.⁸⁵ However, agreements that placed general restraints on trade were void as against public policy.⁸⁶ Prior to the amendment, courts disfavored noncompete agreements on contractual relations because any restriction on trade reduced competition.⁸⁷ Pursuant to the 1983 Georgia Constitution, a

75. O.C.G.A. § 13-8-50 (2010 & Supp. 2012); GA. CONST. of 1983, art. III, § 6, para. 5(c)(3) (2007 & Supp. 2012).

76. Ga. H.R. Res. 178, Reg. Sess. (2009).

77. *See id.*; *see also* Becham v. Synthes, No. 11-14495, 2012 WL 1994604, at *1 (11th Cir. June 4, 2012).

78. Ga. H.R. Bill 173, Reg. Sess. (2009).

79. *Becham*, 2012 WL 1994604, at *1.

80. *Id.* at *1.

81. *Id.*

82. Ga. H.R. Bill 30, Reg. Sess. (2011).

83. *Becham*, 2012 WL 1994604, at *1.

84. *Id.* (alteration in original); *see also* Ga. H.R. Bill 30, § 5, Reg. Sess. (2011).

85. WIMBERLY, *supra* note 32, at 108.

86. O.C.G.A. § 13-8-2(a)(2) (2010 & Supp. 2012).

87. WIMBERLY, *supra* note 32, at 107.

judge had the power to limit the “duration, geographic area, and scope of prohibited activities provided in a contract or agreement restricting or regulating competitive activities.”⁸⁸ However, the Georgia Court of Appeals has recognized that the new version of the statute will not apply to restrictive covenants that predate the amendment.⁸⁹ For these prior covenants, a noncompete agreement is valid as a partial restraint on trade when the agreement is specific and reasonable in regard to duration, territorial coverage, and the scope of activities prohibited.⁹⁰

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.”⁹¹ A questionable restriction, if not void on its face, may require the introduction of additional facts to determine whether it is reasonable.⁹² However, depending on the type of contract, courts apply different levels of scrutiny in determining the reasonableness of the contract.⁹³ If a noncompete agreement is ancillary to an employment agreement, a stricter standard applies;⁹⁴ if any portion of that agreement is considered overbroad or unreasonable, the entire agreement becomes invalid.⁹⁵ If the agreement is pursuant to a contract for the sale of a business, a less stringent standard permits broader provisions; even if provisions of that agreement are deemed overbroad or unreasonable, the court may “blue pencil” the agreement, rewriting or severing the overly broad provisions.⁹⁶ However, “in restrictive covenant cases strictly scrutinized as employment contracts, Georgia does not employ the ‘blue pencil’ doctrine of severability.”⁹⁷

88. GA. CONST. of 1983, art. III, § 6, para. 5(c)(3).

89. *Cox v. Altus Healthcare & Hospice, Inc.*, 308 Ga. App. 28, 30, 706 S.E.2d 660, 664 (2011).

90. *Id.* at 31, 706 S.E.2d at 664; *see W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992).

91. *Sysco Food Servs., Inc. v. Chupp*, 225 Ga. App. 584, 585, 484 S.E.2d 323, 325 (1997) (citing *W.R. Grace & Co.*, 262 Ga. at 465 n.1, 422 S.E.2d at 531 n.1).

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

93. *See WIMBERLY*, *supra* note 32, at 108-09.

94. *See id.* at 110.

95. *Drumheller v. Drumheller Bag & Supply, Inc.*, 204 Ga. App. 623, 626, 420 S.E.2d 331, 334 (1992) (citing *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”).

96. *Advance Tech. Consultants, Inc. v. RoadTrac, LLC*, 250 Ga. App. 317, 320, 551 S.E.2d 735, 737 (2001).

97. *Id.* The court in *Advance Technology* also stated that “Georgia courts have traditionally divided restrictive covenants into two categories: ‘covenants ancillary to an

B. Georgia Public Policy

During the survey period, the United States Court of Appeals for the Eleventh Circuit examined the enforceability of a restrictive covenant entered into after voters approved the amendment and the November 3, 2010 effective date of House Bill 173 but prior to the May 11, 2011 effective date of House Bill 30.⁹⁸ In *Becham v. Synthes*,⁹⁹ Becham signed four restrictive covenants as part of his employment contract with Synthes in 2000. In November 2010, Becham informed his manager that he was leaving Synthes at the end of the year. Synthes agreed to pay Becham commissions on January 15, 2011, in exchange for a promise to honor the restrictive covenants in January 2011. Becham accepted the terms in December 2010. However, after Becham received his commission, he sought a declaration that the restrictive covenants were unenforceable and began working for a competitor of Synthes. The trial court granted summary judgment in favor of Becham and applied Georgia law to the restrictive covenants, notwithstanding a contractual provision choosing Pennsylvania law.¹⁰⁰

Generally, a choice-of-law provision is enforceable in Georgia.¹⁰¹ However, this provision may be unenforceable in Georgia if the application of the law from another jurisdiction would violate the public policy of Georgia.¹⁰² Synthes argued that "Georgia's public policy shifted in November 2010 to support the broad enforcement of restrictive covenants" and that the district court should have considered Georgia's new public policy.¹⁰³

The court of appeals noted that House Bill 173, by its terms, would be effective on November 3, 2010, and applied to "all contracts entered on or after."¹⁰⁴ Moreover, Becham agreed to honor the covenants on

employment contract, which receive strict scrutiny and are not blue-penciled, and covenants ancillary to a sale of business, which receive much less scrutiny and may be blue-penciled." *Id.* at 319, 551 S.E.2d at 736 (quoting *Habif, Arogeti & Wynne, P.C. v. Baggett*, 231 Ga. App. 289, 289-90, 498 S.E.2d 346, 349 (1998)). However, the recent amendment to the Georgia Constitution permits courts to "blue pencil" restrictive covenants ancillary to employment contracts. *See supra* Part VII.2A.

98. *Becham v. Synthes*, No. 11-14495, 2012 WL 1994604, at *1 (11th Cir. June 4, 2012).

99. No. 11-14495, 2012 WL 1994604 (11th Cir. June 4, 2012).

100. *Id.* at *2-3.

101. *Id.* at *3 (citing *Carr v. Kupfer*, 250 Ga. 106, 107, 296 S.E.2d 560, 562 (1982)).

102. *Id.* (citing *Nasco, Inc. v. Gimbert*, 239 Ga. 675, 676, 238 S.E.2d 368, 369 (1977)).

103. *Id.*

104. *Id.* at *4.

December 1, 2010.¹⁰⁵ These circumstances would ordinarily render the covenants enforceable; however, House Bill 173 is “unconstitutional and void.”¹⁰⁶ The court stated, “In Georgia, a statute’s constitutionality is tested at the time it was passed.”¹⁰⁷ At the moment House Bill 173 went into effect on November 3, 2010, the General Assembly still did not have the power to authorize the enforcement of restrictive covenants.¹⁰⁸ Therefore, even though a constitutional amendment authorizing House Bill 173 went into effect on January 1, 2011, the act could not be saved.¹⁰⁹ Finally, the court noted that “[i]n Georgia, the only way to ‘revive’ an unconstitutional statute is to reenact that statute.”¹¹⁰

The General Assembly did eventually pass House Bill 30 to correct House Bill 173.¹¹¹ However, House Bill 30 went into effect on May 11, 2011, and “does not apply ‘in actions determining the enforceability of restrictive covenants entered into before’ May 11, 2011.”¹¹² Consequently, the restrictive covenants in question were not covered by House Bill 30.¹¹³ The court of appeals upheld the district court’s decision to grant summary judgment in favor of Becham.¹¹⁴

Similarly, in *Boone v. Corestaff Support Services, Inc.*,¹¹⁵ the United States District Court for the Northern District of Georgia examined whether a choice-of-law provision that applies another jurisdiction’s law violates Georgia public policy in the context of restrictive covenants.¹¹⁶ Boone signed a noncompete agreement in December 2008. While the agreement lacked a forum-selection clause, it had a choice-of-law provision stating that Delaware law governed. Boone left his position with Corestaff in April 2011 to work for a competitor. Later that month, Boone filed suit in Georgia in an effort to prevent Corestaff from enforcing the restrictive covenant not to compete. Corestaff filed suit in Delaware and sought to have the Georgia action dismissed in accordance

105. *Id.*

106. *Id.*

107. *Id.* (citing *Comm’rs of Rds. & Revenues of Fulton Cnty. v. Davis*, 213 Ga. 792, 793-94, 102 S.E.2d 180, 182-83 (1958)).

108. *Id.* (citing *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 372, 405 S.E.2d 253, 254-55 (1991)).

109. *Id.*

110. *Id.*

111. *See* Ga. H.R. Bill 30.

112. *Becham*, 2012 WL 1994604, at *4; *see also* Ga. H.R. Bill 30 § 5.

113. *Becham*, 2012 WL 1994604, at *4.

114. *Id.* at *6.

115. 805 F. Supp. 2d 1362 (N.D. Ga. 2011).

116. *Id.* at 1368-69.

with the choice-of-law provision of the noncompete and employment agreement.¹¹⁷

Delaware law governing restrictive covenants in employment agreements is permissive and does not violate the new Georgia public policy that went into effect in May 2011.¹¹⁸ However, since the agreement in question was signed in 2008, the court must apply the law as it existed prior to the recent amendment.¹¹⁹ Since the agreement between Boone and Corestaff allows for the application of the “blue pencil” rule and Georgia prohibited such a rule prior to 2011, the agreement violated Georgia public policy.¹²⁰ As such, the “choice-of-law provision choosing the law of a foreign jurisdiction may not be applied to enforce the covenant.”¹²¹

C. *Scope of Prohibited Activities*

During the survey period, the Georgia Court of Appeals applied a three element test to assess the reasonableness of a restrictive covenant entered into under Georgia law prior to the 2011 amendment.¹²² In *Murphree v. Yancey Brothers Co.*,¹²³ Murphree entered into a restrictive covenant with Yancey that prohibited him from soliciting clients for the purposes of competing, which were procured by Murphree on behalf of Yancey and for a term of two years following his termination of employment. However, prior to leaving his job with Yancey, Murphree copied company files to a thumb drive and then to his work computer at his new job with Flint, a competitor of Yancey. Murphree then contacted his former clients and submitted bids on behalf of Flint. Yancey sought, and was granted, an interlocutory injunction by the trial court to prevent further compromise of trade secrets.¹²⁴

The court of appeals assessed the duration, territorial coverage, and scope of prohibited activity to determine reasonableness.¹²⁵ Murphree challenged the restrictive covenant claiming it was “invalid and unenforceable because it fail[ed] to limit or define the scope of activity

117. *Id.* at 1366-68.

118. *Id.* at 1369.

119. *Id.*

120. *Id.*

121. *Id.* (citing *Convergys Corp. v. Keener*, 276 Ga. 808, 810, 582 S.E.2d 84, 85-86 (2003)).

122. *Murphree v. Yancey Bros. Co.*, 311 Ga. App. 744, 747, 716 S.E.2d 824, 827 (2011).

123. 311 Ga. App. 744, 716 S.E.2d 824 (2011).

124. *Id.* at 744-46, 716 S.E.2d at 825-26.

125. *Id.* at 747-48, 716 S.E.2d at 827 (quoting *Reardigan v. Shaw Indus., Inc.*, 238 Ga. App. 142, 143, 518 S.E.2d 144, 146 (1999)).

prohibited."¹²⁶ The court held that the scope of the activity was properly defined because the contract expressly prohibited soliciting clients procured by a former employee for the purposes of competing.¹²⁷ The covenant was reasonable because it "prohibited Murphree from initiating affirmative action to compete with Yancey by contacting former customers, but the clause would not have precluded him 'from accepting unsolicited business from the forbidden clients.'"¹²⁸ Accordingly, the interlocutory injunction was affirmed.¹²⁹

Conversely, in *Fantastic Sams Salons Corp. v. Maxie Enterprises, Inc.*,¹³⁰ a franchisee signed a restrictive covenant in 2008 that prohibited competing within five miles of the franchise location for two years and competing within two and one-half miles of any Fantastic Sams Salon for ten years.¹³¹ The court held that, applying pre-ratification law, "restrictive covenants in franchise agreements are subject to strict scrutiny, and they 'must be reasonable as to time, territory[,] and scope.'"¹³² Moreover, since the covenant prohibited the franchisee from serving in any capacity in any business that engaged in a similar business to Fantastic Sams, the covenant is overbroad and has an unreasonable scope.¹³³

Similarly, in *Clark v. Johnson Truck Bodies, LLC*,¹³⁴ the United States District Court for the Southern District of Georgia examined the reasonableness of a noncompete clause entered into prior to the amended restrictive covenant law in 2011.¹³⁵ Clark entered into an employment contract that contained a noncompete provision with Johnson. The agreement prohibited Clark from engaging in any business that competes with Johnson's products for eighteen months and did not contain any limitations to a specified territory.¹³⁶

126. *Id.* at 747, 716 S.E.2d at 827.

127. *Id.* at 748-49, 716 S.E.2d at 828.

128. *Id.* at 749, 716 S.E.2d at 828 (quoting *Baggett*, 231 Ga. App. at 298, 498 S.E.2d at 355); *cf.* *Waldeck v. Curtis 1000, Inc.*, 261 Ga. App. 590, 592, 583 S.E.2d 266, 268 (2003) (noting that "a covenant prohibiting a former employee from merely accepting business, without any solicitation, is not reasonable").

129. *Murphree*, 311 Ga. App. at 749, 716 S.E.2d at 828.

130. No. 3:11-CV-22, 2012 WL 210889, at *1 (M.D. Ga. Jan. 24, 2012).

131. *Id.* at *2.

132. *Id.* (quoting *Atlanta Bread Co. Int'l v. Lupton-Smith*, 285 Ga. 587, 589-90, 679 S.E.2d 722, 724 (2009)).

133. *Id.* at *3.

134. No. CV411-132, 2012 WL 1014827, at *1 (S.D. Ga. Mar. 23, 2012).

135. *Id.* at *4-6.

136. *Id.* at *1.

The court applied Georgia's law of restrictive covenants as it was in 2008, since that was when the agreement was entered into.¹³⁷ The restriction on Clark from involvement in any business that competes with Johnson for eighteen months in any territory was "overly unreasonable on the effects it ha[d]."¹³⁸ The court held that "[b]ecause these provisions are invalid under Georgia's pre-ratification law, and is not capable of being 'blue-penciled' by the Court, the entire covenant must fail."¹³⁹

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 each year. Adding to this challenge is a growing overlap between state and federal issues. Regardless of whether a practitioner professes to specialize in state, federal, administrative, or trial law, it is important to recognize that any one law or legal proceeding can and does impact other relations between employer and employee.

137. *Id.* at *5 (citing *Boone v. Corestaff Servs.*, 805 F. Supp. 2d 1362, 1369 (N.D. Ga. 2011)).

138. *Id.* at *6.

139. *Id.*