Labor and Employment Law

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I. INTRODUCTION

This Article surveys revisions to the Official Code of Georgia Annotated (O.C.G.A.)[1] and decisions interpreting Georgia law from June 1, 2017 to May 31, 2018, that affect labor and employment relations for Georgia employers.[2]

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1. The Georgia Legislature did not pass any laws in the 2018 session that significantly impacted Georgia employers. For an analysis of Georgia labor and employment law during the prior survey period, see W. Melvin Haas III et al., *Labor and Employment Law*, *Annual Survey of Georgia Law*, 69 MERCER L. REV. 141 (2017).

2. Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and case law. *See generally* THE DEVELOPING LABOR LAW (John E. Higgins, Jr. et al. eds., 7th ed. 2017); BARBARA T.

II. WRONGFUL TERMINATION

A. Employment At-Will

An "at-will employment" relationship is one that may be terminated at any time with or without cause by the employer or the employee.[3] While employment at-will in other jurisdictions may be weakening,[4] the presumption in Georgia remains that all employment is at-will unless a statutory or contractual exception exists.[5] "This bar to wrongful discharge claims in the at-will employment context 'is a fundamental statutory rule governing employer-employee relations in Georgia.'"[6] Indeed, O.C.G.A. § 34-7-1[7] provides that "[a]n indefinite hiring" is at-will employment.[8] Indefinite hiring includes contract provisions specifying "'permanent employment,' 'employment for life,' [and] 'employment until retirement.'"[9] A contract specifying an annual salary does not create a definite period of employment.[10] However, if an employment contract specifies a definite period of employment, any employment beyond that period becomes employment at-will, subject to discharge without cause.[11]

Regardless of an employer's motive, Georgia law allows the discharge of an at-will employee without creating "a cause of action for wrongful termination."[12] Oral promises between an employer and employee will

LINDEMANN, PAUL GROSSMAN & C. GEOFFREY WELCH, EMPLOYMENT DISCRIMINATION LAW (Julia Campins et al. eds., 5th ed. 2012); W. Jonathan Martin II et al., *Labor and Employment*, *Eleventh Circuit Survey*, 69 MERCER L. REV. 1223 (2017); *Daily Labor Report*, BLOOMBERG BNA, https://www.bloomberglaw.com/product/labor/bloomberglaw news/daily-labor-report?tab=NEWS (last visited Sept. 14, 2018). Accordingly, this Article is not intended to cover the latest developments in federal labor and employment law. Rather, this Article is intended only to cover legislative and judicial developments arising under Georgia state law during the survey period.

3. *Employment at Will*, BLACK'S LAW DICTIONARY (10th ed. 2014).

4. Haas et al., *supra* note 1, at 143 ("[E]mployment at-will in other jurisdictions may be weakening.").

5. *See, e.g.*, Wilson v. City of Sardis, 264 Ga. App. 178, 179, 590 S.E.2d 383, 385 (2003) (citing Duck v. Jacobs, 739 F. Supp. 1545, 1548 (S.D. Ga. 1990)).

6. Haas et al., *supra* note 1, at 143 (quoting Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 280, 528 S.E.2d 238, 240 (2000)).

7. O.C.G.A. § 34-7-1 (2018).

8. *Id.*; Ga. Power Co. v. Busbin, 242 Ga. 612, 613, 250 S.E.2d 442, 443–44 (1978).

9. *Ga. Power Co.*, 242 Ga. at 613, 250 S.E.2d at 443 (quoting Land v. Delta Airlines, Inc., 130 Ga. App. 231, 231, 203 S.E.2d 316, 317 (1973)).

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

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

12. H&R Block E. Enters., Inc. v. Morris, 606 F.3d 1285, 1294 (11th Cir. 2010) (quoting Nida v. Echols, 31 F. Supp. 2d 1358, 1376 (N.D. Ga. 1998)); Fink v. Dodd, 286 Ga. App. 363, 365, 649 S.E.2d 359, 362 (2007) ("The employer[ ] with or without cause and regardless of

not modify the relationship between the two; absent a written contract, an employee's status remains at-will.[13]

In *O'Connor v. Fulton County*,[14] a county employee was fired after failing to resign his employment when given the opportunity. Patrick O'Connor was the finance director for Fulton County and for a short time was named interim county manager. However, when deciding to fill the county manager position on a permanent basis, the County decided not to return O'Connor to the position of finance director and offered him the opportunity to resign, but when he refused he was terminated. O'Connor filed suit in the Fulton County Superior Court against the County and its new county manager, seeking damages for breach of contract, a writ of mandamus compelling the county manager to reinstate him to the position of finance director, and attorney's fees. O'Connor argued that a county regulation required that he be returned to his position of finance director following his appointment to interim county manager. The trial court disagreed and granted summary judgment to the County, concluding that the personnel regulations did not create an employment contract and that, even if they had, the regulation did not apply to O'Connor.[15]

The court held that, typically, the policies and information in personnel or employee manuals neither support a contract nor support a claim for breach of contract.[16] The court did acknowledge that "an at-will employment relationship can give rise to certain contractual rights."[17] The court further stated that "[p]rovisions in an employee manual relating to additional compensation plans, of which an employee is aware, may amount to a binding contract between the parties."[18] Although O'Connor argued that the personnel regulation constituted additional or future compensation that amounted to an enforceable contract, the court did not agree because the referenced salary was only applicable where there was continued employment, which was not the case here.[19] Not only did the regulation not create a contract, the particular regulation cited by O'Connor was one that "applie[d] only to

its motives may discharge the employee without liability."); Troy v. Interfinancial, Inc., 171 Ga. App. 763, 766, 320 S.E.2d 872, 877 (1984).

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

14. 302 Ga. 70, 805 S.E.2d 56 (2017).

15. *Id.* at 70–71, 805 S.E.2d at 58.

16. *Id.* at 71, 805 S.E.2d at 58.

17. *Id.* at 71, 805 S.E.2d at 58–59 (quoting Shelnutt v. Mayor & Alderman of Savannah, 333 Ga. App. 446, 450, 776 S.E.2d 650, 655 (2015)).

18. *Id.* at 71, 805 S.E.2d at 59 (quoting Ellison v. Dekalb Cty., 236 Ga. App. 185, 186, 511 S.E.2d 284, 285 (1999)).

19. *Id.* at 72, 805 S.E.2d at 59.

'on-range' employees, and it [was] undisputed that O'Connor was a 'set-range' employee."[20] The court further determined that O'Connor was not entitled to reinstatement of his previous position for two reasons.[21] First, the regulation is inapplicable, as indicated above, and second, since the employee was at-will with no vested right in his continued employment, he failed to prove a clear legal right to be reinstated to his former position.[22] Thus, the Georgia Supreme Court held that the employee regulation did not constitute an enforceable employment contract and the employee was not entitled to a writ of mandamus compelling his reinstatement as finance director.[23]

B. Whistleblower Act

Under the Georgia Whistleblower Act (GWA),[24] "[n]o public employer shall retaliate against a public employee for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency."[25] To make out a prima facie case, the plaintiff must establish four elements: "(1) [the plaintiff] was employed by a public employer; (2) [the plaintiff] made a protected disclosure or objection; (3) [the plaintiff] suffered an adverse employment action; and (4) there is some causal relationship between the protected activity and the adverse employment action."[26] A prima facie case of retaliation raises the presumption that the employer is liable to the employee, and the burden of production, but not the burden of persuasion, shifts to the employer to articulate a legitimate, nonretaliatory reason for the employment action.[27] The burden then returns to the plaintiff to prove that the employer's reasons are pretextual.[28]

20. *Id.* at 73, 805 S.E.2d at 60.

21. *Id.*

22. *Id.* at 73–74, 805 S.E.2d at 60.

23. *Id.*

24. Ga. H.R. Bill 642, Reg. Sess., 2012 Ga. Laws 446 (codified as amended at O.C.G.A. § 45-1-4 (2018)); *see also* Colon v. Fulton Cty., 294 Ga. 93, 93, 751 S.E.2d 307, 308 (2013) (reversed on other grounds).

25. O.C.G.A. § 45-1-4(d)(2) (2018).

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

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

28. United States *ex rel.* Parato v. Unadilla Health Care Ctr., Inc., 787 F. Supp. 2d 1329, 1341–42 (M.D. Ga. 2011).

In *Murray-Obertein v. Georgia Government Transparency & Campaign Finance Commission*,[29] the Georgia Court of Appeals addressed the question of whether a "public employee" as defined by the GWA includes former employees.[30] Since the trial court answered this in the negative, the trial court did not get to the question of whether, under the GWA, the employee was engaged in protected acts or whether the employer's acts were in retaliation.[31] Thus, these claims were not addressed on appeal.[32] Elisabeth Murray-Obertein was an employee of the Commission from December 2011 to January 29, 2014. In October of 2014, Murray-Obertein brought claims alleging retaliation under the GWA, claiming the Commission's Executive secretary made derogatory statements during interviews with the media, which occurred after Murray-Obertein was no longer employed with the Commission.[33] "[T]he trial court found that the definition of 'public employee' for purposes of bringing a retaliation claim pursuant to the GWA, means a current employee, rather than a former employee."[34]

The court of appeals agreed, holding that the definition of public employee is limited to "any person who *is* employed by the executive, judicial, or legislative branch."[35] Murray-Obertein attempted to argue that the court should follow *Robinson v. Shell Oil Co.*,[36] a United States Supreme Court decision that interpreted Title VII of the Civil Rights Act of 1964[37] to include a former employee as an "employee" for purposes of a retaliation.[38] Title VII defines employee as "an individual employed by an employer."[39] The court of appeals distinguished this language from that contained in O.C.G.A. § 45-1-4(a)(3), which expressly employs a temporal qualifier by stating "who *is* employed."[40] Thus, the court determined that Murray-Obertein was not employed at the time she claimed the retaliation occurred, and therefore, "the trial court did not err in granting summary judgment to the Commission."[41]

29. 344 Ga. App. 677, 812 S.E.2d 28 (2018).

30. *Id.* at 677, 812 S.E.2d at 29.

31. *Id.*

32. *Id.*

33. *Id.* at 678, 812 S.E.2d at 29.

34. *Id.*

35. *Id.* (quoting O.C.G.A. § 45-1-4(a)(3) (2018)).

36. 519 U.S. 337 (1997).

37. 42 U.S.C. § 2000(e) (2018).

38. *Murray-Obertein*, 344 Ga. App. at 679, 812 S.E.2d at 30 (citing *Robinson*, 519 U.S. at 341–42).

39. 42 U.S.C. § 2000(f) (2018).

40. *Murray-Obertein*, 344 Ga. App. at 679–80, 812 S.E.2d at 30.

41. *Id.* at 681, 812 S.E.2d at 31.

In *Coward v. MCG Health, Inc.*,[42] the court of appeals determined that the plaintiffs failed to establish that they made a protected disclosure or objection to an unlawful practice, an element necessary to establish a claim of retaliation under the GWA.[43] Both plaintiffs, Coward and Bargeron, worked as charge nurses in the Adult Unit for MCG Health. Coward changed shifts with another charge nurse on September 11, 2009, and was on duty four nights later when a patient in that ward attempted suicide. Coward advised that she believed the attempted suicide resulted from short-staffing. A week later, she was terminated for refusing to perform her duties as a charge nurse on September 11, 2009. Similarly, on May 31, 2010, Bargeron was assigned to work as the charge nurse in the Adult Unit. Bargeron called her manager twice to advise that the unit was understaffed and that she was unable to obtain a status report from the prior shift's charge nurse. As a result, she refused to continue with her staffing assignment, was asked to go home, and was terminated a few days later. Both plaintiffs subsequently filed suit against MCG Health alleging retaliation for speaking out against the understaffing.[44]

To establish the second prong of a prima facie case under the GWA, plaintiffs must show that they either (1) "disclos[ed] a violation of or noncompliance with a law, rule, or regulation to . . . a supervisor," or (2) "object[ed] to, or refus[ed] to participate in, any activity, policy, or practice . . . that [they] reasonabl[y] . . . believe[d to be] in violation of or noncompliance with a law, rule, or regulation."[45]

MCG argued that the plaintiffs failed to establish a prima facie case for retaliation. The trial court agreed and granted summary judgment. [46] The court of appeals affirmed, holding that the plaintiffs failed to identify that the understaffing violated any law, rule, or regulation.[47] The court indicated that although both plaintiffs identified internal procedures in their complaints, neither plaintiff established a prima facie case based on the refusal to work alone.[48]

42. 342 Ga. App. 316, 802 S.E.2d 396 (2017).
43. *Id.* at 316, 802 S.E.2d at 397.
44. *Id.* at 317–18, 802 S.E.2d at 397–98.
45. O.C.G.A. § 45-1-4(d)(2)–(3) (2018).
46. *Coward*, 342 Ga. App. at 318, 802 S.E.2d at 398.
47. *Id.* at 321–22, 802 S.E.2d at 400–01.
48. *Id.*

C. Other Employment Contracts

In *Everson v. DeKalb County School District*,[49] the court of appeals affirmed the trial court's dismissal of a former employee's substantive due process claim and breach of contract claim but reversed the dismissal of the wrongful termination claim based on a procedural due process error.[50] Ronald Everson worked as a plant engineer at Columbia High School and possessed keys to the school, which allowed him access at all times. As part of his duties, he was responsible for letting construction workers in the building on the weekends for renovations to the school. Everson claims that, in 2006, he witnessed several illegal monetary exchanges between the superintendent and the construction company owner. Everson claimed he made the school district aware of the misconduct and alleges nothing was done. On May 23, 2008, management at the school accused Everson of theft from the school and, one month later, Everson was terminated. After his termination, Everson filed suit alleging wrongful termination, slander, and various other claims against the school and the superintendent individually. The trial court concluded that Everson's claims were barred by sovereign and qualified immunity and granted the school's motion to dismiss on all claims.[51]

On appeal, the court of appeals affirmed that all claims against the school district and the superintendent in his official capacity should be dismissed based on sovereign immunity.[52] However, the court stated that claims against the superintendent individually are subject to qualified immunity on a limited basis.[53] Public officials are protected from most actions taken in their official capacity, except those done willfully, maliciously, or with corruption.[54] In this case, the court of appeals held that since there was a claim of willful and malicious intent, dismissal was not proper against the individual.[55]

In addressing the claims that remained against the superintendent, the court stated that "an employee with a property right in employment is protected only by the procedural component of the *Due Process Clause*, not its substantive component."[56] Therefore, when a policy manual

49. 344 Ga. App. 665, 811 S.E.2d 9 (2018).

50. *Id.* at 670, 811 S.E.2d at 14–15.

51. *Id.* at 665–66, 811 S.E.2d at 11.

52. *Id.* at 667, 811 S.E.2d at 12.

53. *Id.* at 668–69, 811 S.E.2d at 12–13.

54. *Id.* at 668, 811 S.E.2d at 12.

55. *Id.* at 669, 811 S.E.2d at 13.

56. *Id.* at 670, 811 S.E.2d at 13 (quoting Angell v. Hart, 232 Ga. App. 222, 224, 501 S.E.2d 594, 596 (1998)).

outlines a specific procedure for termination, failure to follow the outlined process alone is not actionable.[57] Rather, it is only required that the terminated employee be given the level of procedural due process required by federal law.[58] Since there was a properly stated claim for wrongful termination for failure of procedural due process, the court reversed the dismissal as applied to the superintendent.[59]

III. RESPONDEAT SUPERIOR

A. Scope of Employment

Under the doctrine of *respondeat superior*, an employer may be held vicariously liable for the negligence or intentional torts of employees that are committed within the scope of their employment.[60] To hold an employer vicariously liable for the torts of an employee, the following two elements must be established: (1) the employee was acting in furtherance of the employer's business; and (2) the employee was acting within the scope of the employer's business.[61]

In *Agnes Scott College, Inc. v. Hartley*,[62] the Georgia Court of Appeals affirmed the trial court's decision to deny a motion for judgment notwithstanding a mistrial to the defendants.[63] In 2009, an Agnes Scott student accused Amanda Hartley of physical and sexual assault. Gaetano Antinozzi, a full-time Agnes Scott campus policeman, investigated the accusation and, based on the student's account and the medical evidence, obtained a warrant for Hartley's arrest. Ultimately, the state dismissed Hartley's charges before presenting them to a grand jury. Following this dismissal, "Hartley brought an action against Agnes Scott, Antinozzi, and other[s] . . . assert[ing] . . . that Antinozzi improperly investigated the accusations against her and wrongfully obtained the arrest warrants." She alleged that Agnes Scott was "vicariously liable for these allegedly tortious acts." The defendants filed a motion to dismiss the complaint for immunity and lack of subject matter jurisdiction.[64]

The trial court denied the defendants' motion to dismiss, and on appeal, the court of appeals affirmed the denial. The case then proceeded through trial, but during jury deliberations the court declared a mistrial

57. *Id.* at 669, 811 S.E.2d at 13.
58. *Id.*
59. *Id.* at 670, 811 S.E.2d at 13–14.
60. CHARLES R. ADAMS III, GEORGIA LAW OF TORTS § 7:2 (2017–2018 ed.).
61. *Id.*
62. 346 Ga. App. 841, 816 S.E.2d 689 (2018).
63. *Id.* at 849, 816 S.E.2d at 695.
64. *Id.* at 842, 816 S.E.2d at 691.

because of jury misconduct. Agnes Scott then moved for judgment notwithstanding the mistrial, asserting that it could not be held liable because there was no evidence that Agnes Scott directed Antinozzi to carry out the alleged tortious acts. The trial court denied the motion and the court of appeals affirmed.[65]

In determining whether Agnes Scott was vicariously liable, the court stated that the applicable standard depended on Antinozzi's capacity "when he engaged in the allegedly tortious acts."[66] Here, it was undisputed that Antinozzi was serving as the campus police officer and the actions taken were within the scope and course of his employment. Agnes Scott conceded that Antinozzi was acting within the scope of his duty.[67] Accordingly, the court of appeals held that the trial court did not err in denying the motion for judgment notwithstanding the mistrial.[68]

B. Independent Contractor

Respondeat superior liability generally does not extend to the actions of independent contractors.[69] Accordingly, in determining vicarious liability, a court must first resolve if an individual is an employee or an independent contractor. To be considered an independent contractor, the contract must allow for the contractor to control when and how he completes his work.[70]

In *Grange Indemnity Insurance Co. v. BeavEx, Inc.*,[71] the Georgia Court of Appeals affirmed the trial court's grant of summary judgment for BeavEx, finding there was no vicarious liability when the tortfeasor was an independent contractor.[72] On March 17, 2017, as Pathe Sarr was making a delivery for BeavEx under a referral contract, he collided with the vehicle of Edward and Patricia Morris. The Morris family sued Sarr and BeavEx to recover for their injuries. On March 31, 2017, the trial court granted summary judgment for BeavEx on the grounds that Sarr

65. *Id.* at 842–43, 816 S.E.2d at 691–92.

66. *Id.* at 844, 816 S.E.2d at 692.

67. *Id.*

68. *Id.*

69. *See* O.C.G.A. § 51-2-4 (2018). "An employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and in it is not subject to the immediate direction and control of the employer." *Id.*

70. Rbf Holding Co. v. Williamson, 260 Ga. 526, 526, 397 S.E.2d 440, 441 (1990).

71. 342 Ga. App. 601, 804 S.E.2d 173 (2017).

72. *Id.* at 601, 804 S.E.2d at 174.

was an independent contractor, not an employee.[73] The court of appeals affirmed.[74]

The court of appeals determined that BeavEx contracted with Sarr to provide delivery services as an independent contractor for customers located by BeavEx through a contract specifically outlining the independent contractor relationship.[75] Sarr was responsible for providing his own vehicle, maintaining vehicle insurance, and paying for all his operating costs and expenses, all of which supports the court's conclusion.[76] Grange argued that since BeavEx required Sarr to wear a company identification badge, make deliveries within a certain period of time, and provide an annual driving record, BeavEx exercised control over the driver.[77] The court of appeals disagreed, holding that independent contractor status is not affected

> where the control reserved does not apply to the manner of doing the details of the work, and does not thereby take the work out of the hands of the contractor, but goes merely to a general supervision to [e]nsure that the ends prescribed by the contract shall be substantially met.[78]

Therefore, the trial court's granting of summary judgment was proper.[79]

C. Negligent Entrustment

In *City of Kingsland v. Grantham*,[80] the Georgia Court of Appeals held that an injured party's negligence claims against the city were duplicative of her claim seeking to hold the city liable under the doctrine of *respondeat superior*.[81] Destini Grantham brought suit against the City of Kingsland and its police officer, Vincent Bryant, after she sustained injuries when a patrol car driven by Officer Bryant collided with the car she was riding in. Grantham alleged claims of negligent training, negligent supervision, and negligent entrustment, and claimed that the City was liable under the doctrine of *respondeat superior*. The City filed a motion for partial summary judgment arguing the claims were

73. *Id.*
74. *Id.*
75. *Id.* at 602–03, 804 S.E.2d at 174–75.
76. *Id.*
77. *Id.* at 603, 804 S.E.2d at 175.
78. *Id.* (quoting Bentley v. Jones, 48 Ga. App. 587, 592, 173 S.E. 737, 739 (1934)).
79. *Id.* at 604, 804 S.E.2d at 176.
80. 342 Ga. App. 696, 805 S.E.2d 116 (2017).
81. *Id.* at 699, 805 S.E.2d at 119.

redundant since they sought a recovery that was duplicative of that sought under *respondeat superior*. The trial court entered an order denying the City's motion but certified the matter for immediate review.[82]

The court of appeals explained that in Georgia, prior to 2005, when a defendant–employer conceded that it was "vicariously liable under the doctrine of [*respondeat superior*] for the negligence of its employee, the employer [was] entitled to summary judgment on the plaintiff's claims for negligent entrustment, negligent hiring, negligent training, and negligent supervision," unless there was a valid claim for punitive damages.[83] However, in 2005, the Georgia General Assembly enacted tort reform legislation[84] eliminating joint and several liability in favor of an apportionment statute that apportions fault between two liable parties rather than having both parties be liable for the full amount.[85] Grantham argued that, as a result of the legislation, the *respondeat superior* rule was no longer applicable.[86] Federal district courts have had conflicting views of the effect this statute has on the rule,[87] but the court of appeals declined to adopt either decision since they are not bound by them.[88] Therefore, the court of appeals held that claims based upon negligent hiring, supervision, and retention of an employee are derivative of underlying claims of *respondeat superior* and thus are duplicative.[89] As a result, the trial court's decision was reversed and the motion for partial judgment granted.[90]

82. *Id.* at 696–97, 805 S.E.2d at 117.

83. *Id.* at 697, 805 S.E.2d at 117.

84. *See* Ga. S. Bill 3, Reg. Sess., 2005 Ga. Laws 1 (amending O.C.G.A. tits. 9, 24, 33, 43, 51).

85. *Grantham,* 342 Ga. App. at 698, 805 S.E.2d at 118 (quoting O.C.G.A. § 51-12-33(b) (2018)).

86. *Id.*

87. *See* Little v. McClure*,* No. 5:12-CV-147, 2014 U.S. Dist. LEXIS 120681 (M.D. Ga. Aug. 29, 2014). *But cf.* Schreckengast v. Carollo, No. CV-416-038, 2017 U.S. Dist. LEXIS 96649 (S.D. Ga. June 22, 2017).

88. *Grantham*, 342 Ga. App. at 699, 805 S.E.2d at 119 (citing RES-GA Hightower, LLC v. Golshani, 334 Ga. App. 176, 180 n.8, 778 S.E.2d 805, 809 n.8 (2015); Hosp. Auth. of Valdosta/Lowndes Cty. v. Fender, 342 Ga. App. 13, 23 n.4, 802 S.E.2d 346, 355 n.4 (2017)).

89. *Id.* (citing as binding authority, *Fender*, 342 Ga. App. at 23, 802 S.E.2d at 355).

90. *Id.* at 700, 805 S.E.2d at 119.

IV. BUSINESS TORTS

A. Negligent Hiring, Retention, and Supervision

Under O.C.G.A. § 34-7-20,[91] "[t]he employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency."[92] The Georgia Court of Appeals 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.'"[93] To sustain an action for negligent hiring, the plaintiff must prove the employer hired an employee whom "the employer knew or should have known posed a risk of harm to others where it [was] reasonably foreseeable from the employee's 'tendencies' or propensities that the employee could cause the type of harm sustained by the plaintiff."[94] Typically, "the determination of whether an employer used ordinary care in hiring an employee is a jury issue,"[95] and is only a question of law "where the evidence is plain, palpable[,] and undisputable."[96]

In *Lucas v. Beckman Coulter, Inc.*,[97] the Georgia Supreme Court held that the employer was not immune from liability when its employee accidently discharged a firearm, injuring the plaintiff.[98] Jeremy Wilson, a field service engineer for Beckman Coulter, Inc. (BCI), accidently discharged his personal firearm while on a service call for his employer. Claude Lucas, an employee at the job site Wilson was servicing, sustained injuries to his abdomen when Wilson's firearm was discharged. Wilson was terminated following this incident for violating his employer's policy against transporting firearms in a company vehicle. Subsequently, Lucas filed suit against Wilson and BCI under theories of *respondeat superior* and negligent supervision.[99]

O.C.G.A. § 16-11-135[100] allows for immunity to any employer from civil and criminal actions where an employee transports, stores, possesses, or

91. O.C.G.A. § 34-7-20 (2018).

92. *Id.*

93. 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).

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

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

96. *Munroe*, 277 Ga. at 864, 596 S.E.2d at 607 (quoting Robinson v. Kroger Co., 268 Ga. 735, 748, 493 S.E.2d 403, 414 (1997)).

97. 303 Ga. 261, 811 S.E.2d 369 (2018).

98. *Id.* at 262–63, 811 S.E.2d at 370–71.

99. *Id.* at 261, 811 S.E.2d at 370.

100. O.C.G.A. § 16-11-135 (2018).

uses a firearm and causes injury or commits a crime.[101] Pursuant to this Code section, the trial court granted summary judgment in favor of BCI on all claims. On appeal, the court of appeals agreed, finding that the plain language of the statute afforded the employer immunity considering the injuries were sustained and the subsequent civil action arose out of Wilson's possession or use of the firearm. Additionally, the court of appeals held there was no criminal act by Wilson or BCI.[102]

On appeal to the supreme court, this decision was reversed.[103] The court held that the lower court's interpretation of this statute was erroneous as this would grant employers immunity from all "firearm-related tort liability" for the acts of its employees.[104] Further, the court indicates when evaluating the statute's plain meaning, that there is no evidence to support this was the intent of the legislature, and therefore, the statute does not provide immunity in this case.[105] The supreme court directed the court of appeals to address the assertion that the trial court erred in granting summary judgment to BCI.[106]

V. RESTRICTIVE COVENANTS

In 2011, the law in Georgia on restrictive covenants underwent major changes when the voters approved a constitutional amendment.[107] Prior to the amendment, the courts would only allow non-compete agreements that merely placed a partial restraint on trade, rather than a general restraint.[108] As a result, any covenant that placed a general restraint was found to be void and, notwithstanding a severability clause, would void the entire agreement.[109] Under the amendment, courts focus their analysis on whether a covenant restricts future employment in a reasonable manner.[110] The amendment also allows courts to blue pencil agreements made after 2011 to avoid the invalidation of the entire

101. O.C.G.A. § 16-11-135(e) (2018).

102. *Lucas*, 303 Ga. at 261–62, 811 S.E.2d at 370–71.

103. *Id.* at 265, 811 S.E.2d at 372.

104. *Id.* at 262, 811 S.E.2d at 371.

105. *Id.* at 263–64, 811 S.E.2d at 371–72.

106. *Id.* at 265, 811 S.E.2d at 372.

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

108. *See* O.C.G.A. § 13-8-2(a)(2) (2010).

109. Vulcan Steel Structures, Inc. v. McCarty, 329 Ga. App. 220, 224, 764 S.E.2d 458, 462 (2014).

110. GA. CONST. art. III, § 6, para. 5(c)(3); *see also* O.C.G.A. § 13-8-50 (2018). For a more in-depth legislative and political history of the restrictive covenant constitutional amendment see Haas et al., *supra* note 1, at 154–56.

agreement.[111] However, agreements made before the approval of the amendment are not subject to blue penciling.[112] These agreements will be held valid as a partial restraint only when the agreement is specific and reasonable in regard to duration, geographic restriction, and scope of the activities prohibited.[113]

As indicated below, and in past survey periods,[114] employers continue to have agreements invalidated by the court because the agreements were entered into prior to 2011. To ensure the agreement would be subject to blue penciling and severability, employers should have pre-2011 employees sign a new agreement. Under Georgia law, employers can require at-will employees to sign a new agreement with the consideration being continued employment.[115] For employees under contract for a specific term, employers must offer additional consideration (monetary payment or other benefits) since the employer is already obligated to continued employment.[116]

In *Burson v. Milton Hall Surgical Associates, LLC*,[117] the Georgia Court of Appeals held that the geographic restrictions in the non-compete agreement were not unreasonably vague or indefinite; however, the prohibition of employees accepting patients who were not solicited by the physicians was unreasonable.[118] The court further indicated that the employer was bound by its admission in the complaint that the employee began her employment prior to enactment of the law allowing blue-pencil modification of the covenant.[119]

James Burson, N. Hadley Heindel, and Esther Askew were employees of Milton Hall Surgical Associates as physicians and a physician's assistant. At the beginning of their employment, the former employees signed an employment agreement that contained a non-compete clause. The clause stated that the physicians were prohibited from engaging in the practice of the specialty of Otolaryngology or head and neck surgery within a geographic area of ten miles of the "territories" for two years. The covenant also contained language indicating that the physicians

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

112. *Vulcan Steel Structures, Inc.*, 329 Ga. App. at 220, 764 S.E.2d at 459.

113. *Cox*, 308 Ga. App. at 31, 706 S.E.2d at 664; *see also* W.R. Grace & Co., Dearborn Div. v. Mouyal, 262 Ga. 465, 465–66, 422 S.E.2d 529, 531–32 (1992).

114. *See* Haas et al., *supra* note 1, at 154–56.

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

116. Glisson v. Global Sec. Servs., LLC, 287 Ga. App. 640, 641–42, 653 S.E.2d 85, 86–87 (2007).

117. 343 Ga. App. 159, 806 S.E.2d 239 (2017).

118. *Id.* at 161–63, 806 S.E.2d at 242–44.

119. *Id.* at 168, 806 S.E.2d at 246.

would review the geographical area occasionally in order to assure that this covered only where the individual was working at the time. The former employees claimed that this amendment made the covenants unreasonable.[120] However, the court pointed out that the Georgia Supreme Court had previously held that amendments such as this are not unreasonable as they require an additional signed agreement to "follow[] the employee to a new territory."[121] Therefore, this amendment does not, in itself, make the covenant unenforceable.

The court held that the covenant restricting the physicians from not only soliciting patients, but also from accepting patients who may have sought out the physicians themselves, was unreasonable.[122] The court stated that "[an employer] may properly protect itself from the risk that former employees might appropriate its customers by taking unfair advantage of client contacts developed while working for [that employer], but the company cannot prevent them from merely accepting overtures from those customers."[123]

"Georgia law is clear that if one covenant in an agreement subject to strict scrutiny is unenforceable, then they are all unenforceable."[124] As a result, the covenant for the physicians was unenforceable, and the trial court's denial of a motion to dismiss the count was reversed.[125]

On the other hand, the covenant for Askew, a physician's assistant, indicated that the geographic restriction may "*be amended without notice as addition[al] practice locations occur*."[126] The court indicated that the geographic restriction was vague and indefinite, and therefore, was not reasonable and, consequently, not enforceable.[127] There was also a dispute as to the start date of the employee to determine whether the court may blue-pencil modify the covenant, but the employer was bound to the date indicated in the complaint which was prior to this change of law.[128] The court thereby affirmed the lower court's decision.[129]

120. *Id.* at 159–62, 806 S.E.2d at 241–43.

121. *Id.* at 162, 806 S.E.2d at 242 (citing Orkin Exterminating Co. v. Walker, 251 Ga. 536, 538, 307 S.E.2d 914, 916–17 (1983)).

122. *Id.* at 164–65, 806 S.E.2d at 243–44.

123. *Id.* at 164, 806 S.E.2d at 243 (quoting *Orkin*, 251 Ga. at 539, 307 S.E.2d at 917).

124. *Id.* at 165, 806 S.E.2d at 244 (quoting *Vulcan*, 329 Ga. App. at 224, 764 S.E.2d at 462).

125. *Id.* at 166, 806 S.E.2d at 245.

126. *Id.*

127. *Id.*

128. *Id.* at 167–68, 806 S.E.2d at 245–46.

129. *Id.* at 168, 806 S.E.2d at 247.

VI. CONCLUSION

As this Article demonstrates, the issues arising under Georgia law are becoming progressively more challenging each year with the growing overlap between state and federal issues, as well as growing state regulations, adding to the challenge. Regardless of whether a practitioner specializes in state, federal, administrative, or other matters pertaining to labor and employment, it is important to recognize and stay abreast of the ever-evolving trends, policies, cases, and state and federal guidelines.