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Labor and Employment Law

by W. Melvin Haas, III^{*}
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I. INTRODUCTION

This Article surveys recent developments in state statutory and common law that affect labor and employment relations of Georgia employers. Accordingly, it surveys published decisions from the Georgia Court of Appeals and Georgia Supreme Court from June 1, 2003 to May 31, 2004. This Article also highlights specific revisions to the Official Code of Georgia Annotated (“O.C.G.A.”).

II. RECENT LEGISLATION

Without regard to the Georgia General Assembly’s changes to the “Workers’ Compensation” section¹ of the Georgia Labor and Industrial

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1. Recent developments in workers’ compensation law are discussed in H. Michael Bagley et al., *Workers’ Compensation*, 56 *MERCER L. REV.* 479, 479-80 (2004) (discussing

Relations Code ("Labor Code"),² the General Assembly passed two noteworthy amendments to Georgia's Labor Code during the survey period.

First, the General Assembly addressed the so-called "Living Wage"³ movement by creating O.C.G.A. section 34-4-3.1⁴ to preempt "[a]ny and all wage or employment benefit mandates adopted by any local government."⁵ The General Assembly did so based, in part, upon the following determination: "In order for businesses to remain competitive and yet attract and retain the highest possible caliber of employees, private enterprises in this state must be allowed to function in a uniform environment with respect to mandated wage rates and employment benefits."⁶ In so doing, the General Assembly eliminated what it perceived as being wage and benefit disparities "creat[ing] an anticompetitive marketplace [and] foster[ing] job and business relocation."⁷

recent legislative amendments).

2. O.C.G.A. §§ 34-9-1 to -421 (2004).

3. The Fair Labor Standard Act, which codifies the federal minimum wage, allows state and local governments to enact minimum wages higher than the federal standard. However, until recently, few states and municipalities have taken this opportunity. 29 U.S.C. § 218(a) (2000). Based upon the premise that the federal minimum wage has failed to keep pace with inflation, the Association of Community Organizations for Reform Now ("ACORN") began a "Living Wage" Campaign in the mid-1990s in an effort to pressure municipalities into raising minimum wages at the local level around the country. See *ACORN Living Wage Res. Ctr. Web Site*, at <http://www.livingwagecampaign.org> (Aug. 2, 2004). Indeed, ACORN's website declares that it had "Living Wage Campaigns Underway" in both Atlanta and Athens, Georgia. *Id.* So far, ACORN counts among its victories 123 cities and counties that allegedly have passed living wage ordinances. *Id.*

4. O.C.G.A. § 34-4-3.1 (2004).

5. *Id.* § 34-4-3.1(b). In relevant part, O.C.G.A. section 34-4-3.1(a)(6)-(b)(3) provides:

(6) "Wage or employment benefit mandate" means any requirement adopted by a local government entity which requires an employer to pay any or all of its employees a wage rate or provide employment benefits not otherwise required under this Code or federal law.

(b)(1) Any and all wage or employment benefit mandates adopted by any local government entity are hereby preempted.

(2) No local government entity may adopt, maintain, or enforce by charter, ordinance, purchase agreement, contract, regulation, rule, or resolution, either directly or indirectly, a wage or employment benefit mandate.

(3) Any local government entity may offer its own employees employment benefits.

O.C.G.A. § 34-4-3.1.

6. 2003 Ga. Laws 1258, § 1.

7. *Id.*

Second, the General Assembly amended O.C.G.A. section 34-8-21⁸ to repeal the "State Unemployment Tax Moratorium."⁹ Although lifting the Unemployment Moratorium may have been necessary to meet unemployment needs during an economic downturn, the increased tax liability placed further burdens on businesses already affected by the recession.¹⁰

III. WRONGFUL DISCHARGE

A. *Employment at Will*

An employment-at-will contract has at least two notable characteristics: first, either the employee or employer may terminate the employment relationship at any time, with or without cause; second, and a corollary of the first characteristic, upon the termination of an employment-at-will contract, the employee may not successfully maintain a wrongful termination claim.¹¹

While the doctrine is gradually eroding in other jurisdictions,¹² O.C.G.A. section 34-7-1¹³ provides that employment contracts in Georgia are at-will unless the parties implicitly or explicitly contract otherwise.¹⁴ Generally, this means that in the absence of a specified length of employment, the relationship is employment-at-will.¹⁵ Contract provisions specifying "permanent employment," "employment

8. 2002 Ga. Laws 1119 (amending O.C.G.A. § 34-8-21 (1991)).

9. Tony Adams, *Unemployment Tax Pinches Bottom line: Georgia companies take the hit as four-year moratorium ends*, Ledger Enquirer.com, at <http://www.ledger-enquirer.com/mld/ledgerenquirer/news/8181309.htm> (Mar. 14, 2004).

10. *Id.*

11. JAMES W. WIMBERLY, JR., *GEORGIA EMPLOYMENT LAW 20-21* (3d ed. & Supp. 2004).

12. See Amy Carlson, *States are Eroding At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?*, 42 DUQ. L. REV. 511 (2004); Melanie Robin Galberry, *Employers Beware: South Carolina's Public Policy Exception to the At-Will Employment Doctrine is Likely to Keep Expanding*, 51 S.C. L. REV. 406 (2000); Cortlan H. Maddux, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment-At-Will*, 49 BAYLOR L. REV. 197 (1997); Mark A. Fahleson, *The Public Policy Exception to Employment-At-Will—When Should Courts Defer to the Legislature?*, 72 NEB. L. REV. 956 (1993); Kimberly Anne Huffman, *Salt v. Applied Analytical, Inc.: Clarifying the Confusion in North Carolina's Employment-at-Will Doctrine*, 70 N.C. L. REV. 2087 (1992); Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197 (1990).

13. O.C.G.A. § 34-7-1 (1998).

14. *Id.*

15. See generally WIMBERLY, *supra* note 11, at 20-21.

for life,' or 'employment until retirement'" are indefinite, and therefore, are employment-at-will contracts.¹⁶

In *Georgia Farm Bureau Mutual Insurance Co. v. Crowley*,¹⁷ the court of appeals reaffirmed the general principle of employment-at-will: "The public policy of Georgia is clear and unambiguous that, absent a definite term of employment, the contract is terminable at will."¹⁸

In that case Crowley, an attorney, had represented Georgia Farm Bureau "on a case-by-case basis" for more than seventeen years.¹⁹ After a verbal confrontation with a Georgia Farm Bureau employee, Crowley was asked to apologize, which he refused to do. When Georgia Farm Bureau directed Crowley to return forty-two active case files, Crowley sued alleging, *inter alia*, breach of contract. Crowley argued that Georgia Farm Bureau had agreed that once it turned a file over to him it would not be removed unless he "didn't do the job[.]" or was disbarred.²⁰ Although the court of appeals stated numerous reasons for affirming the trial court's grant of summary judgment to defendant on Crowley's breach of contract claim, it did so in part because "there was no stated duration of the agreement . . . [and] absent a definite term of employment, the contract [was] terminable at will."²¹

Similarly, in *Cramp v. Georgia-Pacific Corp.*²² the court of appeals relied upon the doctrine of employment-at-will to limit an employee's ability to bring a fraud claim against his former employer.²³ The decision in *Cramp* arose from the acquisition of Unisource Worldwide, Inc. ("Unisource") by Georgia-Pacific Corp. ("Georgia Pacific"). Before the acquisition, Unisource offered additional severance benefits to some of its employees, including Cramp, its vice president of customer service.²⁴ Unisource promised Cramp that if his employment "was terminated other than for cause, or should he resign following a change of control, . . . [he] would be entitled to [twelve] months continued salary, with the first six months guaranteed and the remaining six months subject to offset by subsequent employment."²⁵

16. *Id.* at 20 (quoting *Ga. Power Co. v. Busbin*, 242 Ga. 612, 613, 280 S.E.2d 442 (1978)).

17. 263 Ga. App. 659, 588 S.E.2d 840 (2003).

18. *Id.* at 662, 588 S.E.2d at 843 (citing *Schuck v. Blue Cross & Blue Shield, Inc.*, 244 Ga. App. 147, 149, 534 S.E.2d 533 (2000)).

19. *Id.*

20. *Id.* at 660, 588 S.E.2d at 842.

21. *Id.* at 662, 588 S.E.2d at 843.

22. 266 Ga. App. 38, 596 S.E.2d 212 (2004).

23. *Id.* at 40, 596 S.E.2d at 214.

24. *Id.* at 38-39, 596 S.E.2d at 213.

25. *Id.* at 39, 596 S.E.2d at 213.

After the acquisition, Georgia-Pacific's vice president of marketing offered Cramp a job and allegedly told Cramp, "we want you to come down to Atlanta and continue the job you're doing."²⁶ The job offer was contingent upon Cramp's release of the severance benefits previously offered by Unisource.²⁷ In part, the written offer stated:

As you are no doubt aware, employment at Georgia-Pacific, as with most employers, is "at will" and thus can be terminated at any time and for any reason not prohibited by law, either at the option of the employee or the option of the company. Similarly, as a matter of policy, Georgia-Pacific reserves the right to make changes in the terms and conditions of employment of all of its regular salaried employees.²⁸

After Cramp accepted the offer and moved to Atlanta, he discovered that his duties with Georgia-Pacific differed from the duties he had performed with Unisource. Eventually, Georgia-Pacific moved Cramp's duties to other executives and eliminated his position, resulting in his termination. Cramp sued alleging fraud.²⁹

Although Cramp admitted that the nature of his at-will employment precluded him from "maintain[ing] a cause of action for an alleged misrepresentation concerning the length of his employment, or promise related to future compensation,"³⁰ he argued that Georgia-Pacific fraudulently induced him into relinquishing his additional severance benefits by misrepresenting the nature of his position with them.³¹ The court of appeals rejected Cramp's argument, holding that an employee cannot justifiably rely upon an employer's representation regarding the particular responsibilities of a position because, in the context of at-will employment, "such a representation was an unenforceable promise."³² Thus, a representation regarding the responsibilities of a position cannot form the basis of a fraud claim.³³

Likewise, in *Shores v. Modern Transportation Services, Inc.*,³⁴ the court of appeals limited an employee's recovery in tort under the theory

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 39-40, 296 S.E.2d at 214.

30. *Id.*

31. *Id.* The elements of a fraud claim are: (1) false representation by a defendant; (2) scienter; (3) intention to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff. *Id.* (citing *Pyle v. City of Cedartown*, 240 Ga. App. 445, 447, 524 S.E.2d 7, 9 (1999)).

32. *Id.*

33. *Id.*

34. 262 Ga. App. 293, 585 S.E.2d 664 (2003).

that no property right existed when the employment was at-will.³⁵ In that case Thomas Shores was operating the lead locomotive of a train when a truck driver, employed by Modern Transportation, collided with the locomotive and the freight car behind Shores. Shores was not physically injured, but he complained of post-traumatic stress syndrome, which prevented him from working as an engineer.³⁶ The court dismissed Shores's tort action for negligent infliction of emotional distress because he failed to show the elements of either physical injury or monetary loss.³⁷ The court held that Shores's injury resulted in no pecuniary loss because Shores had no "reasonable expectation of continued employment to establish a property right protected by law."³⁸

Finally, the court, in *Wilson v. City of Sardis*,³⁹ reaffirmed the application of the doctrine of employment-at-will for public and private employees when there is no statutory or contractual bar to termination.⁴⁰ Wilson, the chief of police for the City of Sardis, misrepresented the employment status of a police academy student. After the misrepresentation was discovered, the City of Sardis, led by the mayor and several city council members, terminated Wilson for falsifying the application. Wilson filed suit against the mayor and various city council members for tortious interference with his contract and against the city itself for "wrongful termination."⁴¹ Regarding the wrongful termination claims, the court of appeals held:

[A] public employee has a property interest in employment when that employee can be fired only for cause In the absence of a contractual or statutory "for cause" requirement, however, the employee serves "at will" and may be discharged at any time for any reason or no reason, with no cause of action for wrongful termination under state law. Such "at will" employees have no legitimate claim of entitlement

35. *Id.* at 295, 585 S.E.2d at 666.

36. *Id.* at 294, 585 S.E.2d at 665.

37. *Id.* at 295, 585 S.E.2d at 665.

38. *Id.*, 585 S.E.2d at 666.

39. 264 Ga. App. 178, 590 S.E.2d 383 (2003).

40. *Id.* at 179, 590 S.E.2d at 385. *Cf.* *Jones v. Board of Regents of the Univ. Sys. of Georgia*, 262 Ga. App. 75, 585 S.E.2d 138 (2003) (Despite the doctrine of employment-at-will, the court of appeals held there was an issue of material fact for a jury regarding whether the "action" taken against Jones was within the purview of O.C.G.A. section 45-1-4, which provides that no action may be taken against a public employee who reports possible activity of fraud, waste, or abuse of state programs that are under the jurisdiction of the public employer).

41. *Wilson*, 264 Ga. App. at 178-79, 590 S.E.2d at 385.

to continued employment and, thus, have no property interest protected by the due process clause.⁴²

B. Breach of Employment Contracts

The following cases demonstrate the problems and unnecessary legal costs associated with poor draftsmanship in employment agreements. Consequently, a practitioner should always include unambiguous and definite terms when defining the employer-employee relationship in an employment contract.

To form a valid employment contract, the basic rules of contracts apply: offer, acceptance, and consideration. Further, an employment contract must contain a designation of the employee's place of employment, the period of employment,⁴³ the nature of services to be rendered, and the amount or type of compensation. The terms of an employment contract must be sufficiently definite to be enforceable, and definitiveness is a question of law for the judge.⁴⁴

When interpreting employment contracts, courts are guided by three general principles. If the contract is not ambiguous, the court will enforce the contract according to its terms and dismiss all technical or arbitrary rules of construction.⁴⁵ However, if the contract is ambiguous, then interpreting the terms is a question of law for the court. If the court cannot negate the ambiguity after applying the statutory rules of construction, then the interpretation will go to the jury.⁴⁶

*Reichman v. Southern Ear, Nose & Throat Surgeons, P.C.*⁴⁷ illustrates the practical dangers associated with ambiguities in the compensation clauses of employment contracts.⁴⁸ Reichman, a physician, signed an employment contract with Southern Ear, Nose & Throat Surgeons, P.C. ("SENT") providing that SENT would collect all fees Reichman charged for the services he rendered, and the collections would then become the property of SENT. SENT, in turn, would pay Reichman a percentage of the collected fees after making certain deductions. The agreement also provided that either party could terminate the contract with ninety days notice.⁴⁹ The contract provided that upon such

42. *Id.* (citing *Duck v. Jacobs*, 739 F. Supp. 1545, 1548 (S.D. Ga. 1990)).

43. If the period of employment is not specified, then an employment-at-will contract is implied. See *WIMBERLY*, *supra* note 11, at 6-7.

44. *Id.*

45. *Mon Ami Int'l, Inc. v. Gale*, 264 Ga. App. 739, 741, 592 S.E.2d 83, 86 (2003) (citing *Atlanta Dev. v. Emerald Capital Invs.*, 258 Ga. App. 472, 477, 574 S.E.2d 585, 589 (2002)).

46. *Id.* at 741, 592 S.E.2d at 86.

47. 266 Ga. App. 696, 598 S.E.2d 12 (2004).

48. *Id.* at 697-98, 598 S.E.2d at 14-15.

49. *Id.*

termination, Reichman “shall be entitled to receive compensation due [him] through the effective date of termination, as calculated pursuant to the Compensation Formula.”⁵⁰

Reichman became dissatisfied with his compensation and exercised his rights under the contract. SENT argued that Reichman’s final compensation was limited to fees collected, whereas Reichman argued he was entitled to be paid for all fees billed up to and including the last day he provided services.⁵¹

The dispute arose out of the amount “due” to Reichman.⁵² Because the word “due” was ambiguous, the court of appeals turned to the principles of contract construction⁵³ to interpret the meaning of the contract.⁵⁴ The court of appeals concluded that when the construction of a contract is in doubt, the construction goes most strongly against the party who drafted the agreement.⁵⁵ Thus, the court of appeals held: “[Because] SENT drafted the agreement here, the contract should be read to mean that SENT is required to compensate Reichman for any fees that he generated while he worked for SENT, even though the fees for such work were collected after Reichman ended his employment with SENT.”⁵⁶ While the court’s holding rests on well-known statutory principles of contract interpretation, the practical lesson for employment practitioners is simple: Failure to carefully avoid ambiguity in compensation clauses will undoubtedly result in unnecessary and costly litigation.

*Mon Ami International, Inc. v. Gale*⁵⁷ illustrates that rules of statutory construction will not always resolve a dispute regarding an employment contract.⁵⁸ In that case the husband/executor of a deceased employee’s estate brought an action to enforce an employment contract drafted by his wife that gave her an option to purchase at least five percent of the total shares of stock in the company. A few months later, the employment contract was amended. The deceased drafted and signed the amended contract as well.⁵⁹ The amended contract provided that her “stock ownership . . . shall be increased from [five percent] to [ten percent].”⁶⁰ The company presented evidence that the deceased

50. *Id.*

51. *Id.*

52. *Id.* at 699, 598 S.E.2d at 16.

53. O.C.G.A. § 13-2-2 (1982).

54. *Reichman*, 266 Ga. App. at 699, 598 S.E.2d at 16.

55. *Id.* at 699-700, 598 S.E.2d at 16.

56. *Id.* at 700, 598 S.E.2d at 16.

57. 264 Ga. App. 739, 592 S.E.2d 83 (2003).

58. *Id.* at 741, 592 S.E.2d at 87.

59. *Id.* at 740, 592 S.E.2d at 86.

60. *Id.*

never exercised her option.⁶¹ At a second trial on the matter,⁶² the court prevented the jury from considering the intent of the parties and ruled for the company as a matter of law.⁶³ The executor appealed.⁶⁴

On appeal Mon Ami argued that the contract was too vague to be enforceable because it lacked specificity as to the “stock” at issue, and it failed to identify when the ten percent ownership was to be calculated.⁶⁵ The court of appeals disagreed, stating “[t]he test of an enforceable contract is whether it is expressed in language sufficiently plain and explicit to convey what the parties agreed upon.”⁶⁶ The court also held that the amendment “when read with the employment contract as a whole, shows that the stock to which the amendment refers” was stock in Mon Ami, and that the ten percent figure was sufficiently specific to be enforceable.⁶⁷ Nevertheless, the court determined the “ambiguity [could not] be resolved by the rules of contract construction.”⁶⁸ Therefore, the court remanded the case for factual determinations on the intent of the parties.⁶⁹

C. *Employment Contracts and Arbitration Clauses*

In *JOJA Partners, LLC v. Abrams Properties, Inc.*,⁷⁰ the court of appeals determined the correct application of provisions of Georgia’s Arbitration Code⁷¹ to an Asset Management Agreement.⁷² Specifically, the Asset Management Agreement provided that plaintiff (“jOjA”) would provide certain services relating to the administration, management, supervision, leasing, and disposition of Abrams’s real estate assets.⁷³ In part the agreement provided that “[jOjA] is, and shall at

61. *Id.*

62. At the first trial, the jury concluded that Mon Ami did not breach a fiduciary duty, but the trial court disagreed with the jury and granted a new trial. Before retrial the court granted a motion in limine, which prevented Mon Ami from presenting evidence on plaintiff’s status as a ten percent shareholder. *Id.* at 739-40, 592 S.E.2d at 85.

63. *Id.* at 742, 592 S.E.2d at 86-87.

64. *Id.* at 740, 592 S.E.2d at 85.

65. *Id.*

66. *Id.* at 742, 592 S.E.2d at 87 (citing *Kueffer Crane & Hoist Serv., Inc. v. Passarella*, 247 Ga. App. 327, 330, 543 S.E.2d 113, 116 (2000)).

67. *Id.*

68. *Id.* at 741, 592 S.E.2d at 86.

69. *Id.* at 742, 592 S.E.2d at 87.

70. 262 Ga. App. 209, 585 S.E.2d 168 (2003).

71. O.C.G.A. § 9-9-2 (1982 & Supp. 2004).

72. *JOJA Partners*, 262 Ga. App. at 211, 585 S.E.2d at 170-71.

73. *Id.* at 209, 585 S.E.2d at 170.

all times during the Term be, an independent contractor, and not an employee of [Abrams].⁷⁴

When a dispute arose regarding certain commissions, jOjA notified Abrams of the termination of the agreement and its election to pursue arbitration. When Adams sued jOjA for breach of contract, jOjA moved to compel arbitration.⁷⁵

The superior court denied jOjA's motion, *inter alia*, on the basis that the arbitration provision contained in the contract was unenforceable because the parties failed to follow the prerequisites of the Georgia Arbitration Code.⁷⁶ Specifically, the superior court relied upon O.C.G.A. section 9-9-2(c)(9),⁷⁷ which provides that an arbitration provision in an employment contract is unenforceable "unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement."⁷⁸ JOjA requested and received a discretionary appeal.⁷⁹

The court of appeals acknowledged that "the Georgia Arbitration Code 'is in derogation of common law and must be strictly construed and not extended beyond its plain terms.'⁸⁰ However, the court decided the trial court erred in applying the code subsection requiring initials for an enforceable arbitration agreement and stated that "[w]here the contract of employment clearly denominates the other party as an independent contractor, that relationship is presumed to be true unless the evidence shows that the employer assumed such control."⁸¹ The contract at issue was not an employment contract because it stated the position at issue would be "an independent contractor, and not an employee of" the company.⁸² Furthermore, the court of appeals decided that broadly interpreting the "terms and conditions of employment"⁸³ to include independent contractors, in addition to employees, would violate the court's strict interpretation of the Georgia Arbitration Code.⁸⁴ Thus, the court held O.C.G.A. section 9-9-2(c)(9) was not applicable to

74. *Id.*, 585 S.E.2d at 171.

75. *Id.* at 209-10, 585 S.E.2d at 170.

76. *Id.*

77. O.C.G.A. § 9-9-2(c)(9) (1982 & Supp. 2004).

78. *Id.*

79. *JOJA Partners*, 262 Ga. App. at 209, 585 S.E.2d at 169.

80. *Id.* at 211, 585 S.E.2d at 170 (quoting *Pinnacle Constr. Co. v. Osborne*, 218 Ga. App. 366, 367, 460 S.E.2d 880, 881 (1995)).

81. *Id.* at 212, 585 S.E.2d at 171 (quoting *Teachers' Retirement Sys. v. Forehand*, 234 Ga. App. 437, 441, 506 S.E.2d 913, 917 (1998)).

82. *Id.*

83. O.C.G.A. § 9-9-2(c)(9).

84. *JOJA Partners*, 262 Ga. App. at 212, 585 S.E.2d at 171-72.

independent contractors, and the contract did not require the initials of the parties for consent to arbitration as an employment contract would.⁸⁵

IV. MISCELLANEOUS EMPLOYMENT TORTS

A. *Negligent Hiring or Retention*

Increasingly, employers are finding themselves the subjects of negligent employment practices claims.⁸⁶ One such case was *Lewis v. Northside Hospital, Inc.*,⁸⁷ wherein an employee who was injured in a shoving incident with a co-worker sought relief for “negligent retention.” Specifically, Lewis and Moore, co-workers, argued over work related issues, which led to an altercation.⁸⁸ Lewis testified that during the altercation she felt a “punch, poke, or something in my back from [Moore],” which [she] described as more annoying than painful.⁸⁹ In response, “Lewis turned around and shoved Moore, who fell over some bins.”⁹⁰ Northside Hospital fired both employees. Although Lewis acknowledged that the exclusive remedy provision of the Georgia Workers’ Compensation Act barred recovery for physical assault, she argued she had mental injuries, which generally are not compensable under the Act.⁹¹ The court of appeals disagreed and determined that the Workers’ Compensation Act was Lewis’s sole remedy.⁹²

Relying upon *Bryant v. Wal-Mart Stores, Inc.*,⁹³ the court of appeals observed that “where an employee suffers a physical injury in the course of employment[,] . . . a related claim for mental damages will be barred by the Act’s exclusive remedy provision.”⁹⁴ In the case of Lewis, the

85. *Id.* at 213, 585 S.E.2d at 172.

86. Under O.C.G.A. section 34-7-20, “[t]he employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency.” O.C.G.A. § 34-7-20 (2004). Courts have 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.’” *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 (2004)).

87. 267 Ga. App. 288, 599 S.E.2d 267 (2004).

88. *Id.* at 288-89, 599 S.E.2d at 268.

89. *Id.* at 289, 599 S.E.2d at 268.

90. *Id.*

91. *Id.* at 289-90, 599 S.E.2d at 268-69 (citing *Fowler Oil Co. v. Hamby*, 192 Ga. App. 422, 385 S.E.2d 106 (1989)).

92. *Id.* at 290, 599 S.E.2d at 269.

93. 203 Ga. App. 770, 417 S.E.2d 688 (1992).

94. *Lewis*, 267 Ga. App. at 290, 599 S.E.2d at 269.

court stated the evidence, “even viewed most favorably to Lewis . . . shows some, if [only] very small, level of physical harm. Furthermore, a battery is considered to be a physical injury.”⁹⁵ Consequently, Lewis’s negligent retention claims were barred by the exclusive remedy provision of the Workers’ Compensation Act.⁹⁶

In contrast, the employer in *TGM Ashley Lakes, Inc. v. Jennings*,⁹⁷ was not as fortunate when its hiring practices were reviewed by the court of appeals. In that case the employer hired a maintenance man who strangled the plaintiff’s daughter to death. Following a jury’s award of more than \$15 million, the employer appealed.⁹⁸ The court of appeals relied upon several key issues in affirming the jury’s verdict:

[First:] the apartment complex had hired Calvin Oliver, a convicted felon and recidivist, as a maintenance worker and gave him full access to all the residents’ keys.

[Second:]

Although Oliver told [defendant] that he had been in trouble with the law and had been in jail, [defendant] did not check into his criminal history or disclose that information to her supervisors. In fact, Oliver had spent most of his adult life in prison or on parole. He had felony convictions for rape, armed robbery, robbery, robbery by force, larceny, credit card theft, and at least three residential burglaries.

[Third:]

Despite knowing that another TGM region required criminal background checks on prospective employees, [the manager] did nothing of this nature. Instead, [the manager], who was directly involved in the hiring decision, testified that she wrote “N/A, not applicable” next to the space for criminal history check on Oliver’s employment paperwork that she sent to TGM’s office in New York.⁹⁹

Finding strong cases for both negligent hiring and negligent retention, the court of appeals observed:

TGM learned that a series of unforced entries and burglaries had occurred at the premises since Oliver had been hired; that some residents suspected an employee; and that Oliver had been discovered in one apartment without authorization. Also, one resident had even suggested that criminal background checks be performed because she was positive that an employee was the culprit. These facts raised an issue for the jury of whether TGM, acting reasonably, should have

95. *Id.* at 292, 599 S.E.2d at 270.

96. *Id.*

97. 264 Ga. App. 456, 590 S.E.2d 807 (2003).

98. *Id.* at 456-57, 590 S.E.2d at 812.

99. *Id.* at 457, 590 S.E.2d at 812.

taken additional steps to investigate the criminal background of their employees, including Oliver.¹⁰⁰

B. Tortious Interference with Employment Contracts

To recover under a theory of tortious interference with business relations, a plaintiff must establish that the defendant: "(1) acted improperly and without privilege, (2) acted purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) caused the plaintiff financial injury."¹⁰¹ However, "[t]o be liable for tortious interference with business relations, [a defendant] must be a stranger to the business relationship giving rise to and underpinning" the cause of action.¹⁰² During the survey period, many of the cases decided by the court of appeals rested upon the issue of whether a defendant was a stranger to a business relationship.

For example, in *Cox v. City of Atlanta*,¹⁰³ the Atlanta-Fulton County Recreation Authority hired Atlanta Police Department ("APD") officers to provide security for the Atlanta Braves games at Atlanta-Fulton County Stadium. When the games were relocated to Turner Field, the Atlanta Braves organization assumed the management of the stadium, including security. The new management stressed a preference for off-duty APD officers to provide security. Eugene Cox was a senior patrol officer and submitted a bid on behalf of "EOC3 SECURITY SERVICE" ("EOC3"). The commander of the APD field operations division called the director of stadium operations at the time of bidding to ask about the plans for the APD. The director told the commander about Cox's proposal.¹⁰⁴ The commander responded that he was concerned "because Cox, as a senior patrol officer, 'could not supervise other patrol officers.'"¹⁰⁵ In addition the commander had concerns about conflicts of interest, off-duty assignment approval, and frequency zones regarding EOC3. The stadium director informed Cox that he would not give EOC3 the contract until these issues were resolved and approved in writing. The night before the first game, the APD informed Cox that he was not approved to perform the off-duty security with the Braves. APD

100. *Id.* at 459-60, 590 S.E.2d at 814.

101. *Wilson v. City of Sardis*, 264 Ga. App. 178, 179-80, 590 S.E.2d 383, 385 (2003) (quoting *Renden, Inc. v. Liberty Real Estate*, 213 Ga. App. 333, 334, 444 S.E.2d 814, 817 (1994)).

102. *Cox v. City of Atlanta*, 266 Ga. App. 329, 332, 596 S.E.2d 785, 788 (2004).

103. 266 Ga. App. 329, 596 S.E.2d 785 (2004).

104. *Id.* at 330, 596 S.E.2d at 787.

105. *Id.*

provided the Braves with security for the first thirty days of the season, and later, other APD officers were hired to coordinate security.¹⁰⁶

Cox complained that the City of Atlanta and several officials, “intentionally and wrongfully induced the [Atlanta] Braves not to enter into or continue a business relationship with Plaintiffs, causing them financial hardship.”¹⁰⁷ The trial court found that Cox and his team failed to establish a case of tortious interference,¹⁰⁸ and Cox appealed, contending the “stranger doctrine” did not apply.¹⁰⁹ The court of appeals disagreed.¹¹⁰

The court of appeals held that Cox could not rely upon the “stranger doctrine” because his team was comprised of APD officers, and the officers needed APD’s approval for all off-duty assignments.¹¹¹ Indeed, when submitting his proposal to the Braves, “EOC3 advised that it ‘has currently assembled a[n] experienced and reliable team of [APD] officers on Staff.’”¹¹² Consequently, the court of appeals determined that Cox had “invoked the APD’s internal procedures for extra job requests because all APD officers were subject to such procedures.”¹¹³ Thus, “the APD had a legitimate interest in both the contract itself and those involved in executing it.”¹¹⁴ Accordingly, the court of appeals affirmed the trial court’s ruling.¹¹⁵

Similarly, in *Wilson v. City of Sardis*,¹¹⁶ the court of appeals affirmed the grant of summary judgment to city officials who related their concerns regarding the prospective employment of a law enforcement officer.¹¹⁷ In that case the chief of police for the City of Sardis, Edgebert Wilson, misrepresented the employment status of a police academy student. Wilson applied for a position as the chief of police for the City of Harlem. He was later informed that the city council might ask for his resignation due to the misrepresentation and that a member of the city council had contacted someone in Harlem regarding his

106. *Id.* at 329-31, 596 S.E.2d at 786-87.

107. *Id.* at 329, 596 S.E.2d at 786.

108. *Id.*

109. *Id.* at 332, 596 S.E.2d at 788.

110. *Id.*

111. *Id.* at 333, 596 S.E.2d at 788.

112. *Id.*

113. *Id.*, 596 S.E.2d at 789.

114. *Id.*

115. *Id.* at 329, 596 S.E.2d at 786.

116. 264 Ga. App. 178, 590 S.E.2d 383 (2003).

117. *Id.* at 180, 590 S.E.2d at 386.

application for employment. Harlem hired someone other than Wilson.¹¹⁸

Following his termination, Wilson sued the city council and mayor for tortious interference with his employment contract and sued the City of Sardis for wrongful termination.¹¹⁹ On Wilson's claim for tortious interference, the court of appeals held that because the mayor and city council members were not third parties to the events and were authorized to discharge Wilson, Wilson's claim for interference regarding the City of Harlem failed as a matter of law.¹²⁰

C. Discrimination—Sexual Harassment

While the common law tort of sexual harassment continues to evolve,¹²¹ state courts are also vested with concurrent jurisdiction over harassment claims under Title VII of the Civil Rights Act of 1964.¹²² As a general matter, there are two types of sexual harassment that constitute a cause of action under Title VII: (1) *quid pro quo*, which are threats that are carried out, and (2) *hostile environment*, which consists of "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile working environment."¹²³ To constitute a hostile work environment and find liability, courts require evidence that shows the conduct at issue was severe enough to change the conditions of the employment.¹²⁴

In *Liebno v. Drexel Chemical Co.*,¹²⁵ the court of appeals affirmed the grant of summary judgment for defendant employer on plaintiff's claim of hostile working environment brought pursuant to Title VII.¹²⁶ In *Liebno* the employee alleged that her supervisor created a hostile work environment when he made the following sexual advances toward her, which she rejected:¹²⁷

Liebno's supervisor put his arm around Liebno's shoulders, which led Liebno to believe that her supervisor was going to thank her for working late. Instead of thanking her, the supervisor took off his

118. *Id.* at 178, 590 S.E.2d at 384-85.

119. *Id.* at 179, 590 S.E.2d at 385.

120. *Id.* at 179-80, 590 S.E.2d at 385.

121. CHARLES R. ADAMS III, *GEORGIA LAW OF TORTS* § 2-3 (2003).

122. 42 U.S.C. § 2000(e) (2000).

123. *Liebno v. Drexel Chem. Co.*, 262 Ga. App. 517, 519, 586 S.E.2d 67, 70 (2003) (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)).

124. *Id.* at 519, 586 S.E.2d at 70.

125. 262 Ga. App. 517, 586 S.E.2d 67 (2003).

126. *Id.* at 517, 586 S.E.2d at 69.

127. *Id.* at 518, 586 S.E.2d at 69.

glasses and said that Liebno might smack him for what he was about to do, and then tried to kiss her. Liebno turned away so that she could not be kissed, and the supervisor immediately let go of Liebno and backed away from her. The supervisor then asked Liebno if she wanted him. Liebno responded that she did not, and the supervisor then said, "You do things to me." Liebno asked, "Like what?" and the supervisor said, "Like this," and grabbed Liebno's right buttock.¹²⁸

This was the only incident that ever occurred, and Liebno subsequently filed a complaint pursuant to the company's sexual harassment policy. The investigation that followed could not substantiate the complaint; however, Liebno's supervisor was reassigned. A month later, Liebno gave notice of her resignation but agreed to remain as a part-time employee after her resignation date to help train her replacement. Her supervisor initially agreed to this arrangement but later informed her that management wanted her to leave permanently on her original resignation day. Later, Liebno learned that her former supervisor returned to the office after her last day.¹²⁹

Liebno sued the company for sexual harassment and retaliation under Title VII. The trial court granted summary judgment for the company, and Liebno appealed.¹³⁰ On appeal the court affirmed the judgment because, although the isolated incident was "clearly inappropriate and reprehensible," it was insufficient to show the conduct was *severe* or *pervasive* to create a hostile working environment.¹³¹ The court then determined the retaliation claim must fail because the company did not take any adverse employment action against Liebno before her voluntary resignation.¹³²

V. RESPONDEAT SUPERIOR

To hold an employer liable for a tort committed by an employee, the plaintiff must show that at the time of the incident the employee was engaged in the employer's business and not in the employee's own personal matter.¹³³ Understandably, the "scope of employment" prong is the subject of frequent litigation when an employee injures a third party. Several cases during the survey period illustrate the considerations important to Georgia Courts of Appeals.

128. *Id.*

129. *Id.* at 518-19, 586 S.E.2d at 69-70.

130. *Id.*

131. *Id.* at 520, 586 S.E.2d at 71.

132. *Id.*

133. *CLO White Co. v. Lattimore*, 263 Ga. App. 839, 840, 590 S.E.2d 381, 382-83 (2003); see also *ADAMS*, *supra* note 121, at § 7-2.

In *CLO White Co. v. Lattimore*,¹³⁴ an employee for CLO White Co. ("CLO") was on his way to work and was on his cell phone with his employer when he was involved in an accident with plaintiff. Plaintiff sued CLO under the theory of respondeat superior, claiming the employee was acting in the scope of his employment at the time of the accident because he was conducting business on his cell phone. The trial court denied CLO's motion for summary judgment, which prompted CLO to appeal.¹³⁵

Normally, barring special circumstances, an employer is not responsible for a servant while the servant is driving to and from work.¹³⁶ However, the court of appeals decided the employee's phone call to his office while on the way to work created a jury issue as to whether the employee was acting in the scope of his employment.¹³⁷ Accordingly, the court of appeals affirmed the denial of summary judgment.¹³⁸

In contrast, in *Torres v. Tandy Corp.*,¹³⁹ the court determined an employee was not acting within the scope of her job when she had an accident while on her way to work.¹⁴⁰ In that case Leah Raffield was driving to work when she made a detour to pick up breakfast for herself, her boss, and her friend. While en route to purchase breakfast, she hit a pedestrian who was caught in the middle of the intersection when the light changed. The pedestrian sued Raffield's employer under the theory of respondeat superior for Raffield's negligence.¹⁴¹

In affirming the jury's verdict, the court of appeals noted the evidence supported a finding that Raffield was not acting within the scope of her employment because running the errand for her boss was not a job requirement.¹⁴² Further, her job would not have been imperiled had she refused to do so.¹⁴³

Likewise, in *Wright v. Pine Hills Country Club, Inc.*,¹⁴⁴ a reporter, Yawn, attended a festival for her own entertainment. While Yawn was at the festival, she ran into a colleague who was assigned to cover the festival. The two co-workers agreed that Yawn would take over the festival coverage, and the other reporter left. Yawn was seen at the

134. 263 Ga. App. 839, 590 S.E.2d 381 (2003).

135. *Id.* at 839-40, 590 S.E.2d at 382.

136. *Id.* at 840, 590 S.E.2d at 383.

137. *Id.*

138. *Id.*

139. 264 Ga. App. 686, 592 S.E.2d 111 (2003).

140. *Id.* at 687, 592 S.E.2d at 112.

141. *Id.*

142. *Id.* at 688, 592 S.E.2d at 113.

143. *Id.*

144. 261 Ga. App. 748, 583 S.E.2d 569 (2003).

festival drinking two glasses of wine, and later, Yawn was involved in an auto accident, which resulted in her death and the injury of another driver. The injured driver sued the newspaper under respondeat superior for injuries caused by Yawn.¹⁴⁵

Although the law generally provides that an employee is not acting within the scope of employment while driving to or from work, an exception exists when the employee is on a special mission at the direction of the employer.¹⁴⁶ Nevertheless, the court of appeals held that the "special mission" exception did not apply because Yawn was not acting at the request of her employer.¹⁴⁷ Rather, Yawn acted on her own volition when she agreed to cover the assignment for her co-worker. Therefore, even though Yawn volunteered to cover the event, her employer was not aware of the decision and did not authorize her to operate within the scope of her employment on a special mission.¹⁴⁸ Because the "application of 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*[,]"¹⁴⁹ the employer was not liable.

VI. RESTRICTIVE COVENANTS

Agreements that place general restraints on trade and have the effect of lessening competition and encouraging monopolies, are void as against public policy.¹⁵⁰ Generally, noncompetition agreements are disfavored in contractual relations because they place restrictions on trade, thereby thwarting competition.¹⁵¹ Nonetheless, courts will uphold a noncompete agreement when the agreement merely places a partial restraint upon trade.¹⁵² A noncompetition agreement is valid as a partial restraint on trade if the agreement is (1) written, (2) has a specific time, (3) territorial limitation, and (4) activity restriction.¹⁵³ Additionally, the agreement must be reasonable, which is a question of law for the court to decide.¹⁵⁴ However, depending on the type of contract, the court will apply different levels of scrutiny in determining to the reasonableness of the contract.¹⁵⁵ If the agreement is ancillary to an employment

145. *Id.* at 749-50, 583 S.E.2d at 570-71.

146. *Id.* at 751, 583 S.E.2d at 572-73.

147. *Id.*, 583 S.E.2d at 573.

148. *Id.* at 751-52, 583 S.E.2d at 573.

149. *Id.* at 751, 583 S.E.2d at 573 (emphasis added).

150. See O.C.G.A. § 13-8-2 (1982 & Supp. 2004).

151. WIMBERLY, *supra* note 11, at 75, § 2-11.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

agreement, then a stricter standard is applied.¹⁵⁶ Further, if any provision of the agreement is considered overbroad or unreasonable, the entire agreement is invalid.¹⁵⁷ But if the agreement is pursuant to a contract for the sale of a business, a less stringent standard allows broader provisions.¹⁵⁸ Also, even if one provision is deemed over broad or unreasonable, the court may “blue pencil” to rewrite or sever the overly-broad provision.¹⁵⁹

A. Noncompete Agreements

In *Martinez v. Davita, Inc.*,¹⁶⁰ the court of appeals elaborated upon the doctrine that noncompete agreements relating to an asset sale are held to a less stringent standard than their counterparts.¹⁶¹ On August 27, 1997, Dr. Martinez sold his East Macon facility to DaVita, Inc. and entered into several restrictive covenants in the Asset Purchase Agreement. Execution of the Asset Purchase Agreement was conditioned on Dr. Martinez’s execution of a restrictive covenant contained in a document entitled “Medical Director Agreement.”¹⁶² In pertinent part the restrictive covenant prohibited Dr. Martinez from participating: “either as principal, agent, proprietor, shareholder, director, creditor, subcontractor, administrator, physician director, medical director, officer, employee or otherwise, in any entity, trade or business other than Company [DaVita] providing “Dialysis Services” within the “Restricted Area.””¹⁶³

The “Restricted Area” was designated as any location within forty miles of the East Macon facility for the duration of the agreement and for two years following termination of the agreement.¹⁶⁴ “Dialysis Services’ was defined as ‘the provision of outpatient dialysis treatment, inpatient dialysis treatment, or dialysis equipment or supplies.’”¹⁶⁵ In 2001 Dr. Martinez began operating a dialysis facility within the forty-mile radius prohibited by the agreement. The company notified Dr. Martinez it would enforce the noncompete clause, and it eventually filed suit against Dr. Martinez. The trial court granted an interlocutory

156. *Id.*

157. *Id.*

158. *Id.* at 76, § 2-11.

159. *Id.*

160. 266 Ga. App. 723, 598 S.E.2d 334 (2004).

161. *Id.* at 727-28, 598 S.E.2d at 337-38.

162. *Id.* at 724, 598 S.E.2d at 335.

163. *Id.*, 598 S.E.2d at 335-36.

164. *Id.*, 598 S.E.2d at 336.

165. *Id.* at 724-25, 598 S.E.2d at 336.

injunction against Dr. Martinez using the more lenient level of scrutiny generally associated with an asset sale.¹⁶⁶

On appeal Dr. Martinez contended that the trial court erred in granting the interlocutory injunction because the noncompete clause in the Medical Director Agreement constituted an employment contract, and therefore, should be evaluated under strict scrutiny. He also argued that the designation "any location" was unreasonably broad and unenforceable, whether the agreement was an employment contract or an asset sale.¹⁶⁷ The court of appeals disagreed and affirmed the grant of the interlocutory injunction.¹⁶⁸

First, the court analyzed the reasoning underlying the distinction between covenants not to compete contained in employment contracts and those contained in agreements for sale.¹⁶⁹ The justification for the heightened scrutiny is that employment contracts typically involve parties that are in unequal bargaining positions, whereas a contract for the sale of a business is more likely to be entered into by parties with equal bargaining power.¹⁷⁰ Given the justification for the disparate scrutiny accorded employment contracts and sale agreements, the court of appeals determined the distinction was meaningless when applied to Dr. Martinez because "even if not part of the sale of a business, Dr. Martinez's East Macon Medical Director Agreement was a 'professional contract' in which the parties had equal bargaining power, making the covenant subject to at least the 'middle level of reduced scrutiny accorded [such] professional contracts.'"¹⁷¹ Furthermore, the court of appeals concluded that the territorial limitation was reasonable despite the agreement's "any [other] location" phraseology.¹⁷² Specifically, the court of appeals held that the "global" provision was insufficient to invalidate the agreement because the facilities at issue were within the forty-mile radius and the provision was part of the sale of a business.¹⁷³

In contrast, in *BellSouth v. Forsee*,¹⁷⁴ the court of appeals employed a more rigorous standard in analyzing an employee's covenant not to

166. *Id.* at 725-26, 598 S.E.2d at 336-37.

167. *Id.* at 726, 598 S.E.2d at 337.

168. *Id.* at 727, 598 S.E.2d at 337.

169. *Id.* at 727-28, 598 S.E.2d at 337.

170. *Id.* at 727, 598 S.E.2d at 337 (quoting *Watson v. Waffle House*, 253 Ga. 671, 672, 324 S.E.2d 175 (1985)).

171. *Id.* at 728, 598 S.E.2d at 338 (quoting *Keeley v. Cardiovascular Surgical Assoc.*, 236 Ga. App. 26, 30, 510 S.E.2d 880 (1999)).

172. *Id.*

173. *Id.*

174. 265 Ga. App. 589, 595 S.E.2d 99 (2004).

compete because it was incident to an employment agreement.¹⁷⁵ In that case Gary Forsee was the vice chairman of domestic operations for BellSouth and was chairman of the board of directors for Cingular Wireless Corporation, a joint venture between BellSouth and SBC Communications.¹⁷⁶ As a condition of his employment, he executed a covenant not to compete, which stated:

[W]hile employed by BellSouth "or an affiliated company," and for a period of 18 months after termination from employment, Forsee will not "provide services . . . in competition with [BellSouth] or any affiliated company to any person or entity which provides products and services identical or similar to products and services provided by [BellSouth] or affiliated companies in the same market(s), whether as an employee, consultant, independent contractor, or otherwise, within the territory."¹⁷⁷

The agreement defined "territory" as the area in which Forsee provided services "to BellSouth, affiliated companies, and additional markets listed on an exhibit attached to the agreement."¹⁷⁸ The "services" which the agreement precluded Forsee from providing were "management, strategic planning, business planning, administration, or other participation in or providing advice with respect to the communications services business"¹⁷⁹

After Forsee left the company, BellSouth and Cingular both filed complaints seeking to temporarily enjoin Forsee from accepting employment from an arch competitor, Sprint. The trial court initially granted a temporary restraining order to prevent Forsee from accepting the employment. However, after the trial court conducted an emergency hearing, it found the noncompete provision unenforceable under Georgia law and dissolved the portion of the restraining order related to it.¹⁸⁰

Although both BellSouth and Cingular moved to compel arbitration, the trial court retained jurisdiction over, and invalidated, the noncompete provision.¹⁸¹ The court of appeals affirmed the trial court's decision, concluding that the trial court properly kept the covenant from the consideration of the arbitrator.¹⁸² The court reasoned:

175. *Id.* at 596, 595 S.E.2d at 105.

176. *Id.* at 589, 595 S.E.2d at 100.

177. *Id.* at 594, 595 S.E.2d at 104.

178. *Id.*

179. *Id.* at 594-95, 595 S.E.2d at 104.

180. *Id.* at 589-90, 595 S.E.2d at 101.

181. *Id.* at 592, 595 S.E.2d at 102.

182. *Id.* at 597, 595 S.E.2d at 106.

A covenant not to compete ancillary to an employment contract has been held unenforceable on public policy grounds[.] [The] restrictive covenant . . . is unenforceable in that it imposes a greater limitation . . . than is necessary for the protection of the employer and does not specify with particularity the nature of the business activities in which the employee is forbidden to engage.¹⁸³

In *Hostetler v. Answerthink, Inc.*,¹⁸⁴ Michael Hostetler signed a non-solicitation agreement as a condition of his employment with the Hackett Group, a unit of Answerthink, Inc. ("Answerthink"). Although the non-solicitation agreement contained a Florida choice of law provision, he executed the agreement in Georgia, and he resided in Georgia.¹⁸⁵ In pertinent part the agreement provided:

Non-solicitation . . . the Employee will not directly or indirectly, during the two year period immediately following his or her termination of Employment . . . induce or attempt to induce any customer, supplier, licensee or other business relation of the Company to cease doing business with the company or in any other way interfere with the relationship between any such customer, supplier, licensee, or business relationship and the Company.¹⁸⁶

Hostetler resigned two months after he began his employment and started his own company, which provided services similar to those of his previous employer. Hostetler brought an action in Georgia, seeking declaratory and injunctive relief regarding the validity and enforceability of the non-solicitation provision. Answerthink then brought an action in Florida seeking enforcement of the agreement. Although the Georgia trial court initially found the provision invalid and entered an injunction prohibiting Answerthink from enforcing the agreement, it subsequently reconsidered and entered an order limiting the geographic scope of the injunction to Georgia. Hostetler appealed, contending that the trial court erred in limiting the injunctive and declaratory relief to Georgia.¹⁸⁷ The court of appeals agreed and reversed.¹⁸⁸

Because the restrictive covenant contained "no geographic limitation" and because it prohibited "any type of employment," the court of appeals determined it violated Georgia's public policy and was void.¹⁸⁹ Then

183. *Id.* at 596, 595 S.E.2d at 105.

184. 267 Ga. App. 325, 599 S.E.2d 271 (2004).

185. *Id.* at 326, 599 S.E.2d at 273.

186. *Id.* at 326-27, 599 S.E.2d at 273.

187. *Id.* at 325-26, 599 S.E.2d at 273.

188. *Id.* at 327, 599 S.E.2d at 274.

189. *Id.* at 328, 599 S.E.2d at 274.

the court addressed the choice of law provision set forth in the agreement.¹⁹⁰ Reiterating established Georgia law, the court held:

The law of the jurisdiction chosen by parties to a contract to govern their contractual rights will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or would be prejudicial to the interests of, this state. Covenants against disclosure, like covenants against competition, affect the interests of this state, namely the flow of information needed for competition among businesses, and hence their validity is determined by the public policy of this state.¹⁹¹

Moreover, “[c]hoice of law provisions in agreements executed outside of Georgia by parties who were outside [of Georgia]” will not be enforced once the party moves to Georgia if the agreement itself is invalid under Georgia law.¹⁹²

B. Nonsolicitation Agreements

In *Waldeck v. Curtis 1000, Inc.*,¹⁹³ the court of appeals invalidated a restrictive covenant in an employment contract because it was overly broad.¹⁹⁴ In that case Kevin Waldeck was an employee of Curtis 1000, Inc. for seventeen years when he resigned and went to work for DSI, a competitor of Curtis 1000.¹⁹⁵ Waldeck’s nonsolicitation agreement provided:

C. The Sales Representative agrees that he will *not*, in the territory and with respect to the Accounts assigned to him, during the Relevant Time Period . . . (ii) actually effect the sale to any Customer Account of, or accept any offer from any Customer Account for, any product that is one of the Company’s Products or that is substantially similar to or competitive with any of the Company’s Products.¹⁹⁶

The defined territory included 26 Georgia counties and 2 Alabama counties, and the relevant time period consisted of 730 days.¹⁹⁷ Notably, “Customer Account” was defined as “any person, partnership, corporation or other entity who purchased the Company’s Products

190. *Id.*, 599 S.E.2d at 274-75.

191. *Id.*, 599 S.E.2d at 275.

192. *Id.* at 329, 599 S.E.2d at 275.

193. 261 Ga. App. 590, 583 S.E.2d 266 (2003).

194. *Id.* at 592, 583 S.E.2d at 268.

195. *Id.* at 591, 583 S.E.2d at 267.

196. *Id.* at 590, 583 S.E.2d at 267.

197. *Id.* at 590-91, 583 S.E.2d at 267.

through or from the Sales Representative within the two year period preceding the Relevant Time Period."¹⁹⁸

The trial court granted an interlocutory injunction against Waldeck to enforce the nonsolicitation agreement with Curtis 1000.¹⁹⁹ The court of appeals reversed, concluding the nonsolicitation clause was unenforceable because it prevented Waldeck not only from soliciting former clients, but also from accepting business from unsolicited former clients for a period of two years after leaving employment, regardless of who initiated the contact.²⁰⁰ Therefore, the court held the agreement constituted an unreasonable restraint of trade.²⁰¹ Under the agreement Waldeck was prohibited from *accepting* any order from any customer account.²⁰² "This [was] an unreasonable restraint [on trade] because, in addition to overprotecting Curtis 1000's interests, it unreasonably impact[ed] on Waldeck and on the public's ability to choose the business it prefer[ed]."²⁰³

VII. CONCLUSION

Although labor and employment issues derived from 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 the challenge is the growing overlap between state and federal issues. Regardless of whether a practitioner professes to specialize in state, federal, administrative, trial, or other matters pertaining to labor and employment law, it is important to recognize that any one law or legal proceeding can and does impact other relations between employer and employee.

198. *Id.* at 590, 583 S.E.2d at 267.

199. *Id.* at 591, 583 S.E.2d at 267.

200. *Id.* at 592, 583 S.E.2d at 268.

201. *Id.*

202. *Id.*

203. *Id.*