

The Employee Fiduciary Duty in Georgia: Narrowest in all the Land?

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Introduction

In Georgia, whether an employee owes his employer a fiduciary duty or duty of loyalty turns on whether he is an agent for the employer.³ Moreover, under Georgia law, an employee may owe a fiduciary duty or duty of loyalty to his employer with respect to certain matters but not others. In fact, whether an employee owes a fiduciary duty or duty of loyalty in Georgia is determined on a transactional basis.

For example, while an employee may owe a fiduciary duty with respect to customers because he is capable of binding the company relative to those customers, he may not owe a fiduciary duty with respect to employees unless he has the authority to hire or fire them.⁴ This view of the fiduciary duty and duty of loyalty owed by employees to their employers in Georgia is significantly narrower than many other states. This article will explore Georgia law with respect to the employee fiduciary duty and duty of loyalty and how it compares to that duty in various other states.

When is an employee a fiduciary under Georgia law?

Under Georgia law, the terms “fiduciary relationship” and “confidential relationship” are synonymous.⁵ Fiduciary duties and obligations are owed by those in confidential relationships, i.e., relationships “where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such is the relationship between partners, principal and agent, etc.”⁶ The Georgia courts have held therefore that in order for an employee to owe a fiduciary duty or a duty of loyalty, the employee must be an agent of the employer.⁷

Under Georgia law, an agency relationship arises “wherever one person expressly or by implication authorizes another to act for him...”⁸ Therefore, in order for an employee to serve as his employer’s agent, he has to be more than an employee delegated by the employer to look after certain accounts. He must be “vested with authority, real or ostensible, to create obligations on behalf of [the employer] bringing third parties into contractual relations with [the employer].”⁹

Gordon Document Products

³ *Gordon Document Prods., Inc. v. Serv. Techs., Inc.*, 308 Ga. App. 445, 453, 708 S.E.2d 48, 55-56 (2011).

⁴ See generally *Gordon Document Prods.*, 708 S.E.2d 48.

⁵ *Bowen v. Hunter, Maclean, Exley and Dunn*, 241 Ga. App. 204, 207, 525 S.E.2d 744 (1999).

⁶ O.C.G.A. § 23-2-58; *Atlanta Mkt. Ctr. Mgmt. Co. v. McLane*, 269 Ga. 604, 606, 503 S.E.2d 278 (1998).

⁷ *Gordon Document Prods.*, 308 Ga. App. 445.

⁸ O.C.G.A. § 10-6-1.

⁹ *Physician Specialists in Anesthesia, P.C. v. Wildmon*, 238 Ga. App. 730, 521, S.E.2d 358 (1999); *South E. Fid. Ins. Co. v. Heard*, 123 Ga. App. 653, 182 S.E.2d 153 (1971).

In *Gordon Document Products*, the Georgia Court of Appeals parsed this standard further when it evaluated whether an employee who could potentially bind the company with respect to customers owed a fiduciary duty with respect to employees if the employee did not have the authority to hire or fire other employees. In that case, the Court of Appeals held that the employee did not have the powers of an agent with respect to his employer because the employment contract specifically provided that he did not “have authority to bind the company for any debt or obligation.”¹⁰ The court went on to explain that the specific breach of fiduciary duty alleged in the case was that the former employee solicited other employees to join his new company.¹¹ The court held that even assuming the employee had the authority to bind the employer with respect to customer contracts, there was no evidence he had the authority to bind the company on employment matters or relations.¹² Thus, the court found, although the employee may have owed his employer a fiduciary duty with respect to the customer contracts he entered into on its behalf, there was no evidence he occupied a similar relationship with respect to employee relations.¹³

The *Gordon Document Products* court based its holding on the holding on the *Atlanta Market Center Management* case in which the Georgia Supreme Court held that “the employee–employer relationship is not one from which the law will necessarily imply fiduciary obligations...the facts...may establish the existence of a confidential relationship...concerning a particular transaction...” (emphasis added).¹⁴

How do other states’ laws determine fiduciary status?

The concept that an employee must be an agent in order to owe a fiduciary duty or duty of loyalty to his employer appears to put Georgia in a minority of states requiring such a standard for an employer to seek relief against a disloyal employee. In addition, the further requirement that the court analyze the employee’s duty to his employer based on the nature of the particular offense involved (e.g., soliciting employees for employment at a competing firm during employment) puts Georgia in a truly unique category. Most other states do not define the employee fiduciary duty or duty of loyalty so narrowly.

For example, in New York an employee is the employer’s agent and has a duty of undivided loyalty.¹⁵ Likewise, in California “[a]n employer has the right to expect the undivided loyalty of its employees.” The duty of loyalty is breached, and may give rise to a cause of action in the employer, when the employee takes action which is inimical to the best interest of the

¹⁰ *Gordon Document Products*, 308 Ga. App. at 454.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *South Park/Envicon Capital Corp. v. United Airlines Inc.*, 505 N.Y.S.2d 491 (1986).

employer.¹⁶ In Florida it is well established that an employee owes a fiduciary duty and duty of loyalty to his or her employer.¹⁷

In Delaware, the law is potentially a little closer to Georgia law. In that state, fiduciary duties, duties of loyalty and of good faith and fair dealing apply only to officers, directors and key managerial personnel.¹⁸ Likewise, in Texas the courts have cautioned against assuming that every employee owes a fiduciary duty to his employer. Under Texas law, a fiduciary duty may also be limited to employees who are considered agents of the employer.¹⁹

In Ohio it appears that only employees who also have a “fiduciary or administrative relationship” to their employer and something more than an ordinary relationship of employer and employee owe a fiduciary duty. Under Ohio law the true test is the duty actually delegated to and performed by the employee.²⁰ A fiduciary relationship does not exist in Ohio where no discretion is involved in the job duties and where tasks are clearly routine.²¹

In Illinois a fiduciary duty may only be reserved for officers, directors and highly paid employees who have management responsibilities.²² However, regular employees may owe a duty of loyalty even if that duty does not rise to the level of a fiduciary duty in Illinois.²³

Conclusion

Thus, while it appears that some states, like Georgia, require something more than the employer-employee relationship in order to impose a fiduciary duty or duty of loyalty on an employee, it does not appear that any other state imposes as stringent requirements for the duty to exist as Georgia law does. Georgia’s narrow construction of the employer-employee fiduciary relationship is arguably consistent with its rich history in favor of free competition (at least the history as it existed before the new restrictive covenants act was passed in 2011). We are not aware of any other state that draws the kind of distinction the court did in *Gordon Document Products* that would allow an employee to be a fiduciary with respect only to work covered under his or her job description and not encompassing other activities that may prove harmful to the company. Litigators in Georgia must be mindful of these rules when gathering information from an employer-client seeking to assert claims against a disloyal former employee.

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¹⁶ *Stokes v. Dole Nut Company*, 41 Cal. App 4th 285 (1995).

¹⁷ *Charles Schwab & Co. v. McMurry*, 2008 WL 5381922 (M.D. Fl. 2008) (citing *Life Mktg. of Florida Inc. v. AIG Life Insurance Company*, 588 So.2d 663, 665 (Fl. Dist. Ct. App. 1991)).

¹⁸ *Science Accessories Corp v. Summagraphics Corp*, 425 A.2d 957, 962 (Del. 1980).

¹⁹ See e.g., *Johnson v. Brewer & Pritchard, PC*, 73 S.W.3rd 193, 200 (Tex. 2002).

²⁰ *In re: Termination of employment of Pratt*, 321 N.E.2d, 603, 608 (Ohio 1975).

²¹ *Olander s. Ohio Environmental Protection Agency*, 732 N.E.2d 400, 403 (Ohio Ct. App. 1999).

²² *Food Com International v. Berry*, 328 F 3rd 300, 303 (7th Cir. 2003).

²³ *Lawlor v. North American Corp of Illinois*, 983 N.E.2d 414, 433 (Ill. 2012).

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