

Employment Termination and Shareholder Oppression

Terminating the employment of a minority shareholder of the closely-held employer presents different considerations than the termination of a typical employee. Particularly when the termination comes in the midst of a dispute over the control or direction of the business, the employer's counsel must consider not only possible claims by the shareholder/employee arising from the status as employee (i.e., discrimination, retaliation, or breach of an employment agreement), but also claims arising from the status as shareholder.

By Jack Blum, former Associate

Closely-held businesses are non-publicly traded companies that are owned by a small number of individuals. The owners of these businesses are often employed by the business and rely on payments from the business, whether in the form of salary or profit distributions, for their livelihood. Their ownership interests, particularly minority interests, are not easily marketable and the only available purchasers may be the other owners. Disputes between the owners of these businesses - often over the company's management, another owner's conduct, or the job performance of an owner/employee - can be bitter and may involve issues that have built over a number of years or the breakdown of personal or working relationships between the owners.

One "freeze out" tactic used in closely-held business disputes is the termination of a minority shareholder's employment. This tactic, particularly when combined with the non-distribution of profits, puts economic pressure on the shareholder/employee by eliminating any return on his or her investment in the business. Because a minority shareholder will always be outvoted by the majority, the termination also leaves the shareholder/employee without an effective voice in the company.

To protect minority shareholders against the actions of a hostile majority, Maryland law recognizes a cause of action for shareholder oppression. Oppressive conduct is defined as actions by the majority that substantially defeat the reasonable expectations of the minority shareholder that were central to the shareholder's decision to invest in the business. These protected reasonable expectations are distinguished from a shareholder's mere subjective hopes and desires. The available relief for an oppressed shareholder can include monetary damages, a wide range of injunctive relief, or, in extraordinary cases, dissolution of the corporation or the appointment of a receiver.

In *Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233 (2005), the Court of Special Appeals addressed when a shareholder/employee has a reasonable expectation of employment that can support a claim of shareholder oppression based upon the shareholder/employee's termination. The court found that because the shareholders' agreement in *Edenbaum* contained provisions describing each shareholder's job duties and responsibilities, it also functioned as an employment agreement. While the court did not address whether this dual agreement altered the shareholder/employee's at-will employment status, it did hold that the agreement's dual status rendered the shareholder/employee's termination oppressive, and entitled the shareholder/employee to relief under her cause of action for shareholder oppression.

In April 2014, the Court of Special Appeals in *Bontempo v. Lare*, 217 Md. App. 81 (2014) again addressed the application of shareholder oppression in the employment context. The court began by clarifying that a shareholder/employee's reasonable expectations are defined by the terms of the shareholders' agreement. In doing so, the court explained that the shareholders' agreement in *Edenbaum* was atypical, and most shareholders' agreements will not also function as an employment agreement. The court also held that where a shareholder/employee's employment is at-will, and the shareholders' agreement lacks the employment terms present in *Edenbaum*, there is no reasonable expectation of continued employment to support the recovery of employment-related damages.

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