1996

Fired Employees and/or Frozen-Out Shareholders (An Essay)

Deborah A. Schmedemann
Mitchell Hamline School of Law, deborah.schmedemann@mitchellhamline.edu

Publication Information

Repository Citation
http://open.mitchellhamline.edu/facsch/46

This Article is brought to you for free and open access by Mitchell Hamline Open Access. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
Abstract
The thesis of this essay can be stated as follows: Shareholder-employees should be able to recover for loss of employment, within the cause of action provided by corporate law, where the termination violates public law, breaches the agreement among the shareholders, or is unsupported by legitimate business purposes. In Part II, this essay presents the employment model, including the paradigm of employment that the law builds on, the starting premise of employment law, the roles of private and public law, and the remedies afforded for violations of an employee's rights. In Part III, this essay develops the corporate model, discussing much the same topics and focusing on the ways in which the courts have analyzed freeze-outs of shareholders through termination of employment. Parts II and III highlight Minnesota law, although the issues and solutions discussed are generic across American jurisdictions. In Part IV, this essay discusses the interaction of employment and corporate law. Under Minnesota's “innovative” statute, when a shareholder suffers a loss of her capacity to contribute her labor to the enterprise, this interest should not be obscured by the capital interest, but rather protected by the rules of employment law and valued for its own sake.

Keywords
Employment law, corporate law, Minnesota law, 302A.751, Business Corporations Act, MBCA, minority shareholders, closely held corporations, shareholder-employee

Disciplines
Business Organizations Law | Labor and Employment Law

This article is available at Mitchell Hamline Open Access: http://open.mitchellhamline.edu/facsch/46
I. INTRODUCTION

If you represented Jane Allison in the following situation, how would you categorize her claim?

Ms. Allison, currently in her early fifties, has worked in human resources (HR) for three decades. She spent most of her
career working on the HR staff of various local corporations; her specialty has been training employees and managers on issues of diversity and workplace relations. About five years ago, when her youngest daughter left for college, Ms. Allison began to think about making changes in various aspects of her life, including her career. She desired more control over her schedule, and she wanted to indulge her desire to be her own boss. So Ms. Allison responded positively to an overture from three junior colleagues to form an HR consulting firm that would provide training on issues of diversity and workplace relations. The colleagues sought out Ms. Allison for the credibility and contacts her lengthy career afforded her.

Ms. Allison and her three colleagues agreed that each would contribute one-quarter of the firm's start-up capital, serve as an officer (Ms. Allison as vice-president) and director, and provide consulting services for the firm’s clients. The foursome incorporated the firm, creating a closely held corporation.

Initially the firm operated without written agreements as to the rights of the founders in the event of separation. Ms. Allison intended to stay with the firm until retirement. Two years ago, the founders executed separation agreements, which provide that a shareholder may be terminated from employment on the basis of “performance deficiencies.”

Although the business operated smoothly and successfully for four years, relationships between Ms. Allison and the other founders deteriorated rapidly over the past year. In part, the others wished to expand the business rapidly, particularly through the use of contract trainers; Ms. Allison believed that the firm could not supervise the contract trainers adequately and that the firm’s reputation for quality would suffer from too rapid growth. In part, the other founders perceived that Ms. Allison had become less productive. They perceived that she worked fewer hours than when the business started; that her presentations were less dynamic and effective; and that their customers sought a livelier, more current training program. These impressions were based on slim anecdotal evidence. The other founders also determined that the firm was well enough established that Ms. Allison’s contacts and credibility were of little present utility.

While Ms. Allison was, of course, aware of the strain, she was nonetheless surprised when the other founders voted to reduce
her salary and deny her a quarterly bonus. This action precipitated a meeting at which the other founders bluntly detailed their dissatisfaction with her. The firm’s president summarized the concerns as follows: “Perhaps it’s your age—who knows? The point is that you are out of step with current training trends and the needs of our customers. And you are keeping this firm from realizing its growth potential.” The meeting ended acrimoniously. Two weeks later, Ms. Allison was informed that her employment was terminated. She was given a check as payment for her shares, which she considers seriously below fair market value.

Ms. Allison’s case is difficult to categorize because it arises out of a complex relationship among Ms. Allison, her co-founders, and the firm. Just as property ownership can be understood as a “bundle of sticks,” so Ms. Allison can be understood as holding a “bundle of sticks” relative to the firm. The “sticks” are relationships: founder, shareholder, director, officer, employee. These relationships are governed in various ways by public law and private law, i.e., contract. Viewed one way, Ms. Allison is a fired employee, and her case is an employment case. Viewed another way, she is a frozen-out minority shareholder, and her case is a closely held corporation case.

In Part II, this essay presents the employment model, including the paradigm of employment that the law builds on,


2. The contrast in imagery here is interesting: Why are employees “fired” while shareholders are “frozen out”? Of course, neither is a particularly appealing prospect.

the starting premise of employment law, the roles of private and public law, and the remedies afforded for violations of an employee's rights. In Part III, this essay develops the corporate model, discussing much the same topics and focusing on the ways in which the courts have analyzed freeze-outs of shareholders through termination of employment. Parts II and III highlight Minnesota law, although the issues and solutions discussed are generic across American jurisdictions. In Part IV, this essay discusses the interaction of employment and corporate law. The thesis of this essay can be stated as follows: Shareholder-employees should be able to recover for loss of employment, within the cause of action provided by corporate law, where the termination violates public law, breaches the agreement among the shareholders, or is unsupported by legitimate business purposes.

II. THE EMPLOYMENT MODEL

A. The Paradigm

The paradigm of employment, on which employment law rests, is a distinct, hierarchical dyad. The employer is a distinctly separate entity from and superior to the employee. The employer "rents" the employee. That is, the employee provides labor, effort, creativity, loyalty, etc. In return, the employer provides compensation as well as certain working conditions. Compensation typically takes the form of money (salary, hourly wages, bonuses) and benefits (insurance, pension, paid vacation). Working conditions include the physical environment, work schedule, performance standards, and organizational structure.\(^4\)

A key condition of employment is job security (or insecurity). Losing one's job is difficult because, with time, employees become bound to employers.\(^5\) Seniority systems tie compensation and favorable working conditions to tenure with the employer. Employees develop job skills of little use to other employers. Employees become psychologically committed to the employer and co-workers; they come to define themselves by


their career identity.\textsuperscript{6} Work provides structure and meaning to daily life.\textsuperscript{7}

Evidence suggests that the employer benefits from the provision of job security as well. A policy of job security induces the employee to feel obligated to reciprocate, that is, to work loyally and to stay with the employer.\textsuperscript{8} Job insecurity correlates with reduced work effort, propensity to leave the employer, and resistance to change within the workplace.\textsuperscript{9} Of course, an employer providing job security thereby reduces its flexibility somewhat.

To a certain extent, the employer and the employee negotiate the terms of their relationship, such as the degree of job security. According to the theory of compensating differentials, employees "buy" advantageous working conditions by accepting reduced compensation.\textsuperscript{10} Thus, for example, a highly secure position may be paid less than a comparable position with little job security.\textsuperscript{11}

To an ever increasing extent, the law also determines the terms of the employment relationship.

\textbf{B. The Operating Premise: Employment at Will}

Despite the significance of job security to employees and employers, the operating premise of employment law is the rule of at-will employment: that the employer or employee may terminate the relationship for any or no reason.\textsuperscript{12}

\begin{itemize}
\item \textsuperscript{6} See Report of a Special Task Force to Secretary of Health, Education and Welfare, \textit{Work in America} 3-7 (1973).
\item \textsuperscript{7} When asked to name the most important things in life, Sigmund Freud reportedly answered, "All that matters is love and work." \textit{The Oxford Dictionary of Quotations} 294, No.2 (4th ed. 1992).
\item \textsuperscript{12} E.g., Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983); Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884). At one time, the U.S. Supreme Court saw a constitutional dimension to the at-will rule. \textit{Adair v. United States}, 208 U.S. 608, 619, 28 S.Ct. 468 (1908).
\end{itemize}
The at-will rule has been the subject of some praise and considerable criticism in recent years. The primary argument in support of the at-will rule is one of economic efficiency: the employer and employee choose at-will through autonomous contracting; it provides both with a measure for controlling the other's behavior (the employer can terminate the employee, and the employee can quit); it permits either to sever a bad relationship easily; and it produces little transaction costs (e.g., litigation). Critics assert, however, that at-will employment permits employers to coerce employees into illegal or illicit acts; employees do not stand on an equal footing with employers and are dependent on job security; and countries similar to the United States mandate job security.

Presumably in response to this criticism, numerous exceptions to the at-will rule have developed in recent years. Some rest on private law, that is, the parties' own contract; others derive from public law, that is, statutory or tort rules applicable regardless of the parties' contract.

C. Private Law Exceptions to Employment at Will

Employment at will is a default rule—it operates only in the absence of a contract to the contrary. In recent years, courts have recognized such contracts in a variety of situations. The

---

18. As the Minnesota Supreme Court has described it, the at-will rule is a rule of "contract construction," not substantive law. Pine River State Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983).
following examples from leading Minnesota cases are typical.

In *Thomsen v. Independent School District No. 91*, the Minnesota Supreme Court held that a written employment contract for a fixed term is enforceable. Further, the court held that an employment contract for a fixed term is terminable only for cause.

In the leading Minnesota case on contracts for job security, *Pine River State Bank v. Mettille*, the Minnesota Supreme Court determined that an employee handbook containing specific dismissal procedures was effective as a contract, where the language was definite, the handbook had been disseminated to the terminated employee, and the employee had continued to work thereafter. Less definite language regarding grounds for termination was not deemed contractually binding, however. Furthermore, as later cases have established, disclaimers can preserve the at-will rule. Examples include language preserving the employer's prerogative or indicating that no contract is intended.

Given certain supporting facts, oral promises of job security may be deemed to constitute contracts. In *Eklund v. Vincent Brass & Aluminum Co.*, the Minnesota Court of Appeals permitted the jury to decide a case based on an oral offer of employment until retirement, so long as the employee performed satisfactorily, where the employer was informed that the employee was giving up a long-term position elsewhere and that the employee and his family would be making major changes in their lives based on the promise. Employers, however, generally win cases with less compelling facts to corroborate the oral promise.

---

20. Thomsen v. Independent Sch. Dist. No. 91, 244 N.W.2d 282, 284 (Minn. 1976).
21. Id.
23. Id.; see also *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 884 (Minn. 1986) (finding language definite enough even though precise nature of rights was unclear); *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 856-57 (Minn. 1986) (finding handbook language too vague to go to the jury).
26. E.g., *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 372 (Minn. 1995) (holding promises made to employee not sufficiently definite to create offer of
When the employee provides an unusual contribution to the employer, beyond the labor required by the job itself, the court may recognize an enforceable contract even though the parties' communications are inadequate to form an enforceable contract. In *Bussard v. College of Saint Thomas, Inc.*, the court reversed summary judgment for the employer where the employee donated $350,000 in stock to the college in exchange for permanent employment, finding that the stock constituted valuable consideration sufficient to overcome the at-will rule.  

The courts have recognized the parties' power to alter their arrangement as to job security over time. The *Pine River* case, for example, involved an initially at-will employee who acquired job security when the employer promulgated the employee handbook. In a more recent case, the Minnesota Supreme Court affirmed that an employer can shift from a contract providing job security to an at-will arrangement so long as the new document clearly rescinds the previous document.

The courts also have adjudicated cases in which employers have sent two concurrent and conflicting messages. For example, in *Bratton v. Menard, Inc.*, the employer’s handbook provided for progressive discipline, while the individual contract indicated that the employment was at-will; the court sent the case to the jury. Similarly the court reversed summary judgment for the employer in *Rognlien v. Carter*, where the handbook contained an at-will statement, but oral statements indicated that the position carried job security.

Where the traditional requirements of contract are not met, but the equities of the situation are compelling, a promissory estoppel claim may succeed. In *Grouse v. Group Health Plan*, Mr. Grouse succeeded on this theory, where he quit his previous job and turned down another job offer in reliance on Group Health's offer, only to learn that Group Health had given the job to another candidate even before Mr. Grouse could start employment; *Aberman v. Malden Mills Indus.*, 414 N.W.2d 769, 771-72 (Minn. Ct. App. 1987) (holding subjective impression insufficient).

However, the courts have subsequently limited the application of promissory estoppel in various respects.

D. Public Law Exceptions to Employment at Will

Even where the parties have not themselves contracted away from the at-will rule, the law restricts the employer's prerogative. In broad terms, these restrictions express the public's interest by prohibiting conduct that either harms society as a whole or crosses the boundaries of acceptable behavior within our culture. Some restrictions operate through legislation, others through the application of standard tort law principles to the employment setting.

Federal and state statutes prohibit discrimination in employment based on certain protected statuses of the employee. At the federal level, Title VII prohibits discrimination based on race, color, religion, sex, and national origin; the Age Discrimination in Employment Act (ADEA) protects employees forty and over; and the Americans with Disabilities Act (ADA) protects disabled employees. Paralleling and extending the federal statutes, the Minnesota Human Rights Act (MHRA) prohibits discrimination based on race, color, creed, national origin, religion, sex, marital status, status with regard to public assistance, membership or activity in a local commission dealing with discrimination, disability, age, and sexual orientation. As legislative history makes clear, these statutes are intended not just to protect individual employees against discrimination, but also to avoid the economic and human waste

34. See Holloway & Leech, supra note 3, at 199-243, 276-363; Modjeska, supra note 3, at 194-306; Befort & Schanfield, supra note 3, at 192-209, 394-55.
35. Indeed, local ordinances paralleling the federal and state legislation also may be pertinent. E.g., St. Paul, Minn., Code §§ 183.01-.03 (1993); Minneapolis, Minn., Code of Ordinances §§ 199.10-40 (1993).
of employment discrimination based on irrelevant characteristics.\(^\text{40}\)

A second set of statutes prohibits employers from terminating employees for actions that may further the public interest. By Minnesota statute, employers may not terminate employees who report in good faith actual or suspected violations of the law to government officials, who are requested to participate in a public hearing or investigation, who refuse to perform an act reasonably believed to violate the law,\(^\text{41}\) or who serve on juries.\(^\text{42}\) Various state and federal statutes protect employees who further particular statutory aims such as environmental protection.\(^\text{43}\)

A third set of statutes also protects employees against reprisal, not for engaging in an action of direct public benefit, but rather for asserting the employee’s own legal rights. The premise of these statutes is that rights guaranteed employees would be hollow if employers could terminate employees who assert statutory rights. As examples, statutes on the following topics include non-reprisal provisions: non-discrimination,\(^\text{44}\) union activities,\(^\text{45}\) minimum wage and overtime,\(^\text{46}\) pensions and benefits,\(^\text{47}\) family and medical leaves,\(^\text{48}\) and safety and health.\(^\text{49}\) Somewhat related are statutes protecting employees’ privacy interests from undue intrusion.\(^\text{50}\)


\(^\text{41}\) As to the third situation, the employee must inform the employer that the order is being resisted on that ground. Minn. Stat. § 181.932 (1994); see also Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 571 (Minn. 1987) (seeming to create a parallel common law cause of action); Bolton v. Department of Human Serv., 527 N.W.2d 149, 154 (Minn. Ct. App. 1995) (indicating that the statute occupies the field), rev’d on other grounds, 540 N.W.2d 523 (Minn. 1995).

\(^\text{42}\) Minn. Stat. § 593.50 (1994).


Tort law, in defining the boundaries of acceptable behavior within our culture, regulates not so much the reason for, but the manner of terminating employees. Defamation law provides a recovery for an employee who has been slandered or libeled in situations where the employer has acted improperly enough to lose the benefit of the qualified privilege typically afforded such speech. In rare cases, an employer may be liable for fraud or misrepresentation in a termination situation. Even less likely, but theoretically possible, is the tort of intentional infliction of emotional distress. If a manager acts outside the scope of his or her employment and in doing so tortiously interferes with an employee's employment contract, there may be personal tort liability.

Thus far, Minnesota courts have declined to adopt the position of a minority of American jurisdictions: That employers are bound by law to a covenant of good faith and fair dealing, much as other contracts carry such an obligation. Rather, the facts of the specific situation must give rise to the covenant for such a potentially broad protection of job security to apply.


51. See Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980) (general framework); see also MINN. STAT. § 181.933 (1994) (requiring the employer to give the employee a truthful statement of the reason for termination and providing some immunity against defamation); Frankson v. Design Space Int'l, 394 N.W.2d 140, 144 (Minn. 1986) (recognizing intracorporate defamation); Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986) (recognizing compelled self-publication); Bolton v. Department of Human Services, 540 N.W.2d 523, 525-26 (Minn. 1995) (declining to recognize defamation by conduct); Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 380-81 (Minn. 1990) (loss of qualified privilege).


E. Remedies

The remedies afforded a successful plaintiff in a wrongful discharge case depend on the theory supporting recovery.

For breach of contract claims, the remedy is damages, measured by what the employee would have received had the contract been carried out according to its terms. While the typical award is back-pay, front-pay (i.e., a pay-based remedy extending beyond the date of trial) also may be awarded in an appropriate case. The employee has the duty to mitigate. An alternative contract measure when the contract is not well defined is quantum meruit.

Recovery based on promissory estoppel is confined to the plaintiff's reliance damages, rather than what he or she would have earned from the defendant employer.

Tort remedies are more substantial than contract remedies. The successful plaintiff in a tort case may recover compensatory, emotional distress, and punitive damages. The latter requires proof of willful indifference to the plaintiff's rights.

Two important remedies are unlikely to be afforded for contract or tort claims: reinstatement and attorney's fees. The latter may be recoverable where the contract provides for it, which is unlikely in employment cases, or where the employer or its attorney has conducted the litigation in bad faith.

The remedy available to the successful plaintiff in a statutory case is set by the specific statute. The possibilities include not only those listed above, but also liquidated damages, attorney's fees, and equitable or affirmative relief, namely reinstatement to employment. For example, the federal Age Discrimination in

\textit{Employment Law, 16 WM. MITCHELL L. REV. 1119 (1990) (discussing the covenant of good faith and fair dealing in Minnesota).}

59. \textit{Id.} at 709.
60. Frankson v. Design Space Int'l, 394 N.W.2d 140, 145 (Minn. 1986).
63. \textit{MINN. STAT.} § 549.20 (1994).
65. \textit{MINN. STAT.} § 549.21 (1994).
Employment Act provides for back-pay, attorney's fees, liquidated damages (double the actual damages) in the event of willful misconduct, and reinstatement. By comparison, the Minnesota Human Rights Act provides for back-pay and benefits, compensatory damages up to three times the actual damages sustained, damages for mental anguish and suffering, up to $8,500 in punitive damages, a civil penalty, and attorney's fees, as well as reinstatement.

III. THE CLOSELY HELD CORPORATION MODEL

A. The Paradigm

By Minnesota statute, a closely held corporation is a corporation which does not have more than thirty-five shareholders. The paradigm of the closely held corporation is a flat, blurry organization, an "intimate enterprise." Investment, control, administration, and labor (at least in part) are in the hands of a small number of individuals. This is unlike large, publicly held corporations where these functions are allocated to different individuals or groups.

As alluded to in Part I, the shareholder in a closely held corporation typically holds a "bundle" of relationships with the corporation. The shareholder not only invests in and partially owns the corporation, but also may have founded it and most likely directs it, manages it, and labors on its behalf. Furthermore, these relationships with the corporate entity probably are secondary, in terms of everyday significance, to the shareholder's relationship with the other shareholders. The shareholders in a closely held corporation are engaged in a mutual venture involving the financial resources, energy, time, creativity, commitment, loyalty, reputation, and livelihood of each shareholder. Unlike the standard employment relationship, where

---

67. MINN. STAT. § 363.071, subd. 2 (1994).
68. MINN. STAT. § 302A.011, subd. 6a (1994).
70. See 1 O'NEAL & THOMPSON, CLOSE CORPORATIONS, supra note 3, § 1:08.
71. Id. § 1:07. Of course, some shareholders do not work for their corporations.
72. Id. (explaining business situations that give rise to the formation of close corporations); see also Thompson, supra note 70, at 702.
the employer is a discernible entity distinct from the employee, a shareholder in a closely held corporation is in essence employed by himself or herself and his or her co-shareholders.\textsuperscript{73}

As in a standard employment relationship, the shareholder’s exit from a closely held corporation is difficult. Loss of the shareholder relationship entails loss of employment, as discussed in Part II. In addition, it is difficult for the shareholder to extract his or her economic share from the corporation because there is no market for the shares.\textsuperscript{74} Involuntary exit, or “freeze-out,” can be accomplished in various ways: forced redemption of shares, transactions benefitting some shareholders over the frozen-out shareholder, withholding of dividends, and termination of employment.\textsuperscript{75}

The remainder of this part focuses on the law’s handling of freeze-outs accomplished through termination of employment.

B. \textit{The Operating Premise: The Duty to Act Fairly}

Minnesota’s Business Corporations Act (MBCA) provides remedies for frozen-out minority shareholders of closely held corporations. The present statute\textsuperscript{76} provides remedies when:

(2) the directors or those in control of the corporation have acted fraudulently or illegally toward one or more shareholders in their capacities as shareholders or directors, or as officers or employees of a closely held corporation;

\textsuperscript{73} See 1 O’NEAL \& THOMPSON, CLOSE CORPORATIONS, \textit{supra} note 3, § 1:08.

\textsuperscript{74} \textit{Id.}; see also 2 O’NEAL \& THOMPSON, CLOSE CORPORATIONS, \textit{supra} note 3, § 9:02.

\textsuperscript{75} See generally 2 O’NEAL \& THOMPSON, CLOSE CORPORATIONS, \textit{supra} note 3, § 9:03.

\textsuperscript{76} The statute was first enacted in 1981. Minnesota Business Corporations Act, ch. 270, § 108, 1981 Minn. Laws. 1213. As initially enacted, the statute provided a remedy when a minority shareholder was treated “fraudulently, illegally, or in a manner persistently unfair.” The 1983 amendments lowered the threshold for statutory relief to “unfairly prejudicial” and introduced the concept that injury suffered as an employee qualifies for statutory protection. Ch. 368, § 9, 1983 Minn. Laws 2524.

For a discussion of the law preceding the statute, see MINN. STAT. § 302A.751 (1981) (Reporter’s Notes). For the leading common law cases pertaining to fiduciary duty, see Harris v. Mardan Business Sys., 421 N.W.2d 350 (Minn. Ct. App. 1988) (determining that an individual with a small percentage of stock and “sweat equity” in the corporation must rely on employment law, rather than corporate law, to challenge his termination), \textit{petition for review denied}, (Minn. May 18, 1988); Evans v. Blesi, 345 N.W.2d 775 (Minn. Ct. App. 1984) (finding for the frozen-out shareholder where the majority engaged in various acts of intimidation and secretiveness, under a standard requiring open, honest, and fair treatment; awarding lost wages, punitive damages, and a buy-out).
(3) the directors or those in control of the corporation have
acted in a manner unfairly prejudicial toward one or more
shareholders in their capacities as shareholders or directors
of a corporation that is not a publicly held corporation, or as
officers or employees of a closely held corporation; ... 

Furthermore, in subdivision 3a, the MBCA contains explicit
directions to the courts analyzing cases involving closely held
corporations:

[T]he court shall take into consideration the duty which all
shareholders in a closely held corporation owe one another
to act in an honest, fair, and reasonable manner in the
operation of the corporation and the reasonable expectations
of all shareholders as they exist at the inception and develop
during the course of the shareholders’ relationship with the
corporation and each other. For purposes of this section, any
written agreements, including employment agreements and
buy-sell agreements, between or among shareholders or
between or among one or more shareholders and the
corporation are presumed to reflect the parties’ reasonable
expectations concerning matters dealt with in the agree­
ments. 

Subdivision 3a was originally enacted in 1983. The last
sentence was added in 1994; at the same time, the legislature
changed the first sentence’s reference to the reasonable expecta­
tions of “the shareholders” to now read “all shareholders.”

Distilled to its essentials, the MBCA provides several
standards applicable to freeze-outs of minority sharehold­
ers—including actions taken against shareholders as employees.
The general rule proscribes conduct that is “fraudulent,”
“illegal,” or “unfairly prejudicial.” Subdivision 3a states two
distinct duties: (1) to act “in an honest, fair, and reasonable
manner” and (2) to act in accord with the “reasonable expecta­
tions of all shareholders,” which are presumptively reflected in
written agreements. This language has parallels in the statutes
and case law of other states.

78. Id. § 302A.751, subd. 3a.
81. See Thompson, supra note 69, at 708-18 (discussing statutes and cases employing
the concepts of oppression, unfair prejudice, and reasonable expectations). It is not,
however, common for a statute to specifically identify the shareholder’s employment
Insofar as the Minnesota statute sets norms based on the shareholders' reasonable expectations, it looks to private law, e.g., contract. The remaining language seems to set a public law standard. As the law has developed, the concepts of unfair prejudice and reasonable expectations have merged, while fraud and illegality have received less judicial attention.

C. Unfair Prejudice and Reasonable Expectations

There are various possible answers to the abstract issue whether the employment rights of a shareholder-employee should be greater than, the same as, or less than those of an employee who is not also a shareholder. One could decide that the rights should be the same as those of a regular employee, which is to say that the at-will rule would prevail absent an exception available to a regular employee. One could decide that the shareholder qualifies for some measure of job security not available to regular employees. In several cases implementing the language of section 302A.751, the Minnesota Court of Appeals has crafted a more complex, fact-specific, middle-ground approach.

In Sawyer v. Curt & Co., a case with few stated facts, the court wrote in broad terms of the relationship between reasonable expectations, unfair prejudice, and the shareholder's employment interest. Ms. Sawyer and three other individuals owned the company in which Ms. Sawyer served as president, CEO, and director. She was removed as president and CEO by the others for undisclosed reasons. The court wrote:

Unfairly prejudicial conduct may be found if a share-
holder's reasonable expectations with respect to that shareholder's relationship to the corporation are defeated. There is no doubt the reasonable expectations of respondent, who is a shareholder-employee-founder of appellant corporation, included a job, a salary and a significant place in management. This expectation was frustrated when she was terminated from her employment without any attempt to compensate her for the loss of status within the corporation. We believe when those in control of a closely held corporation terminate the employment of a moving shareholder, a good faith effort must be made to buy-out the shareholder at a fair price or adjust the income distribution mechanism to assure the shareholder an equitable investment return. 87

Thus, the court afforded Ms. Sawyer a remedy under section 302A.751. 88

Then in Dullea v. Dullea Co., the court viewed the employment and corporate claims as unrelated. 89 John Dullea brought suit when he was fired from the family farming corporation. He challenged not only his termination, but also the management of the corporation and pension fund. 90 In one part of the opinion, the court ruled that Mr. Dullea's wrongful termination claim failed because he was an at-will employee and had not proved any exceptions to the at-will rule. 91 In another part of the opinion, the court ruled against him on his section 302A.751 claim, finding that he had participated in making the decisions he challenged, legitimate business reasons supported the challenged expenditures, and he had received adequate salary and benefits. 92 It is unclear whether Mr. Dullea's pleadings framed his termination as an incident of unfair prejudice under section 302A.751.

Easily the most prominent of the several appellate cases under section 302A.751 is Pedro v. Pedro. 93 The three Pedro

87. Id. at *2 (citations omitted).
88. Id. at *3.
90. Id.
91. Id. at *3.
92. Id.
brothers co-owned and co-managed the family luggage business. They had worked in the business for decades when squabbles began in the late 1980s. Alfred discovered discrepancies in the business’ books, and he pressed for an investigation. Although his brothers resisted, two accountants did investigate and determined that there were indeed missing funds. Alfred’s brothers harassed him during this period, e.g., by having him trailed by a private investigator, by interfering in his areas of responsibility, and by threatening to fire him. Ultimately, they placed him on a leave of absence and then, at age sixty-two, fired him and told employees he had suffered a nervous breakdown. 94

In the first appeal, the court of appeals ruled that the trial court had used the jury improperly to decide the case, rather than advise the court, and thus remanded. 95 The court also discussed the general purpose and operation of section 302A.751. The court first noted that, under the common law, shareholders are analogous to partners and thus owe each other a fiduciary duty. 96 Because minority shareholders are in a vulnerable position, section 302A.751 affords the courts broad discretion to achieve equity when shareholders are unfairly treated. 97 As for the employment interest in particular, the court found that “[i]n a closely held corporation the nature of the employment of a shareholder may create a reasonable expectation by the employee-owner that his employment is not terminable at will.” 98 The court also noted that the proper inquiry is whether the shareholder has a reasonable “expectation” of job security, not whether there was an “agreement” to that effect. 99

In the second appeal, the court affirmed a substantial award to Alfred Pedro.100 In addition to the principles set forth above, the court noted that the law requires shareholders to act in accord with the “highest standards of integrity and good faith

94. Pedro II, 489 N.W.2d at 799-800.
95. Pedro I, 463 N.W.2d at 288.
96. Id. (citing Westland Capitol Corp. v. Lucht Eng’g, 308 N.W.2d 709, 712 (Minn. 1981); Evans v. Blesi, 345 N.W.2d 775, 779 (Minn. Ct. App. 1984)).
97. Id. at 288-89.
98. Id. at 289.
99. Id. at 289-90. Presumably an “expectation” is more easily formed than an “agreement.” The issue arose as a challenge to the special verdict form.
100. Pedro II, 489 N.W.2d at 800-01.
in their dealings with each other." The court cited various actions failing to meet this standard: hiring the private investigator, fabricating false accusations, failing to make the payments required under the stock repurchase agreement, etc. More important, the court noted that a shareholder's reasonable expectation extends beyond ownership to include a job and salary, referring to the Pine River and Eklund cases, and then concluded that the facts implied an agreement to provide lifetime employment to Alfred. The court stressed the longevity of the brothers' employment. Thus, the loss of the employment interest merited separate recovery.

Finally, the court of appeals reached a different outcome, while essentially following the Pedro analysis, in Kelley v. Rudd. Mr. Kelley and Mr. Rudd co-founded a jewelry business in which Mr. Rudd eventually became the majority shareholder. Early on, Mr. Kelley formed an expectation of permanent employment, but he and Mr. Rudd then entered into two consecutive employment agreements providing for termination with notice but without cause. After these agreements expired, Mr. Rudd terminated Mr. Kelley's employment.

The court denied Mr. Kelley a remedy under section 302A.751. Mr. Kelley's claim hinged on his termination, and the court determined that, unlike Alfred Pedro, he did not have a reasonable expectation of continued employment. Although Mr. Kelley may have had such an expectation before the written agreements, they altered that expectation. The court did not explain why the original expectation did not revive once the agreements expired. Furthermore, the court found that Mr. Rudd had not engaged in intimidating tactics.

101. Id. at 801 (citing Prince v. Sonnesyn, 25 N.W.2d 468, 472 (Minn. 1946)).
102. The court rejected the defendants' argument that there could be no recovery if the shares had not diminished in value. Id. at 801-02.
103. The court also emphasized the view of the corporate accountant that the brothers would be employed at the business for life. Id. at 803.
104. Id.
106. Id. at *1.
107. Id. at *5-4.
108. Id. at *2-3.
109. Id. at *9. The court distinguished Evans v. Blesi, 345 N.W.2d 775, 779-80 (Minn. Ct. App. 1984), in which the court found in favor of the minority shareholder under the common law, in part because the majority shareholder threatened the
D. Fraud and Illegality

As noted above, section 302A.751 proscribes not only conduct that is unfairly prejudicial, but also "fraudulent" and "illegal" conduct.\textsuperscript{110} These two standards have received little attention from the courts.\textsuperscript{111}

Presumably, the reference to "fraud" incorporates common law principles of fraud. In general terms, the standard definition requires a false representation of a material past or present fact, the defendant's knowledge of the falsity (or assertion of the representation without knowing of its truth or falsity), the defendant's intention that the plaintiff act on the representation, action by the plaintiff in reliance on the representation, and damages suffered by the plaintiff as a proximate cause of the representation.\textsuperscript{112}

The term "illegality," which is not defined in the statute,\textsuperscript{113} has a less obvious reference point. One definition of "illegal" is "against or not authorized by law."\textsuperscript{114} Certainly "illegal" in section 302A.751 would refer to actions rendered illegal by corporate statutes, such as holding a shareholder's meeting without notice.\textsuperscript{115} In the context of shareholder-employees who are discharged, this language also could be read to incorporate public law restrictions on termination of employment, as described in section D of Part II.

This reading could be significant, because standing requirements of employment statutes may deny a shareholder-employee minority shareholder, acted behind his back, and engaged in intimidating behavior. \textit{Kelley}, 1992 WL 3651, at *3.

\textsuperscript{110} See supra text accompanying notes 77-81.
\textsuperscript{111} In \textit{Kelley v. Rudd}, Mr. Kelley alleged that he had been fraudulently induced into signing the employment contracts, as an aspect of his \$ 302A.751 claim. But the court ruled that the claim was barred by the six-year statute of limitations in Minnesota Statutes \$ 541.05, subd. 1(6) (1990). \textit{Kelley}, 1992 WL 3651, at *3. Mr. Pedro claimed slander and infliction of emotional distress, but those claims were dismissed during the first trial. \textit{Pedro I}, 463 N.W.2d at 287.
\textsuperscript{112} \textit{E.g.}, Rognlien v. Carter, 443 N.W.2d 217, 220 (Minn. Ct. App. 1989). In employment cases, the representation often pertains to present intention as to a future event; it may be actionable if the promisor had no intention to perform at the time. \textit{See id.} at 220-21.
\textsuperscript{113} See MINN. STAT. \$ 302A.011 (1994).
\textsuperscript{114} BLACK'S LAW DICTIONARY 747 (6th ed. 1990).
\textsuperscript{115} See MINN. STAT. \$ 302A.435 (1994).
a claim under those statutes. For example, discrimination statutes speak of claims brought by an "employee" against an "employer." Case law under federal discrimination statutes suggests, although not unequivocally, that shareholders in closely held corporations may have difficulty fitting within such language.

If shareholders are analogized to partners, the case law stands against the shareholder's claim. The origin of the principle that partners may not pursue claims under discrimination statutes is Justice Powell's concurrence in *Hishon v. King & Spalding*, which holds that the decision to admit an associate in a law firm to partnership is not covered by Title VII. Justice Powell wrote:

>[T]he Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an "employment" relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its associates. The judgmental and sensitive decisions that must be made among the partners embrace a wide range of subjects. The essence of the law of partnership is the common conduct of a shared enterprise. The relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement . . . or consent among the partners.

Thus, for example, in *Wheeler v. Hurdman*, the Tenth Circuit held that a partner in an accounting firm who alleged that she was expelled based on her gender and age could not pursue a


117. For example, the ADEA makes it unlawful for an employer to discriminate against an employee because of the employee's age of 40 or more. 29 U.S.C. § 623(a)(1994). The ADEA defines an "employee" as "an individual employed by any employer . . . ." *id.* § 630(f); accord 42 U.S.C. § 2000e(f) (1994) (Title VII); 42 U.S.C. § 12111(f) (1994) (ADA); MINN. STAT. § 363.01, subd. 16 (1994) (MHRA).

118. Recall that the Pedro case proceeds from this assumption. *Pedro II*, 489 N.W.2d at 801.


120. *Id.* at 79-80 (Powell, J., concurring) (citations and footnotes omitted).
claim under federal discrimination statutes.\textsuperscript{121} Following an extensive analysis of the tests used to define “employee” in various legal and factual settings,\textsuperscript{122} the court concluded that the “total bundle of partnership characteristics,” in particular those of Ms. Wheeler, makes a partner not an “employee.”\textsuperscript{123} The court stressed the following characteristics: participation in profit and loss, exposure to liability, investment in the firm, partial ownership of firm assets, voting rights, and status under partnership law and the partnership agreement.\textsuperscript{124} The court distinguished “a small, voting shareholder/director or officer of a large corporation.”\textsuperscript{125}

The case law on closely held corporations is somewhat murky. In \textit{Fountain v. Metcalf, Zima & Co.}, the Eleventh Circuit decided that a member-shareholder of a small accounting firm was a “partner,” not an “employee,” and hence could not bring a claim under the ADEA.\textsuperscript{126} The court noted that the plaintiff, unlike true employees of the firm, was compensated on the basis of the firm’s profits, was liable for certain of its obligations, owned thirty-one percent of the firm, and could vote on various decisions—including admission and termination of other member-shareholders.\textsuperscript{127}

The Eleventh Circuit declined to follow\textsuperscript{128} the Second Circuit’s decision in \textit{Hyland v. New Haven Radiology Associates}.\textsuperscript{129} In \textit{Hyland}, the Second Circuit permitted Dr. Hyland to pursue his ADEA claim against the professional corporation in which he was a shareholder, director, officer, and employee.\textsuperscript{130} The court reasoned that the corporation had selected the corporate entity and could not now deny it in order to depict Dr. Hyland

\textsuperscript{121} Wheeler v. Hurdman, 825 F.2d 257, 277 (10th Cir.), cert. denied, 484 U.S. 986 (1987). The firm had over 500 “partners” at the time. \textit{Id.} at 260.
\textsuperscript{122} \textit{Id.} at 262-75.
\textsuperscript{123} \textit{Id.} at 276.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.; see also} Burke v. Friedman, 556 F.2d 867, 869-70 (7th Cir. 1977) (partners may not be counted as employees for determining the fifteen-employee threshold under Title VII).
\textsuperscript{126} Fountain v. Metcalf, Zima & Co., 925 F.2d 1398, 1401 (11th Cir. 1991).
\textsuperscript{127} \textit{Id.} at 1399; \textit{see also} E.E.O.C. v. Dowd & Dowd, 736 F.2d 1177, 1178 (7th Cir. 1984) (en banc) (shareholders, analogous to partners, can not be counted in determining whether an entity meets the 15-employee threshold).
\textsuperscript{128} Fountain, 925 F.2d at 1400.
\textsuperscript{129} 794 F.2d 793 (2d Cir. 1986).
\textsuperscript{130} \textit{Id.} at 798.
as a partner for ADEA purposes. Furthermore, the court wrote:

The status of Dr. Hyland is clear—not only was he an officer, director and shareholder of NHRA, he also was specifically designated as an employee of the corporation in an employment agreement containing detailed provisions relating to the terms and conditions of his employment. There was nothing inconsistent between his proprietary interest . . . and the corporate employment relationship he held. An analysis of his status need proceed no further.

The dissent argued that the majority had honored form over substance.

E. Remedies

The remedies under section 302A.751 are defined as "any equitable relief [the court] deems just and reasonable in the circumstances." Furthermore, the statute explicitly lists dissolution and buy-out as options, as well as provides for attorney fees and expenses where the defendant has acted "arbitrarily, vexatiously, or otherwise not in good faith." The legislative history clearly suggests that the courts' range of options is wide and their discretion is substantial.

In Sawyer, the shareholder sought and won a buy-out and attorney fees. Furthermore, the court ruled that she could obtain the buy-out from the other shareholders if the corporation itself was unable to carry it out.

In Pedro, by contrast, Alfred Pedro sought—and

---

131. Id.
132. Id.
133. Id. at 799 (Cardamone, J., dissenting). Similarly, in a case predating Hishon, the Seventh Circuit treated as an employee a vice-president who held one-third of a closely held corporation's stock; however the firm's total employee count fell below the ADEA threshold. Zimmerman v. North Am. Signal Co., 704 F.2d 347 (7th Cir. 1983).
134. MINN. STAT. § 302A.751, subd. 1 (1994).
135. Id. subds. 1, 2.
136. Id. subd. 4.
137. See Joseph E. Olson, Statutory Changes Improve Position of Minority Shareholders in Closely-Held Corporations, 59 HENNEPIN LAW. 10, 11 (Sept.-Oct. 1983); see also Thompson, supra note 69, at 718-26 (discussing remedies under various states' statutes).
139. Id. at *2.
obtained—not just a buy-out according to the stock repurchase agreement, but also the difference between that price and the fair market value of his shares, a wage-based recovery for ten years after the termination, prejudgment interest, and attorney fees.\textsuperscript{140} The court rejected the defendants’ argument that the stock price recovery and the wage recovery constituted double recovery, noting that there were two distinct losses—employment and ownership—to compensate.\textsuperscript{141} In dictum, the court suggested that the award properly would run against the Pedro brothers and the corporation jointly and severally.\textsuperscript{142}

In the cases decided under section 302A.751, the courts have not examined the appropriateness of the equitable remedy used in employment termination cases: reinstatement.\textsuperscript{143} Nor do the cases under section 302A.751 afford recovery of punitive damages.\textsuperscript{144}

\section*{IV. Observations and Synthesis}

\subsection*{A. Preliminary Observations}

Consider again Ms. Allison’s dispute with her fellow shareholders and the firm they founded, presented in Part I. What legal rights should she have as a consequence of her employment?\textsuperscript{145} What remedy should the law afford her as compensation for her termination?

A natural starting point is to argue that she should have the same rights as any other employee; that is, she would be entitled to pursue a claim for wrongful termination under the common law and statutes described in Part II. She would argue for a contract exception to the at-will rule,\textsuperscript{146} and she also would

\begin{thebibliography}{99}
\bibitem{141} \textit{Id.} at 803.
\bibitem{142} \textit{Id.}
\bibitem{143} There is a mention of such a remedy in a common law case, but the trial court abandoned it, obviating appellate discussion. \textit{See} Evans v. Blesi, 345 N.W.2d 775, 777 (Minn. Ct. App. 1984).
\bibitem{144} \textit{Cf.} Evans, 345 N.W.2d at 781 (under the common law, awarding the shareholder punitive damages against the oppressing shareholder personally). Presumably punitive damages also would be available under § 302A.751 given an egregious set of facts.
\bibitem{145} This discussion does not address the details of her rights and remedies as a shareholder per se.
\bibitem{146} \textit{See} discussion \textit{supra} Parts II.C and D.
\end{thebibliography}
assert that her termination was tainted by age-based animus and thus was prohibited under federal and state age discrimination statutes.\textsuperscript{147} Depending on the basis for recovery, the remedies would include wage-based damages, compensatory damages, damages for mental anguish, liquidated damages, punitive damages, attorney fees, and reinstatement.\textsuperscript{148} This approach focuses on Ms. Allison’s holding a single “stick”—that of employee.

But Ms. Allison holds other “sticks” as well. Because Ms. Allison, as a shareholder and founder, has invested in her employer in an unusual manner, one could argue that she is entitled to greater protection than a mere employee. This approach finds indirect support in the \textit{Bussard} case, recognizing the role of additional consideration provided by the employee in establishing an exception to the at-will rule.\textsuperscript{149} On the other hand, because she has some power to control the firm’s actions, one could argue that she is entitled to less protection than a regular employee. This approach finds indirect support in the federal discrimination cases denying protection to “partners.”\textsuperscript{150}

In my view, the employment interest of Ms. Allison and similarly situated shareholders is distinct and significant so as to merit specific protection. Minnesota law is in accord with this basic premise. The MBCA explicitly refers to the employment interest within a closely held corporation,\textsuperscript{151} and the court of appeals has recognized this interest as distinct and significant.\textsuperscript{152} At the same time, this interest must be understood in context; Ms. Allison is not a regular employee.

\textbf{B. One Proposal}

In my view, the shareholder-employee’s rights should be adjudicated in a proceeding under section 302A.751. Insofar as the employment interest is concerned, the courts should inquire

\begin{footnotes}
\item \textsuperscript{147} See supra text accompanying notes 37, 39. Her claim under federal law would depend on the firm’s meeting the 20-employee threshold of the ADEA. See 29 U.S.C. § 630(b) (1994).
\item \textsuperscript{148} See supra text accompanying notes 66-67.
\item \textsuperscript{149} See supra text accompanying note 27.
\item \textsuperscript{150} See supra text accompanying notes 118-33.
\item \textsuperscript{151} See supra text accompanying notes 76-78.
\item \textsuperscript{152} See supra text accompanying notes 85-88, 99-104.
\end{footnotes}
into several matters:

(1) Does the termination violate public law?

(2A) If the shareholders have made an agreement about the permissible grounds for termination of employment, does the termination meet the requirements of that agreement?

(2B) If the shareholders have not made such an agreement, does the termination rest on legitimate business purposes of the corporation?

With one exception, the remedies available should be modeled on the remedies afforded an employee with a comparable claim.

1. Adjudication within Section 302A.751’s Framework

Protection of the shareholder’s employment interest should be secured within a section 302A.751 action. Section 302A.751 is a flexible mechanism, flexible enough to accommodate employment issues as well as more traditional corporate issues.\(^{153}\) Furthermore, the loss of employment may well coincide with the loss of shareholder rights.\(^{154}\) Joining the employment issues with the accompanying corporate issues permits coordination in such matters as proof, factfinding, and remedies, whereas separating them unnecessarily complicates the proceedings.\(^{155}\)

---

153. See Olson, supra note 137, at 11.

154. Indeed in the Sawyer case, the court saw the loss of employment, in and of itself, as a violation of the shareholder’s rights. See supra text accompanying notes 85-88.

155. There are procedural differences between the employment and corporate causes of action. For example, a contract case ordinarily would be tried to a jury, whereas cases under the MHRA and MBCA could be tried to advisory juries. See Bilal v. Northwest Airlines, Inc., 537 N.W.2d 614 (Minn. 1995) (MHRA claim tried to advisory jury); Pine River State Bank v. Mettille, 393 N.W.2d 622 (Minn. 1983) (handbook case); Pedro v. Pedro, 463 N.W.2d 285 (Minn. Ct. App. 1990) petition for rev. denied (Minn. Jan. 24, 1991), on appeal after reward, 489 N.W.2d 798 (Minn. Ct. App. 1992), petition for rev. denied (Minn. Oct. 20, 1992) (MBCA case tried to advisory jury). The statutes of limitations also vary between employment and corporate causes of action. See MINN. STAT. §§ 302A.557, subd. 2; 302A.559, subd. 4; 302A.729, subd. 2 (1994) (two-year statute of limitations for various actions under MBCA); Portland v. Golden Valley State Bank, 405 N.W.2d 240, 242 (Minn. 1987) (also two-year statute for contract claim); MINN. STAT. § 363.06, subd. 3 (1994) (one-year statute of limitations for claims under the MHRA).

It is less sensible to use the employment law mechanisms precisely because multiple mechanisms exist. Furthermore, an employment law proceeding would not encompass the non-employment dimensions of the shareholder’s claim.
behavior.\textsuperscript{157}

The rationale for this first inquiry is straightforward: If the public interest is harmed by termination of an employee for a given reason, such as whistleblowing or discriminatory motives, it is harmed whether the employee is a regular employee or a shareholder-employee. For example, had Alfred Pedro suspected that his brothers were engaged in illegal kickbacks and pursued his concerns with public authorities,\textsuperscript{158} public policy would call for protecting him from termination just as if the company's accountant had pursued the same suspicion. Indeed the shareholder-employee arguably should receive heightened protection as her vantage point within the company may permit more accurate assessment of corporate wrongdoing. Similarly, if Mr. Pedro's age prompted his discharge, public policy embodied in age discrimination statutes would call for a remedy.

To a certain extent, this recommendation appears to counter the federal cases denying "partners" standing under discrimination statutes. Of course, unlike those statutes, section 302A.751 expressly grants shareholder-employees standing.\textsuperscript{159} Furthermore, those cases miss some important points. First, when a shareholder-employee loses her position for discriminatory reasons, she scarcely has any real power within the corporation on issues of internal management; she is not a "partner" in any significant sense. Second, the public interest in forestalling discrimination does not end at access to the ranks of partner or shareholder;\textsuperscript{160} discrimination at high echelons of American business is equally troublesome.\textsuperscript{161}

3. \textit{The Agreement or the Legitimate Business Purpose Rule}

The second inquiry is less concerned with public law

\textsuperscript{157} MINN. STAT. § 302A.751, subd. 1(b)(2) (1994).
\textsuperscript{158} If Mr. Pedro were an employee and had acted in good faith by reporting the suspected violation of the law to government officials, this activity would be protected under MINN. STAT. §181.932, subd. 1(a) (1994).
\textsuperscript{159} MINN. STAT. § 302A.751, subd. 1(b) (1994).
\textsuperscript{160} Justice Powell, concurring in \textit{Hishon}, apparently took the opposite view. See supra text accompanying notes 119-20.
\textsuperscript{161} See generally MINNESOTA GLASS CEILING TASK FORCE, THE GLASS CEILING TASK FORCE REPORT (1995); HENNEPIN COUNTY BAR ASS'N, HENNEPIN COUNTY BAR ASS'N GLASS CEILING TASK FORCE REPORT, "WALKING THROUGH INVISIBLE DOORS SHATTERING GLASS CEILINGS" (1993).
3. The Agreement or the Legitimate Business Purpose Rule

The second inquiry is less concerned with public law restrictions on termination than with honoring the private arrangement among the shareholders as to job security. This inquiry is grounded in several provisions of section 302A.751: the prohibition of "unfairly prejudicial" conduct;\textsuperscript{162} the requirement of "honest, fair, and reasonable" action;\textsuperscript{163} and the references to "reasonable expectations" and "written agreements."\textsuperscript{164} These three provisions can be synthesized into a two-branched analysis.

First, if the corporation and shareholders carry out any agreements among them as to termination of employment, they have acted in a manner that is not "unfairly prejudicial" and that is "honest, fair, and reasonable." This is so regardless of what the agreement is.\textsuperscript{165} If the agreement provides for job security, its fairness is not difficult to see. Even if the agreement calls for no job security, it may be deemed fair\textsuperscript{166} because it was bargained for by the shareholder. Hence, the lack of job security should come as no surprise and presumably is offset by favorable terms as to other matters.\textsuperscript{167}

Thus, the first branch is to discern whether there was an agreement among the parties and whether its terms were followed. Analysis of whether the terms of an agreement have been followed will vary from case to case, of course. In discerning whether there was an agreement among the parties, the courts are likely to encounter two dilemmas, both answerable by standard principles of contract law.

\textsuperscript{162} MINN. STAT. § 302A.751, subd. 1(b)(3) (1994).
\textsuperscript{163} Id. subd. 3a.
\textsuperscript{164} Id.
\textsuperscript{165} If, however, the agreement provided no protection and were a part of the squeeze-out, it should not be given effect.
\textsuperscript{166} In some sense, this contradicts the Sawyer case, which seems to say that termination of employment in and of itself is "unfairly prejudicial" conduct, so that a buy-out is appropriate. See supra text accompanying notes 85-88. The Sawyer case does not, however, address other remedies.
\textsuperscript{167} The at-will arrangement is fairer in the context of shareholder-employees than in traditional employment settings, because there likely is awareness of it and some capacity on the part of the shareholder to bargain for it.
First, what constitutes the agreement? Both oral and written agreements should be recognized, with a preference for a writing. Section 302A.751 presumes that any written agreement represents the understanding of the parties. Similarly, the parol evidence rule provides that a written integrated agreement governs over prior written or oral and contemporaneous oral agreements of the parties. Extrinsic evidence (such as parol evidence, evidence of common usage and practice between the parties, indications of the circumstances at the time of contracting) may be useful in interpreting a written agreement.

Second, how should the courts handle modifications of the agreement? Section 302A.751 recognizes that the agreement may evolve over time. Contract law also permits modification with the mutual consent of the parties, appropriate consideration, or circumstances rendering the modification equitable. Thus, in *Kelly v. Rudd*, the court of appeals was partly right. The court properly looked to the parties' written agreement; it also properly recognized that the parties' agreement may change over time (although it would have been preferable to explain how the modification came to be).

In some situations, however, there will be no agreement between the parties; then the second branch is to be pursued. At this point, the law must provide a default rule. The rule should not be employment-at-will; that rule does not reflect the

---

168. An additional limitation is the statute of frauds, which bars enforcement of an oral contract not performable within one year. See Roaderick v. Lull Eng'g Co., 208 N.W.2d 761, 763-64 (Minn. 1973); RESTATEMENT (SECOND) OF CONTRACTS § 130 (1981) (statute of frauds).

169. MINN. STAT. § 302A.751, subd. 3a (1994).


172. MINN. STAT. § 302A.751, subd. 3a (1994).

173. See Freemen v. Duluth Clinic, Ltd., 354 N.W.2d 626, 630 (Minn. 1983); RESTATEMENT (SECOND) OF CONTRACTS § 89 (1987).

174. See supra text accompanying 105-09.

175. This default rule operates only where employment is part of the shareholder's participation; the rule does not create an entitlement to employment for an investor-shareholder.
contributions of the shareholder beyond employment itself.\textsuperscript{176} Nor should the rule require just cause or good faith reasons for termination, given the delicacy of high-level employment decisions.\textsuperscript{177} Rather there must be legitimate business purposes for the termination of the shareholder's employment.

This requirement captures the sense of section 302A.751. It recognizes that termination of employment will be prejudicial to the shareholder, while acknowledging that prejudice is not unfair if the corporation has a legitimate business purpose for it. When the corporation acts for legitimate business purposes, it acts fairly, honestly, and reasonably. This standard is used to assess other corporate decisions, such as expenditure of corporate funds.\textsuperscript{178}

The operation of this rule is illustrated in the leading Massachusetts case, \textit{Wilkes v. Springside Nursing Home}.\textsuperscript{179} In that case, a minority shareholder was squeezed out because he pressed for and secured a higher price for corporate assets sold to a fellow shareholder than the shareholder desired to pay. He was terminated from employment although he had performed competently and stood ready to do so.\textsuperscript{180} Relying on general concepts of fiduciary duty, a sense of the centrality of the employment interest, and an awareness of the corporation's interest in managerial discretion,\textsuperscript{181} the court developed the following rule:

It must be asked whether the controlling group can demonstrate a legitimate business purpose for its action . . . . When an asserted business purpose for their action is advanced by the majority, . . . we think it is open to minority stockholders to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest . . . . If called on to settle a dispute, our courts must weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative.\textsuperscript{182}

\begin{itemize}
\item \textsuperscript{176} See supra Parts II.B.-D.
\item \textsuperscript{177} See Pugh v. See's Candies, 171 Cal. Rptr. 917, 927-28 (1981).
\item \textsuperscript{179} 353 N.E.2d 657 (Mass. 1976).
\item \textsuperscript{180} \textit{Id.} at 660-61.
\item \textsuperscript{181} \textit{Id.} at 661-63.
\item \textsuperscript{182} \textit{Id.}
\end{itemize}
This framework has analogues in various areas of employment law.\textsuperscript{183}

Incidentally, the two branches—following the parties’ agreement and requiring legitimate business purposes—are not unrelated. The latter serves as the presumed “agreement” of the parties where they have failed to reach their own agreement; it is sensible to presume that a shareholder would not be terminated without legitimate business purposes. Furthermore, where the parties’ agreement lapses or is too indeterminate to ascertain with adequate certainty, the legitimate business purpose standard would apply.

Hence the \textit{Kelley} case\textsuperscript{184} should have been analyzed differently in part. Once the court determined that the written agreements had lapsed, the governing principle would be the legitimate business purpose standard, rather than the at-will rule.

The two-branched analysis set forth above thus defines the parties’ “reasonable expectations” under section 302A.751. If they have entered into an agreement, they reasonably should expect to follow it. If not, they reasonably should expect that employment will continue absent legitimate business purposes for termination.\textsuperscript{185}

4. Remedies

As with employment law remedies available to regular employees, the remedies available to terminated shareholders\textsuperscript{186} should vary according to the nature of the wrong suffered. Thus, if the claim is based on the parties’ agreement or on the default rule requiring a legitimate business purpose, the remedy will be based on the shareholder’s economic losses

\textsuperscript{183} \textit{See} Mark A. Rothstein \textit{et al.}, \textit{Employment Law} § 3.25 (1994) (discussing less discriminatory alternatives in the context of discrimination law).

\textsuperscript{184} \textit{See supra} text accompanying notes 105-09.

\textsuperscript{185} There is a difference in degree between “expectation” and “agreement” here. The legitimate business purpose standard is posited as a working assumption or default rule. If the parties wish to override it, they must take affirmative steps to craft an agreement—one way (at-will) or another (greater job security).

identifiable with termination of employment, namely lost wages and benefits. 187 If the claim is based on public law, such as tort or statute, the wider range of remedies available to a regular employee also ought to be available to a shareholder-employee. 188 The recovery is, of course, subject to a requirement that the employee mitigate her damages. 189

It may seem that this result leads to double recovery if the shareholder also obtains a buy-out. The court of appeals in the Pedro case thought not 190—and properly so. The employment recovery compensates the shareholder for loss of a "stick" separate from the ownership interests. A shareholder who is not an employee may be fully compensated for the loss of her investment and future earnings through a buy-out. But a shareholder who also is an employee suffers additional losses. She "loses" skills that are useful only at her prior employer, because they are tailored to its operations. She loses the advantages of tenure with the firm. She suffers psychological dislocation as well. If she is highly employable and these losses are not great, neither will her damages be great; but if the losses are substantial, her damages should be so as well. Finally, when the employment recovery is for a public law violation, the employment recovery addresses not just the shareholder's interest in compensation, but also the public's interest in deterring wrongful conduct by employers.

While symmetry between the remedies available to regular employees and shareholder-employees is generally desirable, one remedy should not be available to the latter: reinstatement. Whether it is wise to return a regular employee to work after the employer has terminated her is debatable. 191 It no doubt is futile to expect a closely held corporation to operate smoothly when a shareholder has been frozen out, litigation has ensued, and the court has compelled the shareholder's return. While closely held corporations generally should be accountable as other employers are, at the shareholder level, they should remain voluntary associations for mutual gain.

187. See supra text accompanying notes 57-61.
188. See supra text accompanying notes 62-67.
189. See supra text accompanying note 59.
190. See supra text accompanying notes 140-42.
V. CONCLUSION

If the proposal just stated were the law, Ms. Allison could pursue not only a buy-out remedy under section 302A.751, but also recovery for loss of employment. This claim would have two chief dimensions and several interesting issues of fact to sort out.\textsuperscript{192}

First, Ms. Allison could claim that her employment was terminated illegally for age-based reasons. Second, she could rely on the agreement requiring "performance deficiencies" before termination and seek to demonstrate that those grounds did not exist. This agreement would supplant the default rule requiring legitimate business purposes. If Ms. Allison's claim were to succeed, the range of remedies would be those stated at the outset of Part IV—less reinstatement.

Both dimensions of the claim point to the same factual issue: what were the grounds for the termination. Several facts work in her favor: the age-related comments during the key meeting, the stereotypical assumptions underlying the assessment of her reduced productivity, the weakness of the factual record as to client concerns over her performance, and the failure of her fellow shareholders to investigate her performance further.

In sum, "[w]ithin a closely held enterprise, a[...]-intimate and intense relationship exists between capital and labor."\textsuperscript{193} Under Minnesota's "innovative" statute,\textsuperscript{194} when a shareholder suffers a loss of her capacity to contribute her labor to the enterprise, this interest should not be obscured by the capital interest, but rather protected by the rules of employment law and valued for its own sake.

\textsuperscript{192} In E.E.O.C. v. Johnson & Higgins, Inc., 91 F.3d 1529 (2d Cir. 1996), the Second Circuit ruled that director-owners of a private corporation with thirty-five directors were employees protected by the ADEA. The organization had chosen the corporate forum (not partnership). Although the directors had duties and were compensated as directors, they also continued to serve as senior managers, reported to the senior board, and were evaluated by the senior board. The ADEA thus covers the requirement that they retire in their 60's as firm managers. \textit{Id.} at 1537-40.

\textsuperscript{193} Thompson, \textit{supra} note 70, at 702.

\textsuperscript{194} \textit{Id.} at 740.