July 2015

Beyond Crosby v. Beam: Ohio Courts Extend Protection of Minority Stockholders of Close Corporations

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BEYOND CROSBY V. BEAM:[1] OHIO COURTS EXTEND PROTECTION OF MINORITY STOCKHOLDERS OF CLOSE CORPORATIONS

INTRODUCTION

The clear trend of legislatures and courts today is to provide remedies for oppressed minority stockholders of closely held corporations.[2] In some Ohio courts, this protection recently has reached a new height. Ohio courts currently view working minority shareholders of close corporations as employees of the corporation, rather than employers.[3] However, as employees, they are not subject to the harsh results of the often unyielding employment-at-will doctrine of Ohio. Rather, these courts are protecting the minority shareholders by finding an implied employment contract with the majority shareholders.[4]

This Comment explores the possible ramifications of viewing working minority shareholders as term employees on both close corporation law and at-will-employment law in Ohio. Part I discusses the background and emergence of the heightened fiduciary duty owed by the majority stockholders to the minority stockholders in closely held corporations and the resultant protection of the minority. Part II discusses the current standing of the employment at-will doctrine and what protections exist for at-will employees in Ohio. Part III examines recent Ohio case law that compares close corporation employment with at-will-employment and analyzes the courts' reasoning behind creating a new exception to at-will-employment. This section also discusses the necessity of using the reasonable expectations test to determine the implied terms of any employment contract binding on the shareholders. Finally, this Comment concludes by arguing that this new judicial standard will provide further needed fairness, predictability and consistency otherwise lacking under Ohio's optional close corporation statute.

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[1] 548 N.E.2d 217 (Ohio 1989).

[2] *See* F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS (3d ed. 1988) [hereinafter O'NEAL & THOMPSON, CLOSE CORPORATIONS]; F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS (2d ed. 1985) [hereinafter O'NEAL & THOMPSON, OPPRESSION OF MINORITY SHAREHOLDERS]; F. Hodge O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121 (1986); Brent Nicholson, *The Fiduciary Duty of Close Corporation Shareholders: A Call for Legislation*, 30 AM. BUS. L.J. 513 (1992).

[3] Gigax v. Repka, 615 N.E.2d 644, 650 (Ohio Ct. App. 1992) (finding "that partners in a close corporation . . . are employees."). *See also* Wrightsel v. Ross-Co Redi-Mix, Inc., No. 1791, 1993 WL 97780, at *6 (Ohio Ct. App. 4th Dist. Mar. 26, 1993) (referring to a minority shareholder of a close corporation as "an employee/shareholder").

[4] *See Gigax*, 615 N.E.2d at 648 (discussing factors relevant to Gigax's employment which create implied-in-fact term employment); *Wrightsel*, 1993 WL 97780 at *5-6 (comparing close corporations to partnerships which demand mutual trust and disclosure). *But see* Priebe v. O'Malley, 623 N.E.2d 573, 576 (Ohio Ct. App.) (refusing to find any employment condition for working minority shareholders except at-will-employment), *jurisdictional motion overruled*, 619 N.E.2d 1028 (Ohio 1993).

I. DEVELOPMENT OF CLOSE CORPORATION FIDUCIARY DUTY

A. *A Need to Protect the Minority Shareholder*

Close corporations are defined by their major attributes. Typically, a close corporation has few stockholders; shares are not publicly traded and are not normally traded at all.[5] The classic examples of close corporations include the incorporated family business and the corporation, limited in scope and investment capital, which is operated like a partnership.[6] In close corporations, the shareholders usually are active participants in the management of the business.[7] Generally, the operation of close corporations follows corporation law which enables the majority shareholders to control the corporation.[8] The majority shareholders elect the directors, usually electing themselves and their relatives to the board.[9]

Close corporation shareholders have no established market for their shares because closely held stock is not normally traded on the public securities market.[10] As a result, the shareholders often have difficulty withdrawing their investment. Without a ready market for stock in close corporations, the original shareholder often may sell only at a great loss.[11]

These distinguishing characteristics of the closely held corporation combine to place the minority shareholder of such a business organization in an extremely precarious position.[12] Minority shareholders in close corporations are vulnerable to "squeeze-

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[5] Crosby v. Beam, 548 N.E.2d 217, 220 (Ohio 1989); Estate of Schroer v. Stamco Supply, Inc., 482 N.E.2d 975, 978 (Ohio Ct. App. 1984). Examples of public markets for stock are the New York Stock Exchange and the American Stock Exchange.

[6] O'NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 2, § 1:02.

[7] *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976).

[8] *See Crosby*, 548 N.E.2d at 220.

[9] O'NEAL & THOMPSON, OPPRESSION OF MINORITY SHAREHOLDERS, *supra* note 2, § 1:02 at 3. *See also* Carlos L. Israels, *The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. CHI. L. REV. 778, 778-79 (1952) (defining a close corporation early on as the "corporate entity typically organized by an individual, or a group of individuals, seeking the recognized advantages of incorporation...but regarding themselves basically as partners and seeking veto powers as among themselves much more akin to the partnership relation then to the statutory scheme of representative corporate government.").

[10] *Crosby*, 548 N.E.2d at 220.

[11] *See* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975). As distinguished from publicly held corporations where the stock is owned by numerous shareholders who act as passive investors, uninvolved in the day-to-day operation of the corporation. *See* O'NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 2, § 1:07 at 24. Shareholders in a public corporation typically are only interested in the cost of their investment in shares, which are highly liquid and are not tied to their salary or other employment benefits. *Id.* A distinguishing characteristic of shareholders in a closely held corporation is their reliance on wages received from the corporation. *Id.*

[12] Professor F. Hodge O'Neal considers the abuse of minority shareholders in closely held corporations by the majority shareholders to be so widespread today as to create a "national business scandal." O'Neal, *supra* note 2, at 121.

out" tactics by the majority.[13] By applying traditional corporate law to a close corporation, the majority may squeeze out a minority shareholder in a variety of ways. The most common methods of majority squeeze-outs include termination of a minority shareholder's employment, withholding of dividends, preventing minority shareholders from participating in company management, and voting excessive salaries for the majority shareholders.[14]

Under general corporation law, a corporation functions by majority rule.[15] As a result, courts have been reluctant to interfere in the internal functioning of a corporation, even when there was clear evidence of oppression of the minority by the majority.[16] The court's deference to majority rule is strengthened by the business judgment rule.[17] Together, the principles of majority rule and the business judgment rule act as barriers to judicial intervention for the protection of oppressed minority shareholders.[18]

More recently, courts have protected the easily abused position of the minority shareholders in closely held corporations by imposing a partnership-type "heightened fiduciary duty" among all shareholders of a close corporation.[19] In *Wilkes v. Springside Nursing Home, Inc.*,[20] this enhanced fiduciary duty was tempered when the Massachu-

[13] *Id.* at 125. *See also* Estate of Schroer v. Stamco Supply, Inc., 482 N.E.2d 975, 978-79 (Ohio Ct. App. 1984) (citing F. HODGE O'NEAL, "SQUEEZE-OUTS OF MINORITY SHAREHOLDERS: EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES (1975)).

[14] *See Crosby*, 548 N.E.2d at 220. *See also* Robert B. Thompson, *Corporate Dissolution and Shareholders' Reasonable Expectations*, 66 WASH. U. L.Q. 193, 194-99 (1988) (discussing risks involved for minority shareholders resulting from traditional corporate norms, and recent legislative and judicial responses to oppression by the majority); Arthur D. Spratlin, Jr., Comment, *Modern Remedies for Oppression in the Closely Held Corporation*, 60 MISS. L.J. 405, 408 (1990) (discussing the different expectations of stockholders in public and close corporations).

[15] O'NEAL & THOMPSON, OPPRESSION OF MINORITY SHAREHOLDERS, *supra* note 2, § 1:02 at 3. Statutory modifications to majority rule in some states require a super-majority, such as a two-thirds majority, to adopt changes or additions to the corporation by-laws. *Id.* at 3-4.

[16] *See* Robert W. Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations*, 67 MINN. L. REV. 1, 38 (1982).

[17] *See* Thompson, *supra* note 14, at 195 (defining the business judgment rule as the broad discretion courts give to the business decisions of a corporation's board of directors).

[18] *See id.* at 236 (concluding that "[t]he traditional corporate norms of centralized control, majority rule and a presumption of the corporation's permanence" subject minority shareholders to potential abuse). *See also* Darryl Kates, Note, *Derivative v. Individual Actions in a Close Corporation Context*: Crosby v. Beam, 47 Ohio St. 3d 105, 548 N.E. 2d 217 (1989), 59 U. CIN. L. REV. 643, 646 (1990) (discussing the unique challenge presented by close corporations to the business judgment rule); Ralph A. Peeples, *The Use and Misuse of the Business Judgment Rule in the Close Corporation*, 60 NOTRE DAME L. REV. 456, 459 (1985).

[19] Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975) (holding that the stockholders of a close corporation owe each other the same heightened fiduciary duty demanded in a partnership). The Massachusetts court went on to find the fiduciary standard required among shareholders of close corporations to be stricter than that demanded of directors and shareholders of public corporations. *Id.* at 515-16. To the *Donahue* court, this meant that close corporation shareholders had to treat each other with the "utmost good faith and loyalty," and "[t]hey may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation." *Id.* at 515.

[20] 353 N.E.2d 657 (Mass. 1976).

setts court allowed the majority shareholder an opportunity to demonstrate a legitimate business purpose for his actions.[21] However, if the complaining minority shareholder then successfully met his burden by demonstrating that this business purpose could be achieved by less harmful actions, the court would still find the majority in breach of his fiduciary duty to the minority.[22] Many courts now follow this enhanced fiduciary duty standard in determining close corporation disputes.[23] But, as in *Wilkes*, the fiduciary duty owed is generally limited by judicial evaluation of the intent and wrongdoing of the majority in terms of specific harms directed at the minority shareholder.[24]

B. Ohio's Close Corporation Statute

Ohio's close corporation law is Section 1701.591 of the Ohio Revised Code.[25] The statute's two principal functions are, first, to allow an informal operation of the internal affairs of a close corporation and, second, to establish a legal relationship among the shareholders that is essentially the same as that provided partners by partnership law.[26] The provisions of the statute are not self-executing, but rather are a set of optional rules

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[21] *Id.* at 663. The Massachusetts court demonstrated their concern for the possible broad sweep of the *Donahue* decision by stating:

> Nevertheless, we are concerned that untempered application of the strict good faith standard enunciated in *Donahue* to cases such as the one before us will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interest of all concerned.

Id.

[22] *Id.* The Massachusetts court demonstrated their concern for the majority's legitimate right to manage the corporation by implementing this balancing between the minority and majority interests. *See id.*

[23] *See, e.g.*, Alaska Plastics, Inc. v. Coppock, 621 P.2d 270 (Alaska 1980); Tillis v. United Parts, Inc., 395 So. 2d 618 (Fla. Dist. Ct. App. 1981); Hagshenas v. Gaylord, 557 N.E.2d 316 (Ill. App. Ct. 1990); Warthan v. Midwest Consol. Ins. Agencies, Inc., 450 N.W.2d 145 (Minn. Ct. App. 1990); Fought v. Morris, 543 So. 2d 167 (Miss. 1989); Crosby v. Beam, 548 N.E.2d 217 (Ohio 1989). For examples of courts unwilling to impose such a high standard of fiduciary duty on majority stockholders in close corporations see Zidell v. Zidell, Inc., 560 P.2d 1086 (Or. 1977); Johns v. Caldwell, 601 S.W.2d 37 (Tenn. Ct. App. 1980).

[24] The courts evaluate whether the majority is acting for personal advantage and not to further the interests of the corporation, as well as whether the majority is benefiting from advantages not made equally available to the minority. *See* O'Neal, *supra* note 2, at 142 (noting "the courts are focusing on the impact on shareholders of acts by those in control of the corporation, rather than using the traditional approach of searching for misconduct by those in control.").

For a related view, compare Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675 (1990). Mitchell suggests that such limitations on the strict fiduciary duty doctrine completely transforms the doctrine by shifting the focus "from the classic fiduciary examination of whether the action taken was in the beneficiary's best interests to a mode of analysis that centers on the fiduciary's interest." *Id.* at 1708.

[25] OHIO REV. CODE ANN. § 1701.591 (Baldwin 1992).

[26] *See id.* § 1701.591(C). Section (C) contains eleven optional methods to simplify the structure and operation of a close corporation. *Id.* They range in scope from eliminating the board of directors to authorizing continuing employment of officers and employees without any limits on duration. *Id.* § 1701.591(C)(6), (8). The end result is a company that functions as a partnership but with the limited liability benefits of a corporation. *See id.* § 1701.591(C).

available to establish a "close corporation agreement".[27] Through the close corporation agreement, shareholders of a closely held corporation may design their own corporate structure, with assurance by the statute that their agreement will be given necessary legitimacy and weight in future dealings and possible conflicts.[28] The protections of Ohio's close corporation agreement are available to any Ohio corporation whose shares are not listed on a national securities exchange or are not regularly quoted in an over-the-counter market.[29] The number of shareholders allowed to participate in a close corporation agreement is not limited by section 1701.591.[30]

It is important to note that, because section 1701.591 is optional, any corporation, regardless of size or structure, not choosing to avail itself of the statute's provisions, may be held to Ohio's general corporation law.[31] Without judicial interference, minority shareholders of close corporations lacking the agreement available through section 1701.591 are open to shareholder oppression by the majority.[32]

Ohio's general corporation law currently sets forth no provision for judicial dissolution resulting from shareholder oppression.[33] This void further increases the reliance placed upon Ohio's courts for protection of minority shareholders of close corporations.[34]

C. Judicial Protection for Minority Shareholders in Ohio

In 1989, the Ohio Supreme Court fully embraced the findings of the Massachusetts Supreme Court in *Donahue* and *Wilkes*.[35] In *Crosby v. Beam*,[36] the Ohio court accepted the analogy of close corporations to partnerships, demanding a heightened fiduciary

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[27] *Id.* § 1701.591(A) (requirements of a close corporation agreement). *See also* Robert A. Kessler, *The ABA Close Corporation Statute*, 36 MERCER L. REV. 661, 697 (1985) (describing enabling legislation as providing an option to shareholders to take action to adopt rules of conduct; self-executing legislation, on the other hand, imposes automatic rules of conduct without any action by the shareholders.)

[28] *See id.* § 1701.591(A), (C). *But see id.* § 1701.591(I) (setting forth conditions under which agreement becomes invalid.)

[29] *Id.* § 1701.591(I).

[30] *See id.* § 1701.591(A) (setting forth requirements for close corporation agreement). Although this extends the provisions of § 1701.591 to corporations with large numbers of shareholders, § 1701.519(A)(1) requires unanimous assent for the agreement to qualify. This requirement will realistically work to limit the availability of § 1701.519 to corporations with large numbers of shareholders. *See also* Forrest B. Weinberg, *The Close Corporation Under Ohio Law*, 35 CLEV. ST. L. REV. 165, 182 (1987).

[31] *See* O'NEAL & THOMPSON, OPPRESSION OF MINORITY SHAREHOLDERS, *supra* note 2, § 1:02.

[32] *See infra* part I. C. and accompanying notes.

[33] OHIO REV. CODE ANN. § 1701.91 (Baldwin 1992). This section's only ground for dissolution relating to shareholder disputes is a deadlock on the part of the directors in the management of corporate affairs or on the part of shareholders in the election of directors. *Id.* at (A)(4).

[34] *See infra* part III. A. and accompanying notes.

[35] *See supra* part I. A. and accompanying notes.

[36] 548 N.E.2d 217 (Ohio 1989).

duty between majority and minority shareholders in close corporations.[37] The court further explained that the majority or controlling shareholders breach their heightened fiduciary duty when they benefit from advantages not made equally available to the minority.[38] The majority shareholders may not use their control over the corporation to advance their own interests, or to provide benefits only to themselves and not to the minority shareholders.[39] However, the *Crosby* decision did permit the majority shareholders to demonstrate a legitimate business purpose to uphold their actions.[40] Once the minority shareholder demonstrates a lack of an equal opportunity to benefit from the corporation, the burden shifts to the majority to demonstrate a legitimate business purpose for their actions.[41] The *Crosby* court also concluded where a breach of fiduciary duty to minority shareholder occurs in a close corporation, such a breach gives rise to an individual, not derivative, cause of action.[42]

II. CURRENT STANDING OF THE EMPLOYMENT-AT-WILL DOCTRINE IN OHIO

Since the Industrial Revolution, the employer-employee relations in the United States have been governed by the at-will employment doctrine.[43] Where the employment relation is of indefinite duration, this conventional doctrine enables the employee to freely quit for any reason at any time, and enables the employer to freely discharge the employee for good cause, bad cause, or no cause at any time.[44] The employment-

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[37] *Id.* at 220 (citing the partnership standard in *Donahue* of the fiduciary duty as the "utmost good faith and loyalty.").

[38] *Id.* at 220-21. Cases cited by the Ohio Supreme Court as support include Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 276 (Alaska 1980) (the majority breaches their fiduciary duty when they use their control of the stock to acquire benefits for themselves which are not shared by the minority); Tillis v. United Parts, Inc., 395 So. 2d 618 (Fla. Dist. Ct. App. 1981); Horizon House-Microwave, Inc. v. Bazzy, 486 N.E.2d 70 (Mass. 1985); Donahue v. Rodd Electrotype Co., Inc., 328 N.E.2d 505, 518 (Mass. 1975) (When a corporation purchases shares of stock from a controlling stockholder, the corporation must " . . . offer each stockholder an equal opportunity to sell a ratable number of his shares to the corporation at an identical price."); Estate of Schroer v. Stamco Supply, Inc., 482 N.E.2d 975 (Ohio Ct. App. 1984); Soulas v. Troy Donut Univ., Inc., 460 N.E.2d 310 (Ohio Ct. App. 1983); North v. Wick, 144 N.E.2d 132 (Ohio Ct. App. 1957); Crosby v. Beam, 548 N.E.2d at 220-21.

[39] *Crosby*, 548 N.E.2d at 221.

[40] *Id.* (discussing Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657 (Mass. 1976)).

[41] *See* Spratlin, *supra* note 14, at 414 (explaining the shift in burden in the balancing test used by the *Wilkes* court to determine whether the minority or majority's interest should prevail).

[42] *Crosby*, 548 N.E.2d at 221. The court pointed out that requiring a derivative action would produce the irrational result that any recovery from a derivative suit would go to the corporation, thereby benefitting the principal wrongdoers, the majority shareholders. *Id.*

[43] For a brief historical background of the at-will-doctrine in the United States, *see* Frank J. Cavico, *Employment At Will and Public Policy*, 25 AKRON L. REV. 497, 498-501 (1992); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 122-29 (1976).

[44] *See* Mers v. Dispatch Printing Co., 483 N.E.2d 150, 153 (Ohio 1985); *see also* Phung v. Waste Management, Inc., 491 N.E.2d 1114, 1116 (Ohio 1986). In Bascom v. Shillito, the Ohio Supreme Court demonstrated early on a reluctance to follow the English rule of term employment for one year presumed from the mere fact a servant had been hired. Bascom v. Shillito, 37 Ohio St. 431, 433 (1882).

at-will doctrine even allows discharge of an employee for morally wrong causes indicative of an employer's bad faith, without making the employer guilty of any legal wrong.[45]

Congress' first limitations on the employment-at-will doctrine severely restrict employee discharges yet today.[46] Both the National Labor Relations Act of 1935[47] and Title VII of the Civil Rights Act of 1964[48] were remedial legislation designed to protect employees within certain classes. Despite the far-reaching effects of these statutes, there are many employees who currently are at-will-employees.[49]

Although the at-will-employment doctrine seems under constant attack in law review articles,[50] Ohio courts stubbornly adhere to its often harsh tenets.[51] In recent years, Ohio courts have carved out only two narrow exceptions to the at-will- employment doctrine. An employee in Ohio may not be discharged in violation of a public policy[52] or when an employment contract is derived from implied contract and promissory estoppel.[53]

A. The Public Policy Exception in Ohio

The most widely accepted exception to at-will-employment is the public policy exception.[54] When an employee is discharged in contravention of a clearly defined and

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[45] Fawcett v. G. C. Murphy & Co., 348 N.E.2d 144, 147 (Ohio 1976) (finding employers' rights to terminate at-will-employees is not "limited by principles which protect persons from gross or reckless disregard of their rights and interests, willful, wanton or malicious acts or acts done intentionally, with insult, or in bad faith.").

[46] *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 947 (1984).

[47] Act of July 5, 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1988)).

[48] Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1988)).

[49] Todd M. Smith, Note, *Wrongful Discharge Reexamined: The Crisis Matures, Ohio Responds*, 41 CASE W. RES. L. REV. 1209, 1214 (1991).

[50] *See, e.g.*, John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 491-92 (1980); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405-06, 1413-14 (1967); Cavico, *supra* note 43, at 532-46; Gary E. Murg & Clifford Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C. L. REV. 329, 338-40, 383-84 (1982); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 1-10 (1979); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB L. REV. 56, 65-70, 81 (1988); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484, 532 (1976); Smith, *supra* note 49, at 1262-69; Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1931-35 (1983).

[51] Peterson v. Scott Constr. Co., 451 N.E.2d 1236, 1239 (Ohio Ct. App. 1982); Mers v. Dispatch Printing Co., 483 N.E.2d 150, 153 (Ohio 1985).

[52] Greeley v. Miami Valley Maintenance Contractors, Inc., 551 N.E.2d 981, 986 (Ohio 1990) (holding "that public policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute.").

[53] *Mers*, 483 N.E.2d at 154.

[54] *Greely*, 551 N.E.2d at 986 & n.3. Including Ohio, thirty-nine states currently recognize this exception. *Id.*

fundamental public policy, the employer may be held legally accountable.[55] The rationale behind the public policy exception involves protection of the employee's, employer's, and society's interests.[56] While the employee is interested in some degree of job security and the employer is interested in the efficient and profitable running of her business, society demands a stable job market premised on fundamental public policies.[57]

A lower court in Ohio first recognized the public policy exception in *Phung v. Waste Management, Inc.*[58] Although the lower courts in Sandusky County carved out the first cause of action in tort for wrongful discharge as against public policy,[59] the Ohio Supreme Court refused to recognize a public policy exception to at-will-employment.[60] The court found that Phung's allegations against his employer " . . . failed to state a violation of a sufficiently clear public policy to warrant creation of a cause of action in favor of Phung."[61] The court required a specific statutory violation by the employer to trigger the public policy exception to at-will-employment.[62] The court was comfortable in deferring to the legislature on this basis because the Ohio Constitution delegates the primary responsibility of protecting employee welfare to the legislature.[63]

In response to the court's inaction and apparent refusal to move beyond the promissory estoppel exception,[64] the Ohio legislature passed a whistleblower's protection act.[65] The statute provides such remedies for retaliatory dismissal as reinstatement, back

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[55] *See* Smith, *supra* note 49, at 1218-19. The author lists "public policy exceptions . . . [as] where employers have discharged employees for refusing to commit a crime, serving on a jury, 'blowing the whistle' on employee wrongdoing, filing a workers' compensation claim, and refusing to violate a code of ethics." *Id.* at 1218 (citations omitted).

[56] *See* Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974). The New Hampshire Supreme Court holds "In all employment contracts, whether at will or for definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance of the two." *Id.*

[57] *See* Joseph R. Grodin, *Past, Present, and Future in Wrongful Termination Law*, 6 LAB. LAW. 97, 97-98, 103-06, (1990).

[58] No. S-84-4, 1984 WL 14394 (Ohio Ct. App. 6th Dist. Oct. 19, 1984), *rev'd*, 491 N.E.2d 1114 (1986).

[59] *Id.* at *7.

[60] Phung v. Waste Management, Inc., 491 N.E.2d 1114, 1116-17 (Ohio 1986) (holding "... Ohio has not yet recognized any public policy exceptions to the employment-at-will doctrine. We do not believe that public policy considerations warrant an exception being made in the case sub judice, nor do they create a cause of action sounding in tort against the employer for wrongful discharge."). Phung had been discharged for reporting to his employer that his toxic waste disposal facility was operating in violation of the law. *Id.* at 1115.

[61] *Id.* at 1116-17.

[62] *Id.*

[63] *See id.* at 1117. The court went on to cite specific legislative action against retaliatory discharges resulting from employees filing a workers' compensation claim. *Id.* (citing OHIO REV. CODE ANN. § 4123.90 (Baldwin 1989)). The court also indicated that a violation of public policy would exist in the discharge of an employee because of discrimination. *Id.* (citing OHIO REV. CODE ANN. § 4112.02 (Baldwin 1990)).

[64] *See infra* part II. B. and accompanying notes.

[65] Such statutes prohibit employers from discharging employees who have reported violations of federal or state law. OHIO REV. CODE ANN. §§ 4113.51-53 (Baldwin 1991). *See also* Stuart v. Beech Aircraft Corp., 753 F. Supp. 317, 324 (D. Kan. 1990) (elements of "whistleblowing" tort).

pay, reinstatement of seniority and fringe benefits.[66] However, neither punitive nor front pay damages are available to the discharged employee under Ohio's whistleblower statute.[67]

In *Greeley v. Miami Maintenance Contractors, Inc.*,[68] the Ohio Supreme Court explicitly recognized the public policy exception to the employment-at-will doctrine.[69] The statute violated by the employer provided that:

> No employer may use an order to withhold personal earnings . . . as a basis for a discharge of, or for any disciplinary action against, an employee, or as a basis for a refusal to employ a person. The court may fine an employer who so discharges or takes disciplinary action against an employee, or refuses to employ a person, not more than five hundred dollars.[70]

The court found this statute fulfilled the necessary requirement lacking in *Phung* of a sufficiently clear exception to the employment-at-will doctrine.[71] But the court made it clear that the public policy exception in Ohio extends only to situations where an employee is dismissed "for a reason which is prohibited by statute."[72]

The *Greeley* court further held that a cause of action for discharge of an employee in violation of public policy may be brought in tort.[73] This enables employees dismissed in direct violation of a statute to recover lost wages in back pay and front pay, reinstatement, and possible assessment of punitive damages for the appropriate set of compelling facts.[74]

Since *Greeley*, the Ohio Supreme Court has strictly construed and limited its holding in that case. In *Tulloh v. Goodyear Atomic Corp.*,[75] the employee asserted a cause of action in tort for wrongful termination in retaliation for his public concern for safety levels in the plant.[76] The court found the employee's reliance on *Greeley* for support

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[66] OHIO REV. CODE ANN. § 4113.52(E) (Baldwin 1991).

[67] *See id.* Front pay damages are awarded as compensation for lost future wages between the date of discharge and reemployment in a position of equal or similar status. Worrell v. Multipress, Inc., 543 N.E.2d 1277, 1283 (Ohio 1989).

[68] 551 N.E.2d 981 (Ohio 1990).

[69] *Id.* at 986. In *Greeley*, the employee was discharged as a result of a court order requiring the employer to withhold child support payments from the employer's wages. *Id.* at 982.

[70] OHIO REV. CODE ANN. § 3113.213(D) (Baldwin 1989).

[71] *Greeley*, 551 N.E.2d at 986.

[72] *Id.* (citing *Hazlett v. Martin Chevrolet, Inc.*, as having a prior similar result when an employer violated O.R.C. 4112.02(A) by terminating an employee for requesting a temporary leave of absence for treatment of his drug addiction. Hazlett v. Martin Chevrolet, Inc., 496 N.E.2d 478 (Ohio 1986)).

[73] *Id.* at 987.

[74] *See* Cavico, *supra* note 43, at 504-05 and accompanying notes.

[75] 584 N.E.2d 729 (Ohio 1992).

[76] *Id.* at 733.

misplaced, because Ohio's whistleblower statute[77] had not yet been enacted at the time of Tulloh's dismissal.[78] Because *Greeley* requires a violation of a statutory prohibition by the employer for the public policy exception to surface,[79] and because there was no such statutory violation by Goodyear in their discharge of Tulloh, the Supreme Court found "no common-law basis in tort for a wrongful discharge claim."[80]

In *Provens v. Stark County Bd. of Mental Retardation & Developmental Disabilities*,[81] the Ohio Supreme Court further limited its *Greeley* decision. In *Provens*, the employee alleged violation of her rights using the Ohio Constitution as her statutory basis.[82] The court found *Greeley* did not apply to the facts of *Provens* because in *Greeley* "[t]he court limited its holding to a public policy enunciated in a statute, and not the Ohio Constitution."[83]

In interpreting the whistleblower statute, lower courts in Ohio have strictly construed the statute's requirements. In *Bear v. Geetronics, Inc.*,[84] the Butler County Court of Appeals disallowed the employee's wrongful termination suit in violation of O.R.C. 4113.51, because the statute expressly requires oral and written notification of the supervisor as to the employer violation at issue.[85] Without strict compliance with the statute's specifications for protection, the court was unwilling to create a public policy for whistleblowing.[86]

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[77] OHIO REV. CODE ANN. §§ 4113.51-53 (Baldwin 1991).

[78] *Tulloh*, 584 N.E.2d at 733. § 4113.52 was enacted on June 29, 1988, and Tulloh was dismissed in November of 1986. *Id.* at 730.

[79] Greeley v. Miami Valley Maintenance Contractors, Inc., 551 N.E.2d 981, 986 (Ohio 1990).

[80] *Tulloh*, 584 N.E.2d at 733. *See also* Wing v. Anchor Media, Ltd., 570 N.E.2d 1095, 1100 (Ohio 1991) (holding § 4113.52 not expressly retroactive and therefore not applicable to employee discharged two months prior to the statute's enactment).

[81] 594 N.E.2d 959 (Ohio 1992).

[82] *Id.* at 961.

[83] *Id.* at 966. The court also found the public school employee in *Provens* had adequate legislative and administrative remedies without involving a private cause of action against the employer. *Id.* at 965. *See also* Anderson v. Lorain County Title Co., No. 92CA005448, 1993 WL 407949, at *3 (Ohio Ct. App. 9th Dist. June 23, 1993) (holding statute violated by employer provided sufficient civil remedy, thereby precluding a separate tort action for wrongful termination in violation of public policy).

[84] 614 N.E.2d 803 (Ohio Ct. App. 1992).

[85] *Id.* at 806. The employee did not provide written notice. *Id.*

[86] *Id.* at 807 (holding "4113.52 preempts the formation of a public-policy exception to the employment-at-will doctrine within the specific context of whistleblowing."). *See also* Haynes v. Zoological Society of Cincinnati, 567 N.E.2d 1048 (Ohio Ct. C.P., Hamilton Co. 1990) (finding violation of whistleblower statute when employee was demoted following employee's written and oral notification to her supervisors that employer was violating Ohio statute requiring all employers to provide a safe place to work).

Lower courts in Ohio have extended the public policy exception to prohibit employee discharge for missing work due to statutorily required jury duty.[87] However, in extending the *Greeley* decision in this case, the court carefully compared the public policy provided by the specific statute at issue in *Shaffer* with that at issue in *Greeley*.[88]

Relatively few jurisdictions in the United States recognize a third exception to at-will-employment, the implied covenant of good faith, and fair dealing.[89] This theory is premised on the basic contract principle that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[90] In Ohio, the public policy exception has not been expanded to include a violation of good faith and fair dealing.[91] As stated in *Fawcett v. G. C. Murphy & Co.*,[92] an employer may terminate an at-will-employee for willful, wanton, malicious reasons, demonstrating bad faith on behalf of the employer.[93] Although *Greeley* modified *Fawcett*,[94] Ohio courts currently stand firm in their refusal to demand employers only terminate employees in good faith.[95]

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[87] *See* Shaffer v. Frontrunner, Inc., 566 N.E.2d 193 (Ohio Ct. App. 1990) (finding a violation of § 2313.18 a sufficiently similar public policy breach as the statute violated in *Greeley*). For the statute at issue in *Greeley*, *see supra*, notes 63, 65 and accompanying text. The statute at issue in *Shaffer* provides in pertinent part:

> (A) No employer shall discharge or threaten to discharge any permanent employee who is summoned to serve as a juror pursuant to Chapter 2313. of the Revised Code if the employee gives reasonable notice to the employer of the summons prior to the commencement of the employee's service as a juror and if the employee is absent from employment because of the actual jury service.
>
> (B) Whoever violates this section shall be punished as for a contempt of court pursuant to Chapter 2705. of the Revised Code.

OHIO REV. CODE ANN. § 2313.18 (Baldwin 1992).

[88] *Shaffer*, 566 N.E.2d at 194-97 (also noting the *Greeley* court dictum specifically mentioning O.R.C. 2313.18 as a statute that would frustrate public policy when violated).

[89] *See* Smith, *supra* note 49, at 1219 (citing *Employment at Will: State Rulings Chart*, [Individual Employment Rights Manual] 9A Lab. Rel. Rep. (BNA) 505:51-52 (Aug. 1989) (list of exceptions to employment-at-will by state)). As few as twelve states recognize this exception. *Id.* For jurisdictions recognizing this exception, *see, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988); Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980); Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974).

[90] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

[91] *See, e.g.*, Edelman v. Franklin Iron & Metal Corp., 622 N.E.2d 411, 414 (Ohio Ct. App. 1993); Ganim v. Brown Derby, Inc., 585 N.E.2d 982, 986 (Ohio Ct. App. 1990); Sheets v. Rockwell Int'l Corp., 588 N.E.2d 271, 275 (Ohio Ct. App. 1990); Spoone v. Seaman Corp., No. CA-413, 1990 WL 103745, at *3 (Ohio Ct. App. 5th Dist. July 20, 1990); Kuhn v. St. John and West Shore Hosp., 552 N.E.2d 240, 242 (Ohio Ct. App. 1989) (noting "[t]he Ohio Supreme Court has recognized a duty of good faith and fair dealing in Ohio insurance contract cases, but not in wrongful discharge cases brought by at-will-employees.").

[92] 348 N.E.2d 144 (Ohio 1976).

[93] *Id.* at 147.

[94] *See* Greeley v. Miami Valley Maintenance Contractors, Inc., 551 N.E.2d 981, 987 (Ohio 1990) (holding "the right of employers to terminate employment at will for 'any cause' no longer includes the discharge of an employee where the discharge is in violation of a statute and thereby contravenes public policy.").

[95] *See* cases cited *supra* note 91.

B. *Implied Employment Contracts and Promissory Estoppel in Ohio*

A widely accepted exception to employment-at-will results in employer liability when employers breach their express or implied promises in reference to their termination policies.[96] Ohio courts recognize both forms this exception may take. In the first instance, implied-in-fact promises not to terminate without cause are derived from express employer representations concerning the employer's discharge policies, their personnel practices, and custom and practice within the industry.[97] The second variation of this exception is the unilateral contract theory applied to express promises made in employee handbooks.[98] When an employee begins or continues to work with knowledge of the handbook, courts have found the employee's performance to constitute acceptance of the employer's unilateral offer of terms and conditions of employment.[99] Employment handbooks are also enforced under the doctrine of promissory estoppel.[100]

In *Mers v. Dispatch Printing Co.*,[101] the Ohio Supreme Court found the doctrine of promissory estoppel applicable to oral employment-at-will contracts.[102] In *Mers*, the employee was discharged following his arrest for rape, kidnapping, and gross sexual imposition.[103] However, his employer promised to reinstate him if the alleged charges were resolved in the employee's favor.[104] Eventually, the charges against Mers were dropped, but Dispatch Printing refused to honor their promise of reinstatement.[105] The Ohio court found conventional promissory estoppel theory applied, thereby reversing the lower court's grant of summary judgment for the employer.[106] According to the Ohio Supreme Court, the correct test for determining whether an at-will-employment contract

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[96] *See* Smith, *supra* note 49, at 1215 (listing "employer handbooks, policies, or other representations to the employees" as creating implied-in-fact term employment in thirty-four states).

[97] For an explanation of this rationale, *see generally id.* at 1215-18. *See also* Mers v. Dispatch Printing Co., 483 N.E.2d 150, 154 (Ohio 1985) (noting use of "[e]mployee handbooks, company policy, and oral representations to limit the employment-at-will right to discharge").

[98] For an in-depth explanation of this rationale, *see* Michael A. Chagares, Comment, *Limiting the Employment-at-Will Rule: Enforcing Policy Manual Promises Through Unilateral Contract Analysis*, 16 SETON HALL L. REV. 465, 477-89 (1986).

[99] *See* Helle v. Landmark, Inc., 472 N.E.2d 765, 775 (Ohio Ct. App. 1984) (holding that continued performance by employee was sufficient consideration to render the employer's promises enforceable). *See also* Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983) (holding employee manual to be an offer for a unilateral contract which is accepted with sufficient consideration when the employee remains on the job).

[100] *See* Jones v. East Center for Community Health, 482 N.E.2d 969, 974 (Ohio Ct. App. 1984) (holding employer representations in handbook enforceable under promissory estoppel theory, even though the handbook did not constitute an enforceable contract); Hedrick v. Center for Comprehensive Alcoholism Treatment, 454 N.E.2d 1343, 1347 (Ohio Ct. App. 1982) (holding that promissory estoppel was applicable to employment contracts).

[101] 483 N.E.2d 150 (Ohio 1985).

[102] *Id.* at 155.

[103] *Id.* at 152.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 154-55.

has been altered by the employer is "whether the employer should have reasonably expected its representation to be relied upon by its employee, and, if so, whether the expected action or forbearance actually resulted and was detrimental to the employee."[107]

Recent Ohio decisions have attempted to clarify the holding in *Mers*. In *Kelly v. Georgia-Pacific Corp.*,[108] the court found that whether the employee's allegations state a claim in promissory estoppel is a question of fact.[109] However, in raising promissory estoppel, the employee must evidence "specific promises" that demonstrate more than "nebulous representations" by the employer.[110] As in any promissory estoppel claim, the reliance must also be detrimental.[111] Declining other employment opportunities on the employer's promise of continued employment may show detrimental reliance, but this also is ultimately a question of fact for the jury.[112]

Numerous Ohio courts have attempted to define the appropriate balance between oral employment contracts and employee handbooks. First of all, there is a strong presumption in favor of at-will-employment in Ohio.[113] However, under certain circumstances, employee handbooks may alter an at-will-employment contract.[114] In addition, both the employee and the employer must show an intention to alter the employment-at-will.[115] Disclaimers in handbooks have been found by Ohio courts to constitute an

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[107] *Id.* at 155.

[108] 545 N.E.2d 1244 (Ohio 1989).

[109] *See id.* at 1249-50 (finding summary judgment inappropriate to decide the reasonableness of the employee's reliance on the employer's representations).

[110] Bruno v. Struktol Co. of Am., 576 N.E.2d 821, 824 (Ohio Ct. App. 1991); Modarelli v. First Fed. Sav. and Loan Assn. of Wooster, No. 2529, 1990 WL 77124 at *9 (Ohio Ct. App. June 6, 1990).

[111] *See* Cohen v. Messina, 492 N.E.2d 867, 872 (Ohio Ct. App. 1985) (setting forth necessary elements of promissory estoppel: "There must be a promise, clear and unambiguous in its terms, reliance by the party to whom the promise is made, the reliance must be reasonable and foreseeable, and the party claiming estoppel must be injured by the reliance.").

[112] *See* Miller v. BancOhio Nat'l Bank, Nos. 90AP-380, 90AP-551, 1991 WL 64907, at *12 (Ohio Ct. App. 10th Dist. Apr. 23, 1991) (finding it a question for the jury whether employee's refusal of job offers made by head hunters because of current job security was reasonable or not).

[113] *See* Biskupich v. Westbay Manor Nursing Home, 515 N.E. 2d 632, 633 (Ohio Ct. App. 1986) (citing Phung v. Waste Management, Inc., 491 N.E.2d 1114 (Ohio 1986) as establishing Ohio's unquestionable adherence to at-will-employment); Stokes v. Worthington Indus., Inc., No. 88AP-583, 1989 WL 71641, at *4 (Ohio Ct. App. 10th Dist. June 29, 1989) (quoting Henkel v. Educ. Research Council of Am., 344 N.E. 2d 118, 121-22 (Ohio 1976)).

[114] *See* Helle v. Landmark, Inc., 472 N.E.2d 765, 775 (Ohio Ct. App. 1984) (holding oral assurances which conflict with an employment handbook's disclaimers or induce an employee to disregard their significance will negate the effect of the disclaimers); Kelly v. Georgia-Pacific Corp., 545 N.E.2d 1244, 1249 (Ohio 1989); *Miller*, 1991 WL 64907, at *5 (noting that the majority of Ohio employment-at-will cases "have held that an employment handbook or oral promises or assurances can create an implied contract not to discharge except for just cause.").

[115] Sowards v. Norbar, Inc., 605 N.E.2d 468, 471 (Ohio Ct. App. 1992). *See also* Wing v. Anchor Media, Ltd., 570 N.E.2d 1095, 1098 (Ohio 1991); Karnes v. Doctors Hosp., 555 N.E.2d 280, 282 (Ohio 1990); Uebelacker v. Cincom Sys., Inc., 549 N.E.2d 1210, 1216 (Ohio Ct. App. 1988).

intent not to be bound to an employment contract other than at-will employment.[116] Also, progressive disciplinary proceedings laid out and explained in an employee manual may alter an at-will contract between employer and employee, but only if the employee demonstrates knowledge of the procedures gained by reading the manual or by learning of the procedures in some other way.[117]

III. A NEW EXCEPTION TO AT-WILL-EMPLOYMENT IN OHIO

When addressing majority oppression or squeeze-outs of the minority shareholders in a close corporation, lower courts in Ohio generally apply the holding in *Crosby v. Beam*, and require a heightened fiduciary duty from the majority.[118] However, the majority may lawfully breach their heightened fiduciary duty by showing some legitimate business purpose for doing so.[119] In responding to the common majority squeeze-out tactic of terminating minority shareholders,[120] Ohio's lower courts also must reconcile any protection given the terminated shareholder with Ohio's generally unfailing employment-at-will doctrine.[121] Without legislative guidelines, different lower courts in Ohio have applied different reasoning and have come to different conclusions regarding minority shareholders and at-will employment.[122]

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[116] *See Karnes*, 555 N.E.2d at 280-81. The terminated employee had signed a disclaimer which said,

> I understand this Handbook is presented for informational purposes only, and can be changed at any time by Doctors Hospital with or without notice. I also understand this Handbook is not a contract expressed or implied between myself and Doctors Hospital. I understand I am an employee at will and either myself or Doctors Hospital can terminate the employment relationship at any time for any reason.

Id. at 281.

[117] *Stokes*, 1989 WL 71641 at *8 (also finding promissory estoppel inapplicable since, without knowledge of the handbook, the employee could not have relied upon it to his detriment). *But see*, Penwell v. Amherst Hosp., 616 N.E.2d 254, 257 (Ohio Ct. App. 1992) (finding employee manual containing progressive disciplinary policy did not change at-will employment contract when policy did not include all employment performance situations).

[118] *See, e.g.*, Howing Co. v. Nationwide Corp., 927 F.2d 263, 267-70 (6th Cir. 1991); Priebe v. O'Malley, 623 N.E.2d 573, 575 (Ohio Ct. App.), *jurisdictional motion overruled*, 619 N.E.2d 1028 (Ohio 1993); Wrightsel v. Ross-Co Redi-Mix, Inc., No. 1791, 1993 WL 97780, at *6 (Ohio Ct. App. 4th Dist. Mar. 26, 1993); B & W Custom Cabinets, Inc. v. Worthington, Nos. 59801, 60709, 1992 WL 83821, at *8 (Ohio Ct. App. 8th Dist. Apr. 23, 1992); McLaughlin v. Beeghly, 617 N.E.2d 703, 705 (Ohio Ct. App. 1992); Gigax v. Repka, 615 N.E.2d 644, 648 (Ohio Ct. App. 1992); Isroff v. Westhall Co., No. 15063, 1991 WL 260204, at *2 (Ohio Ct. App. 9th Dist. Nov. 27, 1991); Lerner & Assoc., Inc. v. Vassy, 599 N.E.2d 734, 738 (Ohio Ct. App. 1991).

[119] Crosby v. Beam, 548 N.E. 2d 217, 221 (Ohio 1989) (citing Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657 (Mass. 1976)).

[120] *See* Thompson, *supra* note 14, at 197.

[121] *Gigax*, 615 N.E.2d at 647-48; *Priebe*, 623 N.E.2d at 576. *See also supra* part II. and accompanying notes.

[122] This result was warned of in 1987 when one commentator proposed an enactment of an oppression relief law for Ohio. *See* Weinberg, *supra* note 30, at 201. *See generally* Nicholson, *supra* note 2 (advocating legislation to provide a consistent and fair balance between fiduciary duty principles and the corporate right to manage and control its business).

A. *Recent Ohio Judicial Responses to Minority Shareholder Terminations*

In *Gigax v. Repka*,[123] a one-third shareholder and working director was terminated by the other two working shareholders of the corporation.[124] The majority alleged the minority shareholder's work performance had declined to an unacceptable level.[125] All three shareholders had invested $70,000 in the corporation since its inception in 1978.[126] Although all three of the shareholders earned the same salary, they had no employment agreement.[127] Gigax, the terminated minority shareholder, sought injunctive relief prohibiting the majority from terminating his at-will-employment with the close corporation.[128] The trial court refused to do so and Gigax appealed.[129]

In its decision, the Second District Court of Appeals compared Ohio at-will-employment law with the heightened fiduciary duty required among close corporation shareholders.[130] Relying on the partnership analogy to shareholders in a close corporation,[131] the *Gigax* court found that a minority shareholder was not an at-will employee that could be discharged at any time, for any reason by the majority.[132] As in a partnership, the heightened fiduciary duty requires that removal of working shareholders must be based on a "legitimate business reason."[133] This Ohio court concluded that, by demanding a legitimate business reason for discharging working minority shareholders, the correct balance was reached between protecting the minority and protecting the profitable workings of the corporations.[134]

Wrightsel v. Ross-Co Redi-Mix, Inc.[135] is a classic example of minority oppression by the majority. In that case, a thirty-year-old, family-owned close corporation ultimately became co-owned by only two brothers in 1978.[136] One brother, Charles, owned

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[123] 615 N.E.2d 644 (Ohio Ct. App. 1992). An appeal to the Supreme Court of Ohio was dismissed for want of prosecution. Gigax v. Repka, 612 N.E.2d 330 (Ohio 1993).

[124] *Gigax*, 615 N.E.2d at 646. The corporation was established in 1978 and Gigax was fired in February or March of 1992. *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 647.

[129] *Id.* The trial court was concerned with burdening a corporation with unproductive employees that would adversely affect the business, thereby damaging all of the shareholders. *Id.* at 649.

[130] *Id.* at 647-49.

[131] *Id.* at 649-50 (noting partnership principles as stated by the same appellate court in Leigh v. Crescent Square, Ltd., 608 N.E.2d 1166 (Ohio Ct. App. 1992)).

[132] *Id.* at 649.

[133] *Id.* at 650. In other words, the at-will-employment doctrine does not apply to such employees. *Id.*

[134] *Id.*

[135] No. 1791, 1993 WL 97780 (Ohio Ct. App. 4th Dist. Mar. 26, 1993).

[136] *Id.* at *1.

61% and the other brother, David, owned 39% of the corporation.[137] Between 1978 and 1987, Charles experienced various health problems and surgeries which required David to take on most of the day-to-day operation and responsibility of running the corporation.[138] In March of 1987, David fell ill and missed three days of work.[139] When he returned to work, his brother fired him.[140] In the ensuing months, David collected unemployment compensation while Charles replaced him with members of Charles' immediate family as officers of the corporation, as well as placing his own 61% in a trust.[141] David remained a 39% shareholder, but he received only $4,600 from the corporation in 1987, as compared to earnings in excess of $60,000 in the prior two years.[142] When the corporation refused to buy out David at his price of $450,000, David unsuccessfully attempted to sell his minority interest to outsiders.[143] In September of 1987, the corporation's final buy-out price of $150,000 was ultimately accepted by David out of financial necessity.[144] David then sued the corporation for breach of fiduciary duty, stating that the corporation terminated him "without notice and without cause," requesting $450,000 in compensation.[145] The jury awarded David $150,000 and the corporation appealed.[146]

In its decision, the Fourth District Court of Appeals cited favorably to the *Gigax* decision, finding that minority shareholders of close corporations were not at-will employees.[147] Because minority shareholders depend on their salary for the primary return on their investments in the corporation, the court held that such shareholder/employees may not be fired without a legitimate business reason for the discharge.[148] The court upheld the jury's verdict because Charles had not offered any reason, legitimate or otherwise, for David's discharge.[149]

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[137] *Id.*

[138] *Id.*

[139] *Id.* at *2.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at *3. Charles died in 1988 and, interestingly, his estate tax return showed his interest in the corporation worth $1,145,839. *Id.*

[146] *Id.* at *4.

[147] *Id.* at *6. The court also cited to Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657 (Mass. 1976), Crosby v. Beam, 548 N.E.2d 217 (Ohio 1989) and B & W Custom Cabinets, Inc. v. Worthington, Nos. 59801, 60709, 1992 WL 83821 (Ohio Ct. App. 8th Dist. Apr. 23, 1992) for support. 1993 WL 97780 at *4.

[148] 1993 WL 97780 at *4. The opinion reveals no actual money amounts invested by David. *See id.* However, David had worked full-time for the corporation since 1966. *Id.* at *1.

[149] *Id.* at *6. Therefore, the court upheld the jury's verdict in favor of the minority shareholder, David. *Id.* at *11.

In *Priebe v. O'Malley*,[150] a less sympathetic plaintiff generated a different finding as to the at-will-employment of close corporation shareholders.[151] Priebe was also a working shareholder and director of a close corporation.[152] Priebe and the other original shareholder agreed to add a third and equal shareholder, O'Malley, to their recently formed corporation in return for O'Malley's pledge of $23,000.[153] Priebe was then discharged by the other two working shareholders for his alleged decline in sales performance and his inability to work well with other employees of the corporation.[154] As in *Gigax*, none of the shareholders in *Priebe* had a written employment agreement.[155] The trial court found for the defendants and Priebe appealed.[156]

The Ninth District Court of Appeals held that the majority shareholders owed Priebe a "heightened fiduciary duty."[157] However, because the majority had convinced the lower court that they had a legitimate business purpose for terminating Priebe, the Ninth District Court of Appeals would not disturb the lower court's finding in favor of defendants.[158]

Priebe also appealed the lower court's finding on the grounds that he had an implied employment contract with the corporation, establishing term employment rather than at-will-employment.[159] The Ninth District disagreed.[160] Instead, the court found the corporation's established work policy "allowing it to 'relieve' any director or shareholder of his holdings in the company and/or any salary or compensation if he did not perform his duties satisfactorily" as demonstrating at-will employment.[161] The appellate court found this policy did not warrant Priebe's belief that he was employed for life by the corporation.[162] Although this court found a lawful breach of fiduciary duty by the

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[150] 623 N.E.2d 573 (Ohio Ct. App.), *jurisdictional motion overruled*, 619 N.E.2d 1028 (Ohio 1993).

[151] *Id.* at 576. A motion to certify the record to the Supreme Court of Ohio was overruled. Priebe v. O'Malley, 619 N.E.2d 1028 (Ohio 1993).

[152] *Priebe*, 623 N.E.2d at 574. But in *Priebe*, the corporation had only recently been established in 1984 and Priebe was fired September 4, 1986. *Id.*

[153] *Id.*

[154] *Id.* at 575.

[155] *Id.* at 576.

[156] *Id.* at 575.

[157] *Id.* at 575 (quoting Crosby v. Beam, 548 N.E.2d 217 (Ohio 1989)).

[158] *Id.* at 576. The appeals court noted Priebe's alleged reduction in sales, his inability to work well with others, as well as some evidence that Priebe was converting corporate property to personal use, that he was not working full shifts, and that he had threatened to close down the company. *Id.* at 575-76.

[159] *Id.* at 576. The court cited to *Mers* as recognizing "that the cumulative effect of various events may transform an employment-at-will agreement into an implied contract for a definite term." *Id.* Priebe was attempting to imply lifetime employment from his 30 year involvement in building the business. *Id.*

[160] *Id.*

[161] *Id.* (citing the strong presumption in favor of at-will-employment noted in Henkel v. Educational Research Council, 344 N.E.2d 118, 122 (Ohio 1976)).

[162] *Id.*

corporation, it was unwilling to find this working minority shareholder anything other than an at-will employee.[163]

B. The Expectations of Close Corporation Shareholders and an Implied Employment Contract

In general, extending the requisite heightened fiduciary duty among close corporation shareholders to include termination of working shareholders only for cause emerges from the shareholders' original expectations of their ownership in close corporations.[164] Shareholders of close corporations have different expectations than shareholders in publicly held corporations.[165] Shareholders of close corporations usually depend on salaried managerial positions in order to realize an equal return on their investment in the company.[166] By drawing the partnership analogy to the close corporation structure, the requisite duty of good faith and loyalty of partnerships would abolish at-will-employment among working shareholders.[167] However, if term employment were achieved merely because of the status of the shareholder, such a standard would be easily abused.[168] The reasonable expectations test[169] keeps such abuse in check. Without first determining

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[163] *Id.*

[164] *See, e.g.*, Wilkes v. Springside Nursing Home, 353 N.E.2d 657, 662-63 (Mass. 1976) (holding that the termination of a minority shareholder defeats the original objective of the shareholder in joining the corporation and prevents him from realizing an equal return on his investment). *But see* Ingle v. Glamore Motor Sales, Inc., 535 N.E.2d 1311, 1312-13 (N.Y. 1989) (finding that a minority shareholder in a close corporation is an at-will employee).

[165] *See* Spratlin, *supra* note 14, at 408.

[166] O'NEAL, *supra* note 13, § 7.15 at 525. O'Neal explains the underlying premise supporting the reasonable expectations test:

> [I]n a corporation based on a personal relationship a court should give relief, dissolution or some other remedy, to a minority shareholder whenever corporate managers or controlling shareholders act in a way that disappoints the minority shareholder's expectations, even though the acts of the managers or controlling shareholders fall within the literal scope of powers or rights granted them by the corporation act or the corporation's charter or by-laws.

Id. See generally Thompson, *supra* note 14.

[167] *See* Victor Brudney, *Fiduciary Ideology in Transactions Affecting Corporate Control*, 65 MICH. L. REV. 259, 270 (1966) ("Strict fiduciary considerations would make any . . . legitimate business purpose irrelevant . . . .").

[168] *See infra* part III. C. and accompanying notes.

[169] The strongest decision adopting the reasonable expectations doctrine held that:

> These 'reasonable expectations' are to be ascertained by examining the entire history of the participants' relationship. That history will include the 'reasonable expectations' created at the inception of the participants' relationship; those 'reasonable expectations' as altered over time; and the 'reasonable expectations' which develop as the participants engage in a course of dealing in conducting the affairs of the corporation . . . . In order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them. Privately held expectations which are not made known to the other participants are not 'reasonable.' Only expectations embodied in understandings, express or implied, among the participants should be recognized by the court.

Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983).

the reasonable expectations of both the minority and the majority shareholders in a close corporation, courts should hesitate to find employment relationships other than strictly at-will.[170]

Ohio's close corporation law merges with its employment law when determining whether or not a terminated shareholder was unjustly discharged. The reasonable expectations of all the close corporation shareholders become the grounds by which the court may find an implied contract for term employment.[171] Once the court finds an implied contract for term employment embodied in the reasonable expectations of the participants, then the court may proceed with the "balancing test" of *Crosby* and determine whether the discharge was justified.[172] The initial step of determining the existence of an implied contract for term employment from the shareholders' reasonable expectations achieves two purposes. First, it appropriately tempers the fiduciary duty required of shareholders in a close corporation setting.[173] Second, it assures term employment will not be found in close corporations without the parties first reasonably anticipating it.[174] The practical result of this two-step analysis will be that term employment in close corporations will be found on a case-by-case basis when the reasonable expectations of those involved demand it.[175]

A closer look at the courts' reasoning in two of Ohio's minority shareholder termination cases demonstrates how this two-step analysis should work, and how inconsistencies result when it is not applied.

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[170] In 1986, F. Hodge O'Neal called for some remedy at law for the terminated minority shareholder whose expectations and investments have been exploited by the majority. *See* O'Neal, *supra* note 2, at 143. Today, Ohio courts provide that remedy for the oppressed minority shareholder who successfully meets the reasonable expectations test. *Id.*

[171] *See* Nicholson, *supra* note 2, at 532-33 (warning that if the use of the heightened fiduciary duty in settling shareholder disputes is not limited by either the courts or the legislature, minority shareholders will continue to neglect to set up provisions to resolve future conflicts when establishing their close corporation).

[172] *See supra* part I.C. and accompanying notes. After the court finds an implied contract for term employment, then the court is free to balance any legitimate business purpose the majority had to discharge the shareholder against any less harmful means of reaching the same purpose proposed by the minority. *Id.*

[173] *See* Kates, *supra* note 18, at 657-58; Spratlin, *supra* note 14, at 414-15; Thompson, *supra* note 14, at 216. *But see* Mitchell, *supra* note 24, at 1708 (asserting that any balancing inappropriately lessens the requisite partnership-type fiduciary duty because it shifts the focus "from the classic fiduciary examination of whether the action taken was in the beneficiary's best interests to a mode of analysis that centers on the fiduciary's interest.").

[174] *See* Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 293-96 (1986) (concluding that the *Wilkes* balancing test limited the equal opportunity rule of *Donahue* by equating the reasonable expectations of the shareholders to the implied terms of an employment contract).

[175] Under this analysis, a minority shareholder may still be legally discharged by the majority at any time and for any reason if the participants did not expect term employment to result from their dealings. Without finding an implied contract for employment, the majority need not show a legitimate business purpose for the discharge.

In *Gigax* and *Priebe*, both appellate courts cited to *Mers* in analyzing whether at-will employment existed:[176]

> The facts and circumstances surrounding an oral employment-at-will agreement, including the character of the employment, custom, the course of dealing between the parties, company policy, or any other fact which may illuminate the question, can be considered by the trier of fact in order to determine the agreement's explicit and implicit terms concerning discharge.[177]

In *Gigax*, the court considered the following factors in determining whether or not the working shareholders were at-will-employees: (1) that the business involved was a close corporation; (2) that those involved were both working directors and shareholders of the close corporation; and (3) that those so involved were working without either an employment contract or a shareholder's agreement pursuant to O.R.C. 1701.591.[178] In *Priebe*, the court considered the following factors: (1) the recent re-formation of the corporation to add a third shareholder to end prior deadlocks; (2) the newly formed corporation's work policy permitting termination of working shareholders for unsatisfactory performance; and (3) Priebe's lack of specific oral or written promise from the company for lifetime employment.[179] In the former case, the court inferred term employment for the minority shareholder from the surrounding circumstances;[180] in the latter case, the court would not infer a lifetime employment contract from the surrounding factors, regardless of whether or not such employment was terminable for a legitimate business purpose.[181] This resultant discrepancy stems from Priebe being a far less sympathetic plaintiff who had supplied ample cause for his termination.[182] What existed in both of the above cases were minority shareholders who, by virtue of the reasonable expectations of the corporate participants, had implied contracts for term employment.[183] In these two cases, the first step of the analysis should have found neither Priebe nor Gigax to be at-will-employees. However, by applying the second step of the analysis, the courts could have effectuated the same holdings as actually reached. In the case of

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[176] Gigax v. Repka, 615 N.E.2d 644, 647-48 (Ohio Ct. App. 1992); Priebe v. O'Malley, 623 N.E.2d 573, 576 (Ohio Ct. App.), *jurisdictional motion overruled*, 619 N.E.2d 1028 (Ohio 1993).

[177] Mers v. Dispatch Printing Co., 483 N.E.2d 150, 154 (Ohio 1985) (listing factors to consider that may overcome the presumption of at-will-employment when the alleged permanent or lifetime employment is not accompanied by additional consideration by the employee, over and above the satisfactory performance of his duties).

[178] *Gigax*, 615 N.E.2d at 648.

[179] *Priebe*, 623 N.E.2d at 576.

[180] *See Gigax*, 615 N.E.2d at 648-49. In his concurrence, Judge Grady adds that he would also find term employment from considerations made by Gigax in investing $70,000 and his work performance. *Id.* at 650.

[181] *Priebe*, 623 N.E.2d at 576.

[182] *See supra* note 158.

[183] Both plaintiffs had been involved with their fellow shareholders with reasonable expectations that their employment was part of the bargain and their return on their investment.

Gigax, the shareholder-majority did not fulfill its burden of showing a legitimate business purpose for terminating the minority shareholder.[184] In the case of *Priebe*, the shareholder-majority did fulfill its burden.[185] If Priebe could have then provided a less harmful alternative that would have achieved the same purpose, his termination may still have been prohibited.[186]

Eliminating minority shareholders from employment opportunities and compensation in a close corporation prevents a great portion of the expected return on the minority's investment in the business.[187] If when the shareholder joined the close corporation, she had reasonable expectations that her salary would furnish a return, and when such implied contractual terms are implicit in the nature and workings of the close corporation, courts should extend the *Crosby* requirement of a heightened fiduciary duty among shareholders of close corporations[188] to include finding an implied contract for term employment for the working shareholders.[189] Lack of an employment agreement or failure to take advantage of the protections available through the shareholders' agreement of O.R.C. 1701.591 should not alter the original expectations of working minority shareholders that their employment with their company was to last at least as long as the corporation exists and their performance remained satisfactory. At the same time, because a legitimate business purpose may ultimately allow the termination of unproductive or unprofitable working shareholders, the corporation is also adequately protected.[190]

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[184] *Gigax*, 615 N.E.2d at 650.

[185] *Priebe*, 623 N.E. 2d at 575-76.

[186] The case is devoid of any effort on Priebe's part to achieve this.

[187] O'NEAL & THOMPSON, OPPRESSION OF MINORITY SHAREHOLDERS, *supra* note 2, § 3:06 at 37 (noting that close corporations rarely pay dividends). *See also* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657 (Mass. 1976) where the court notes:

> The denial of employment to the minority at the hands of the majority is especially pernicious in some instances. A guaranty of employment with the corporation may have been one of the basic reason[s] why a minority owner has invested capital in the firm . . . The minority stockholder typically depends on his salary as the principal return on his investment, since the earnings of a close corporation . . . are distributed in major part in salaries, bonuses and retirement benefits . . . In sum, by terminating a minority stockholder's employment or by severing him from a position as an officer or director, the majority effectively frustrate the minority stockholder's purposes in entering on the corporate venture and also deny him an equal return on his investment.

Id. at 662-63.

[188] Crosby v. Beam, 548 N.E.2d 217, 221 (Ohio 1989) (holding that the heightened fiduciary duty is breached when the majority uses their "control of the corporation to their own advantage, without providing minority shareholders with an equal opportunity to benefit . . . "). *See also* Kates, *supra* note 18, at 657-59 (discussing the benefits of using the reasonable expectations of minority shareholders as a guide to determining shareholder disputes).

[189] *See Gigax*, 615 N.E.2d at 648-49 (favorably quoting Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657 (Mass. 1976).

[190] *See id.* at 650 (concluding "[o]ur holding today balances the need to protect the minority shareholder-employee with the needs of the close corporation in ridding itself of the unproductive or troublesome employee."). The court found that because all three shareholders' performance was down, and Gigax was not given notice of his alleged decline in work quality, the majority had no legitimate business purpose to terminate Gigax. *Id.*

Although the Ohio judiciary is reluctant to add a "just cause" and "good faith" requirement to the at-will-employment doctrine in general, it is mandated by the fiduciary duty required when close corporations are analogized to partnerships.[191]

C. Arguments Against Finding Working Minority Shareholders to be Term Employees

Although the elimination of at-will-employment in close corporations is a natural outgrowth of the heightened fiduciary duty owed by shareholders to each other, some commentators have criticized such a shift in employment law.[192] Their major arguments center around the shortcomings of the partnership analogy to close corporations.[193] Because Ohio has so whole-heartedly embraced this analogy,[194] such arguments seem inapplicable. However, other less explored arguments are worth noting.

First of all, there exists the possibility of creating minority rule through judicial determinations based on fairness. The more power the minority has, the greater the probability of shareholder disputes resulting in deadlock.[195] If a 5% shareholder employed by the corporation may successfully litigate a wrongful termination suit, this shareholder is in a position to exploit the majority as well as the corporation's profitability.[196] Such exploitation may financially destroy the business or, alternatively, guarantee lifetime employment to the unproductive or uncooperative employee.[197]

The ultimate result of increasing the protection of working minority shareholders to include a finding of term employment may be a reduction in offers of part-ownership in

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[191] *See id.* at 649-50.

[192] *See* Easterbrook & Fischel, *supra* note 174, at 273 (proposing that shareholders of close corporations are open to no more exploitation than shareholders of publicly held corporations). *See generally* Sandra L. Schlafge, Comment, Pedro v. Pedro: *Consequences for Closely Held Corporations and the At-Will Doctrine in Minnesota*, 76 MINN. L. REV. 1071 (1992) (arguing that employees of close corporations are not at-will-employees and are adequately protected by statute in Minnesota without also granting wrongful termination damages).

[193] *See, e.g.*, Easterbrook & Fischel, *supra* note 174, at 297-300 (arguing that determining the employment contract from the reasonable expectations and observable behavior of those involved in a close corporation achieves a better result than a per se application of the partnership fiduciary duty); Kates, *supra* note 18, at 659-60 (proposing that because by definition some close corporations may have up to fifty shareholders, the partnership analogy is weakened); Nicholson, *supra* note 2, at 530-32 (arguing application of partnership law to close corporations may be contrary to the objectives of the shareholders).

[194] Crosby v. Beam, 548 N.E.2d 217, 220 (Ohio 1989). *See also* cases cited *supra* note 118.

[195] In Ohio, deadlock is the only ground for dissolution of a close corporation. OHIO REV. CODE ANN. § 1701.91 (A)(4) (Baldwin 1992).

[196] *See* Schlafge, *supra* note 192, at 1095 (suggesting that terminated minority shareholders who may recoup damages through suits in tort for breach of fiduciary duty and wrongful termination, as well as be granted a fair buy-out price for their stock, receive a judicial "windfall"). *See also* McLaughlin v. Beeghly, 617 N.E.2d 703, 707 (Ohio Ct. App. 1992). The court found attorney fees recoverable in a shareholder suit for breach of fiduciary duty as in a derivative suit. *Id.* This will provide further incentive to sue.

[197] Schlafge, *supra* note 192, at 1095 & n.119. The author also proposes that such an "easily abused standard" will encourage such litigation whenever a working shareholder is fired without cause. *Id.* at 1094 & n.118, 1095 & n.119.

a business with limited personal liability.[198] However, if future judicial determinations are based on the reasonable expectations of the shareholders, close corporation disputes will be settled according to the original explicit and implicit contract terms of the parties.[199] First determining the original expectations of the terminated employee will afford the majority shareholders adequate protection against unjustifiable exploitation by the minority shareholder.[200]

Another problem created by the court's interpretation of term employment in close corporations arises out of a perceived lessening in the requirements for discharging a term employee. Conventional employment law requires a finding of "just cause" to lawfully terminate an employee of definite term.[201] The judicial interpretations in recent Ohio case law are granting lawful terminations on a showing of a "legitimate business purpose."[202] If courts construe "a legitimate business purpose" to be less strict than the requirement of "just cause," then term employees in close corporations may be discharged for less significant reasons than other employees under contract in Ohio.

One final possible result from abolishing at-will-employment in close corporations may be the further wearing down of the at-will doctrine in general.[203] A major criticism of the conventional at-will doctrine is that it fails to reflect the reasonable expectations

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[198] *See* Easterbrook & Fischel, *supra* note 174, at 290 (recommending the benefits of protecting minority shareholders should be weighed against "greater transaction costs as deadlocks multiply, an increase in the price of equity and debt capital, and perhaps the denial of any opportunity to invest.").

[199] *See* Thompson, *supra* note 14, at 225 (suggesting that oppression statutes like MINN. STAT. ANN. § 302A.751 (West 1985) guarantee that the reasonable expectations of all involved would determine what protections are afforded the disputing factions). *But see*, Schlafge, *supra* note 192, at 1094-97 (arguing judicial use of the reasonable expectations standard in Minnesota which results in finding shareholders term employees is unwarranted because of Minnesota's statutory protections).

[200] *See* Easterbrook & Fischel, *supra* note 174, at 296. The commentators compare the balancing test of *Wilkes* to the standard of review used to determine "conflict of interest transactions in publicly held corporations. This standard, which gives some but not absolute protection to the minority, is in all likelihood closer to the bargain the parties would have reached themselves if transaction costs were zero." *Id.*

[201] The draft Uniform Employment-Termination Act of the National Conference of Commissioners on Uniform State Laws defines a good cause as: "(1) a reasonable basis for termination in view of relevant factors and circumstances, or (2) the exercise of good-faith business judgment by the employer." UNIF. EMPLOYMENT TERMINATION ACT (Draft Mar. 11, 1990). Specific examples given under the first option include employee theft, on-the-job drug or alcohol use, inadequate job performance and neglect of duty. *Id. But see* Mers v. Dispatch Printing Co., 483 N.E.2d 150, 153 (Ohio 1985) (warning against abolishing at-will-employment because it would result in continuous judicial second guessing as to the employers' business judgment).

[202] *See, e.g.*, Priebe v. O'Malley, 623 N.E.2d 573, 575 (Ohio Ct. App.), *jurisdictional motion overruled*, 619 N.E.2d 1028 (Ohio 1993). *See also supra* note 158 (for examples cited by court of sufficient corporate business purpose for terminating the employee); Wrightsel v. Ross-Co Redi-Mix, Inc., No. 1791, 1993 WL 97780 at *6 (Ohio Ct. App. 4th Dist. Mar. 26, 1993) (upholding lower court holding in favor of terminated employee when discharging shareholders offered no legitimate business purpose for the termination).

[203] Schlafge, *supra* note 192, at 1094-95.

of modern employees and employers.[204] Recent Ohio case law bases the finding of term employment, where an employee is also a shareholder of a close corporation, on the reasonable expectations of the shareholder.[205] It may only be a small jump to extend this holding to include the reasonable expectations of all of today's employees for job security and all of today's employers for lower costs from reduced employee turnover rates.

CONCLUSION

Ohio courts are responding to the special needs of shareholders in close corporations. This is necessitated by the optional character of Ohio's close corporation law. By no longer viewing working shareholders as at-will-employees, the courts have carved out a new exception to at-will-employment in Ohio. This exception is a natural outgrowth of current close corporation law. However, the court system must insure a just result by first determining the reasonable expectations of the shareholders when creating the implied-in-fact employment contract. In this manner, a workable balance is achieved where the majority is protected from unwarranted exploitation by the minority, while the special nature of the minority is more adequately shielded.

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[204] *See* Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 674-75 (1988); St. Antoine, *supra* note 50, at 66-71 (reviewing the basis for the presumption of at-will-employment and calling for statutory solutions in response to legitimate employee expectations); Cavico, *supra* note 43, at 502 (quoting Sabine Pilot Serv. v. Hauch, 687 S.W.2d 733 (Tex. 1985) (Kilgarlin, J., concurring)).

> Absolute employment-at-will is a relic of early industrial times, conjuring up visions of the sweat shops described by Charles Dickens and his contemporaries. This doctrine belongs in a museum, not in our law. As it was a judicially promulgated doctrine, this court has the burden and duty of amending it to reflect social and economic changes.

Id.

[205] *See supra* part III. B. and accompanying notes.