

THE CAROLINA EMPLOYER

A BULLETIN ON EMPLOYMENT, LABOR, BENEFITS AND IMMIGRATION LAW FOR CLIENTS AND FRIENDS OF JACKSON LEWIS P.C.

N.C. 'Going and Coming' Rule Bars Employees' Claims for Injuries Suffered While Traveling from Holiday Luncheon

It's that time of year again. Company-sponsored social events will soon be in full swing. Just in time, a recent North Carolina Court of Appeals decision provides good guidance on employers' responsibilities for employees' injuries suffered after leaving an employer-sponsored social event.

Facts

John Graven and Kathryn Wall, two employees of the State Highway Patrol ("SHP"), attended their employer's holiday lunch at a public restaurant about a half-hour drive from the workplace. The December 16, 2010, luncheon was to celebrate workplace accomplishments. Employees' attendance at the luncheon was voluntary and fewer than half of the SHP's employees who were invited actually attended. Although three supervisors made brief remarks thanking employees for their dedication, no formal speeches were given and no awards were presented during the event.

After the lunch, Graven and Wall were riding back to the SHP office on a public street in a state-owned vehicle when the vehicle struck a tree. Both employees were injured as a result of the accident and each subsequently made claims for workers' compensation benefits.

The North Carolina Industrial Commission ruled that the injuries suffered by Graven and Wall were not compensable under the Workers' Compensation Act ("Act"). Significantly, a sergeant of the SHP testified that although Graven and Wall rode in a state-owned vehicle, the vehicle was not authorized for use to attend the holiday lunch. He also testified that if the vehicle had been requested for that purpose, the request would have been denied.

Graven and Wall appealed the Commission's ruling to the North Carolina Court of Appeals.

Injuries Not Compensable

The North Carolina Court of Appeals affirmed the Commission's decision and that the employees' injuries were not compensable. *Graven, et al. v. N.C. Dept. of Public Safety-Division of Law Enforcement, et al.*, 762 S.E.2d 230, 2014 N.C. App. LEXIS 811 (2014).

North Carolina's "going and coming" rule provides that "[i]njuries received by an employee while traveling to or from his place of employment are usually not covered by the Act unless the employer furnishes the means of transportation as an incident of the contract of employment" or if the injuries are sustained while the employee is "on the premises owned or controlled by the employer[.]"

In holding that the "going and coming" rule applied to bar the employees' claims, the Court noted that although the employees were in a state-owned vehicle at the time of the accident, the vehicle "was provided as an accommodation" and that the employees were "not traveling to perform work for their employer"; instead, they were injured "while *traveling back*" to the workplace. (Emphasis in original.)

The Court also held that an "increased risk" analysis did not apply to allow the employees to receive workers' compensation benefits because they: (1) voluntarily attended the social event and (2) were injured due to a risk that is common to the public while traveling on a public road.

The Court emphasized six factors that can serve as guideposts to determine whether employee injuries incurred at employer-sponsored recreational and social activities arise out of and in the course of employment. Those factors include:

- (1) whether the employer in fact sponsored the event;
- (2) whether attendance at the event is voluntary;
- (3) whether there is some degree of encouragement of employees to attend the event;

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JACKSON LEWIS
CAROLINA OFFICES

GREENVILLE OFFICE

One Liberty Square
55 Beattie Place
Suite 800
Greenville, SC 29601
864-232-7000
Stephanie E. Lewis,
Office Managing Shareholder

RALEIGH-DURHAM OFFICE

1400 Crescent Green
Suite 215
Cary, NC 27518
919-854-0044
Richard S. McAtee,
Office Managing Shareholder

EDITORIAL BOARD:

Ted N. Kazaglis, Esq.
919-854-0044
kazaglis@jacksonlewis.com

Roger S. Kaplan, Esq.
631-247-0404
kaplanr@jacksonlewis.com

Mei Fung So, Esq.
212-545-4000
som@jacksonlewis.com

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Jackson Lewis P.C. represents management exclusively in workplace law and related litigation. Our attorneys are available to assist employers in their compliance efforts and to represent employers in matters before state and federal courts and administrative agencies. For more information, please contact the attorney(s) listed or the Jackson Lewis attorney with whom you regularly work.

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- (4) whether the employer financed the event, and to what degree;
- (5) whether employees regarded the event as an employment benefit to which they were entitled to as of right; and
- (6) whether the employer benefited from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having the opportunity to make speeches and present awards.

In addition to reviewing the guidance of the North Carolina Court of Appeals, employers can take other precautions to minimize the risk of unintended consequences while celebrating the season with coworkers. When alcohol is served, employers may

be the ones with a hangover because of employees' inappropriate conduct, such as offensive language and unwelcome sexual advances. Among other things, consider reminding employees of substance abuse and sexual harassment policies, providing plenty of food and non-alcoholic beverages, limiting or not providing alcohol, inviting spouses and dates, and designating party managers and monitoring conduct.

If you need assistance in understanding employer responsibilities related to employer-sponsored events, please contact Ted N. Kazaglis, at kazaglis@jacksonlewis.com, Paul Holscher, at paul.holscher@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work.

Erasing North Carolina's Rejection of a Full Blue Pencil Doctrine for Non-Competes?

Historically, North Carolina's law of non-competition agreements has prohibited a court from "drafting a new contract for the parties" where it finds an overly broad non-compete agreement. A court has been limited to striking distinctly separable parts of a non-compete agreement, if it found them overbroad, it could not revise or rewrite the offending covenant—a limited "blue pencil" doctrine. Now, a divided panel of the North Carolina Court of Appeals may have partially erased this strict rejection of the full "blue pencil" doctrine in *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, et al.*, No. COA 14-185 (Aug. 5, 2014), to allow courts greater flexibility in adjudicating non-competition disputes.

The parties executed a non-competition agreement in tandem with the plaintiff's purchase of the defendant's business. The agreement specifically provided that a court could revise and refine its duration, scope, or geographic area in the event any of its provisions were determined to be overly broad. After the plaintiff discovered that the defendant created a competing company immediately after the sale, he brought suit.

The trial court found the non-compete agreement's description of the geographic area, which was not limited to places where the defendant had former customers, was overly broad, covering more territory than was necessary to protect the plaintiff's legitimate business interests—the maintenance of the

plaintiff's customer relationships. But rather than exercise the authority granted in the non-compete agreement to redraft and limit the description of the geographic area, the trial court left it as it was and determined the clause to be unenforceable. The trial court relied on North Carolina's long-established, limited blue pencil doctrine in support of its reluctance to rewrite the agreement.

On appeal, a majority of the North Carolina Court of Appeals, in an opinion written by Judge Robert C. Hunter, reasoned that a trial court's ability to go beyond the restrictions of the "blue pencil" doctrine, specifically in a sale-of-business context, made "good business sense and better protects both a seller's and purchaser's interests in the sale of a business." Finding North Carolina courts have indicated a willingness to recognize and enforce a revised non-compete, *Outdoor Lighting Perspectives Franchising, Inc. v. Harders*, 747 S.E.2d 256 (2013), the Court distinguished *Beverage Sys.* from prior cases because the non-competition agreement at issue expressly authorized a court to revise the agreement. It determined that non-competes drafted pursuant to the sale of a business are afforded more latitude than those arising out of the employment relationship since the parties were in relatively equal bargaining positions. Therefore, the Court ruled the trial court should have exercised its power to revise the offending geographic provision to make the agreement enforceable. It remanded the case to the trial court to do so.

Whether *Beverage Sys.* will be appealed to the North Carolina Supreme Court remains to be seen. The North Carolina Supreme Court historically is more conservative with regard to the enforcement of non-competition agreements than the Court of Appeals. Moreover, it is unlikely that the reasoning in *Beverage Sys.* would be applied to non-compete agreements arising outside the context of a sale of a

business. Regardless, North Carolina employers may be well-served to include a modification provision in their non-compete agreements expressly authorizing court modification so that this argument is available in the event the original covenant is determined to be overbroad.

If you have any questions about non-compete agreements, please contact Ted N. Kazaglis, at kazaglis@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work.

Worley Joins Jackson Lewis in Raleigh-Durham

We are pleased to announce **Amy R. Worley** has joined the firm's Raleigh-Durham office as Shareholder. Ms. Worley, who formerly served as Counsel at McGuireWoods, has extensive experience representing companies in all types of employment-related litigation as well as in regulatory matters involving data privacy and security.

"We are thrilled to welcome Amy to our Raleigh team," said **Rick McAtee**, Office Managing Shareholder in Raleigh-Durham. "Her strong background in data security and employment litigation combined with her tremendous professional reputation locally make her the perfect addition to our office."

Ms. Worley, who is a certified mediator and certified information privacy professional, has significant trial experience in state and federal courts. She represents clients, a majority of whom are financial services companies or vendors for financial services companies, on labor and employment matters, including data privacy, security and technology issues, focusing on helping them identify, classify and protect company and client assets. Ms. Worley also provides regulatory and compliance advice to clients across a broad range of workplace law issues.

Ms. Worley is a member of the North Carolina Bar Association, where she has previously served as CLE Chair, Treasurer and Secretary of its Labor & Employment Council, as well as the North Carolina Association of Women Attorneys and the International Association of Privacy Professionals. She is admitted to practice in Georgia and North Carolina.

JACKSON LEWIS NEWS

Accolades for Jackson Lewis

Jackson Lewis is pleased to announce the firm and its attorneys have been recognized in the latest edition of *Chambers USA: America's Leading Lawyers for Business*. The annual legal guide ranks firms and lawyers across the country in a variety of practice areas, including Labor & Employment, on the basis of written submissions, in-depth attorney and client interviews, and its own database resources.

Jackson Lewis Carolina attorneys designated as "Leaders in Their Field" are:

Ashley B. Abel (Greenville)
Patricia L. Holland (Raleigh-Durham)
Stephanie E. Lewis (Greenville)
Richard S. McAtee (Raleigh-Durham)
Andreas N. Satterfield, Jr. (Greenville)

We are pleased to announce the firm has been designated a "Powerhouse" in both Complex and Routine Employment Litigation in the *BTI Litigation Outlook 2015*. This is the fourth time in a row the firm has been selected a "Powerhouse" by BTI. An in-depth analysis of today's litigation market, BTI's latest

report is based on 300 one-on-one interviews with corporate counsel from Fortune 1000 companies.

We also are pleased to announce 119 of the firm's attorneys have been named in the 2015 edition of *The Best Lawyers in America*®, selected by professional peers as being among the best in the area of employment and labor law. The firm's presence in this prestigious publication has grown steadily each year, with the number of attorneys listed more than tripling since the 2010 edition. Among the Jackson Lewis attorneys named are:

Patricia L. Holland (Raleigh-Durham)
Stephanie E. Lewis (Greenville)
Richard S. McAtee (Raleigh-Durham)
Andreas N. Satterfield, Jr. (Greenville)
Allison E. Serafin (Raleigh-Durham)
Ann H. Smith (Raleigh-Durham)
Sandi R. Wilson (Greenville)

We are proud to congratulate the following attorneys on being named by North Carolina and South Carolina *Super Lawyers*® as among the top attorneys in those states (only five percent of lawyers in a state are named by *Super Lawyers*® each year):

Continued on next page

Ashley B. Abel (Greenville)
M. Robin Davis (Raleigh-Durham)
Patricia L. Holland (Raleigh-Durham)
Paul Holscher (Raleigh-Durham)
Ted N. Kazaglis (Raleigh-Durham)
Stephanie E. Lewis (Greenville)
Richard S. McAtee (Raleigh-Durham)
Andreas N. Satterfield, Jr. (Greenville)
Sandi R. Wilson (Greenville)

Mr. Satterfield also was named by South Carolina *Super Lawyers*® as one of the Top 25 Lawyers in the state across all practice groups.

Super Lawyers® called the following Rising Stars:

Matthew Duncan (Raleigh-Durham)
Wendy Furhang (Greenville)
T. Chase Samples (Greenville)
John Sulau (Greenville)

Greenville Business Magazine listed the following attorneys as “Legal Elite” in the Labor in Employment Law category:

Stephanie E. Lewis
Ellison F. McCoy
Andreas N. Satterfield, Jr.

Finally, our Greenville Office was recognized as one of the *Best Places to Work in South Carolina* by the South Carolina Chamber of Commerce, the Best Companies Group and *SCBIZ Magazine*.

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Preventive Strategies and
Positive Solutions for the Workplace®

Jackson Lewis P.C. represents management exclusively in employment, labor, benefits and immigration law and related litigation.

The firm has more than 770 attorneys practicing in 55 locations throughout the U.S. and Puerto Rico.

Jackson Lewis represents employers before state and federal courts and administrative agencies on a wide range of issues, including discrimination, wrongful discharge, wage/hour, affirmative action, immigration, and pension and benefits matters. Jackson Lewis negotiates collective bargaining agreements, participates in arbitration proceedings and represents union-free and unionized employers before NLRB and other federal and state agencies. The firm counsels employers in matters involving workplace health and safety, family and medical leaves and disabilities.

MANAGEMENT EDUCATION OPPORTUNITY

Surveying the Workplace Law Landscape

November 19, 2014

The Westin Poinsett Hotel
120 South Main Street
Greenville, SC 29601

Registration: 8:30 – 9:00 a.m.
Program: 9:00 – 1:30 p.m.

Join Jackson Lewis attorneys for a lively program on, among other topics:

Best Hiring Practices

*Onboarding and Exiting Employees in
an Emerging Non-Compete World*

*Arbitration and Mediation –
Considerations and How to Achieve
a Successful Resolution*

Plus: Lunch and Conversation with **Otis Rawl**,
President and CEO of the South Carolina
Chamber of Commerce

Please register at www.jacksonlewis.com.

For questions, please contact:
Michelle Tyler at (864) 672-8035 or
Michelle.Tyler@jacksonlewis.com

Mail regarding your subscription
should be sent to

Jackson Lewis P.C.
666 Third Avenue
New York, NY 10017

Attn: Client Services
or
contactus@jacksonlewis.com

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