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Labor and Employment Law

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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, this Article surveys published decisions from the Georgia Supreme Court and the Georgia Court of Appeals from June 1, 2007 to May 31, 2008. This Article also highlights specific revisions to the Official Code of Georgia Annotated (O.C.G.A.).[1]

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

II. RECENT LEGISLATION

A. *Concealed Weapons on Company Property*

During the survey period, Georgia Governor Sonny Perdue signed into law House Bill 89,[2] which permits employees who lawfully possess concealed weapons to store these weapons in locked vehicles while on company property.[3] Subject to several exceptions, O.C.G.A. § 16-11-135[4] prohibits employers from enforcing policies that forbid employees from storing concealed weapons in the employee's vehicles on company property.[5] Additionally, the law limits the ability of employers to search privately owned vehicles for concealed weapons.[6]

Despite the increased safety concerns that accompany the storage of concealed weapons on company property, employers do not assume greater obligations under the law.[7] The law states that "[n]o employer . . . shall be held liable in any criminal or civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession, or use of a firearm" unless the employer commits a criminal act with a concealed weapon while on company property or knows that another will do so.[8]

Even though the law appears broad, it has a number of exceptions that enable employers to prohibit employees and invited guests from storing concealed weapons in locked vehicles.[9] Under what is perhaps the largest exception, employers may prohibit concealed weapons in vehicles parked on properties that they own, lease, or otherwise legally control.[10] Even when employers do not legally control the property used for parking, other exceptions enable them to prohibit individuals from storing concealed weapons in their vehicles.[11] For example,

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LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (C. Geoffrey Weirich et al. eds., 4th ed. 2007); Daily Lab. Rep. (BNA). Accordingly, this Article is not intended to cover the latest developments in federal labor and employment law. Rather, this Article is intended only to cover legislative and judicial developments arising under Georgia state law during the survey period.

2. Ga. H.R. Bill 89, Reg. Sess. (2008) (codified at O.C.G.A. § 16-11-135 (Supp. 2008)).
3. *See id.* § 7(b).
4. O.C.G.A. § 16-11-135 (Supp. 2008).
5. *Id.* § 16-11-135(b).
6. *Id.* § 16-11-135(a).
7. *See id.* §§ 16-11-135(e), (h).
8. *Id.* § 16-11-135(e).
9. *See id.* §§ 16-11-135(d), (k).
10. *Id.* § 16-11-135(k).
11. *See id.* § 16-11-135(d).

employers may prohibit employees who have a completed or pending disciplinary action from bringing concealed weapons onto company property.[12]

In addition to the above exceptions, the law also has numerous exceptions that enable employers to search locked vehicles for concealed weapons.[13] For example, employers may search vehicles that they own or lease.[14] Employers may also search privately owned vehicles when "a reasonable person would believe that . . . [it] is necessary to prevent an immediate threat to human health, life, or safety."[15] Moreover, employers may search vehicles parked in areas not open to the general public, such as by gates or security officers, provided that all vehicles in the area are searched uniformly.[16]

III. WRONGFUL TERMINATION

A. *Employment-at-Will*

1. Overview. Although the employment-at-will doctrine is gradually eroding in other jurisdictions,[17] it is alive and well in Georgia.[18] Section 34-7-1 of the O.C.G.A.[19] provides that employment contracts in Georgia are at-will unless the parties implicitly or explicitly contract otherwise.[20] Generally, this means that in the absence of a specified length of employment, the relationship is employment-at-will.[21] Contracts specifying "permanent employment, employment for life, or

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12. *Id.* § 16-11-135(d)(5).
13. *See id.* §§ 16-11-135(c)-(d), (k).
14. *Id.* § 16-11-135(c)(2).
15. *Id.* § 16-11-135(c)(3).
16. *Id.* § 16-11-135(d)(1).
17. *See* Mark A. Fahleson, *The Public Policy Exception to Employment at Will—When Should Courts Defer to the Legislature?*, 72 NEB. L. REV. 956 (1993); 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); 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); Cortlan H. Maddux, Comment, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197 (1997); Richard J. Pratt, Comment, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197 (1990).
18. *See* O.C.G.A. § 34-7-1 (2008).
19. O.C.G.A. § 34-7-1.
20. *Id.*
21. *See generally* JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW § 1:6 (4th ed. 2008).

employment until retirement" are indefinite and thus are employment-at-will contracts.[22]

Georgia's employment-at-will doctrine has two notable characteristics. First, the employee or employer may terminate the employment relationship at any time, with or without cause.[23] Second, and a corollary of the first characteristic, the employee may not successfully maintain a wrongful termination claim upon the termination of an employment-at-will contract.[24]

During the survey period, the Georgia Court of Appeals decision in *Fink v. Dodd*[25] demonstrated that an employee-at-will cannot successfully maintain a wrongful termination claim.[26] In *Fink* the defendant terminated the plaintiff after employing him for eleven months. The employee subsequently brought suit against the employer, alleging wrongful termination.[27] When the defendant failed to timely answer the complaint, the trial court entered a default judgment against the defendant. The defendant appealed, claiming that the plaintiff failed to state a claim. Specifically, the defendant asserted that the facts in the complaint failed to establish a claim of wrongful termination.[28]

The court of appeals agreed with the defendant, stating, "Nowhere in the complaint does [the plaintiff] allege facts showing an enforceable contract of employment or assert facts from which such a contract reasonably may be inferred."[29] Due to the absence of an enforceable employment contract, the court deemed the plaintiff an at-will employee.[30] Because an at-will employee may be terminated at any time, he or she cannot reasonably expect continued employment.[31] Therefore, the court held that the plaintiff failed to successfully state a claim of wrongful termination and reversed the trial court's judgment.[32]

2. Exceptions to Employment-at-Will. The statute creating the employment-at-will doctrine contains the most significant exception to

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22. *Id.*
23. *Id.*
24. *Id.*
25. 286 Ga. App. 363, 649 S.E.2d 359 (2007).
26. *Id.* at 366, 649 S.E.2d at 362.
27. *Id.*
28. *Id.* at 364, 649 S.E.2d at 361. The suit was for libel and slander, but the trial court apparently derived a wrongful termination claim from the complaint's factual allegations. *Id.* at 364 n.4, 649 S.E.2d at 361 n.4.
29. *Id.* at 366, 649 S.E.2d at 362 (footnote omitted).
30. *Id.*
31. *Id.*
32. *Id.*

the doctrine: unless the parties implicitly or explicitly contract otherwise.[33] In *Powell v. Wheeler County*,[34] the Georgia Court of Appeals reviewed a case in which the employee claimed he was not an at-will employee.[35] In *Powell* the plaintiff entered into a four-year employment agreement with the board of tax assessors. In compliance with O.C.G.A. § 48-5-298(a),[36] the employment agreement was forwarded to the county commission for approval, but the commissioners voted against approval. Despite the contract not being approved, the plaintiff continued to work as a tax appraiser and to be paid by the county until he was terminated two years later. Following his termination, the plaintiff brought suit against the county and the board of tax assessors for breach of contract. The trial court granted the defendants' motion for summary judgment. The plaintiff appealed, claiming that the payments from the county ratified the employment agreement.[37]

The court of appeals emphasized that a county commission's "'power to approve the whole includes the power to approve any part thereof less than the whole.'"[38] Because the county commission voted against approving the employment contract, thereby failing to ratify it, the court held that the payments from the county only demonstrated that the plaintiff was an at-will employee.[39] Accordingly, the court affirmed the trial court's grant of summary judgment.[40]

In *Avion Systems, Inc. v. Thompson*,[41] the court of appeals reviewed a case in which the employer claimed the employee was bound by the specific terms of an employment agreement rather than the general language of at-will employment.[42] In *Avion Systems, Inc.*, the employment agreement stated that the defendant was an at-will employee, but the agreement also stated that she would provide services for at least twelve months. Before the expiration of the specified period, the employee terminated her employment. The employer subsequently brought suit against the former employee for breach of contract. The

33. O.C.G.A. § 34-7-1.

34. 290 Ga. App. 508, 659 S.E.2d 893 (2008).

35. *See id.* at 509, 659 S.E.2d at 894.

36. O.C.G.A. § 48-5-298(a) (1999) (allowing the county board of tax assessors to employ individuals when the county governing authority approves the employment).

37. *Powell*, 290 Ga. App. at 509, 659 S.E.2d at 894.

38. *Id.* (quoting Bd. of Pub. Educ. & Orphanage for Bibb County v. Zimmerman, 231 Ga. 562, 568, 203 S.E.2d 178, 183 (1974)).

39. *Id.* at 510, 659 S.E.2d at 894.

40. *Id.*, 659 S.E.2d at 895.

41. 286 Ga. App. 847, 650 S.E.2d 349 (2007).

42. *See id.* at 848-49, 650 S.E.2d at 351-52.

trial court dismissed the action for failure to state a claim, and the former employer appealed.[43]

The court of appeals agreed with the employer, stating, "Where, as here, the parties have explicitly set forth restrictions on the time and manner in which an employee may terminate employment, these specific terms must prevail over any conflicting general language of employment at-will."[44] Because the court considered the unilateral restriction on the ability to terminate employment during the first twelve months to be reasonable, the court held that the employee could terminate her employment only after the expiration of the specified period.[45] Accordingly, the court reversed the trial court's dismissal of the action.[46]

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

1. Formulation of Employment Contracts. When forming a valid employment agreement, the basic rules of contract law apply.[47] Therefore, there must be an offer, acceptance, and valuable consideration.[48] Additionally, an employment contract must contain a designation of the employee's place of employment, the period of employment (if other than at-will), the nature of services to be rendered, and the amount or type of consideration.[49] These terms must be sufficiently definite to be enforceable, and this is a question of law for the judge.[50]

The party relying on the employment agreement has the burden of establishing the agreement's existence and terms by a preponderance of the evidence.[51] In *Shilling v. Cornerstone Medical Associates, LLC*,[52] the court of appeals considered whether this burden had been met.[53] In *Shilling* the plaintiff brought suit against the defendant to enforce an employment agreement. The defendant denied the existence of any agreement and sought a copy of the alleged contract. The plaintiff produced an employment agreement after being served with a motion to

43. *Id.*, 650 S.E.2d at 351.
44. *Id.* at 850, 650 S.E.2d at 352.
45. *Id.* at 850-51, 650 S.E.2d at 352.
46. *Id.* at 851, 650 S.E.2d at 353.
47. *See generally* WIMBERLY, *supra* note 21, at § 2:1.
48. *See generally id.*
49. *Id.*
50. *Id.*
51. *See* Shilling v. Cornerstone Med. Assocs., LLC, 290 Ga. App. 169, 170, 659 S.E.2d 416, 418 (2008) (citing Wallace v. Triad Sys. Fin. Corp., 212 Ga. App. 665, 667, 442 S.E.2d 476, 478 (1994)).
52. 290 Ga. App. 169, 659 S.E.2d 416 (2008).
53. *See id.* at 170-71, 659 S.E.2d at 418.

compel, but the defendant claimed that his signature was forged and pointed out that the middle initial in the typed name was incorrect. Despite the defendant's claim of forgery, the trial court granted the plaintiff's motion for summary judgment. The defendant appealed, claiming that there were issues of material fact.[54]

The trial court never addressed whether the alleged employment agreement was valid even though the defendant repeatedly denied its existence.[55] The court of appeals, emphasizing this dispute, held that the plaintiff failed to meet his burden of establishing the existence and terms of the employment agreement by a preponderance of the evidence.[56] Accordingly, the court reversed the trial court's grant of summary judgment.[57]

2. Dismissals "With Cause." Under an employment agreement that requires "cause" for dismissal, an employer who terminates an employee without cause can be liable for breach of contract.[58] In *American Water Service USA v. McRae*,[59] the court of appeals considered whether an employee could be terminated by a third party even though the employer had overlooked the employee's medical restrictions.[60] The plaintiff was a third-party beneficiary to a contract that his employer, the county, entered into with the defendant.[61] In the contract, the defendant agreed to offer employment to the plaintiff for at least eighteen months if the plaintiff was "ready, willing and able to work."[62] The plaintiff could be terminated during the specified period only for cause consistent with the county's policy.[63]

While the plaintiff was working for the defendant, the defendant learned of medical restrictions placed on the plaintiff due to a prior injury. These restrictions, along with a subsequent injury, prevented the plaintiff from performing certain duties necessary to his job.[64] The plaintiff would, at times, have an uncertified person complete these

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54. *Id.* at 169, 659 S.E.2d at 417.
55. *Id.* at 170, 659 S.E.2d at 418.
56. *Id.*
57. *Id.* at 171, 659 S.E.2d at 418.
58. *See* Savannah Coll. of Art & Design, Inc. v. Nulph, 265 Ga. 662, 663, 460 S.E.2d 792, 793 (1995).
59. 286 Ga. App. 762, 650 S.E.2d 304 (2007).
60. *Id.* at 762-63, 650 S.E.2d at 305.
61. *Id.* at 762, 650 S.E.2d at 304-05.
62. *Id.*, 650 S.E.2d at 305.
63. *Id.*
64. *Id.* at 762-63, 650 S.E.2d at 305.

duties.[65] When the defendant learned of the restrictions, he terminated the plaintiff.[66] The plaintiff subsequently brought suit against the defendant, claiming breach of contract. The trial court granted the plaintiff's motion for summary judgment, and the defendant appealed.[67]

The court of appeals agreed with the defendant, emphasizing that the county's policy included "inability or unfitness to perform assigned duties" as grounds for termination.[68] Because the plaintiff was unable to perform certain duties necessary to the job, the court held that the defendant was able to terminate him even though the employer had overlooked the restrictions.[69] Accordingly, the court reversed the trial court's grant of summary judgment.[70]

IV. NEGLIGENT HIRING OR RETENTION

A. *Overview*

Under O.C.G.A. § 34-7-20,[71] "The employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency."[72] To sustain a cause of action for negligent hiring and retention, a plaintiff must show that the employer employed an individual that "'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.'"[73] Generally, the determination of whether an employer used ordinary care in hiring and retaining an employee is an issue for the jury.[74]

In *Dowdell v. Krystal Co.*,[75] the Georgia Court of Appeals held that an employee must have dangerous tendencies for the employer to be liable for negligent hiring or retention.[76] In *Dowdell* the employee had worked for the defendant for three months as a cashier. On the night

65. *Id.* at 764, 650 S.E.2d at 306.
66. *Id.* at 763, 650 S.E.2d at 305.
67. *Id.*, 650 S.E.2d at 305-06.
68. *Id.* at 764, 650 S.E.2d at 306.
69. *Id.*
70. *Id.*
71. O.C.G.A. § 34-7-20 (2008).
72. *Id.*
73. Dowdell v. Krystal Co., 291 Ga. App. 469, 472, 662 S.E.2d 150, 154 (2008) (quoting Munroe v. Universal Health Servs., Inc., 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004)).
74. *See* Sparlin Chiropractic Clinic v. TOPS Pers. Servs., 193 Ga. App. 181, 181, 387 S.E.2d 411, 412 (1989).
75. 291 Ga. App. 469, 662 S.E.2d 150 (2008).
76. *Id.* at 472-73, 662 S.E.2d at 154-55.

of the incident, the defendant's restaurant was crowded, and the employee had trouble quickly filling orders. When the plaintiff asked the employee about taking his order, the employee insulted him. After the plaintiff insulted the employee in return, the employee struck the plaintiff, and a fight ensued between the two. The plaintiff subsequently filed suit against the defendant, alleging that the defendant negligently hired and retained the employee. The trial court granted the defendant's motion for summary judgment.[77] The plaintiff appealed, claiming that the defendant should have known that the employee posed a risk of harm to others.[78]

The court of appeals, agreeing with the defendant, emphasized that there was no evidence showing that the employee verbally argued with or physically harmed any customer other than the plaintiff.[79] Because there was no prior incident to alert the defendant of the employee's potential to harm customers, the court held that the defendant was not liable for negligent hiring or retention.[80] Accordingly, the court affirmed the trial court's grant of summary judgment.[81]

B. Award of Damages

In *Aldworth Co. v. England*,[82] the court of appeals considered the appropriate amount of damages to be awarded to an individual assaulted by an employee who was negligently hired.[83] In *Aldworth Co.*, the defendant hired the employee to drive tractor-trailers without properly investigating the employee's record.[84] While driving for the defendant, the employee became enraged and followed the plaintiff's vehicle into a parking lot, where he assaulted her. The plaintiff subsequently brought suit against the defendant. At the trial level, the jury awarded the plaintiff $750,000 in compensatory damages and $1,000,000 in punitive damages. The defendant made motions for a new trial and for judgment notwithstanding the verdict. When these motions were denied, the defendant appealed. The appellate court affirmed the trial court's decision to deny the motions. The Georgia Supreme Court granted

77. *Id.* at 469-70, 662 S.E.2d at 152-53.
78. *Id.* at 472, 662 S.E.2d at 154.
79. *Id.* at 473, 662 S.E.2d at 154.
80. *Id.*, 662 S.E.2d at 154-55.
81. *Id.*, 662 S.E.2d at 155.
82. 286 Ga. App. 1, 648 S.E.2d 198 (2007).
83. *See id.* at 1-3, 648 S.E.2d at 199-201.
84. *Id.* at 4, 648 S.E.2d at 201.

certiorari and remanded the case with the instruction that the appellate court examine the damages award.[85]

On remand, the court of appeals examined the damages award and held that there was sufficient evidence to support awarding compensatory and limited punitive damages to the plaintiff.[86] The court held that compensatory damages could be awarded because the evidence established that the employee was acting within the scope of his employment at some point between the time he became enraged and when he assaulted the plaintiff.[87] The court further held that punitive damages could be awarded because the evidence established that the defendant showed conscious indifference to the consequences of hiring and retaining the employee.[88] However, punitive damages had to be limited by the $250,000 ceiling set by O.C.G.A. § 51-12-5.1(g)[89] because the evidence did not establish that the defendant "'acted, or failed to act, with the specific intent to cause harm.'"[90]

V. 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 an employee's employment.[91] The following two elements must be established in order to hold an employer vicariously liable for the torts of her employee: "[F]irst, [the employee] must be in furtherance of the [employer's] business; and, second, [the employee] must be acting within the scope of [the employer's] business."[92]

B. *Independent Contractor or Employee*

Vicarious liability under respondeat superior generally does not apply to the acts of independent contractors.[93] Therefore, the initial determi-

85. *Id.* at 1-2, 648 S.E.2d at 199-200.
86. *Id.* at 2, 648 S.E.2d at 200.
87. *Id.* at 3, 648 S.E.2d at 201.
88. *Id.* at 3-4, 648 S.E.2d at 201.
89. O.C.G.A. § 51-12-5.1(g) (2000).
90. *Aldworth Co.*, 286 Ga. App. at 4, 648 S.E.2d at 201 (quoting O.C.G.A. § 51-12-5.1(f) (2000)).
91. CHARLES R. ADAMS, III, GEORGIA LAW OF TORTS § 7-2 (2008 ed.).
92. *Id.*
93. *Id.* § 8-1.

nation is whether an individual is an independent contractor or an employee.[94]

For example, in *Touchton v. Bramble*,[95] the Georgia Court of Appeals considered whether an off-duty law enforcement officer working in an amusement park was an independent contractor or an employee.[96] In *Touchton* a park patron mistakenly identified the plaintiff as the man who had indecently exposed himself in the defendant's amusement park. Because of this identification, the off-duty law enforcement officer working at the park arrested the plaintiff. When the plaintiff was found not guilty, he brought suit against the defendant under the doctrine of respondeat superior. The trial court granted the defendant's motion for summary judgment. The plaintiff appealed, claiming that the defendant employed the law enforcement officer.[97]

The court of appeals stated that an employee-employer relationship exists when "the employer controls the time, manner, and method of executing the work."[98] After considering the amount of direction the defendant gave the law enforcement officer, the court held that the officer was an independent contractor because the defendant did not tell the officer how to handle security matters.[99] Accordingly, the court of appeals affirmed the trial court's grant of summary judgment.[100]

Similarly, in *American Ass'n of Cab Cos. v. Parham*,[101] the court of appeals considered whether a taxicab driver was an independent contractor or an employee.[102] The driver leased a taxicab insured by the defendants and signed papers stating he would drive the vehicle on the defendants' behalf. Subsequently, the driver was involved in an automobile accident that injured the plaintiff. The plaintiff brought suit against the defendants under the theory of respondeat superior. At the trial level, the jury returned a verdict in favor of the plaintiff. The trial judge denied the defendants' motion for judgment notwithstanding the verdict. The defendants appealed, claiming that the driver was an independent contractor.[103]

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94. *See id.*
95. 284 Ga. App. 164, 643 S.E.2d 541 (2007).
96. *See id.* at 165-66, 643 S.E.2d at 543-44.
97. *Id.* at 164-65, 643 S.E.2d at 543.
98. *Id.* at 165, 643 S.E.2d at 543.
99. *Id.* at 166, 643 S.E.2d at 544.
100. *Id.*
101. 291 Ga. App. 33, 661 S.E.2d 161 (2008).
102. *See id.* at 35, 661 S.E.2d at 164.
103. *Id.* at 33-36, 661 S.E.2d at 163-64.

The court of appeals considered the amount of control the defendants exercised over the driver.[104] The court emphasized that the vehicle was co-titled in the defendants' names and bore their insignia.[105] Also, the court noted that the driver would answer calls from the defendants and pick up passengers whenever the defendants called him.[106] Based on this evidence, the court held that the driver was an employee of the defendants because they exerted sufficient control over his operation of the vehicle.[107] Accordingly, the court of appeals affirmed the trial court's judgment.[108]

C. *Private Enterprise*

An employee on a private enterprise is not acting in furtherance of the employer's business.[109] Therefore, an employer is not vicariously liable for the actions of an employee on a private enterprise.[110] In *Dowdell v. Krystal Co.*,[111] the court of appeals considered whether an employee who fought with a customer was on a private enterprise.[112] Discussed above, *Dowdell* involved an employee and a customer exchanging insults that led to a physical altercation. The customer subsequently filed suit against the defendant, alleging that the defendant was liable under the theory of respondeat superior. After the trial court granted the defendant's motion for summary judgment, the plaintiff appealed, claiming that the employee had acted within the scope of his employment when the fight occurred.[113]

The court of appeals concluded that the employee abandoned his employment and engaged in the fight for personal reasons because the assault was disconnected from his cashier duties.[114] The court stated that its determination was supported by the fact that the manager on duty, not the employee, was responsible for handling hostile or complaining customers.[115] Consequently, the court held that the

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104. *See id.* at 35-36, 661 S.E.2d at 164.
105. *Id.*
106. *Id.* at 36, 661 S.E.2d at 164-65.
107. *Id.*, 661 S.E.2d at 165.
108. *Id.* at 40, 661 S.E.2d at 168.
109. *See* Dowdell v. Krystal Co., 291 Ga. App. 469, 470, 662 S.E.2d 150, 153 (2008) (quoting Brownlee v. Winn-Dixie Atlanta, 240 Ga. App. 368, 369, 523 S.E.2d 596, 598 (1999)).
110. *See id.* (citing *Brownlee*, 240 Ga. App. at 369, 523 S.E.2d at 598).
111. 291 Ga. App. 469, 662 S.E.2d 150 (2008).
112. *See id.* at 471, 662 S.E.2d at 153.
113. *Id.* at 469-70, 662 S.E.2d at 152-53.
114. *Id.* at 471, 662 S.E.2d at 153.
115. *Id.*

defendant was not liable under the theory of respondeat superior.[116] Accordingly, the court affirmed the trial court's grant of summary judgment.[117]

D. Commuting to Work

Generally, an employee is not acting within the scope of employment when commuting to work.[118] Therefore, an employer is generally not vicariously liable for the actions of an employee traveling to or from work.[119] However, in *Hunter v. Modern Continental Construction Co.*,[120] the court of appeals considered the exceptions to this general rule.[121] In *Hunter* the defendant's employee was involved in an automobile accident with the plaintiff while driving to work. Another employee of the defendant called the employee's cell phone approximately one minute before the accident occurred. The employee involved in the accident claimed he knew the call regarded business even though he did not answer the phone. Following the accident, the plaintiff brought suit against the defendant under the theory of respondeat superior. The trial court granted the defendant's motion for summary judgment. The plaintiff appealed, claiming that there were triable issues of material fact.[122]

The court of appeals stated that an employer is vicariously liable for an employee's actions while commuting to work only if (1) the employee is on a special mission for the employer or (2) there are special circumstances.[123] Here, the employee was not on a special mission for the defendant.[124] Therefore, the defendant would be liable under the theory of respondeat superior only if there were special circumstances surrounding the accident.[125] Because the details concerning the phone call were in question, the court held that there were triable issues of material fact.[126] Specifically, the trial court had to determine if the employee was conducting business over his cell phone or was distracted

116. *Id.*
117. *Id.*
118. *See* Hunter v. Modern Cont'l Constr. Co., 287 Ga. App. 689, 690-91, 652 S.E.2d 583, 584 (2007).
119. *See id.* at 691, 652 S.E.2d at 584 (quoting Clo White Co. v. Lattimore, 263 Ga. App. 839, 840, 590 S.E.2d 381, 383 (2003)).
120. 287 Ga. App. 689, 652 S.E.2d 583 (2007).
121. *See id.* at 691, 652 S.E.2d at 584.
122. *Id.* at 690, 652 S.E.2d at 584.
123. *Id.* at 691, 652 S.E.2d at 584.
124. *Id.*
125. *See id.*
126. *Id.*

by an incoming work-related phone call when the accident occurred.[127] Accordingly, the court of appeals reversed the trial court's grant of summary judgment.[128]

VI. RESTRICTIVE COVENANTS

A. *Noncompete Agreements*

1. Overview. Agreements that place general restraints on trade are void as against public policy.[129] Generally, noncompete agreements are disfavored in contractual relations because they place restrictions on trade, thereby reducing competition.[130] Nonetheless, courts will uphold a noncompete agreement when the agreement merely places a partial restraint upon trade.[131] In general, a noncompete agreement is valid as a partial restraint on trade when the agreement is specific and is reasonable in regards to duration, territorial coverage, and the scope of activities prohibited.[132]

Whether the terms of the noncompete agreement are reasonable is a question of law for the court to decide.[133] However, depending on the type of contract, the court will apply different levels of scrutiny to determine the reasonableness of the contract.[134] If the noncompete agreement is ancillary to an employment agreement, a stricter standard is applied; and if any provision of that agreement is considered overbroad or unreasonable, the entire agreement is invalid.[135] But if the agreement is pursuant to a contract for the sale of a business, a less stringent standard allows for broader provisions; even if provisions of that agreement are deemed overbroad or unreasonable, the court may "blue pencil" to rewrite or sever the overly broad provisions.[136]

2. Reasonableness of Prohibited Activities. Three cases during the survey period considered whether the prohibited activities were reasonable. First, in *Avion Systems, Inc. v. Thompson*,[137] discussed

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127. *Id.*
128. *Id.*
129. O.C.G.A. § 13-8-2(a)(2) (1982 & Supp. 2008).
130. *See* WIMBERLY, *supra* note 21, § 2:11.
131. *Id.*
132. *See* W.R. Grace & Co. v. Mouyal, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992).
133. *Id.*
134. *See* WIMBERLY, *supra* note 21, § 2:11.
135. *See id.*
136. *See id.*
137. 286 Ga. App. 847, 650 S.E.2d 349 (2007).

above, the Georgia Court of Appeals considered whether a restriction on all activities for pecuniary gain was reasonable.[138] In *Avion Systems, Inc.*, the employment agreement contained a noncompete provision that prohibited the defendant-employee from

> deal[ing] directly, indirectly, or by any other means, either individually or in association with another individual or organization for any pecuniary gain with [the employer's] customer or their client to whom he is assigned at the particular job site for that particular division or subdivision with whom Employee had contact.[139]

After the employee terminated her employment, she continued to work at the site assigned to her by her former employer. When the employer learned of this, it brought suit against the former employee for breach of contract. The trial court dismissed the action for failure to state a claim, and the employer appealed.[140]

The noncompete agreement prohibited the former employee from dealing with the employer's clients for pecuniary gain and did not specify what activities were restricted. Thus, the restriction prohibited the employee from dealing with the employer's clients even when the employee's activities were unrelated to the employer's business.[141] Reasoning that this restriction was overbroad and unnecessary to protect the employer's interests, the court of appeals held that the noncompete agreement was unenforceable.[142] Accordingly, the court affirmed the trial court's dismissal of the claim.[143]

Second, in *Beacon Security Technology, Inc. v. Beasley*,[144] the court of appeals considered whether a wide range of prohibited activities was reasonable.[145] In *Beacon Security Technology, Inc.*, the employee signed a noncompete agreement stating that he would not

> directly or indirectly, in Spalding, Henry, Butts, Lamar, Pike, Fayette, and Clayton Counties, Georgia, enter into or engage generally in direct competition with the Employer in the business of selling, leasing, or servicing burglar & fire alarms, Closed Circuit TV, Intercoms, Telephone & TV Hook ups, Central Vacs, and Medical Alert, or other Security systems of a type which would be in direct competition with those marketed and serviced by the Employer at the time of [his]

138. *See id.* at 851, 650 S.E.2d at 352-53.
139. *Id.* at 848, 650 S.E.2d at 351.
140. *Id.* at 848-49, 650 S.E.2d at 351.
141. *Id.* at 851, 650 S.E.2d at 353.
142. *Id.*
143. *Id.*
144. 286 Ga. App. 11, 648 S.E.2d 440 (2007).
145. *See id.* at 11-12, 648 S.E.2d at 441.

> termination . . . for a period of two years after the date [his] employment terminate[d].[146]

When the employee terminated his employment, he began competing with his former employer. After learning of this, the employer brought suit to enforce the noncompete agreement. The trial court entered judgment in favor of the former employee, and the employer appealed.[147]

The court of appeals stated, "[P]rohibitions on competition with respect to customers or potential customers beyond those with whom the employee dealt during his employment will not always be considered unreasonable. . . . A broad territorial limitation may be reasonable if the scope of prohibited behavior is sufficiently narrow."[148] The court held that the noncompete agreement was unenforceable because it prohibited the former employee from doing a large number of activities with anyone in eight counties, regardless of whether he performed each prohibited activity in each county.[149] The court determined that this restriction unreasonably limited the former employee's ability to earn a living.[150] Accordingly, the court of appeals affirmed the trial court's judgment.[151]

Third, in *Stultz v. Safety & Compliance Management, Inc.*,[152] the court of appeals considered whether the use of the word "includes" made the prohibited activities unreasonable.[153] In *Stultz* the employee signed a noncompete agreement in which she agreed to "not compete with [the employer] in any area of business conducted by [the employer]. This *includes* solicitation of existing accounts . . . for a two year period and a fifty (50) mile radius."[154] After the employee terminated her employment, she began offering services similar to those offered by her former employer. The employer brought suit for breach of contract after he became aware of the former employee's competitive practices. The trial court granted the employer's motion for summary judgment. The former employee appealed, claiming that the noncompete agreement was unenforceable.[155]

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146. *Id.*
147. *Id.*, 648 S.E.2d at 440-41.
148. *Id.* at 12-13, 648 S.E.2d at 442 (citing Chaichimansour v. Pets Are People Too, No. 2, Inc., 226 Ga. App. 69, 71-72, 485 S.E.2d 248, 250 (1997)).
149. *See id.* at 13, 648 S.E.2d at 442.
150. *Id.*
151. *Id.*
152. 285 Ga. App. 799, 648 S.E.2d 129 (2007).
153. *See id.* at 802, 648 S.E.2d at 132.
154. *Id.* at 800-01, 648 S.E.2d at 131 (emphasis added).
155. *Id.* at 801, 648 S.E.2d at 131.

The court of appeals determined that the noncompete agreement prohibited the former employee from competing with the employer, regardless of the kind of activity being done, because the use of "includes" made the listed activities illustrative and not exclusive.[156] Therefore, the court held that the noncompete agreement was overbroad and thus unenforceable.[157] Accordingly, the court of appeals reversed the trial court's grant of summary judgment.[158]

3. Need for Consideration. Like all agreements, a noncompete agreement must be supported by adequate consideration to be enforceable.[159] In *Glisson v. Global Security Services, LLC*,[160] the court of appeals considered whether a noncompete agreement signed during the course of a specified term of employment had adequate consideration.[161] In *Glisson* the employee signed a noncompete agreement while in the course of his two-year employment contract. When the employer learned that the employee planned to start a competing business, he terminated the employee and brought suit to enforce the noncompete agreement. After the trial court entered judgment in favor of the employer, the former employee appealed, claiming that the noncompete agreement lacked adequate consideration.[162]

The court of appeals held that the noncompete agreement was unenforceable because continued employment is not sufficient consideration when the employer has a pre-existing contractual obligation to employ the employee.[163] Accordingly, the court of appeals reversed the trial court's grant of summary judgment.[164]

B. Nonsolicitation Agreements

In *Trujillo v. Great Southern Equipment Sales, LLC*,[165] the court of appeals held that a nonsolicitation provision was unenforceable because it did not contain a territorial restriction, and the court refused to enforce the noncompete provision as a result.[166] In *Trujillo* the

156. *Id.* at 802, 648 S.E.2d at 132.
157. *Id.* at 803, 648 S.E.2d at 133.
158. *Id.* at 804, 648 S.E.2d at 133.
159. *See* Glisson v. Global Sec. Servs., LLC, 287 Ga. App. 640, 641, 653 S.E.2d 85, 86 (2007).
160. 287 Ga. App. 640, 653 S.E.2d 85 (2007).
161. *See id.* at 641, 653 S.E.2d at 86-87.
162. *Id.* at 640-41, 653 S.E.2d at 86.
163. *Id.* at 641-42, 653 S.E.2d at 87.
164. *Id.* at 642, 653 S.E.2d at 87.
165. 289 Ga. App. 474, 657 S.E.2d 581 (2008).
166. *Id.* at 478, 657 S.E.2d at 584.

employee signed an agreement containing noncompete and nonsolicitation provisions.[167] The nonsolicitation provision prohibited the employee from soliciting "Customers of Employer with whom Employee had contact (whether personally, telephonically, or through written or electronic correspondence) during the three (3) year period immediately preceding the Separation Date *or about whom Employee had confidential or proprietary information because of his / her position with Employer*" for three years following his separation.[168]

While working for the employer, the employee received on-the-job training, was given customer lists, and was introduced to customers. After terminating his employment, the former employee began competing with the employer and soliciting the employer's customers. Upon learning of the former employee's behavior, the employer brought suit against him for breach of contract. After the trial court entered judgment in favor of the employer, the former employee appealed, claiming that the nonsolicitation provision was unenforceable.[169]

The court of appeals agreed with the former employee, stating, "'Georgia law is clear that unless the nonsolicit covenant pertains *only to those clients with whom the employee had a business relationship* during the term of the agreement, the nonsolicit covenant must contain a territorial restriction.'"[170] The court determined that the nonsolicitation provision prohibited the former employee from contacting any of the employer's customers, regardless of whether the former employee had contact with the customers while employed, because the customer lists given to the former employee contained confidential information.[171] Because the nonsolicitation provision did not contain a territorial restriction, the court held that the provision was unenforceable.[172] The court further held that the noncompete provision was unenforceable,[173] because Georgia courts do not use the blue pencil doctrine when applying the stricter standard for noncompete provisions ancillary to employment agreements.[174] Accordingly, the court of appeals reversed the trial court's judgment.[175]

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167. *Id.* at 475, 657 S.E.2d at 582.

168. *Id.* at 476-77, 657 S.E.2d at 583-84.

169. *Id.* at 475-76, 657 S.E.2d at 582-83.

170. *Id.* at 477, 657 S.E.2d at 584 (quoting Advance Tech. Consultants v. RoadTrac, LLC, 250 Ga. App. 317, 321, 551 S.E.2d 735, 738 (2001)).

171. *See id.* at 478, 657 S.E.2d at 584.

172. *Id.*

173. *Id.*

174. *See id.*, 657 S.E.2d at 585 (quoting Waldeck v. Curtis 1000, Inc., 261 Ga. App. 590, 593, 583 S.E.2d 266, 269 (2003)).

175. *Id.* at 478-79, 657 S.E.2d at 585.

In another case during the survey period, *Atlantic Insurance Brokers, LLC v. Slade Hancock Agency, Inc.*,[176] the court of appeals held that a former employee did not violate a nonsolicitation agreement because he did not act "on behalf of" the former employer while negotiating.[177] In *Atlantic Insurance Brokers, LLC*, the plaintiff sold his business to the defendant, and the defendant hired the plaintiff in turn.[178] The plaintiff later signed a consulting agreement that contained a nonsolicitation provision in which he agreed to not solicit, for two years following his separation,

> any insureds who transacted business with [the defendant] and with whom [the plaintiff] dealt on behalf of [the defendant] and had material contact, either during the two (2) year period immediately preceding the date [the plaintiff] sold his business to [the defendant], or during his subsequent employment by [the defendant], or during the term of this Consulting Agreement.[179]

When the plaintiff terminated his employment, he began working for another employer. However, the defendant and the plaintiff still communicated. In fact, following a conversation with the plaintiff, the defendant located an insurer for a company that had approached the plaintiff. When the policy was near expiration, the plaintiff negotiated for the company without the defendant's help. After learning of this, the defendant informed the plaintiff that he considered the company to be covered by the nonsolicitation provision. The plaintiff then brought a declaratory judgment action against the defendant. The trial court entered judgment in favor of the plaintiff, and the defendant appealed.[180]

The court of appeals determined that the plaintiff did not act on behalf of the defendant when he separately negotiated for the company because the plaintiff approached the defendant for assistance with the company when the plaintiff was employed by another.[181] Because of this, the court held that the plaintiff did not violate the nonsolicitation covenant.[182] Therefore, the court of appeals affirmed the trial court's judgment.[183]

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176. 287 Ga. App. 677, 652 S.E.2d 577 (2007).
177. *Id.* at 680, 652 S.E.2d at 580.
178. *Id.* at 677, 652 S.E.2d at 578.
179. *Id.* at 678, 652 S.E.2d at 578-79.
180. *Id.* at 678-79, 652 S.E.2d at 579.
181. *Id.* at 680, 652 S.E.2d at 580.
182. *Id.*
183. *Id.*

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 this 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.