

1996

# Meredith Gibson v. US West Communications, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

MEREDITH GIBSON,

Plaintiff and Appellant,

v.

U S WEST COMMUNICATIONS, INC.,

Defendant and Appellee.

Case No. 960251-CA

Priority 15

BRIEF OF APPELLEE

Appeal from a Summary Judgment entered in the  
Third District Court in and for Salt Lake County, Utah  
Honorable J. Dennis Frederick, District Judge

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## STATEMENT OF JURISDICTION

Jurisdiction in the Utah Court of Appeals is conferred by Utah Code Ann. § 78-2a-3(2)(k) and by Rule 3 of the Utah Rules of Appellate Procedure.

## STATEMENT OF THE ISSUES and STANDARD OF APPELLATE REVIEW

In this case, the issues presented for review are:

1. Whether the District Court properly granted U S West Communications, Inc. ("U S WEST") summary judgment on the claim of Appellant Meredith Gibson ("Gibson") for breach of implied contract;
  - a. Whether Gibson properly presented sufficient admissible evidence to overcome the presumption of at-will employment and create a genuine issue of material fact;
  - b. Whether, assuming the existence of an implied covenant not to discharge except for just cause, U S WEST had just cause as a matter of law to discharge Gibson.

Applicable standard of appellate review: A summary judgment is reviewed for correctness, with no deference to the decision. Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1000 (Utah 1991).

2. Whether the District Court properly granted U S WEST summary judgment on Gibson's claim for breach of an implied covenant of good faith and fair dealing:

Applicable standard of appellate review: A summary judgment is reviewed for correctness, with no deference to the decision. Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1000 (Utah 1991).

3. Whether the District Court properly granted U S WEST summary judgment on Gibson's claim for severance pay.

Applicable standard of appellate review: A summary judgment is reviewed for correctness, with no deference to the decision. Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1000 (Utah 1991).

4. Whether the District Court abused its discretion in denying Gibson's Rule 59 Motion, which was based solely on an argument that the District Court had made errors of law in granting summary judgment.

Applicable standard of appellate review: The denial of a Rule 59 Motion may be reversed only for an abuse of discretion. Moon Lake Elec. Ass'n, Inc. v. Ultrasystems Western Constructors, Inc., 767 P.2d 125, 128 (Utah Ct. App. 1988).

## **DETERMINATIVE RULES**

Rules 56 and 59 of the Utah Rules of Civil Procedure are determinative of the issues raised in this appeal. Rule 56 provides, in pertinent part:

(c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

. . .

(e) . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Rule 59 provides, in pertinent part:

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes: provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

. . .

(7) Error in law.

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

U S WEST discharged Gibson, an employee in its Security Department, following an incident in which Gibson disclosed confidential information to a non-employee, in violation of company policy. Gibson sued U S WEST for wrongful discharge (breach of an implied covenant not to discharge without just cause), breach of an implied covenant of good faith and fair dealing, failure to pay severance pay, defamation, and negligent hiring and supervision.

## **II. COURSE OF THE PROCEEDINGS**

Gibson filed her Complaint against U S WEST on September 28, 1993. Following discovery, on May 23, 1995, U S WEST moved for summary judgment on all of Gibson's claims. Oral argument on U S WEST's motion for summary judgment was held October 2, 1995. After taking the matter under advisement, on October 3, 1995, the District Court granted U S WEST's Motion for Summary Judgment in a minute entry.<sup>1</sup>

Prior to entry of the final written order granting summary judgment and dismissing Gibson's complaint, on October 12, 1995, Gibson filed a motion under Rule 59, Utah Rules of Civil Procedure, seeking reversal of the summary judgment decision.

The Order Granting Motion for Summary Judgment and Dismissing Complaint was entered on November 9, 1995. See Addendum A attached hereto.

There was no oral argument on Gibson's Rule 59 motion. On November 9, 1995, the District Court denied Gibson's Rule 59 motion in a minute entry. On November 28, 1995, the District Court entered its Order Denying Gibson's Rule 59 Motion and Objection. See Addendum B attached hereto.

On December 6, 1995, Gibson filed her Notice of Appeal from the denial of her Rule 59 Motion and the dismissal of her claims for breach of contract and for severance pay.<sup>2</sup>

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<sup>1</sup> Gibson stipulated to dismissal of her claim for negligent hiring and supervision.

<sup>2</sup> Gibson does not appeal the dismissal of her claims for defamation and negligent hiring and supervision.

### **III. DISPOSITION IN THE TRIAL COURT**

The District Court granted U S WEST's motion for summary judgment for the following reasons:

1. Because Plaintiff failed to come forward with evidence that she was employed for a definite term, the law presumes that Plaintiff was an employee at will, whose employment could be terminated by Defendant at any time, for any reason or for no reason, with or without notice.

2. The presumption of at-will employment is reinforced by statements in Defendant's publications, all of which were issued prior to Plaintiff's termination, to the effect that employment with Defendant is at will. Such statements establish Defendant's intention to create or maintain an at-will employment relationship with its employees, including Plaintiff.

3. To avoid summary judgment, Plaintiff had the burden to present admissible evidence showing that notwithstanding its published statements that employment with Defendant is at will, Defendant manifested a contrary intent and communicated that intent to Plaintiff in a manner sufficiently definite to operate as a contract provision, and that the communication was of such a nature that Plaintiff could reasonably believe that Defendant was making an offer of employment other than employment at will.

4. Plaintiff failed to present admissible evidence sufficient to satisfy her burden, as described above. Plaintiff's deposition testimony that an unidentified person in Defendant's employment office told her that her employment in Defendant's Security Department would be governed by the terms and conditions of a collective bargaining agreement is insufficient to raise an issue of material fact. It is undisputed that Plaintiff was not a member of the union during her tenure in the Security Department. Furthermore, the statement cannot be imputed to Defendant in the absence of foundational evidence as to the identity or authority of the person making the statement. Such evidence was wholly lacking. Finally, neither Plaintiff's understanding of her employment relationship, nor Defendant's general assurances regarding an ongoing employment relationship, are sufficient to demonstrate Defendant's intent to alter Plaintiff's presumed at-will status.

5. Even if an implied covenant not to discharge except for just cause existed, Plaintiff was terminated for just cause as a matter of law because she violated Defendant's policy against the disclosure of confidential information to persons not employed by Defendant, as set forth in Defendant's Code of Business

Ethics and Conduct. Defendant's Code of Business Ethics and Conduct allowed Defendant to determine the measure of discipline for breach of its provisions. Plaintiff offered no evidence to establish that the Code of Conduct did not apply to her, or that Defendant had agreed to different terms with respect to her employment.

6. As a matter of law, an implied covenant of good faith and fair dealing does not create a for-cause standard of dismissal under Utah law; therefore, Plaintiff's claim for breach of such a covenant is not cognizable in this case.

7. Plaintiff's claim for failure to pay severance pay fails as a matter of law because Plaintiff's discharge was not wrongful, and Plaintiff has presented no evidence to establish that Defendant had an obligation to pay severance pay to discharged employees.

. . . .

*See Addendum A.*

The District Court denied Gibson's Rule 59 motion "for the reasons stated in [U S WEST's] opposing memorandum." [R. 923]

#### **IV. STATEMENT OF THE FACTS**

##### **Background**

Gibson began working for Mountain Bell, U S WEST's predecessor, in April of 1971. [R. 124, 222] When Gibson was initially employed by Mountain Bell, she belonged to the Communication Workers of America ("Union"). [R. 124, 226-27] In 1989, she transferred to U S WEST's Security Department as a security assistant. [R. 124, 223-24] The Security Department was a non-bargained for unit. [R. 125, 227] Therefore, after she began working as a security assistant, Gibson was not a member of the Union. [R. 125, 227]

Notwithstanding the fact that Gibson was not a Union member, she claimed that her employment in U S WEST's Security Department was governed by the terms of the collective

bargaining agreement ("CBA") between U S WEST and the Union, because someone in U S WEST's local employment office told her so prior to her acceptance of the job in the Security Department. [R. 670, 716] However, she could not identify that person, nor was there any evidence that such person had authority from U S WEST to set the terms and conditions of her employment. [R. 695-96, 716] Gibson was unaware of any specific promises made by U S WEST to terminate her only for cause, and was unaware of any company publication that sets forth what constitutes "just cause" for termination. [R. 287, 695]

The 1986 Mountain Bell Code of Conduct ("1986 Code") provides in pertinent part:

Safeguarding the privacy of communications -- known as "secrecy of communications" -- is a fundamental rule of the business. Customers must be able to use the network with the knowledge and peace of mind that their usage and their communications will be confidential. This is required by law and violators are subject to heavy penalties.

Employees have moral and legal responsibilities to refrain from listening to calls, except when it's necessary for the provision of service. Employees must keep confidential what they hear and what they see when handling or observing calls, records of calls, data transmission or other messages.

[R. 126, 161]

The U S West Code of Business Ethics and Conduct ("1989 Code"), issued in 1989 as the successor to the 1986 Code, provides in pertinent part:

#### **Confidential Information**

Confidential information includes all information, whether technical, business, financial or otherwise, concerning the company, which the company treats as confidential or secret and/or which is not available or not made available publicly. It also includes any private information of, or relating to, customer records, fellow employees, other persons or other companies and national security information obtained by virtue of the employee's position.

\* \* \*

Confidential company information must not be used for an employee's personal gain nor may an employee allow a third-party to use or obtain such information.

This is true regardless of the nature of the information or the manner in which the information is acquired.

The 1989 Code also states:

For these reasons, we cannot contract or even imply that your employment will continue for any particular period of time. While you may terminate your employment at any time, with or without cause, we reserve the same right. This relationship may not be modified, except in writing, signed by an appropriate representative of the Company.

[R. 126-27, 173-74]

The U S WEST Human Resource Guide states in pertinent part:

In addition, all employees should recognize that employment at Mountain Bell is at will. That is to say that either an employee or Mountain Bell may choose to terminate the employment relationship at any time, for any reason, without any prior notice.

[R. 127, 184]

The U S WEST benefits handbook in effect during 1990 contained the following provision in each of thirteen separate sections describing various employee benefits:

#### **EMPLOYMENT RIGHTS**

No provision of the Plan or this Summary Plan Description shall give any employee any right of continued employment or shall in any way prohibit unilateral changes in the terms, or the termination of, the employment of any employee covered by the Plan. Termination may occur at any time, with or without notice, and for any reason or for no reason.

[R. 142, 356]

Gibson was familiar with the 1986 Code, and reviewed it every year. [R. 126, 234-35]  
Daniel Gomez ("Gomez"), Gibson's supervisor in the Security Department, reviewed the 1989 Code with Gibson every year he supervised her (*i.e.* 1989 and 1990). [R. 126, 319-20]

As part of her duties as a security assistant, Gibson handled "telabuse" calls, *i.e.*, customer complaints regarding annoying, abusive, or threatening phone calls. [R. 125, 228]

In particular, Gibson was responsible for establishing a "trap and trace" for customers who authorized it. [R. 125, 228-29] A trap and trace was a procedure by which the telephone number of the calling party and the time of the call to the customer was automatically recorded, and could be used to help identify the harassing caller. [R. 125, 228-31] Information obtained from a trap and trace was typically turned over to the local police for further investigation and possible prosecution. [R. 229]

Mary Tolman ("Tolman"), another security assistant who worked with and trained Gibson on the telabuse calls, handled Gibson's telabuse duties if Gibson was on vacation or out of the office. [R. 125, 232-33]

Derek Mehl was divorced from his first wife, Brenda *Mehl*, in July of 1990. [R. 127] He began dating Brenda *Carlson*, Gibson's sister, in early June of 1990. [R. 127, 330] Gibson first met Derek Mehl in June of 1990. [R. 127, 242] Gibson knew in June or July of 1990 that Derek Mehl and Brenda Mehl did not get along and were often violent with each other. [R. 128, 269-70]

In September or October of 1990, Brenda Mehl called the U S WEST Security Department where Gibson was employed, seeking information about setting up a trap and trace as a result of harassing calls from her ex-husband, Derek Mehl. [R. 128-29, 270-71] Gibson gave Brenda Mehl general instructions and sent out an authorization form for her to complete. [R. 128, 270-71] Gibson recognized Brenda Mehl's name. [R. 128, 270] After Gibson received the call from Brenda Mehl, she told Gomez and Tolman that she could not handle the case because it would be a conflict of interest. [R. 128, 271]

### **Disclosure of Confidential Customer Information**

On or about December 19, 1990, the Security Department received a customer authorization letter from Brenda Mehl requesting a trap and trace. [R. 128, 295-96] Gibson was out of the office on vacation. [R. 128, 245, 296]

On December 20, 1990, while Gibson was still on vacation, Tolman called Brenda Mehl, who gave Tolman the requested information and indicated the lines on which she wanted a trap and trace to be set. [R. 128, 299] Tolman questioned Brenda Mehl thoroughly with regard to the number and content of annoying calls from her ex-husband, Derek Mehl. [R. 129, 297] Brenda Mehl told Tolman that she believed the calls were coming from a Smith's Food and Drug Center warehouse in the Kaysville area where Derek Mehl was working. [R. 129, 297-98]

After talking with Brenda Mehl on December 20, 1990, Tolman phoned Gibson's residence. [R. 129, 251-52] Gibson was unavailable, so Tolman talked to Gibson's husband (who was not a security employee at U S West), and inquired as to the last name of Gibson's sister Brenda. [R. 129, 251-52] Gibson's husband later told Gibson about Tolman's call and what was discussed. [R. 129, 251-52] Later that day, when Gibson and her husband went to her sister Brenda Carlson's home, Brenda Carlson was on the phone with her ex-husband, Dennis Butcher ("Butcher"). Derek Mehl, whom Brenda Carlson was dating at the time, was in the dining area, six to twelve feet away. [R. 129, 250, 253-54] After hanging up, Carlson told Gibson and Gibson's husband that she was tired of Butcher calling her. [R. 129, 187] Gibson responded, "That's funny. Mary [called] from my office today wanting to know your last name. Because a Brenda [called] wanting call tracing in Kaysville and Mary thought it could be you." [R. 129, 187]

### **Investigation of the Disclosure of Confidential Customer Information**

On the morning of December 21, 1990, Brenda Mehl called the U S WEST Security Department, complaining that the trap and trace on her lines had been disclosed, that her ex-husband, Derek Mehl, had called her and told her that he was aware that she was trying to have U S WEST use a trap and trace in her behalf, and that he had identified Gibson as having made the disclosure. [R. 130, 255-56, 305-06, 316-17] Gomez then contacted Gibson. [R. 130, 255-56, 305-06, 316-17]

Gibson concluded that Derek Mehl must have gained some information from her comments to her sister, Brenda Carlson, the previous night, but did not tell this to Gomez during their first conversation. [R. 130, 256] After Gomez again talked to Brenda Mehl, he called Gibson back a second time on December 21, 1990 and reprimanded her, but did not take further action. [R. 130, 256]

Brenda Mehl then contacted U S WEST's Security Department in Denver and complained about what had happened in U S WEST's Salt Lake Security Department. [R. 131, 349-54] U S WEST then directed a formal investigation. [R. 131, 332-37] Pending the investigation, Gibson was suspended without pay. [R. 132, 338-39]

Even though Gibson was not a member of the Union at this time, she contacted the Union on February 26, 1991, because she was concerned about the investigation. [R. 133, 264-68] However, the Union declined to represent her in a grievance proceeding. [R. 133, 265-66]

Following the investigation, Gibson was discharged on March 1, 1993. [R. 8]

## **SUMMARY OF THE ARGUMENT**

### **I. THE DISTRICT COURT CORRECTLY GRANTED U S WEST SUMMARY JUDGMENT ON THE CLAIMS GIBSON NOW APPEALS.**

The District Court was correct in granting U S WEST summary judgment on Gibson's claims for breach of implied contract, breach of the implied covenant of good faith and fair dealing, and for severance pay.

#### **A. Implied covenant not to discharge without just cause.**

Because she did not have a definite term of employment and was not covered by a collective bargaining agreement, under Utah law, Gibson was presumed to be an employee at will. To rebut the presumption and avoid summary judgment, she had the burden to produce evidence of sufficiently definite manifestations of U S WEST's intent that her employment status be other than at-will. Gibson did not meet this burden.

Gibson admitted that her position as security assistant was not included in any bargained-for unit, and that she was not a Union member while holding that position. Nevertheless, she claimed that her employment in U S WEST's Security Department was governed by the terms of the collective bargaining agreement ("CBA") between U S WEST and the Union, because someone in U S WEST's local employment office told her so prior to her acceptance of the job in the Security Department. However, she could not identify that person, nor could she produce evidence that such person had authority from U S WEST to set the terms and conditions of her employment. Furthermore, not only was Gibson unaware of any specific promises made by U S WEST to terminate her only for cause, she was unaware of any company publication that sets forth what constitutes "just cause" for termination. Therefore, Gibson did not satisfy her burden

by pointing to sufficiently definite manifestations of U S WEST's intent that her employment be other than at-will.

In contrast, U S WEST's intent that Gibson's employment be at-will was clearly expressed in all of the written materials distributed by U S WEST, including its Human Resource Guide, its 1989 Code, and its benefits handbook. An employer's express disclaimer of any intent to change the at-will employment relationship increases the burden on an employee to show that the employer manifested a contrary intent. Gibson failed to meet this burden.

Even if there were evidence of an implied covenant not to discharge without cause, U S WEST did not breach it, because Gibson was terminated for cause. Gibson was aware of the need to protect confidential information, and admitted that her disclosure of it was wrong and justified discipline. The 1986 and 1989 Codes, which Gibson reviewed, expressly prohibit the disclosure of confidential information, provide that discipline for violations may include dismissal, and reserve to U S WEST the right to determine disciplinary measures in its sole discretion. Gibson's disclosure of confidential information directly violated U S WEST's expressed policy and justified dismissal under the applicable provisions of the Code of Conduct.

**B. Implied covenant of good faith and fair dealing.**

Utah law does not recognize an implied in law covenant of good faith and fair dealing that creates a for-cause standard for dismissal in a contract of employment. Therefore, the District Court correctly granted summary judgment on Gibson's claim for breach of such a covenant.

**C. Severance pay.**

The District Court correctly granted U S WEST's motion for summary judgment on Gibson's claim for severance pay, because she produced no evidence that U S WEST was obligated, contractually or otherwise, to pay severance pay to a discharged employee.

**II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING GIBSON'S RULE 59 MOTION.**

The District Court's denial of Gibson's Rule 59 motion can only be disturbed for an abuse of discretion. The District Court did not abuse its discretion. Gibson's motion was merely an attempt to reargue the motion for summary judgment. Although Gibson inappropriately sought to confuse the District Court with issues of credibility and foundation, the real issue before the District Court was whether summary judgment was appropriate under applicable Utah case law and Rule 56 of the Utah Rules of Civil Procedure.

Gibson's argument that U S WEST waived objections to introduction of statements Gibson made in her deposition is a red herring; U S WEST merely pointed out that Gibson's testimony failed to identify an employee who made a hearsay statement, and failed to provide any evidence of the unidentified person's authority to bind U S WEST; hence that person's statement cannot be imputed to U S WEST. Gibson's argument that U S WEST inappropriately challenged Gibson's credibility is likewise a red herring; the District Court was well aware that credibility is not an issue in a summary judgment proceeding, and there is no evidence that the District Court ruled on the basis of credibility of the affiants or deponents. The District Court did not abuse its discretion in ignoring Gibson's red herrings, nor in finding that Gibson had not

satisfied her burden to rebut the presumption of at-will employment, that there was no error of law, and that summary judgment was appropriately granted under Rule 56.

## **ARGUMENT**

### **II. THE DISTRICT COURT CORRECTLY GRANTED U S WEST SUMMARY JUDGMENT ON GIBSON'S BREACH OF IMPLIED CONTRACT CLAIM.**

#### **A. Introduction**

Under Rule 56(c), Utah Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment should be entered against a "party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, (1986). *See also*, Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986).

A movant who would not have the burden of proof on a claim at trial is not required to support a motion for summary judgment with evidence, but may satisfy its burden by pointing out that there is no evidence to support a non-movant's case. The burden then shifts to the non-moving party to demonstrate through the production of probative evidence that an issue of fact remains to be tried. If the non-movant does not produce evidence beyond the pleadings showing a genuine issue of material fact on that element of the claim, summary judgment should be granted. Celotex, 477 U.S. at 323-25.

Gibson alleged that U S WEST breached an implied contract of employment when it terminated her. In its order granting summary judgment dated November 9, 1995, the District Court found that "plaintiff was an employee at-will" and that "plaintiff failed to present admissible evidence sufficient to satisfy her burden [of showing that her at-will employment had been modified]." *See* Addendum A. The District Court correctly granted U S WEST summary judgment on Gibson's breach of implied contract claim.<sup>3</sup>

**B. Gibson Was Employed At-Will.**

Under Utah law, if an employment contract has no specified term or duration, an at-will relationship is presumed. Berube v. Fashion Center, Ltd., 771 P.2d 1033, 1044 (Utah 1989). This presumption can be rebutted by proof that the parties "intended a specific term or agreed to terminate the relationship for cause alone," *id.*, but this proof is sufficient only if it meets traditional rules of contract formation. Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1002 (Utah 1991). A plaintiff's mere "subjective understandings or expectations" are insufficient. Rose v. Allied Development Co., 719 P.2d 83, 86 (Utah 1986).

Here, U S WEST did not intend to alter Gibson's at-will employment status in the Security Department; rather, all written materials re-affirmed U S WEST's intent to maintain the at-will employment relationship.

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<sup>3</sup> The existence of an implied employment contract is an appropriate matter to be determined on summary judgment. For cases in which Utah courts granted summary judgment on implied contract claims, *see* Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992); Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991); Robertson v. Utah Fuel Company, 889 P.2d 1382 (Utah App. 1995); Trembly v. Mrs. Fields Cookies, 884 P.2d 1306 (Utah App. 1994); Kirberg v. West One Bank, 872 P.2d 39 (Utah App. 1994).

C. Gibson Has Not Produced Evidence of Any Enforceable Promises Which Modified Her At-Will Status.

Gibson has the burden of proving that U S WEST objectively manifested its intent to modify the presumed at-will employment relationship. Johnson, 818 P.2d at 1001; *see Evans v. GTE Health Systems Inc.*, 857 P.2d 974, 977 (Utah App. 1993), *aff'd* 878 P.2d 1153 (Utah 1994). Further, Gibson must show that 1) any alleged manifestation of U S WEST's *intent* was *sufficiently definite* to operate as a contract provision, *and* 2) that any alleged manifestation was of such a nature that she *reasonably* believed U S WEST was making an offer of employment other than employment at-will. Johnson, 818 P.2d at 1001. Gibson did not and cannot meet this burden.

Gibson cannot identify any specific promises that U S WEST made to terminate her only for cause, nor is she aware of any company publication that sets forth what constitutes "just cause" for termination. [R. 134, 695] To the contrary, Gibson relies only upon her subjective "understanding," based upon her perception of how Union and non-Union employees were treated and upon how two supervisors acted. [R. 695] Gibson could not recall any specifics nor could she distinguish between her perception of the practice and any statements by other employees. [R.134, 695] Gibson's subjective understanding is clearly insufficient under the test set forth in Johnson, 818 P.2d at 1002; *see also, Kirberg v. West One Bank*, 872 P.2d 39, 42 (Utah App. 1994) (employee's breach of implied contract claim fails because employee's "understanding" and "what she was taught" did not support her claim that discipline should be progressive and that she should not have been terminated arbitrarily or without cause). Further, the Utah Supreme Court has never held that an employer's conduct and oral disclosures alone

could create an implied-in-fact employment contract. Kirberg, 872 P.2d at 41, citing Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992).

Although Gibson claimed that U S WEST breached an implied contract of employment consisting of the terms of the CBA, she admitted that she was not covered by the CBA because she was not a Union member and her position as a Security Assistant was not included in any bargained-for unit. [R.125] To support her position, Gibson relied upon a hearsay statement of an unidentified employee in U S WEST's employment office, who told her that her employment would be governed by the CBA. [R. 695]

Gibson's reliance on that statement is misplaced, because there is no evidence on the record that such a person was authorized to make a statement in complete contravention of U S WEST's published statements that employment with U S WEST is at will. Furthermore, such a statement by a non-party to the action, which would otherwise be inadmissible hearsay, could be an admission against interest by a party (*i.e.* U S WEST) only if the agency of the maker of the statement is established. *See* Rules 801(c), 801(d)(2), Utah R. Evid.; Larson v. Wycoff Co., 624 P.2d 1151, 1155 (Utah 1981). Gibson made no attempt to establish such agency.

In Larson, the court held that a *supervisor's* assurances about the continuance of insurance benefits when the plaintiff/employee transferred to another department could not be imputed to the employer. The court stated the general rule as follows:

Declarations or admissions of an officer or agent of a corporation are not binding upon it, nor admissible in evidence against it for any purpose, unless they were made by the officer or agent in the course of a transaction on behalf of the corporation, and within the scope of his authority, or unless they were expressly authorized by the corporation, or have since been ratified by it.

624 P.2d at 1155, quoting 2 Fletcher Cyclopedia Corporations Sec. 733.

It was Gibson's burden, not U S WEST's, to lay a sufficient foundation to enable the phantom statement of an unidentified employee to be imputed to U S WEST; that is, Gibson had to produce evidence that the employee who made the statement was authorized to make an offer of employment on behalf of U S WEST, contrary to U S WEST's published statements of its at-will policy. Since Gibson could not even identify the employee, much less produce evidence of that employee's position or other evidence of authority, she did not sustain her burden.

**D. U S WEST Intended Gibson's Employment to be At-Will.**

All of the written materials distributed by U S WEST re-affirm U S WEST's intent to maintain an at-will employment relationship. U S WEST's Human Resource Guide, quoted in Gibson's Complaint (R. 695), contains the following at-will disclaimer:

Nothing contained in this handbook should be interpreted as creating a contract of employment, either expressed or implied, between Mountain Bell and employees. . . . In addition, all employees should recognize that **employment at Mountain Bell is at-will**. That is to say that either an employee or Mountain Bell may chose to terminate the employment relationship at any time, for any reason and without any prior notice.

[R. 184, emphasis added] In her deposition, Gibson identified the Guide as the document she referred to in her Complaint. [R. 237-38]

In addition to its Guide containing at-will language, on page 1 of the 1989 Code of Business Ethics and Conduct, U S WEST specifies that the employment relationship between it and its employees is at-will. This section reads as follows:

[U S WEST] cannot contract or even imply that your employment will continue for any particular period of time. While you may terminate your employment at any time, with or without cause, we reserve the same right. This relationship

may not be modified, except in writing signed by an appropriate representative of the company.

[R. 167]

In addition to the at-will disclaimers in the Guide and in the 1989 Code, all U S WEST employees, including Gibson, received a benefits handbook effective June 1, 1987, and revised July 1, 1989. In *each* of the *thirteen* sections of the handbook describing various employee benefit programs, the following language appears:

#### **EMPLOYMENT RIGHTS**

No provision of the Plan or this Summary Plan Description shall give any employee any right of continued employment or shall in any way prohibit unilateral changes in the terms, or the termination of, the employment of any employee covered by the Plan. **Termination may occur at any time, with or without notice, and for any reason or for no reason.**

[R. 356] (emphasis added).

In light of the language in the Guide, the 1989 Code, and the benefits handbook, it is impossible to conclude that U S WEST intended anything other than at-will employment. Furthermore, Utah courts have consistently found that in determining whether an employer *intended* to change an employee's at-will employment, an employer's express disclaimer of any intent to change the at-will employment relationship precluded the formation of an implied contract. Johnson, 818 P.2d at 1002-03; Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1313 (Utah App. 1994); Sorenson v. Kennecott-Utah Copper Corp., 873 P.2d 1141, 1146 (Utah App. 1994); Kirberg v. West One Bank, 872 P.2d 39, 41-42 (Utah App. 1994); Hodgson v. Bunzl Utah, Inc., 844 P.2d 331, 334 (Utah 1992).

**E. U S WEST Complied With Any Alleged Implied Contract.**

Even assuming Gibson could prove that an implied employment contract existed that required that termination be for just cause, U S WEST satisfied this requirement because Gibson was terminated for admittedly wrongful conduct that violated the 1989 Code, compromised U S WEST's security policies and procedures, endangered and led to harassment of a customer, and caused U S WEST considerable harm through having to defend a lawsuit by the customer.

Notwithstanding that the District Court correctly found that no implied contract had been created, the District Court was also correct in finding that:

Even if an implied covenant not to discharge except for just cause existed, Plaintiff was terminated for just cause as a matter of law because she violated Defendant's policy against the disclosure of confidential information . . . as set forth in Defendant's Code of Business Ethics and Conduct. Defendant's Code of Business Ethics and Conduct allowed Defendant to determine the measure of discipline for breach of its provisions.

*See Addendum A, ¶ 5.*

Where an employer's policies and procedures concerning discharge are proved to be part of an employment contract, summary judgment is appropriate if the employer followed the discharge procedures. *See Caldwell v. Ford, Bacon & Davis*, 777 P.2d 483, 486 (Utah 1989). Gibson's termination occurred as a result of her breach of security and confidentiality regarding the Brenda Mehl incident.

Both the 1986 and 1989 Codes addressed the protection of confidential information.<sup>4</sup>

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<sup>4</sup> The 1986 Code provides in pertinent part:

Safeguarding the privacy of communications -- known as "secrecy of communications" -- is a fundamental rule of the business. Customers must be  
(continued...)

The 1989 Code provides that an employee shall not *"allow a third party to use or obtain [confidential] information. This is true regardless of the nature of the information or the manner in which the information is acquired."* [R. 174, emphasis added] Gibson's behavior in the Mehl incident directly violated this provision of the Code. Gibson allowed Derek Mehl to obtain confidential information which he used to his advantage and to the detriment of Brenda Mehl and U S WEST. Gibson's disclosure of confidential information was in violation of company policy *and* the Code.

In her deposition, Gibson admits that she did something wrong, albeit "inadvertently." [R. 293] Gibson's disclosure was inadvertent only in the sense that she may not have known that Derek Mehl would use the disclosed information to render the trap and trace useless and to

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<sup>4</sup>(...continued)

able to use the network with the knowledge and peace of mind that their usage and their communications will be confidential. This is required by law and violators are subject to heavy penalties.

Employees have moral and legal responsibilities to refrain from listening to calls, except when it's necessary for the provision of service. Employees must keep confidential what they hear and what they see when handling or observing calls, records of calls, data transmission or other messages.

An entire section of the 1989 Code addresses "Confidential Information and Privacy of Communications." This section provides in pertinent part:

Company policy and various laws protect the integrity of the company's confidential information which must not be divulged except in strict accordance with established company policies and procedures. The obligation not to divulge confidential company information is in effect even though material may not be specifically identified as confidential and the obligation exists during and continues after employment with the company.

[R. 126-27]

harass the very customer that U S WEST was trying to help. However, she obviously intended to make the statement that Derek Mehl overheard, knew that it was based on confidential information obtained from U S WEST, and knew or should have known that Derek Mehl would overhear it. In this sense her disclosure was not inadvertent at all. In any event, the Code makes it clear that even an inadvertent disclosure of confidential information constitutes a breach of company policy.

Gibson was aware of the need to protect confidential information. Each year when employees received the Code, they initialed an Acknowledgment Receipt ("Acknowledgement").<sup>5</sup> This Acknowledgement stated:

I agree that I will not, except as required in the conduct of Mountain Bell Business or when properly authorized in writing, publish, disclose, use, or authorize anyone else to publish, disclose or use any private, confidential or proprietary information that I may have in any way acquired, learned, developed or created by reason of my employment.

[R. 709]

Gibson's behavior in the Mehl incident directly violated this Acknowledgement, as well as the confidentiality provisions of the 1986 and 1989 Codes. Gibson disclosed confidential information in the presence of Derek Mehl, who overheard and used the information to further harass Brenda Mehl, the customer who had requested U S WEST's assistance and authorized the trap and trace on her lines. Gibson's serious breach of confidentiality resulted in a lawsuit

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<sup>5</sup> Since Gibson was a Union member in 1986, 1987, and 1988, she did not sign the acknowledgment; rather, she requested that her supervisor sign the acknowledgment for her. [R. 700]

against U S WEST from Brenda Mehl. The District Court was correct as a matter of law that such egregious behavior justified dismissal.

Furthermore, the 1989 Code makes it clear that a disclosure such as Gibson's was grounds for dismissal. Under the section of the 1989 Code entitled "Discipline," the Code clearly lists "Dismissal" as a disciplinary action that U S WEST may take against an employee who violates the Code. This same section of the Code also states:

The disciplinary action appropriate to a given matter will be determined by the company in its sole discretion. The company's rules and regulations regarding proper employee conduct will not be waived in any respect. Violation is cause for disciplinary action including dismissal.

[R. 701] Gibson cannot now complain that U S WEST exercised its discretion to dismiss her for her admitted breach of its strong policy against disclosure of confidential information.

In summary, the District Court properly granted summary judgment on Gibson's implied contract claim for the following reasons:

- 1) Gibson was presumed to be an at-will employee under Utah law;
- 2) Gibson did not rebut this presumption by producing sufficiently definite evidence that U S WEST intended to modify her at-will status;
- 3) the unambiguous, express terms of the Guide, the Code and the benefits handbook unequivocally established that U S WEST intended that Gibson be employed at-will;
- 4) the at-will disclaimers preclude the conclusion that U S WEST intended an implied contract contrary to the at-will relationship; and
- 5) even if an implied contract was created, U S WEST complied with the terms of such contract when it terminated Gibson for cause.

Accordingly, the District Court properly granted U S WEST summary judgment on Gibson's claim for breach of implied contract.

III. THE DISTRICT COURT WAS CORRECT IN GRANTING U S WEST SUMMARY JUDGMENT ON GIBSON'S CLAIM FOR BREACH OF AN IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

The District Court was correct when it ruled:

As a matter of law, an implied covenant of good faith and fair dealing does not create a for cause standard of dismissal under Utah law; therefore, Plaintiff's claim for breach of such a covenant is not cognizable in this case.

See Addendum A, ¶ 6.

Gibson alleged a claim for wrongful termination based on breach of the implied covenant of good faith and fair dealing. Gibson based this claim on her belief that the investigation conducted by U S WEST's independent investigator was inadequate and because her supervisor, Gomez, had already verbally reprimanded her. [R. 13-14] Gibson further states "U S WEST's efforts to unilaterally change Ms. Gibson's contract and to renounce it in total constitutes extreme bad faith and the most unfair of dealings." [R. 671] As shown above, Gibson did not show that U S WEST intended to modify her at-will status as an employee in the Security Department. Therefore, she cannot rebut the presumption under Utah law that she was employed at-will.<sup>6</sup>

A claim for breach of the implied covenant of good faith and fair dealing fails because Utah recognizes no for-cause standard for dismissal in the at-will employment context. Sanderson v. First Leasing Co., 844 P.2d 303, 308 (Utah 1992); Heslop v. Bank of Utah, 839 P.2d 828, 840 (Utah 1992); Loose v. Nature-All Corp., 785 P.2d 1096, 1097-98 (Utah 1989);

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<sup>6</sup> Further, because U S WEST complied with any implied contract when it dismissed Gibson for cause, there was no breach of an implied covenant of good faith and fair dealing.

Berube v. Fashion Center, Ltd., 771 P.2d 1033, 1046-47 (Utah 1989). In Sanderson, the Utah Supreme Court stated:

Three times in the past three years, we have refused to recognize an implied-in-law covenant of good faith and fair dealing that creates a for-cause standard for dismissal (citations omitted). As we explained in Brehany, although every contract is subject to an implied covenant of good faith, that implied covenant "cannot be construed . . . to establish new, independent rights or duties not agreed upon by the parties."

Sanderson, 844 P.2d at 308 (citing Brehany v. Nordstrom, Inc., 812 P.2d 49, 55 (Utah 1991)).

For the above reasons, the District Court correctly found that Gibson's claim for breach of the implied covenant of good faith and fair dealing fails under existing Utah law.

#### **IV. GIBSON IS NOT ENTITLED TO SEVERANCE PAY DAMAGES.**

The District Court was correct in granting U S WEST's motion for summary judgment on Gibson's claim for severance pay. The Court stated:

Plaintiff's claim for failure to pay severance pay fails as a matter of law because Plaintiff's discharge was not wrongful, and Plaintiff has presented no evidence to establish that Defendant had an obligation to pay severance pay to discharged employees.

See Addendum A, ¶ 7. Gibson submitted absolutely no evidence to support a theory that she was entitled to any severance pay upon involuntary separation from employment with U S WEST. She cannot reasonably claim that she was entitled to severance pay as a result of her involuntary termination for wrongful conduct that harmed U S WEST. Nor can she claim that she was entitled to severance pay upon termination as an at-will employee, whether with or without cause. Accordingly, the District Court correctly granted summary judgment on her claim for severance pay.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING GIBSON'S RULE 59 MOTION.

Although Gibson fails to expressly argue in her brief the District Court's denial of her Rule 59 motion, it must be addressed because Gibson includes in her appeal issues of foundation and credibility that were raised for the first time in her Rule 59 motion.<sup>7</sup>

The District Court's denial of Gibson's Rule 59 motion can be disturbed on appeal only for an "abuse of discretion." Moon Lake Elec., 767 P.2d at 128 (finding that the trial court properly denied plaintiff's Rule 59 motion).<sup>8</sup> The District Court did not abuse its discretion.

Gibson's Rule 59 motion claimed that the District Court had made an error of law [R. 808-09]. Therefore, the issue before the District Court was whether it had properly granted summary judgment under applicable Utah case law and Rule 56 of the Utah Rules of Civil Procedure.

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<sup>7</sup> Although Gibson may claim that these issues arose out of the summary judgment pleadings and hearing, Gibson raised no objections during the summary judgment briefing or oral argument. The first time these issues were raised was in Gibson's memorandum in support of her Rule 59 motion. [R. 812] Indeed, the "credibility" issue was raised for the first time in Gibson's *reply* memorandum in support of her Rule 59 motion. [R. 844] Because Gibson did not brief the denial of her Rule 59 motion, it is uncertain whether these issues are properly before the Court. However, U S WEST addresses the propriety of the denial of Gibson's Rule 59 motion here because it was identified in Gibson's notice of appeal and docketing statement.

<sup>8</sup> In Moon Lake, as grounds for its motion, plaintiff (Moon Lake) argued that its "untimely filed affidavits . . . 'clearly establish the injustice that will be accomplished if said summary judgment is allowed to stand.'" *Id.* at 128. In the present case, Gibson also relies upon an untimely filed affidavit to support her Rule 59 motion asking that the summary judgment be overturned. As in Moon Lake, this Court should find that there was no abuse of discretion.

The District Court properly granted summary judgment because Gibson did not meet her burden under Rule 56 and applicable Utah case law.<sup>9</sup> However, Gibson tried to distract the District Court with red herrings such as foundation and credibility. The District Court did not abuse its discretion when it disregarded Gibson's red herrings and focused on the real issue-- whether Gibson satisfied her burden under Johnson and whether it had properly granted summary judgment under Rule 56.

**A. Foundation.**

In her brief, Gibson states that U S WEST had "never before attacked Ms. Gibson's testimony concerning her conversation with the U S WEST employment office." She also cites Rule 32(c)(3)(B), Utah R. Civ. Proc., stating that it "prevents this type of surprise attack." Gibson Brief at 11-12.<sup>10</sup> On the contrary, U S WEST's comments in oral argument about the inadequacy of Gibson's testimony to defeat summary judgment was *not* a "surprise attack", and Gibson is *wrong* in stating that the issue had not been raised before oral argument.

U S WEST raised the issue of Ms. Gibson's conversation with the U S WEST employment office in both its Memorandum in Support of Motion For Summary Judgment ("Memo in Support") and in its Reply Memorandum in Support of Motion For Summary

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<sup>9</sup>An extensive discussion of Gibson's failure to meet her burden of establishing the existence of an implied employment contract under Utah law is found in Point I., *supra*.

<sup>10</sup> The only case cited by Gibson in support of her argument, D&L Supply v. Saurini, 775 P.2d 420 (Utah 1989), does not support the proposition that objections not made in a deposition are waived. In D&L, the court merely held that the opponent of a motion for summary judgment had waived his objections to affidavits containing hearsay statements "when he failed to object at the trial court." 775 P.2d at 421. There was no discussion of objections in a deposition, much less of waiver of such objections or of Rule 32(c)(3)(B).

Judgment ("Reply Memo"). In its Memo in Support, U S WEST had an entire section devoted to this issue. This section is entitled Gibson's Argument That Verbal Representations Created An Implied Contract Consisting Of The Terms In The Collective Bargaining Agreement Fails As A Matter Of Law. [R. 139] In its Reply Memo, U S WEST specifically addressed Gibson's allegation that someone in the employment office told her that her employment would be governed by the CBA, and showed that this allegation was insufficient under the Johnson test and that summary judgment was appropriate under Rule 56. [R. 695-96]

During Gibson's deposition, she was asked:

Q [Mr. Jensen] Can you tell me who among the management personnel<sup>11</sup> made those statements to you [that the terms of the CBA would apply to Gibson's job in the Security Department]?

A [Ms. Gibson] The employment office.

Q Do you recall any particular individual who made the statements?

A No. I'm sorry, I can't.

. . . .

Q But you don't have any recollection about who particularly told you that the Collective Bargaining Agreement would apply to you?

A No.

[R. 716]<sup>12</sup>

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<sup>11</sup> The complaint had alleged that Gibson "was told by management personnel that although the security office had been excluded from the bargaining unit, the terms and conditions of the CBA would dictate the terms and conditions of her employment." [R. 2-3]

<sup>12</sup> The quoted testimony formed the basis on which U S WEST argued its motion for summary judgment, to the effect that Gibson had failed to produce evidence of a sufficiently  
(continued...)

On the basis of Gibson's inability to identify a specific individual, U S WEST argued in its Reply Memo that Gibson's allegation that an unidentified person told her that her job in the Security Department would be governed by the CBA is insufficient under the Johnson test because Gibson did not satisfy her burden by pointing to "sufficiently definite" manifestations of U S WEST's "intent" to modify the terms of her employment. Notwithstanding Gibson's attempt to turn this into a foundation issue by citing Rule 32, it is not a foundation issue;

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<sup>12</sup>(...continued)

definite offer by U S WEST of employment other than at will--the person who supposedly had made the statement could not be identified, nor could that person's authority to offer employment on terms different from U S WEST's publications be established.

Gibson filed her complaint on September 28, 1993. However, for the next 20 months she failed to conduct any discovery directed toward ascertaining the identity or authority of the mystery person who allegedly told her that her employment in the security department would be governed by the CBA.

U S WEST's motion for summary judgment was filed May 23, 1995, yet argument on the motion was not heard until October 2, 1995. Thus Gibson had over four months to submit an affidavit in opposition to the motion, but did not do so. It was not until November 3, 1995, after the court had granted summary judgment, after Gibson had filed her Rule 59 motion, and after U S WEST had filed its memorandum in opposition to the Rule 59 motion, that Gibson submitted an affidavit in which she purported to recall the first name of the person in the U S WEST employment office who supposedly told her that her employment in the Security Department would be governed by the CBA. In her Rule 59 motion reply memorandum, Gibson sought to use that affidavit, even though it was untimely, U S WEST had no opportunity to rebut it, and Gibson herself recognized that it had not been properly filed, where she stated: "If permitted, Ms. Gibson would file the attached Affidavit." [R. 846] Gibson never sought leave to file the affidavit.

Even if Gibson had properly filed her affidavit in opposition to the motion for summary judgment, it should have been disregarded, since a party opposing a motion for summary judgment may not rely on an affidavit contradicting prior deposition testimony. *See, e.g., Guardian State Bank v. Humpherys*, 762 P.2d 1084, 1087 (Utah 1988); *Webster v. Sill*, 675 P.2d 1170, 1173 (Utah 1983); *Gaw v. State by and through Dep't of Trans.*, 798 P.2d 1130, 1140 (Utah App. 1990); *Floyd v. Western Surgical Assoc.*, 773 P.2d 401, 403 (Utah App. 1989). *See generally*, 10A C. Wright and A. Miller, *Federal Practice and Procedure*, § 2726, 1995 Pocket Part at 31-32.

instead, it is simply an issue of Gibson not having satisfied her burden under Utah law.<sup>13</sup> [R. 695-96]

**B. Credibility.**

Gibson argues that because U S WEST's Reply Memorandum in support of its summary judgment motion placed the word "someone" in quotation marks when referring to Gibson's allegation that "someone" in the employment office said her employment would be governed by the CBA, U S WEST was inappropriately attacking Ms. Gibson's credibility, and that such a practice is reversible error. This argument is ludicrous. In its Reply Memorandum, U S WEST states:

Furthermore, Gibson's claim that "someone" in the employment office told her that her employment would be governed by the CBA, is insufficient under the Johnson test. Gibson depo. at 26.

[R. 696]

Several sentences later, in the same paragraph, U S WEST states:

Not only does Gibson not satisfy her burden by pointing to "sufficiently definite" manifestations of U S WEST's "intent" to modify the terms of her employment,

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<sup>13</sup> Gibson appears to be claiming that U S WEST should have objected to her *answer* based on lack of foundation. Not only would this be highly unusual, it is nonsensical in light of the fact that Gibson was asked to identify who had made the statement and she said that she "can't," indicating that she did not have personal knowledge to answer the question. There is nothing objectionable about a witness responding that she lacks knowledge to answer a question. To raise a foundation issue in response to U S WEST's argument that Gibson failed to satisfy her burden is disingenuous. In any event, if a foundation objection was proper (which it was not), Gibson's counsel should have objected to U S WEST's question. However, as Gibson points out, any objection thereto has now been waived under Rule 32.

but based upon her testimony, she cannot even legitimately argue that she "reasonably" believed her employment was being modified.<sup>14</sup>

The deposition page cited (p.26) is the page on which Ms. Gibson states that she does not know who made this statement to her. It is clear from the context that "someone" is in quotes to reflect that Gibson did not know who made the statement. For purposes of summary judgment, U S WEST assumed that the statement was made by someone, but simply argued that Gibson had the burden of showing not only that the statement was made, but that the speaker had authority to bind U S WEST by the statement. Without both elements, the statement could not be imputed to U S WEST.

This is not a credibility issue; rather, U S WEST was arguing that because Gibson does not know who made the statement to her, her allegation is insufficient under the Johnson test. Specifically, the statement was not a "sufficiently definite" manifestation of U S WEST's intent to modify the terms of her at-will employment, as required by Johnson.<sup>15</sup> The District Court did not abuse its discretion in holding that Gibson had failed to sustain her burden.

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<sup>14</sup> In the paragraph in question, not only is "someone" in quotes, but the words "sufficiently definite," "intent," and "reasonably" are in quotes as well.

<sup>15</sup> Gibson also claims that because U S WEST's counsel referred to the statement as one "supposedly" made, this is also an attack on Gibson's credibility. It should be noted that this issue was first raised, improperly, in this appeal. Gibson brief at 11-12. Notwithstanding this, Gibson's argument is ridiculous. There is no difference in stating that a statement was "supposedly" made and in referring to it as an "alleged statement." In the context of an oral argument, neither such statement could possibly be viewed as an attack on credibility. Gibson would like to have this appeal decided on semantics rather than the true issues; she would have Utah attorneys frantically watching every word said during an oral argument. This issue merits no further discussion.

In her Rule 59 motion, Gibson also argued that the unidentified person in the U S WEST employment office was an "agent" for U S WEST, thus binding U S WEST by his or her statement to Gibson. Gibson has no evidence that the unidentified employee was authorized to make an offer of employment on behalf of U S WEST, contrary to U S WEST's published intent. All the evidence supports the opposite conclusion. Disregarding this, Gibson supports her argument with an inapposite conclusory quote on apparent authority. *See Appellant's Brief* at 12-13. Gibson assumes that the unidentified speaker was clothed with apparent authority without proper evidence to support that conclusion.

The Utah Supreme Court has clearly set out the necessary elements for establishing apparent authority.

In order to show apparent authority, the following must be established: (1) that the principal has manifested his [or her] consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; (2) that the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person, relying on such appearance of authority, has changed his [or her] position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal.

Luddington v. Bodenvest Ltd., 855 P.2d 204, 209 (Utah 1993).

Gibson cannot satisfy the threshold element, that U S WEST manifested its consent that the unidentified employee had authority to make an offer of employment on behalf of U S WEST, contrary to its published intent, or that it knowingly permitted its employee to make such an offer. Gibson did not even establish that the person who made the statement was even employed in U S WEST's employment office, nor that the person was a management level employee, much less that the person's job duties included the determination of the terms and

conditions of jobs offered by U S WEST. See Larson v. Wycoff Co., 624 P.2d 1151, 1155 (Utah 1981) (statements of a corporate officer or agent are not binding on the corporation, nor admissible in evidence, unless there is evidence that the officer or agent was acting within the scope of his authority in a transaction on behalf of the corporation, or unless the statement was expressly authorized or ratified by the corporation); Brown v. Caldwell School Dist., 898 P.2d 43, 48 (Idaho 1995) ("apparent authority cannot be created by the acts or statements of the alleged agent alone." The court affirmed summary judgment in favor of school district on employee's contract claim because assistant superintendent lacked apparent authority to contract with employee).

In Larsen, the Utah Supreme Court affirmed summary judgment in favor of the employer where a supervisor promised plaintiff continuing insurance benefits, contrary to the written policy in the insurance benefits handbook. 624 P.2d at 1151. Gibson's claim that an unidentified U S WEST employee changed the terms of her employment--contrary to the terms in all of U S WEST's written materials--is similarly flawed. See Larsen, 624 P.2d 1151; Demetracopoulos v. Strafford Guidance Center, 536 A.2d 189, 193 (N.H. 1987) (corporation's executive director lacked apparent authority to enter into employment contract with plaintiff where the terms of the contract were beyond the scope of and directly contrary to the guidelines of the company's manual); Harrell v. Reynolds Metals Company, 495 So.2d 1381, 1385-86 (Ala. 1986) (court affirmed summary judgment in favor of company, holding that personnel supervisor lacked apparent authority to offer "permanent" employment to plaintiff which was contrary to company's standard at-will employment contract); Hassett v. Swift & Company, 388 N.W.2d 55, 59 (Neb. 1986) (court affirmed summary judgment in favor of corporation, holding

that city sales manager for corporation lacked apparent authority to agree that company would "bridge" employee's six-month departure from company for purposes of calculating employee's pension where such promise was contrary to the specific written provisions of the pension plan). Finally, even if the unidentified U S WEST employee did make the alleged statement, this employee lacked apparent authority because "[e]ven the president of a corporation has no apparent authority to bind the corporation to an unusual, extraordinary, or unreasonable contract." *Id.* at 59 (citation omitted).

Because she has pointed to no evidence that U S WEST manifested its consent to having an unidentified employee in its employment office make an offer of employment contrary to its expressed policy of at-will employment, Gibson's apparent authority argument is just another red herring. The District Court did not abuse its discretion in rejecting that argument.

### CONCLUSION

The District Court properly granted U S WEST summary judgment on Gibson's implied contract claim because: 1) Gibson was presumed to be an at-will employee under Utah law; 2) Gibson did not rebut this presumption by satisfying her burden of proving that U S WEST intended to modify her at-will status; 3) the unambiguous, express terms of the Guide, the 1989 Code, and the benefits handbook unequivocally established that U S WEST intended that Gibson be employed at-will; 4) the at-will disclaimers preclude the formation of an implied contract which would alter the at-will relationship; and 5) even if an implied contract was created, U S WEST complied with the terms of such contract when it terminated Gibson for "just cause."

The District Court also correctly dismissed Gibson's claim for breach of implied covenant of good faith and fair dealing, because Utah recognizes no for-cause standard for dismissal in

the at-will employment context. Further, because U S WEST complied with any implied contract when it dismissed Gibson for just cause, there was no breach of the implied covenant of good faith and fair dealing.

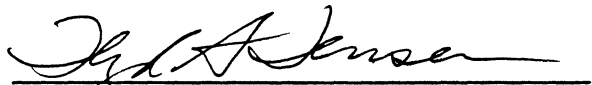
Because Gibson had absolutely no evidence that U S WEST owed her severance pay, the District Court correctly granted summary judgment on her severance pay claim.

Not only did the District Court not abuse its discretion in denying Gibson's Rule 59 motion, it ruled correctly. Gibson's arguments about foundation and credibility are red herrings that should be wholly disregarded.

Accordingly, this Court should affirm the District Court's denial of Gibson's Rule 59 motion, and the dismissal of Gibson's claims for breach of implied contract, breach of the implied covenant of good faith and fair dealing, and for severance pay.

DATED this 3 day of September, 1996.

RAY, QUINNEY & NEBEKER

A handwritten signature in dark ink, appearing to read "Floyd A. Jensen", is written over a horizontal line.

Floyd A. Jensen  
Janet Hugie Smith  
Frederick R. Thaler

Attorneys for U S West Communications

**CERTIFICATE OF MAILING**

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLEE were mailed, postage prepaid, on this 3rd day of September, 1996 to the following:

Charles M. Bennett  
BLACKBURN & STOLL, L.C.  
77 West 200 South, St., Suite 400  
Salt Lake City, Utah 84101

A handwritten signature in cursive script, reading "Pauline Langston", written over a horizontal line.

## **ADDENDA**

<b>Addendum A</b>	<b>Order Granting Motion for Summary Judgment and Dismissing Complaint</b>
<b>Addendum B</b>	<b>Order Denying Rule 59 Motion and Objection</b>

Floyd Andrew Jensen (Bar No. 1672)  
Janet Hugie Smith (Bar No. 3001)  
Lisa A. Yerkovich (Bar No. 5165)  
RAY, QUINNEY & NEBEKER  
79 S. Main, Suite 700  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385  
Telephone: (801) 532-1500  
Attorneys for Defendant  
U S WEST Communications, Inc.

**FILED DISTRICT COURT**  
Third Judicial District

NOV 9 1995

By C. Bennett  
SALT LAKE COUNTY  
Deputy Clerk

**IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

MEREDITH A. GIBSON,

Plaintiff,

vs.

U S WEST COMMUNICATIONS, INC.,  
a Colorado corporation,

Defendant.

**ORDER GRANTING MOTION  
FOR SUMMARY JUDGMENT  
AND DISMISSING COMPLAINT**

Civil No. 930905599CV

Judge J. Dennis Frederick

**BY THE COURT:**

Defendant's Motion for Summary Judgment came on for hearing before the Court, the Honorable J. Dennis Frederick, District Judge, presiding, on October 2, 1995, at 9:00 a.m. Defendant was represented by Floyd A. Jensen, and Plaintiff was represented by Charles Bennett. The motion was argued to the Court, and the Court took the matter under advisement. Having reviewed the arguments of counsel and the memoranda and other materials on file supporting and opposing the motion, including depositions and affidavits, relying on the reasons set forth in Defendant's supporting memoranda, and being thus fully advised in the premises, the Court rules that there are no genuine issues of material fact pertaining to Defendant's motion, and that Defendant is entitled to judgment as a matter of law

dismissing Plaintiff's complaint, and each cause of action therein, for the following reasons:

1. Because Plaintiff failed to come forward with evidence that she was employed for a definite term, the law presumes that Plaintiff was an employee at will, whose employment could be terminated by Defendant at any time, for any reason or for no reason, with or without notice.
2. The presumption of at-will employment is reinforced by statements in Defendant's publications, all of which were issued prior to Plaintiff's termination, to the effect that employment with Defendant is at will. Such statements establish Defendant's intention to create or maintain an at-will employment relationship with its employees, including Plaintiff.
3. To avoid summary judgment, Plaintiff had the burden to present admissible evidence showing that notwithstanding its published statements that employment with Defendant is at will, Defendant manifested a contrary intent and communicated that intent to Plaintiff in a manner sufficiently definite to operate as a contract provision, and that the communication was of such a nature that Plaintiff could reasonably believe that Defendant was making an offer of employment other than employment at will.
4. Plaintiff failed to present admissible evidence sufficient to satisfy her burden, as described above. Plaintiff's deposition testimony that an unidentified person in Defendant's employment office told Plaintiff that her employment in Defendant's Security Department would be governed by the terms and conditions of a collective bargaining agreement is insufficient to raise an issue of material fact. It is undisputed that Plaintiff was not a member of the union during her

tenure in the Security Department. Furthermore, the statement cannot be imputed to Defendant in the absence of foundational evidence as to the identity or authority of the person making the statement. Such evidence was wholly lacking. Finally, neither Plaintiff's understanding of her employment relationship, nor Defendant's general assurances regarding an ongoing employment relationship, are sufficient to demonstrate Defendant's intent to alter Plaintiff's presumed at-will status.

5. Even if an implied covenant not to discharge except for just cause existed, Plaintiff was terminated for just cause as a matter of law because she violated Defendant's policy against the disclosure of confidential information to persons not employed by Defendant, as set forth in Defendant's Code of Business Ethics and Conduct. Defendant's Code of Business Ethics and Conduct allowed Defendant to determine the measure of discipline for breach of its provisions. Plaintiff offered no evidence to establish that the Code of Conduct did not apply to her, or that Defendant had agreed to different terms with respect to her employment.

6. As a matter of law, an implied covenant of good faith and fair dealing does not create a for-cause standard of dismissal under Utah law; therefore, Plaintiff's claim for breach of such a covenant is not cognizable in this case.

7. Plaintiff's claim for failure to pay severance pay fails as a matter of law because Plaintiff's discharge was not wrongful, and Plaintiff has presented no evidence to establish that Defendant had an obligation to pay severance pay to discharged employees.

8. Plaintiff's defamation claim is barred by the one year statute of limitations

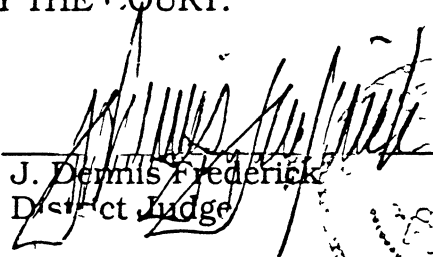
in Utah Code Ann. § 78-12-29(4). Even if a discovery rule applied, Plaintiff knew of the defamatory statements more than one year prior to filing her complaint. Alternatively, even if the statute of limitations were not a bar, the alleged defamatory statements were qualifiedly privileged, because they were made by and to persons who had a legitimate interest in Plaintiff's discharge from employment, and Plaintiff presented no evidence of excessive publication or actual malice on the part of Defendant.

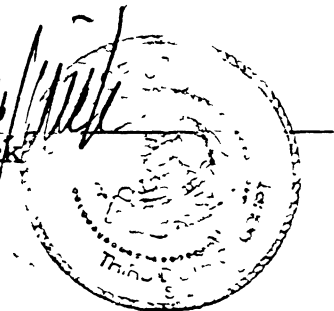
9. Plaintiff stipulated in open court and in her opposing memorandum that her negligence claim may be dismissed. Accordingly, the Court does not address the merits of that claim.

Based on the foregoing, the Court ORDERS that (1) Defendant's motion for summary judgment is granted, and (2) Plaintiff's complaint is dismissed in its entirety, with prejudice, Plaintiff to bear the costs in the sum of \$\_\_\_\_\_.

Dated this 9th day of Nov, 1995.

BY THE COURT:

  
J. Dennis Frederick  
District Judge



APPROVAL AS TO FORM:

\_\_\_\_\_  
Attorney for Plaintiff

### **Certificate of Service**

I hereby certify that on this 6th day of October, 1995, I caused a copy of the foregoing ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DISMISSING COMPLAINT to be hand delivered to the following:

Charles M. Bennett  
Blackburn & Stoll  
77 W. 200 South  
Salt Lake City, Utah 84101



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Floyd Andrew Jensen (Bar No. 1672)  
Janet Hugie Smith (Bar No. 3001)  
Lisa A. Yerkovich (Bar No. 5165)  
RAY, QUINNEY & NEBEKER  
79 S. Main, Suite 700  
P.O. Box 45385  
Salt Lake City, Utah 84145-0385  
Telephone: (801) 532-1500  
Attorneys for Defendant  
U S WEST Communications, Inc.

FILED DISTRICT COURT  
Third Judicial District

NOV 28 1995

By C. Buerkle  
SALT LAKE COUNTY  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MEREDITH A. GIBSON,

Plaintiff,

vs.

U S WEST COMMUNICATIONS, INC.,  
a Colorado corporation,

Defendant.

ORDER DENYING PLAINTIFF'S  
RULE 59 MOTION AND  
OBJECTION

Civil No. 930905599CV

Judge J. Dennis Frederick

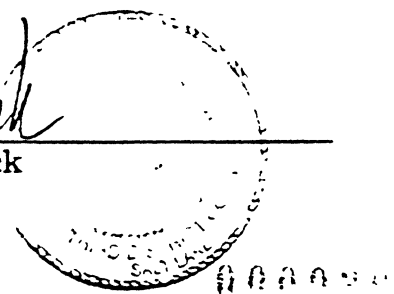
BY THE COURT:

Plaintiff's Rule 59 Motion for Denial of U S WEST's Motion for Summary Judgment and her Objection to Defendant's Proposed Order, together with supporting and opposing memoranda, were duly presented to and considered by the Court pursuant to a Notice to Submit for Decision. Having reviewed the memoranda and other materials on file supporting and opposing the motion, and being thus fully advised in the premises, the Court hereby ORDERS that Plaintiff's Motion and Objection are denied.

Dated this 28th day of Nov, 1995.

BY THE COURT:

J. Dennis Frederick  
District Judge



APPROVAL AS TO FORM:

  
Attorney for Plaintiff

**Certificate of Service**

I hereby certify that on this 16th day of November, 1995, I caused a copy of the foregoing ORDER DENYING PLAINTIFF'S RULE 59 MOTION AND OBJECTION to be mailed by United States mail, postage prepaid, to the following:

Charles M. Bennett  
Blackburn & Stoll  
77 W. 200 South  
Salt Lake City, Utah 84101

  
\_\_\_\_\_