

2004

# Melany Zoumadakis v. Uintah Basin Medical Center, and individually Dr. Mark Mason, Lloyd Nielson, Carlyn Smith, and John Does 1-10 : Brief of Appellee

Utah Court of Appeals

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Carolyn Cox; Holme Roberts and Owen, LLP; Attorney for Appellees.

Jay L. Kessler; Kessler Law Office, L.L.C; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

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MELANY ZOUMADAKIS ,

Plaintiff/Appellant,

v.

UNITAH BASIN MEDICAL CENTER,  
and individually DR. MARK MASON,  
LLOYD NIELSON, CAROLYN SMITH,  
and JOHN DOES 1-10,

Defendants/Appellees.

**BRIEF OF APPELLEES  
UNITAH BASIN MEDICAL CENTER,  
DR. MARK MASON, LLOYD  
NIELSON AND CAROLYN SMITH**

**Case No. 20040542**

Appeal from the May 24, 2004 decision of the Eighth Judicial District Court, Judge John R. Anderson, granting Defendants' Motion to Dismiss

Jay L. Kessler, Esq.  
Kessler Law Office, L.L.C.  
9117 West 2700 South, #A  
Magna, Utah 84044

Attorney for Plaintiff/Appellant  
Melany Zoumadakis

Carolyn Cox, Esq.  
Holme Roberts & Owen, LLP  
299 South Main Street, Suite 1800  
Salt Lake City, Utah 84111-2263

Attorney for Defendant/Appellees  
Uintah Basin Medical Center, Dr. Mark  
Mason, Lloyd Nielson and Carolyn Smith

**UTAH COURT OF APPEALS  
BRIEF**

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Jay L. Kessler, Esq.  
Kessler Law Office, L.L.C.  
9117 West 2700 South, #A  
Magna, Utah 84044

Attorney for Plaintiff/Appellant  
Melany Zoumadakis

Carolyn Cox, Esq.  
Holme Roberts & Owen, LLP  
299 South Main Street, Suite 1800  
Salt Lake City, Utah 84111-2263

Attorney for Defendant/Appellees  
Uintah Basin Medical Center, Dr. Mark  
Mason, Lloyd Nielson and Carolyn Smith

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## STATEMENT OF JURISDICTION

This appeal is taken by plaintiff-appellant Melany Zoumadakis (“Zoumadakis”) from the trial court’s grant of the Motion to Dismiss of defendants-appellees Uintah Basin Medical Center (“Uintah Basin”), Dr. Mark Mason (“Dr. Mason”), Lloyd Nielson (“Nielson”) and Carolyn Smith (“Smith”). The Utah Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

## STATEMENT OF THE ISSUES

Defendants-Appellees offer this statement of issues and the standard of review in lieu of the one contained in Appellant’s Brief because it more accurately characterizes the issues presented to the trial court and the standard of review to be applied by this Court.

1. Whether the trial court erred in granting defendants-appellees’ motion to dismiss:
  - i. Zoumadakis’ first cause of action alleging defamation;
  - ii. Zoumadakis’ second cause of action alleging intentional infliction of emotional distress; and
  - iii. Zoumadakis’ third cause of action alleging interference with employment contract.
- a. Standard of Review. This Court reviews a trial court’s grant of a motion to dismiss for correctness. *Hunter v. Sunrise Title Co.*, 84 P.3d 1163, 1165 (Utah 2004).



2. Whether the trial court erred in failing to allow Zoumadakis to amend her Complaint in lieu of granting defendants-appellees' Motion to Dismiss notwithstanding Zoumadakis' failure to seek amendment under Utah R. Civ. P. 15.

a. Standard of Review. This Court reviews a trial court's denial of a motion to amend for abuse of discretion. *Holmes Dev., LLC v. Cook*, 48 P.3d 895, 909 (Utah 2002).

### **RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

Utah R. Civil P. 12(b)(6), providing for dismissal of a complaint for failure to state a claim upon which relief may be granted.

### **STATEMENT OF THE CASE**

This case arose out of the termination of Zoumadakis' employment with Uintah Basin as a home health nurse in September 2003. Zoumadakis filed her Complaint in December 2003. In January 2004, defendants-appellees moved to dismiss Zoumadakis' Complaint in its entirety, with prejudice. After briefing was complete, the trial court heard the Motion to Dismiss on May 10, 2004. On May 24, 2004, the Court entered an order granting the Motion to Dismiss. This timely appeal followed.

### **STATEMENT OF FACTS**

Because this case involves the review of the trial court's granting of a motion to dismiss, the allegations of Zoumadakis' Complaint comprise the relevant "facts." As set forth in her Complaint, defendant-appellee Uintah Basin is a small, rural hospital located in Roosevelt, Utah. Zoumadakis was employed by Uintah Basin as a home health nurse

from approximately June 1990 through mid-September 2003. R. 2-3, ¶¶ 5, 7, 14.

Defendant-appellee Dr. Mason is a doctor who provides services to Uintah Basin pursuant to contract, under which Uintah Basin manages his practice. R. 2, ¶ 8; R. 47, ¶ 3. Defendant-appellee Nielson is employed by Uintah Basin as the director of Uintah Basin's home health department, in which role he supervised Zoumadakis. R. 2, ¶¶ 7, 10; R. 47, ¶ 4. Defendant-appellee Smith is employed by Uintah Basin and works as a medical assistant to Dr. Mason. R. 2, ¶ 9; R. 47, ¶ 5.

Zoumadakis alleged that Smith told Dr. Mason that Zoumadakis had questioned his care of his patients. R. 2, ¶ 9. Zoumadakis alleged that thereafter, Dr. Mason told Uintah Basin that (1) Zoumadakis was telling Dr. Mason's patients that he had ordered the wrong treatment and was giving improper care, and (2) a patient had complained to Dr. Mason that Zoumadakis smelled of alcohol during a home health visit, R. 2, ¶ 8. Zoumadakis claimed that in response to these statements, Nielson prepared a disciplinary report in September 2003 incorporating Dr. Mason's statements. R. 2-3, ¶ 18.

Zoumadakis alleged that in September 2003, Nielson showed the disciplinary report to Zoumadakis and asked her to sign it. R. 2-3, ¶¶ 10-14. When Zoumadakis refused to sign the form and accept the discipline, Nielson terminated her employment. *Id.* Zoumadakis also alleged that following her employment, in response to an unemployment claim she filed, Nielson told the Utah Department of Workforce Services that Zoumadakis quit, as opposed to being fired, and misstated her professionalism and work history. R. 6, ¶ 36.

In her Complaint, Zoumadakis stated three causes of action against all defendants: defamation, intentional infliction of emotional distress and interference with contract. R. 4-6.

### **SUMMARY OF THE ARGUMENT**

Following the termination of her employment with Uintah Basin, Zoumadakis initiated suit against Uintah Basin and several of its employees and agents alleging defamation, intentional infliction of emotional distress and interference with her contract of employment. Defendants-appellees moved to dismiss Zoumadakis' Complaint with prejudice because it failed to state a claim under Utah law. The trial court correctly dismissed Zoumadakis' defamation claim on several grounds, including failure to plead the alleged defamatory statements with sufficient specificity, qualified and absolute privilege for the alleged defamatory statements and lack of publication. The trial court correctly dismissed Zoumadakis' intentional infliction of emotional distress claim because under Utah law, emotional distress suffered by reason of an allegedly incorrect or wrongful termination is not sufficient to state a claim for intentional infliction. Finally, as Zoumadakis now acknowledges, the trial court correctly dismissed Zoumadakis' interference with employment contract claim because, among other reasons, she was employed at will.

On appeal, Zoumadakis's primary argument is that even if her Complaint failed to state a claim, the trial court erred by failing to allow her to amend in lieu of dismissing her complaint. Zoumadakis makes this argument despite the fact that in the trial court,

she failed to avail herself of the options for amending her Complaint under Utah R. Civil P. 15. The trial court correctly dismissed her Complaint for failure to state a claim, and its decision should be affirmed in all respects.

## **ARGUMENT**

### **I. THE TRIAL COURT CORRECTLY DISMISSED ZOUMADAKIS' COMPLAINT PURSUANT TO UTAH R. CIVIL P. 12(B)(6).**

#### **A. The Trial Court Correctly Dismissed Zoumadakis' First Cause Of Action For Defamation.**

The trial court dismissed Zoumadakis' first cause of action for defamation on the grounds (1) she failed to plead her allegations with adequate specificity and (2) the alleged defamatory statements were conditionally privileged. R. 97; Appellant's Addendum, No. 6. Zoumadakis' defamation claim was based on the following alleged communications:

- a. a statement by Smith to Dr. Mason that Zoumadakis had questioned his care of his patients; R. 2, ¶ 9;
- b. statements by Dr. Mason to Uintah Basin that Zoumadakis was telling Dr. Mason's patients that he had ordered the wrong treatment and was giving improper care, and that a patient told Dr. Mason that Zoumadakis smelled of alcohol during a home health visit; R. 2, ¶ 8; and
- c. a written disciplinary report prepared by Nielson that addressed the above complaints by Dr. Mason. R. 2-3, ¶¶ 10, 18.

In her third cause of action, Zoumadakis also alleged that in response to her claim for unemployment, Nielson told the Department of Workforce Services that she quit, and was not fired, and misstated her professionalism and work history.

The elements of a claim for defamation include (1) that defendants published statements concerning plaintiff; (2) such statements were false, defamatory and not subject to any privilege; (3) such statements were published with the requisite degree of fault; and (4) their publication resulted in damage. *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994). Here, the trial court correctly dismissed Zoumadakis' defamation claim because (1) she failed to plead her claim with adequate particularity; (2) to the extent she adequately plead defamatory statements, the statements of Dr. Mason and Smith were subject to a qualified privilege; and (3) with respect to the statements attributed to Nielson, such statements were not published, were not defamatory or were subject to a qualified privilege.

**1. Zoumadakis' Defamation Claim Was Not Pled With Particularity As Required By Utah R. Civil P. 9.**

Utah law requires that defamation claims be pled with particularity. *Boisjoly v. Morton Thiokol, Inc.*, 706 F.Supp 795, 799-800 (D. Utah 1988); *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982). To meet this requirement, a plaintiff must identify the defamatory statement either by its "words or words to that effect;" general statements characterizing the defamatory words are inadequate. *Id.* Courts have also required that the complaint allege when, where and to whom the alleged defamatory statement was made. *Boisjoly*, 706 F.Supp. at 800. This level of specificity is required so that the court can determine if the complained of statement is defamatory and also so that the defendant may formulate a defense. *Id.*

Applying the above standards, Zoumadakis' Complaint failed to state a claim and the district court properly dismissed her claim. Although Zoumadakis identified generally the type of statements made, she failed to identify when and where such statements were allegedly made, and as to Dr. Mason's alleged statements, exactly to whom the statements were made. R. 2-3, ¶¶ 8, 9 and 18. Thus, Zoumadakis' first cause of action was properly dismissed.

**2. The Alleged Statements of Smith and Dr. Mason Were Subject To A Qualified Privilege.**

The law has long recognized that a publication is conditionally privileged if it is made to protect a legitimate interest of the publisher. *Brehany v. Nordstrom*, 812 P.2d 49, 58-59 (Utah 1991). The privilege also extends to statements made to advance a legitimate common interest between the publisher and the recipient of the publication. *Id.*; *Lind v. Lynch*, 665 P.2d 1276, 1278 (Utah 1983). Here, construing the Complaint in a light most favorable to her, Zoumadakis alleged that Smith, Dr. Mason's medical assistant, made a defamatory statement to Dr. Mason and Dr. Mason made defamatory statements to Uintah Basin regarding Zoumadakis' interaction with Dr. Mason's patients.

Even accepting the truth of these allegations, Zoumadakis' defamation claim was properly dismissed because Smith's alleged statements to Dr. Mason, and Dr. Mason's alleged statements to Uintah Basin, were subject to the common interest qualified privilege and therefore cannot constitute defamation. Smith works for Dr. Mason as his medical assistant. As such, Smith and Dr. Mason have a common interest in the welfare of the patients seen by Dr. Mason. Statements by Smith to Dr. Mason regarding

Zoumadakis' interaction with and care of Dr. Mason's patients clearly fall within that common interest.

Similarly, given that Dr. Mason is under contract with Uintah Basin and provides services to its patients, and Uintah Basin's home health department provides services to Dr. Mason's patients, Dr. Mason and Uintah Basin share a common interest in both their patients and the care provided to those patients by Uintah Basin personnel. Statements by Dr. Mason to Nielson, who directs Uintah Basin's home health division and directly supervises Zoumadakis, regarding Zoumadakis' performance of her home health duties with Dr. Mason's patients fall within that common interest and within the qualified privilege. *Brehany*, 812 P.2d at 58-59; *see also Yu v. Northwest Pipeline Corp.*, 1991 U.S. Dist. LEXIS 12722, \*14-15 (D. Utah June 11, 1991) (employer-employee communications regarding employee discipline matter subject to common interest qualified privilege) (A copy of *Yu* is contained in the Addendum hereto.).

Zoumadakis claims that dismissal of her defamation claim was error because she submitted an affidavit in response to the Motion to Dismiss alleging that Smith's statements to Dr. Mason and Dr. Mason's statements to Uintah Basin were made with malice, which vitiates the qualified privilege. *See Brehany*, 812 P.2d at 58 (plaintiff can overcome qualified privilege by demonstrating actual malice or over-publication). As an initial matter, as she acknowledges, Zoumadakis' allegations of malice were not contained in her Complaint. Defendants-appellees sought dismissal of Zoumadakis' Complaint under Utah R. Civil P. 12(b)(6). A Rule 12(b)(6) motion addresses the sufficiency of the allegations contained in the claim, accepting their truth for purposes of

the motion. Zoumadakis cannot supply missing elements of her Complaint by way of an affidavit. *See e.g. Nester v. Bank One Corp.*, 224 F.Supp.2d 1344, 1346 (D. Utah 2002) (where Rule 12(b)(6) motion addresses only the sufficiency of complaint, it is inappropriate to consider an affidavit from plaintiff in connection with the motion).<sup>1</sup> Thus, the trial court correctly dismissed her defamation claim to the extent it rests on the statements of Smith and Dr. Mason.

**3. Zoumadakis' Defamation Claim Was Properly Dismissed To The Extent It Rests On Statements By Nielson.**

**a. Zoumadakis Failed to Allege Publication of Nielson's Disciplinary Report.**

Zoumadakis' defamation claim rests in part on a disciplinary report prepared by Nielson and presented to Zoumadakis addressing the complaints raised by Dr. Mason. To make out a claim for defamation, Zoumadakis must demonstrate that the allegedly defamatory statement (i.e., the disciplinary report) was published to third parties. *DeBry v. Godbe*, 992 P.2d 979, 985 (Utah 1999) ("the requirement of publication means that the defamatory statement must be communicated to a third person and that the third person reads and understands the statement"). However, Zoumadakis alleges only that Nielson showed her the disciplinary report; she does not allege that Nielson published the disciplinary report to any third party. Because Zoumadakis has failed to establish publication by Nielson, a necessary element of a defamation claim, the trial court

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<sup>1</sup> Moreover, the trial court properly disregarded her affidavit because it contained conclusions, as opposed to facts, R. 67, ¶ a, (her allegations of malicious intent on the part of Smith and Dr. Mason) and to the extent it alleged facts, such facts were based on inadmissible hearsay, rather than personal knowledge. R. 67, ¶ b (statements regarding Nielson's actions).



correctly dismissed her first cause of action to the extent it rests on the disciplinary report.

**b. Nielson's Statements To The Utah Department Of Workforce Services Were Either Privileged or Not Defamatory.**

Zoumadakis also alleged that Nielson defamed her by telling the Department of Workforce Services that she quit, rather than that she was fired, and made unspecified statements about her professionalism. To the extent Zoumadakis' defamation claim rested on these allegations, dismissal was appropriate because any statements by Nielson to the Department of Workforce Services are subject to both an absolute and a qualified privilege.

Utah courts recognize an absolute privilege protecting statements made in a judicial or quasi-judicial proceeding, including administrative proceedings such as unemployment proceedings in the Department of Workforce Services. *See Price v. Armour*, 949 P.2d 1251, 1257 (Utah 1997) (judicial proceedings privilege covers all proceedings of a judicial or quasi-judicial nature, including statements made in the course of an administrative proceeding). The necessary elements for application of the judicial proceeding privilege include (1) the statement must have been made during or in the course of a judicial proceeding; (2) the statement must have some reference to the subject matter of the proceeding; and (3) the statement must have been made by someone acting in the capacity of judge, juror, witness, litigant or counsel. *Id.* at 1256. Nielson's alleged statements to the Department of Workforce Security clearly meet the above test. Nielson's statements were made in response to and addressed Zoumadakis' claim for

unemployment benefits and, as a representative of Uintah Basin, he was acting as a litigant. Furthermore, even if the alleged statements were not covered by the judicial proceeding privilege, such statements would be subject to the common interest qualified privilege. *Yu*, 1991 U.S. Dist. LEXIS 12722 at \*15 (employer's statements regarding reasons for plaintiff's termination made to Job Services in connection with plaintiff's unemployment claim were subject to qualified privilege).

Dismissal was also appropriate because Nielson's alleged statement that Zoumadakis quit, and was not fired, was not defamatory. To constitute defamation, a statement must impeach an individual's honesty, integrity, virtue or reputation, and thereby expose the individual to public hatred, contempt or ridicule. *West*, 872 P.2d. at 1008. Simply stating that a person quit his or her job, even if untrue, does not constitute defamation as a matter of law.

Finally, to the extent Zoumadakis' defamation claim rested on her allegation that Nielson misstated her professionalism to the Department of Workforce Services, her claim was properly dismissed because she failed to identify with particularity the statements allegedly made. *See* Section I.A.1. above.

**B. The Trial Court Correctly Dismissed Zoumadakis' Second Cause Of Action For Intentional Infliction Of Emotional Distress.**

Zoumadakis' second cause of action purported to state a claim for intentional infliction of emotional distress against all defendants. The trial court correctly dismissed this claim on the ground the alleged conduct did not rise to the level required to state a claim under Utah law, and its decision should be affirmed.

To state a claim for intentional infliction of emotional distress under Utah law, a plaintiff must show:

(a) that the defendant engaged in some conduct toward the plaintiff considered outrageous and intolerable in that it offends the generally accepted standards of decency and morality (b) with the purpose of inflicting emotional distress or where any reasonable person would have known that such would result, and (c) that severe emotional distress resulted as a direct result of the defendant's conduct.

*Ankers v. Rodman*, 995 F.Supp. 1329, 1335 (D. Utah 1997) (quoting *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 905 (Utah 1992)). Dismissal of a claim for intentional infliction of emotional distress on a Rule 12 motion is appropriate if all the elements of the tort are not alleged or if the alleged conduct on which the claim is based does not rise to the level of outrageousness required under Utah law. *Boisjoly*, 706 F.Supp. at 801-02.

Here, dismissal of Zoumadakis' intentional infliction claim was correct because, as a matter of law, the alleged conduct on which she based her claim does not rise to the level of outrageousness required under Utah law. Whether the alleged conduct at issue may reasonably be regarded as so extreme and outrageous as to permit recovery is a question of law for the court. *Ankers*, 995 F.Supp. at 1335. The burden of proving outrageous conduct is a heavy one, and liability may be imposed only where the conduct is "atrocious, and utterly intolerable in a civilized community." *Retherford v. AT & T Communications*, 844 P.2d 949, 977-78 n.19 (Utah 1992). Conduct which simply constitutes an insult or indignity is not actionable.

Zoumadakis alleged that defendants Dr. Mason and Smith made untrue statements to Uintah Basin regarding her work performance in providing services to their patients.

Such allegations, even if true, hardly rise to the level of “atrocious and utterly intolerable” behavior as required to establish a claim for intentional infliction of emotional distress. The Utah courts have consistently rejected claims for intentional infliction that arise out of the alleged wrongful termination of an employee. For example, in *Larson v. Sysco Corp.*, 767 P.2d 557 (Utah 1989), plaintiff claimed he had been wrongfully terminated, and in addition to a claim for breach of contract, sought recovery for intentional infliction of emotional distress. The Utah Supreme Court affirmed the lower court’s grant of summary judgment on plaintiff’s intentional infliction claim, stating that “[w]hile termination can be an emotionally distressing event in one’s life, mere termination alone does not constitute the intentional infliction of emotional distress.” *Id.* at 561.

In *Sperber v. Galigher Ash Co.*, 747 P.2d 1025 (Utah 1987), the Utah Supreme Court held that plaintiff’s claim for intentional infliction of emotional distress arising out of an alleged wrongful termination was properly dismissed for failure to state a claim under Utah law. As in *Larson*, the Court found that mere discharge from employment, even where plaintiff claimed, as here, that the employer’s stated reason for termination was incorrect and a pretext, did not state a claim for intentional infliction as a matter of law. The Court noted that while every employee who contests a termination decision suffers some emotional anguish as a result of the termination, such distress is simply insufficient to state a claim for intentional infliction of emotional distress, absent facts that would independently support such a claim. *Id.* at 1028-1029.

Similarly, in *Boisjoly*, 706 F.Supp. at 801-02, plaintiff was employed by defendant as an engineer and was involved in the manufacturing of certain parts used in the Space Shuttle Challenger. After the Challenger exploded, plaintiff testified before a federal commission investigating the incident. Although the plaintiff was not ultimately terminated, plaintiff claimed that in connection with that investigation, his employer discredited him, threatened his job and removed him from the investigation of the accident. Again, the court found that under Utah law, such conduct, while not laudable or desirable behavior, was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Id* at 802. *See also, Nestor*, 224 F.Supp. at 1347 (to state a claim for intentional infliction, the alleged conduct must evoke outrage or revulsion; it must be more than unreasonable, unkind or unfair); *Gudenkauf v. Stauffer Communications, Inc.*, 922 F.Supp. 461, 464 (D. Kan. 1996) (termination for allegedly discriminatory reasons is insufficient to state a claim for intentional infliction of emotional distress); *Bunker v. City of Olathe*, 2001 U.S. Dist. LEXIS 3583 (D. Kan. February 21, 2001) (demotion and other adverse employment actions for allegedly wrongful reasons is insufficient to state a claim for intentional infliction of emotional distress) (A copy of *Bunker* is included in the Addendum hereto).

Regardless of its severity, the emotional distress Zoumadakis claims to have suffered by reason of Uintah Basin's decision to terminate her employment is not enough to support a claim for intentional infliction of emotional distress. The trial court correctly dismissed Zoumadakis' intentional infliction claim and its decision should be affirmed.

**C. The Trial Court Correctly Dismissed Zoumadakis' Third Cause Of Action For Intentional Interference With Contract.**

In her third cause of action, Zoumadakis alleged that defendants tortiously interfered with her employment by making the allegedly false statements that are the subject of her defamation claim, leading to her termination. Although entitled “tortious interference with employment,” such a claim does not exist under Utah law. As Zoumadakis admits, her claim was essentially a claim for interference with an employment contract. To establish a claim for interference with contract, a party must show (1) that the defendant intentionally interfered with plaintiff’s existing contractual relationship; (2) by an improper purpose or for an improper means; (3) causing damage to plaintiff. *St. Benedict’s Dev. Co. v. St. Benedict’s Hospital*, 811 P.2d 194, 200 (Utah 1991); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 301 (Utah 1982); *see also Milatz v. Frito-Lay, Inc.* 1997 U.S. App. LEXIS 599, \*8 (10<sup>th</sup> Cir. January 15, 1997) (a claim of tortious interference with an employment relationship requires the existence of a valid enforceable contract) (A copy of *Milatz* is included in the Addendum hereto.); *Tatum v. Philip Morris, Inc.*, 809 F.Supp. 1452, 1468 (W.D. Okla. 1992), *aff’d* 16 F.3d 417 (10<sup>th</sup> Cir. 1993), *cert. denied*, 114 S.Ct. 1833 (1994) (same).

In the trial court, defendants-appellees obtained dismissal of Zoumadakis’ interference with contract claim on several grounds, including that she was employed at will and did not have an enforceable contract with Uintah Basin. R. 98; Appellant’s

Addendum, No. 6.<sup>2</sup> On appeal, Zoumadakis now acknowledges that she was an at will employee and her interference with employment claim was properly dismissed.

Zoumadakis claims, however, that this Court should remand to give her the opportunity to seek to amend her claim to bring a public policy wrongful termination claim.

However, in the trial court, Zoumadakis failed to take advantage of the legal options available to her for amending her Complaint. Zoumadakis cannot wait until she is on appeal and then ask this Court to protect her from her own inaction. As set forth in section II below, Zoumadakis had ample opportunity to seek amendment below and the district court correctly dismissed her complaint.

## **II. THE TRIAL COURT DID NOT ERR BY FAILING TO ALLOW ZOUMADAKIS TO AMEND HER COMPLAINT IN LIEU OF DISMISSAL.**

Finally, Zoumadakis argues the trial court erred because it should have allowed her to amend her complaint to correct any deficiencies rather than dismissing her claims. Here, the trial court did not err in dismissing her claims; rather, Zoumadakis failed to seek amendment under Utah R. Civil P. 15. Under Rule 15, a party may amend his or her complaint once as a matter of course prior to the filing of a responsive pleading. Thereafter, a party may amend with leave of court or the consent of the opposing party.

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<sup>2</sup> The trial court also properly dismissed this claim because Zoumadakis alleged interference only by a party to the contract or its employees and agents. *See Leigh Furniture*, 657 P.2d at 301 (a party to the contract cannot be liable for the interference with contract); *Yu*, 1991 U.S. Dist. LEXIS 12722 at \*16 (interference with contract claim fails when alleged interferer is agent of the employer). In addition, Zoumadakis failed to allege defendants-appellees intentionally interfered with her alleged contract or knew that their actions were a necessary consequence thereof. *See Mumford v. ITT Commercial Finance Corp.*, 858 P.2d 1041, 1044 (Utah Ct. App. 1993).

A properly filed motion to amend must state specifically the grounds for amendment and be accompanied by a memorandum in support and a proposed amended complaint. Utah R. Civil P. 7; *Holmes*, 48 P.2d at 909-910 (motion to amend must be accompanied by a memorandum in support and a proposed amended complaint); *see also Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1182 (Utah 1983) (same). Here, Zoumadakis failed to seek any of the above remedies for amending her Complaint.<sup>3</sup> Rather, Zoumadakis mentioned the possibility of amendment only in passing in the conclusion of her motion to dismiss and at oral argument.<sup>4</sup>

The Utah Supreme Court has made clear under the circumstances presented here, the trial court did not err in failing to allow amendment.<sup>5</sup> In *Holmes Dev.*, plaintiff did not make a motion to amend but, as in this case, simply requested in its opposition to a motion to dismiss that the court allow amendment if it determined the complaint was insufficient.<sup>6</sup> 48 P.3d at 909. The court dismissed plaintiff's complaint and denied the request to amend. On appeal, the Utah Supreme Court affirmed the trial court, stating:

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<sup>3</sup> Whether Zoumadakis could have amended as of course or only with leave of court or consent of defendants is irrelevant because she did not attempt to amend by any method.

<sup>4</sup> In her Opposition to the Motion to Dismiss, Zoumadakis stated that the pleadings should be allowed to be amended if necessary, R.63 , and during the argument, Zoumadakis stated on one occasion that allowing for an amended complaint would be appropriate. Zoumadakis' Opening Brief at 16; R. 110 at 18.

<sup>5</sup> Here, the trial court did not specifically address the issue of amendment but simply granted defendants-appellees' motion to dismiss without providing for amendment.

<sup>6</sup> Unlike this case, in *Holmes*, the plaintiff at least referred to Rule 15 and cited one case addressing the standard for amendment under Rule 15. 48 P.3d at 909.



To properly move for leave to amend a complaint, a litigant must file a motion that “shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.” Further, a motion for leave to amend must be accompanied by a memorandum of points and authorities in support, and by a proposed amended complaint.

\* \* \* \* \*

In this case, Holmes never filed an actual motion for leave to amend. Further, Holmes’s request failed to “state with particularity the grounds” upon which it based its motion for leave to amend. Holmes merely cited rule 15(a) and noted that leave to amend should be freely given. Holmes never articulated a single reason why the trial court should have granted it leave to amend and never provided the trial court a proposed amended complaint so that the court could determine the changes that Holmes intended to make. By relegating its motion to the end of the memoranda opposing the motions to dismiss, Holmes’s motions did not comply with Utah’s formal motion practice rules. Simply put, Holmes’s abbreviated requests for leave to amend its complaint “lacking . . . statements of the grounds for amendment and dangling at the end of [its] memorand[a, do] not rise to the level of a motion for leave to amend.” Therefore, because Holmes’s motions for leave to amend its complaint were insufficient, the trial court did not abuse its discretion in denying the motions.

*Id.* at 909-910 [citations omitted]. *See also Coroles v. Sabey*, 79 P.2d 974, 985-986 (Utah Ct. App. 2003) (court did not err in denying amendment where plaintiff failed to seek amendment as required under rules of civil procedure).

Here, while Zoumadakis does not explicitly address her failure to seek amendment under Rule 15, she suggests reversal and remand of this case to give her an opportunity to amend is appropriate because by granting the motion to dismiss, the trial court did not give her time to amend her complaint. Appellant’s Brief at 16. Zoumadakis had ample time for exercising her rights under Rule 15 if she deemed it appropriate. Defendants-appellees’ Motion to Dismiss was filed in January 2004, but not heard until May. Zoumadakis could have sought amendment in response to the Motion to Dismiss, or even

after she had filed her opposition but before the Motion to Dismiss was heard. Similarly, the Motion to Dismiss was heard on May 10, 2004, but the Court did not enter its decision granting the Motion to Dismiss until May 24, 2004. R. 97; Appellant's Addendum at No. 6. Again, Zoumadakis could have acted under Rule 15 after the hearing, but before the trial court's ruling was entered.


Zoumadakis also suggests her failure to act under Rule 15 should be excused because she could not anticipate defendants-appellees' assertion of the qualified privilege defense, and she was mistaken as to the at will nature of her employment relationship, and its effect on her third cause of action. Again, defendants-appellees raised both the qualified privilege and the at will nature of her employment as grounds for dismissal in the Motion to Dismiss. Zoumadakis had ample time to pursue amendment under Rule 15 in response to the Motion to Dismiss. Zoumadakis should not be allowed to ignore the procedural options available to her in the trial court, and then seek reversal from this Court to protect her from her inaction below.

The trial court did not err in failing to allow amendment. Its decision dismissing Zoumadakis' Complaint should be affirmed in its entirety.

## CONCLUSION

For all of the reasons set forth above, defendants-appellees ask the Court to affirm the trial court's decision granting their Motion to Dismiss.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of January, 2005.

  
\_\_\_\_\_  
HOLME ROBERTS & OWEN LLP  
Carolyn Cox  
Attorneys for Defendants/Appellees

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 21<sup>ST</sup> day of January, 2005, two (2) true and correct copies of the foregoing APPELLEES' BRIEF was served by U.S. mail, postage prepaid, as follows:

Jay L. Kessler  
Attorney at Law  
9117 West 2700 South #A  
Magna, UT 84044

Michelle Stephens

## **ADDENDUM**

- A. *Yu v. Northwest Pipeline Corp.*, 1991 U.S. Dist. LEXIS 12722 (D.Ut. 1991).
- B. *Bunker v. City of Olathe*, 2001 U.S. Dist. LEXIS 3583 (D. Kan. February 21, 2001).
- C. *Milatz v. Frito-Lay, Inc.* 1997 U.S. App. LEXIS 599 (10<sup>th</sup> Cir. 1997).

Tab A

LEXSEE 1991 US DIST LEXIS 12722

**DOROTHY D. S. YU, Plaintiff, v. NORTHWEST PIPELINE CORPORATION, a  
corporation of the State of Delaware, JUANITA REID, KAREN MCPHEETERS, TOM  
O'KEEFE AND HOWARD FINLEY, Defendants**

**Civil No. 89-C-834W**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL  
DIVISION**

**1991 U.S. Dist. LEXIS 12722; 56 Fair Empl. Prac. Cas. (BNA) 313; 122 Lab. Cas.  
(CCH) P56,993; 6 I.E.R. Cas. (BNA) 1116**

**June 11, 1991, Decided  
June 11, 1991, Filed**

**LexisNexis(R) Headnotes**

**JUDGES: [\*1]**

David K. Winder, United States District Judge.

**OPINIONBY:**

WINDER

**OPINION:**

**MEMORANDUM DECISION AND ORDER**

This matter is before the court on cross motions for summary judgment. A hearing on these motions was held March 12, 1991. Plaintiff was represented by Louise T. Knauer. Defendants were represented by Robert A. Peterson, Teresa Silcox and Paul E. Pratt. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to these motions. Now being fully advised, the court renders the following memorandum decision and order.

**BACKGROUND**

Plaintiff is a non-white, Chinese-born woman, who was fifty-one years of age when she was terminated by defendant Northwest Pipeline Corporation ("Northwest") on May 16, 1988. Plaintiff was hired by Northwest in January 1979 and held the position of Office Administrator of the Business Information Center at the time of her termination.

On or about May 6, 1988, defendant Karen McPheeters, Northwest's Corporate Librarian, discov-

ered on or in plaintiff's desk a document from the Personnel Department listing the degrees, major [\*2] fields of study and universities attended by Northwest employees. Plaintiff's duties as Office Administrator did not involve access to any documents generated by the personnel department.

Northwest's Standard Operating Policies and Procedures Manual ("SOP Manual"), in effect and posted on a bulletin board at the time of plaintiff's employment, provided as follows:

Damaging the integrity of, or compromising the confidentiality of corporate information . . . may be cause for disciplinary action up to and including discharge.

SOP No. 12.3006(3)(m) at 1. The SOP Manual further provided that

it should not be inferred from this policy that an employee can only be discharged for committing violations on this list [including compromising the confidentiality of corporate information], nor should this policy be construed to alter the Company's rights as an employer at will.

Id.

McPheeters reported to defendant Juanita Reed, Manager of Employee Development and Communications, that she had discovered the personnel document in plaintiff's possession. The Personnel Department then notified defendant Tom O'Keefe, Manager of General Services, of the discovery. Defendant Howard Finley, plaintiff's [\*3] immediate supervisor, was out of town at the time.

1991 U.S. Dist. LEXIS 12722, \*3; 56 Fair Empl. Prac. Cas. (BNA) 313;  
122 Lab. Cas. (CCH) P56,993; 6 I.E.R. Cas. (BNA) 1116

On May 11, 1988, O'Keefe began an investigation of the matter. During the investigation, plaintiff admitted the personnel document was in her possession and that she had obtained the document from Trent Enser, an employee in the Records Department. Plaintiff said she had placed the document in her desk drawer because it contained an inaccuracy concerning her educational background that she wanted corrected.

Enser admitted to O'Keefe that he had given the document to plaintiff. O'Keefe determined that the personnel document was a confidential personnel record, that plaintiff should not have had possession of the document and that both plaintiff and Enser had violated Northwest's policy regarding confidential corporate records. On May 16, 1988, Northwest terminated plaintiff under SOP No. 12.3006(3)(m) for damaging the integrity or compromising the confidentiality of corporate information. Enser also was terminated.

Following plaintiff's termination, Northwest informed Utah Job Services that plaintiff had been terminated for breach of confidentiality, and therefore should be denied unemployment compensation. Non-supervisory Northwest [\*4] employees also were informed that plaintiff had been terminated for breach of corporate confidentiality.

During her employment with Northwest, plaintiff applied for five positions other than the one she held and was not hired for any of them. Plaintiff claims that Northwest hired two younger, white American-born females and three younger, white American-born males for these positions.

#### STANDARD OF REVIEW

Summary judgment is proper "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 judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court must construe all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991).

Once the moving party has carried its burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by . . . affidavits, or [\*5] by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Gonzales v. Millers Casualty Ins. Co.*, 923 F.2d 1417, 1419 (10th Cir. 1991). n1 The non-

moving party must "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." *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3186 (1990) (quoting *Celotex Corp.*, 477 U.S. at 322).

n1 The summary judgment motion may be "opposed by any of the kinds of evidentiary materials listed in Rule 56 (c), except the mere pleadings themselves." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

In considering whether there exists a genuine issue of material fact, the court does not weigh the evidence but instead inquires whether a reasonable [\*6] jury, faced with the evidence presented, could return a verdict for the nonmoving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Clifton v. Craig*, 924 F.2d 182, 183 (10th Cir. 1991). n2 Finally, all material facts asserted by the moving party shall be deemed admitted unless specifically controverted by the opposing party. U.S. Ct. D. Utah Civ. R. P. 5(e).

n2 "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

#### DISCUSSION

Plaintiff's Second Amended Complaint asserts seven causes of action: (1) discriminatory treatment on the basis of plaintiff's gender, race and national origin in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2000e-17; (2) discriminatory treatment and discharge on the basis of plaintiff's age in violation of the Age Discrimination in Employment Act ("ADEA"), [\*7] 29 U.S.C. 626(b); (3) breach of employment contract; (4) breach of an implied covenant of good faith and fair dealing; (5) defamation against defendants Northwest, Reid and O'Keefe; (6) defamation against defendant McPheeters; and (7) intentional interference with contractual relations against defendant McPheeters.

Defendants have moved for summary judgment on all claims. Plaintiff has moved for partial summary judgment as to the liability issues on her Title VII, ADEA, breach of contract and defamation claims. The court considers each claim in turn.

##### A. Title VII and ADEA Claims

In *McDonnell Douglas Corp. v. Green*, 411 U.S.



1991 U.S. Dist. LEXIS 12722, \*7; 56 Fair Empl. Prac. Cas. (BNA) 313;  
122 Lab. Cas. (CCH) P56,993; 6 I.E.R. Cas. (BNA) 1116

792 (1973), the United States Supreme Court defined the elements and burdens of proof necessary to establish a prima facie case under Title VII. Plaintiff must establish that she was (1) a member of a protected class, (2) adversely affected by defendant's employment decision, (3) qualified for the position, and (4) replaced or rejected in favor of a person not in a protected class. *McDonnell Douglas Corp.*, 411 U.S. at 802.

Once plaintiff establishes a prima facie case, the burden of production shifts to the employer to [\*8] articulate a legitimate, nondiscriminatory reason for the employee's rejection. *Id.* After the employer presents a legitimate, nondiscriminatory reason, the plaintiff must demonstrate that the reason offered is in fact a mere pretext for impermissible discrimination. *Id.* at 804

Cases brought under ADEA are subject to the same requirements of proof as Title VII cases alleging discriminatory treatment. *Branson v. Price River Coal Co.*, 853 F.2d 768, 770 (10th Cir. 1988).

Employers defending a Title VII or ADEA claim can establish a basis for summary judgment two ways. First, the defendant can demonstrate that the plaintiff will be unable to establish a prima facie case at trial. *Howcroft v. Mountain States Tel. and Tel. Co.*, 712 F. Supp. 1514, 1520 (D. Utah 1989). Alternatively the defendant can demonstrate that the plaintiff cannot carry the ultimate burden of proving intentional discrimination, assuming plaintiff has established a prima facie case and defendant has presented a legitimate, nondiscriminatory reason. *Howcroft*, 712 F. Supp. at 1520.

Defendant Northwest contends that even assuming plaintiff [\*9] has established a prima facie case of discriminatory treatment and discharge, she cannot carry the ultimate burden of proving intentional discrimination. On that ground alone, Northwest argues, it is entitled to summary judgment. The court disagrees. With respect to plaintiff's theory of discriminatory discharge, plaintiff has presented evidence that a few years prior to plaintiff's termination, a younger, white, native-born male who violated company confidentiality policies was not terminated. Plaintiff also has presented evidence that she was equally or better qualified than the persons selected for the other positions for which she applied and was rejected.

In the court's opinion, this evidence is sufficient to raise a factual question about whether Northwest's reasons for failing to promote and for discharging plaintiff were pretextual or legitimate. Accordingly, neither defendant Northwest nor plaintiff are entitled to summary judgment on the Title VII and ADEA claims.

#### B. Breach of Employment Contract

Plaintiff claims the SOP Manual created an express or implied contract that plaintiff be terminated only for cause. The presumption under Utah law is that any employment contract [\*10] that contains no specified term of duration is terminable at the will of either party. See *Berube v. Fashion Center, Ltd.*, 771 P.2d 1033, 1044 (Utah 1989). This presumption may be rebutted by evidence that certain terms in an employee policy manual were implied terms of the contract of employment and limited the employer's right to discharge. *Berube*, 771 P.2d at 1044.

Since this case was argued and submitted, the Utah Supreme Court has elaborated on the *Berube* implied employment contract theory in the case of *Brehany v. Nordstrom, Inc.*, No. 20590 (Utah May 16, 1991) (1991 Westlaw 80706). In *Brehany*, the Utah Supreme Court set forth two propositions that must be established by employees who claim their at-will status was altered by language in employment manuals. First, the employee must show that the provisions in the manual limit or modify the employer's unfettered right to discharge its employees. *Brehany*, slip op. at 9. Once this burden is carried, the employee then must demonstrate that the employer violated the terms of the manual. *Id.*

If the terms of the employment manual do purport to limit the employer's power to [\*11] discharge, the question of whether they become implied terms of the employment contract is primarily a factual issue. *Id.* The proper construction of contractual terms in the first instance, however, is an issue of law to be decided by the court, unless the contract terms are ambiguous and raise factual issues. *Id.* "Thus, when it is plain that a manual or bulletin does not limit the right to discharge at will, the case need not go to a jury." *Id.*

Applying the law of *Berube* and *Brehany* to this case, the court concludes that the SOP Manual plainly did not limit Northwest's right to discharge at will, and thus defendant was free to discharge plaintiff for any nondiscriminatory reason. The SOP Manual expressly states that "it should not be inferred from this policy that an employee can only be discharged for committing violations on this list, nor should this policy be construed to alter the Company's rights as an employer at will." SOP Manual No. 12.3006(3)(m) at 1 (emphasis added).

Plaintiff has failed to carry her initial burden of demonstrating that the SOP Manual somehow limited or modified Northwest's right to discharge her. Northwest therefore is entitled [\*12] to summary judgment on plaintiff's breach of employment contract claim.

#### C. Breach of Implied Covenant of Good Faith and Fair Dealing

1991 U.S. Dist. LEXIS 12722, \*12; 56 Fair Empl. Prac. Cas. (BNA) 313;  
122 Lab. Cas. (CCH) P56,993; 6 I.E.R. Cas. (BNA) 1116

Plaintiff's claim that defendant breached a duty of good faith and fair dealing in discharging her fails as a matter of law. Without comment, the Utah Supreme Court refused to recognize such a claim in *Caldwell v. Ford, Bacon & Davis of Utah, Inc.*, 777 P.2d 483, 485 (Utah 1989). In *Brehany v. Nordstrom, Inc.*, No. 20590 (Utah May 16, 1991), the court again rejected this legal theory and this time cleared up any confusion that may have surrounded the implied covenant of good faith in the employment contract context. *Id.*, slip op. at 7-9.

The Brehany court explained that the purpose and function of the covenant of good faith implied in all contracts differs from the purpose and function of the so-called covenant of good faith and fair dealing in employment contracts. The former covenant presumes that the parties intended the rights and duties created by the contract to be performed and exercised in good faith. Brehany, slip op. at 8. The latter covenant, on the other hand, acts as a substantive limitation on the [\*13] employer's right to discharge. *Id.*

The Brehany court stated that "in the absence of express terms limiting the right of an employer to discharge for any or no reason and in the absence of provisions establishing procedures by which a discharge should be effectuated, it would be inconsistent to hold that an employer, on the basis of the implied covenant of good faith, is bound to a substantive limitation on the employer's right to discharge." *Id.*

Northwest, therefore, is entitled to summary judgment on plaintiff's claim for breach of implied covenant of good faith and fair dealing.

#### D. Defamation

Plaintiff claims that defendants Northwest, Reid and O'Keefe defamed plaintiff by informing Utah Job Services and various Northwest employees that plaintiff was terminated for violating the confidentiality of company records. Plaintiff further claims that defendant McPheeters defamed plaintiff by informing Northwest management that McPheeters discovered the personnel document on rather than in plaintiff's desk and by informing Northwest employees that plaintiff was terminated for breaching the company confidentiality policy.

The alleged defamatory statement communicated [\*14] by McPheeters to the Northwest managers related solely to the location of the personnel document. If, as plaintiff alleges, the location of the document was the only untruth, the court finds as a matter of law that the statement could not be defamatory. Whether the document was on or in the desk is not determinative. Possession, not location, of the document is the critical fact for purposes of determining defamatory content, and

plaintiff does not dispute such possession.

With respect to McPheeters' statements to Northwest employees, the court finds that such communications were truthful or privileged. Similarly, the court finds that even if the statements of defendants Reid and O'Keefe were defamatory per se, such statements also were truthful or privileged, and thus are not actionable.

A communication between an employer and an employee is protected by the common interest qualified privilege when (1) the statement refers to a matter in which the speaker has an interest or duty, (2) the recipient had a corresponding duty, and (3) the communication was made pursuant to that duty. *Lind v. Lynch*, 665 P.2d 1276, 1278 (Utah 1983); *Sowell v. IML Freight, Inc.*, 30 Utah 2d 446, 519 P.2d 884, 885 (1974); [\*15] *Alford v. Utah League of Cities and Towns*, 791 P.2d 201, 204 (Utah App. 1990).

It is undisputed that any allegedly defamatory statements made by Reid or O'Keefe were communicated pursuant to the company investigation of the circumstances surrounding plaintiff's possession of the personnel document. The recipients of the information, selected Northwest employees and Job Service, had a corresponding interest in hearing the information. Similarly, McPheeters' statements to co-workers were privileged as statements between members of a group with a common interest. Because there is no evidence that defendants abused the common interest qualified privilege, the statements by Reid, O'Keefe and McPheeters are not actionable.

Accordingly, defendants are entitled to summary judgment on plaintiff's defamation claims against them.

#### E. Intentional Interference with Contractual Relations

Plaintiff's final claim is that McPheeters interfered with her employment relationship with Northwest by searching plaintiff's desk and informing Northwest that she discovered the personnel document for the wrongful purpose of having plaintiff disciplined or terminated.

Tortious interference [\*16] with contractual relations, however, requires three actors: two contracting parties and a third interfering party. *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 301 (Utah 1982). There is no third party when the alleged interferer is an agent of the employer, acting within the scope of her employment. *Fletcher v. Wesley Medical Center*, 585 F. Supp. 1260, 1262-63 (D. Kan. 1984).

Because the undisputed facts demonstrate that McPheeters' allegedly interfering acts were within the scope of her employment, such acts are attributable to

1991 U.S. Dist. LEXIS 12722, \*16; 56 Fair Empl. Prac. Cas. (BNA) 313;  
122 Lab. Cas. (CCH) P56,993; 6 I.E.R. Cas. (BNA) 1116

Northwest. Thus, plaintiff's claim fails as a matter of law and McPheeters is entitled to summary judgment.

Accordingly, based on the foregoing, and good cause appearing,

IT IS HEREBY ORDERED that

1. Defendants' motion for summary judgment is granted as to all claims except plaintiff's claims against

defendant Northwest under Title VII and ADEA.

2. Plaintiff's motion for summary judgment is denied.

3. This order shall suffice as the court's ruling on this motion and no further order need be prepared by counsel.

Dated this 11th day of June, 1991.

Tab B

LEXSEE 2001 US DIST LEXIS 3583

JOHN H. BUNKER, Plaintiff, vs. CITY OF OLATHE, KANSAS, et al., Defendants.

CIVIL ACTION No. 99-2217-GTV

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

2001 U.S. Dist. LEXIS 3583

February 21, 2001, Decided

**DISPOSITION:** [\*1] Defendants' motion to dismiss (Doc. 35) granted; Counts III, IV, and V of Plaintiff's complaint dismissed.

#### LexisNexis(R) Headnotes

**COUNSEL:** For JOHN K BUNKER, plaintiff: Harold S. Youngentob, Goodell, Stratton, Edmonds & Palmer, Topeka, KS.

For OLATHE, KANSAS, CITY OF, SUSAN SHERMAN, PHILIP J MAJOR, HOWARD KANNADY, defendants: Daniel B. Denk, McAnany, Van Cleave & Phillips, P.A., Kansas City, KS.

**JUDGES:** G. Thomas VanBebber, United States Senior District Judge.

**OPINIONBY:** G. Thomas VanBebber

#### OPINION:

##### MEMORANDUM AND ORDER

Plaintiff John H. Bunker is a former Captain of the City of Olathe, Kansas Police Department. He filed this action against the City of Olathe, as a public employer; Susan Sherman, in her individual capacity and as former Acting City Manager of the City of Olathe; Philip Major, in his individual capacity and as former Chief of Police of the City of Olathe; and Howard Kannady, in his individual capacity and as former Acting Chief of Police of the City of Olathe. Plaintiff brings claims pursuant to 42 U.S.C. § 1983 alleging unlawful retaliation for exercise of his constitutional right of free speech. Plaintiff also brings claims pursuant to Kansas state law alleging retaliatory [\*2] discharge and intentional infliction of emotional distress. The case is before the court on Defendants' motion to dismiss Plaintiff's state law claims pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state claims upon which relief can be granted (Doc.

35). For the reasons set forth below, the court grants the motion.

#### I. Standard for Judgment

Dismissal of a claim under Rule 12(b)(6) is appropriate only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of his theory of recovery that would entitle him to relief, see *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957), or when an issue of law is dispositive, see *Neitzke v. Williams*, 490 U.S. 319, 326, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, see *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), and all reasonable inferences from those facts are viewed in favor of the plaintiff, see *Zinermon v. Burch*, 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990). The issue in reviewing [\*3] the sufficiency of a complaint is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support his claims. See *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).

#### II. Factual Background n1

n1 The facts contained in this background are based solely upon the allegations in Plaintiff's complaint.

Plaintiff was hired by the City of Olathe as a police officer in 1973. Plaintiff became classified as a Captain in 1982. After receiving multiple positive evaluations from his superiors, Plaintiff was assigned to command the Investigations Division of the Police Department.

As Commander of the Investigations Division, Plaintiff served, among other things, as the primary contact person for the Midstates Organized Crime Information

Center (the "MOCIC"). The MOCIC is one of six regional projects that form the Regional Information Sharing System, which is supported by a federal grant. The overall objective [\*4] of the six regional projects is to enhance the ability of local, state, and federal law enforcement agencies to identify, target, and remove criminal conspiracies and activities that cross jurisdictional boundaries. To help accomplish this objective, the MOCIC provides "a computerized criminal intelligence database and intelligence inquiry service . . . and access to a telecommunication system." Plaintiff's Complaint at P29.

In late 1997, an employee of the MOCIC named Bill Goodrich contacted Plaintiff to inquire about the MOCIC telecommunication system. Mr. Goodrich advised Plaintiff "that his reason for visiting the Olathe Police Department was to relay his superior's concern that the Department had utilized the [telecommunication system] 35-40 times in 1997, but had not submitted any criminal intelligence into the intelligence database during this same time period." Plaintiff's Complaint at P34. Some investigative work revealed that the Chief of Police, Defendant Major, had made twenty-nine telephone calls using the MOCIC telecommunication system, eleven of which were made to a number listed to his ex-wife. Plaintiff concluded that Defendant Major was likely using the MOCIC [\*5] telecommunication system for unauthorized personal use.

Plaintiff met with the Acting City Manager of Olathe, Defendant Sherman, to discuss the MOCIC situation. Shortly thereafter, an article appeared in an Olathe newspaper regarding Plaintiff's report to Defendant Sherman and Defendant Major's alleged misuse of the MOCIC telephone line. Plaintiff did not speak to the Olathe newspaper or any other media organization concerning either his conversation with Defendant Sherman or his suspicions of misuse of the MOCIC telephone line.

On February 26, 1998, Plaintiff met with the Johnson County District Attorney, Paul Morrison, to discuss the MOCIC situation.

On March 3, 1998, Plaintiff received notification that Defendant Major had authorized an Internal Affairs Investigation against him. According to the notification, Plaintiff had "engaged in action disrespectful of other officers" and "failed to give suitable attention to the performance of his duties." Plaintiff's Complaint at P71. Plaintiff was placed on administrative leave pending the outcome of the investigation. During the investigation, officers searched Plaintiff's desk without his permission.

On June 29, 1998, Plaintiff [\*6] received a letter from Defendant Sherman. The letter advised Plaintiff that Defendant Sherman had reviewed the results of the Internal Affairs Investigation and determined that Plaintiff had violated multiple sections of the Olathe Police Department Rules and Regulations. As a result, Plaintiff was suspended without pay for four weeks and placed on one year of disciplinary probation. In accordance with the guidelines of his probation, Plaintiff was to have his performance evaluated on a monthly basis and to attend employee counseling.

Plaintiff was reassigned from Commander of the Investigations Division to a position in the Administration Division entitled Special Projects Officer. He experienced grief, shame, embarrassment, anger, and disappointment after being transferred to this administrative position. Plaintiff found his working conditions to be so intolerable that he eventually retired early.

### III. Discussion

#### A. Retaliatory Discharge

In Counts III and IV of his complaint, Plaintiff alleges that Defendants demoted and constructively discharged him in retaliation for his "whistle-blowing" activities concerning Defendant Major's alleged misuse of the MOCIC [\*7] telecommunication system. Plaintiff complains that such retaliation is in violation of Kansas law, which makes it unlawful for an employer to demote or terminate an employee in retaliation for good faith reporting of serious infractions of rules, regulations, or law to either company management or law enforcement officials. See *Brigham v. Dillon Cos., Inc.*, 262 Kan. 12, 935 P.2d 1054, 1059-60 (Kan. 1997); *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685, 689-90 (Kan. 1988). Defendants argue that Plaintiff is precluded from bringing any claims for retaliatory demotion/discharge based upon his whistle-blowing activities, because 42 U.S.C. § 1983 provides him with an adequate, alternative remedy. n2 The court agrees.

n2 Defendants actually argue that Plaintiff is "preempted" from bringing any claims for retaliatory demotion/discharge because § 1983 provides him with an adequate, alternative remedy. The court determines, however, that use of the word "preemption" in this context is somewhat confusing. See, e.g., *Flenker v. Willamette Indus., Inc.*, 266 Kan. 198, 967 P.2d 295, 299 (Kan. 1998) ("The question to ask in resolving recognition of a state tort claim for retaliatory discharge is whether the statutory remedy is adequate and

thus precludes the common-law remedy."); Equal Employment Opportunity Comm'n v. Int'l Paper Co., 1992 U.S. Dist. LEXIS 18895, \*17, No. 91-2017-L, 1992 WL 370850, at \*6 (D. Kan. Oct. 28, 1992) (declining to entertain defendant's argument that plaintiff's state law claims are barred due to the presence of an available federal remedy where pretrial order "discusses preemption, not adequate alternative remedies" and the "two doctrines are significantly different"); but cf. King v. Unified Sch. Dist. No. 500, 1993 U.S. Dist. LEXIS 6017, \*2, No. 92-2414-EEO, 1993 WL 141868, at \*1 (D. Kan. Apr. 23, 1993) (holding that plaintiff's state law claim for retaliatory discharge is "preempted" by her § 1983 claim); Groh v. City of Lenexa, Kan., 1991 U.S. Dist. LEXIS 6074, \*12, No. 90-2073-V, 1991 WL 79662, at \*4 (D. Kan. Apr. 16, 1991) (holding same). For this reason, the court uses the word "precluded."

[\*8]

The general rule in Kansas is at-will employment, meaning "in the absence of a contract, expressed or implied, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party." Flenker v. Willamette Indus., Inc., 266 Kan. 198, 967 P.2d 295, 298 (Kan. 1998) (quoting Johnston v. Farmers Alliance Mut. Ins. Co., 218 Kan. 543, 545 P.2d 312, 315 (Kan. 1976)). Kansas courts, however, have recognized certain public policy exceptions to the at-will employment doctrine. See *id.* One such exception is commonly referred to as the "whistle-blower" exception. This exception makes it unlawful for an employer to demote or terminate an employee in retaliation for his good faith reporting of a co-worker's or employer's serious infraction of rules, regulations, or laws pertaining to public health, safety, and the general welfare to either company management or law enforcement officials. See Brigham, 935 P.2d at 1059-60; Palmer, 752 P.2d at 689-90.

Plaintiff's allegations in his complaint appear to state a valid claim for retaliatory demotion/discharge based [\*9] upon the whistle-blowing exception, because Plaintiff alleges that Defendants unlawfully demoted him and terminated his employment (by constructively discharging him) in retaliation for his good faith reporting of Defendant Major's alleged misuse of the federally funded MOCIC telecommunication system—a system designed to assist law enforcement officials in fighting crime. Kansas courts, however, will not recognize a claim based upon a public policy exception to the at-

will employment doctrine where a state or federal statute provides an adequate, alternative remedy. See Flenker, 967 P.2d at 299 (citing *Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176, 1187-88 (Kan. 1991); *Masters v. Daniel, Int'l Corp.*, 917 F.2d 455, 457 (10th Cir. 1990)). Thus, "in order to succeed on a claim for retaliatory discharge under Kansas law, a plaintiff must show not only that [he] was discharged in contravention of public policy, but also that [he] has no alternative remedy under state or federal law." *Conner v. Schnuck Mkts., Inc.*, 906 F. Supp. 606, 615 (D. Kan. 1995) (quoting *Braun v. Dillon Cos., Inc.*, 1995 U.S. Dist. LEXIS 6117, \*30, No. 94-2079-EEO, 1995 WL 261142, [\*10] at \*10 (D. Kan. Apr. 19, 1995)). Plaintiff is unable to do this; Plaintiff is unable to show that he has no other adequate, alternative remedy under federal law. Plaintiff brings a claim pursuant to § 1983 based upon the very same factual allegations as his whistle-blowing claim. Plaintiff does not contest that § 1983 provides him with an alternative vehicle for pursuing a claim against Defendants for retaliatory demotion/discharge based upon his reporting of Defendant Major's alleged misuse of the MOCIC telecommunication system. Nor does he contest that § 1983 provides him with an adequate remedy. Instead, he simply argues that the adequate alternative doctrine does not apply to the facts of this case. Plaintiff argues that the adequate alternative doctrine applies only where the court is faced with a decision of whether to recognize a *new* public policy exception to the at-will employment doctrine, and not where, as here, the court is faced with a decision of whether to recognize an already existing public policy exception. The court rejects Plaintiff's argument. The public policy exception based upon whistle-blowing was first announced by the Kansas Supreme Court in 1988 in [\*11] *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (Kan. 1988). Since that decision, numerous courts have precluded whistle-blowing claims pursuant to the adequate alternative doctrine where the plaintiff has had an alternative cause of action under § 1983. See, e.g., *Merkel v. Leavenworth County Emergency Med. Servs.*, 2000 U.S. Dist. LEXIS 975, \*40-41, 98-2335-JWL, 2000 WL 127266, at \*12 (D. Kan. Jan. 4, 2000) (precluding plaintiff's retaliatory discharge claim based upon whistle-blowing where § 1983 "clearly provides an alternative vehicle for plaintiff to pursue any injuries stemming from his alleged retaliatory discharge"); *King v. Unified Sch. Dist. No. 500*, 1993 U.S. Dist. LEXIS 6017, No. 92-2414-EEO, 1993 WL 141868, at \*1 (D. Kan. Apr. 23, 1993) (same); *Groh v. City of Lenexa, Kan.*, 1991 U.S. Dist. LEXIS 6074, No. 90-2073-V, 1991 WL 79662, at \*4 (D. Kan. Apr. 16, 1991) (same).

The court concludes that § 1983 provides Plaintiff with an adequate, alternative remedy to his claim for retal-

iatory demotion/discharge based upon whistle-blowing and, therefore, Plaintiff is precluded from pursuing Counts III and IV of his complaint.

#### B. Intentional Infliction of Emotional Distress

In Count V of his [\*12] complaint, Plaintiff brings a claim for intentional infliction of emotional distress. Defendants argue that this claim should be dismissed because the underlying allegations are insufficient to state a claim as a matter of law. The court agrees.

Kansas recognizes the tort of intentional infliction of emotional distress. See *Moore v. State Bank of Burden*, 240 Kan. 382, 729 P.2d 1205, 1211 (Kan. 1986). Under this tort, "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another may be liable for such emotional distress." *Id.* To state a claim against Defendants, Plaintiff must allege that (1) Defendants' conduct was intentional or in reckless disregard of Plaintiff, (2) Defendants' conduct was extreme and outrageous, (3) a causal connection existed between Defendants' conduct and Plaintiff's mental distress, and (4) Plaintiff's mental distress was extreme and severe. See *Nwakpuda v. Falley's, Inc.*, 14 F. Supp. 2d 1213, 1218 (D. Kan. 1998) (citing *Roberts v. Saylor*, 230 Kan. 289, 637 P.2d 1175, 1179 (Kan. 1981)). In addition, Plaintiff must meet two threshold requirements: [\*13] Plaintiff must convince the court that reasonable fact finders might conclude that (1) Defendants' conduct was sufficiently extreme and outrageous as to permit recovery, and (2) Plaintiff's emotional distress suffered as a result of Defendants' conduct was so extreme and severe that no reasonable person should be expected to endure it. See *Nwakpuda*, 14 F. Supp. 2d at 1218 (citing *Roberts*, 637 P.2d at 1180). Conduct is considered extreme and outrageous if it is "beyond the bounds of decency and utterly intolerable in a civilized society." *Moore*, 729 P.2d at 1211 (citing *Neufeldt v. L.R. Foy Constr. Co.*, 236 Kan. 664, 693 P.2d 1194, 1198 (Kan. 1985)). Courts will dismiss claims for intentional infliction of emotional distress pursuant to Rule 12(b)(6) when "all the elements are not alleged or when the alleged conduct does not amount to extreme and outrageous under state law." *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 461, 464-65 (D. Kan. 1996) (citing *West v. Boeing Co.*, 843 F. Supp. 670, 677-79 (D. Kan. 1994); *Moten v. Am. Linen Supply Co.*, 155 F.R.D. 202, 205 (D. Kan. 1994); [\*14] *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 801 (D. Utah 1988)).

Plaintiff has failed to allege conduct that is sufficiently extreme and outrageous to permit recovery under Kansas law. Plaintiff alleges that, in an effort to punish him for reporting Defendant Major's alleged misuse of the MOCIC telecommunication system, Defendants (1) initiated an Internal Affairs Investigation against him, (2) placed him on administrative leave, (3) improperly searched his desk, (4) required him to attend employee counseling, (5) demoted him to a new position which gave him less important responsibilities and effectively isolated him from contact with his peers, (6) sustained most of the violations alleged against him in the Internal Affairs Investigation, (7) suspended him without pay for four weeks, (8) placed him on disciplinary probation for one year, and (9) forced him to retire early. Such allegations do not rise to the level of extremeness and outrageousness necessary to permit recovery. Courts are very reluctant to extend the tort of intentional infliction of emotional distress to the employment context. See *West*, 843 F. Supp. at 678 (citing [\*15] *Laughinghouse v. Risser*, 754 F. Supp. 836, 843 (D. Kan. 1990)). "Employment discrimination by itself, without aggravating factors like ethnic slurs and physical threats, does 'not amount to outrage.'" *Gudenkauf*, 922 F. Supp. at 464 (citing *Rupp v. Purolator Courier Corp.*, 790 F. Supp. 1069, 1073 (D. Kan. 1992) (further citation omitted)). The court determines that the conduct alleged cannot be considered "beyond the bounds of decency and utterly intolerable in a civilized society." *Moore*, 729 P.2d at 1211. Instead, it is more akin to "ordinary business decisions . . . made every day by employers across the nation." *Moten*, 155 F.R.D. at 205 (quoting *Anspach v. Tomkins Indus., Inc.*, 817 F. Supp. 1499, 1508 (D. Kan. 1993)).

IT IS, THEREFORE, BY THE COURT ORDERED that Defendants' motion to dismiss (Doc. 35) is granted; Counts III, IV, and V of Plaintiff's complaint are dismissed.

Copies of this order shall be mailed to counsel of record for the parties.

#### IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 21st day of February 2001.

G. Thomas VanBebber

United [\*16] States Senior District Judge



Tab C

MARTIN EDWARD MILATZ, Plaintiff-Appellant, v. FRITO-LAY, INC., a Division of Pepsi Co., Inc., and  
TERRY L. KELLY, individually and in his managerial capacity, Defendants-Appellees.

No. 95-6184

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

1997 U.S. App. LEXIS 599

January 15, 1997, Filed

**NOTICE:**

**PUB-STATUS:** \*1 RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**SUBSEQUENT HISTORY:** Reported in Table Case Format at: 106 F.3d 413, 1997 U.S. App. LEXIS 25879.

**PRIOR HISTORY:** (Western District of Oklahoma). (D.C. No. CIV-94-668-M).

**DISPOSITION:** AFFIRMED.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Plaintiff former employee sought review of judgments entered by the United States District Court for the Western District of Oklahoma in favor of defendants, former employer and former supervisor, on a complaint of retaliatory discharge and discrimination in violation of the Americans with Disabilities Act (ADA), 42 U.S.C.S. §§ 12101-12213, and tortious interference with employment relationship.

**OVERVIEW:** The employee took a leave of absence after undergoing surgery. After a physician determined he was permanently partially disabled, the employee's supervisor refused to let him to return to work. The employee was terminated during a second leave of absence. The employee filed suit against the employer and the supervisor for retaliatory discharge and discrimination in violation of the ADA and against the supervisor for tortious interference with employment relationship. The court granted summary judgment for defendants on all but the retaliatory discharge claim against the employer. A jury found for the employer. On appeal, the court affirmed the judgments. The court held that there was no contract of employment to support a tortious interference claim. The court noted that the employee claimed that he was impaired in his capacity to work but never identified a class of jobs that he could not perform. The employee also did not present evidence that his employer regarded him as having a physical impairment that prevented him from performing a class of jobs. The supervisor was not liable under the ADA because he was

not the employer.

**OUTCOME:** The court affirmed summary judgment for defendants and the judgment for the employer entered on a jury verdict.

**CORE TERMS:** impairment, disability, disabled, retaliatory discharge, summary judgment, impaired, shoulder, workers' compensation, Disabilities Act, tortious interference, correctly, route, employment relationship, mental impairment, supervisor, training, abuse of discretion, leave of absence, effective date, termination, terminated, surgery, rehire, rating, pain

**LexisNexis(TM) Headnotes**

*Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions*

*Pensions & Benefits Law > Americans With Disabilities Act > Prohibited Employment Discrimination*

*Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage*

HN1The Americans with Disabilities Act (ADA) prohibits discrimination against disabled individuals. A disability under the ADA is defined as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C.S. § 12102(2).

*Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions*

*Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage*

*Workers' Compensation & SSDI > Remedies Under Other Statutes > Americans With Disabilities Act*

HN242 U.S.C.S. § 12102(2)(A) requires an actual physical impairment that substantially limits a major life activity. Work constitutes a major life activity, but to qualify as disabled under the Americans with Disabilities Act, the impairment must significantly restrict the individual from performing a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform one particular job is not necessarily sufficient.

***Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions***

***Constitutional Law > Civil Rights Enforcement > Americans With Disabilities Act > Coverage***

***Workers' Compensation & SSDI > Remedies Under Other Statutes > Americans With Disabilities Act***

HN3 Under subsection 42 U.S.C.S. § 12102(2)(C), a person is disabled if he or she is "regarded as having," § 12102(2)(C), a physical or mental impairment that substantially limits one or more of the major life activities of such individual, § 12102(2)(A), regardless of whether he or she actually has such an impairment. The difference from the subsection (A) claim is that the focus shifts from the individual's actual physical or mental condition to the employer or others' perception of the individual's impairment. While the employee need not have actually suffered any impairment, the impairment perceived to exist by others must still be shown to be one that substantially limits a major life activity.

***Constitutional Law > Equal Protection > Disability***

***Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions***

***Pensions & Benefits Law > Americans With Disabilities Act > Qualified Individuals With a Disability***

HN4 Just as a claim of actual disability under 42 U.S.C.S. § 12102(A) must show a specific class of jobs or a broad range of jobs from which the plaintiff is excluded, a claim of perceived disability must show a class of jobs or broad range of jobs from which the plaintiff is perceived to be precluded.

***Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements***

HN5 An individual is not liable under the Oklahoma Workers' Compensation Act unless he or she actually employed the plaintiff.

***Torts > Business & Employment Torts > Interference With a Contract***

HN6 A claim of tortious interference with employment relationship requires "the existence of a valid, enforceable contract."

**COUNSEL:** For MARTIN EDWARD MILATZ, Plaintiff - Appellant: Marilyn D. Barringer, Oklahoma City, OK.

For FRITO-LAY, INC., a Division of Pepsi Co., Inc., TERRY L. KELLY, individually and in his managerial capacity, Defendants - Appellees: Katie J. Colopy, Matthew W. Ray, Jones, Day, Reavis & Pogue, Dallas, TX.

**JUDGES:** Before BALDOCK, McWILLIAMS and RONEY,

\*\* Circuit Judges.

\*\* The Honorable Paul H. Roney, Senior Circuit Judge for the Eleventh Circuit, sitting by designation.

**OPINION BY: PAUL H. RONEY**

**OPINION: ORDER AND JUDGMENT \***

----- Footnotes -----  
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\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

----- End Footnotes -----  
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**\*2**

Martin Milatz sued his former employer, Frito-Lay, Inc., and supervisor, Terry Kelly, alleging retaliatory discharge and discrimination in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, by Frito-Lay and Kelly, and tortious interference with employment relationship by Kelly. The district court entered summary judgment for all defendants except as to the retaliatory discharge claim, which was tried against Frito-Lay and was resolved by a verdict for the defendant. Plaintiff appeals. We affirm.

***ADA Discrimination Claim***

We affirm summary judgment for defendants on the Americans with Disabilities Act claim because the district court correctly determined that plaintiff did not present sufficient facts to establish a disability under the statute. The district court correctly focused on only those events that occurred after the July 26, 1996 effective date of the Act. Americans with Disabilities Act of 1990, Pub. L. No. 104-336, § 108, 1991 U.S.C.C.A.N. (104 Stat.) 337.

HN1 The ADA prohibits discrimination against disabled individuals. A disability under the ADA is defined as (A) a physical or mental impairment that substantially limits one or **\*3** more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2). Milatz's primary focus on appeal is his subsection (C) claim that he was "regarded as having" an impairment.

Milatz alleged that Frito-Lay discriminated against him by failing to rehire him to his route sales position due to a real or perceived limitation on his ability to use his wrist or shoulder. Terry Kelly was Milatz's supervisor at the time these acts occurred.

Milatz was a route salesman for Frito-Lay from 1986 until his termination in June 1992. In January 1992, Milatz developed numbness in his left hand and pain in his left shoulder. He underwent carpal tunnel release surgery in March 1992, followed by a leave of absence. Following his return to work, Milatz was examined by Frito-Lay's rating physician who found him permanently partially disabled. Milatz alleges that after he admitted that his shoulder pain continued, Kelly refused to allow him to return to his job because he was not 100 percent.

Milatz took a second leave of absence during which he was terminated. Although Milatz raises claims of ADA discrimination \*4 in the events that led to his termination in June 1992, the district court correctly disregarded these claims because they fell before the July 26, 1992, effective date of the Act.

In May 1993, approximately one year later and after the ADA was in effect, Milatz informed Frito-Lay that he had recovered and was ready to return to his job. Milatz had undergone shoulder surgery in November 1992 and had obtained a work release from his physician effective June 1, 1993, with the single restriction of no overhead lifting. Frito-Lay informed Milatz that he had been terminated for job abandonment in 1992 and did not offer to rehire Milatz to his old job.

Milatz filed an EEOC claim in January 1994, was issued a notice of right to sue in May 1994, and filed this action. Frito-Lay and Kelly were awarded summary judgment on the ground that Milatz was not disabled under the ADA.

Milatz has never raised a serious issue that he was actually disabled under subsection (A) of the ADA disability definition or that he had a record of impairment under subsection (B). HN2Subsection (A) requires an actual physical impairment that substantially limits a major life activity. Milatz presents evidence related \*5 to impairment only in the major life activity category of work. Work constitutes a major life activity, but to qualify as ADA disabled, the impairment must significantly restrict the individual from performing "a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Bolton v Scrivner, Inc.*, 36 F.3d 939, 942 (10th Cir. 1994) (citing 29 C.F.R. § 1630.2(i)), cert. denied, 130 L. Ed. 2d 1071, 115 S. Ct. 1104 (1995). The inability to perform one particular job is not necessarily sufficient. *Id.* (citing *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992)

(interpreting equivalent provision of the Rehabilitation Act)).

Milatz's evidence focuses only on the degree to which he is physically impaired, rather than any specific class or range of jobs from which he is excluded. While focusing on work as the major life activity for which he is impaired, Milatz does not identify a single job he cannot perform. We have previously held such evidence insufficient as a matter of law under subsection (A). *Bolton*, 36 F.3d at 944 (noting that the plaintiff's evidence failed to address any vocational training, the \*6 geographical area to which he had access, or the number and type of jobs demanding similar training for which the plaintiff would also be qualified).

While the district court order does not address subsection (B), the record indicates that Milatz's failure to establish a claim under the "record of impairment" theory was before the district court and that Milatz has not presented a material issue of fact under this theory either. Milatz's injury and worker's compensation rating were insufficient to establish disability under subsection (A), and Frito-Lay's awareness of these same facts does not establish a "record of impairment" under subsection (B).

HN3Under subsection (C), a person is disabled if he is "regarded as having," § 12102(2)(C), "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," § 12102(2)(A), regardless of whether he actually has such an impairment. See *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1443 (10th Cir. 1996). The difference from the subsection (A) claim is that the focus shifts from the individual's actual physical or mental condition to the employer or others' perception of the \*7 individual's impairment. While the employee need not have actually suffered any impairment, the impairment perceived to exist by others must still be shown to be one that substantially limits a major life activity. *Id.*

Milatz's subsection (C) claim exhibits a deficiency similar to his claim under subsection (A). He offers evidence only that Frito-Lay may have perceived him to be too impaired to perform the sales route job, not evidence that Frito-Lay perceived him impaired in a class of jobs or broad range of jobs in various classes.

HN4Just as a claim of actual disability under subsection (A) must show a specific class of jobs or a broad range of jobs from which the plaintiff is excluded, a claim of perceived disability must show a class of jobs or broad range of jobs from which the plaintiff is perceived to be precluded. See *Taylor v. Albertsons, Inc.*, 1996 U.S. App. LEXIS 390, 1996 WL 10931 at \*\* 2 (10th Cir. 1996) (unpublished, disposition reported at 74 F.3d 1250) ("For employee's claim to have merit

. . . she must show that employer regarded her disabled for more than a single job."). Further, the misperception alleged here does not raise the specter of what \*8 appears to be the primary target of subsection (C)--discrimination based upon invidious stereotypes. See *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995) (citing preamble to ADA, 42 U.S.C. § 12101).

***Retaliatory Discharge Claim Against Kelly***

We affirm summary judgment for Kelly on the retaliatory discharge claim because he was not a proper party. HN5An individual is not liable under the Oklahoma Workers' Compensation Act unless he actually employed the plaintiff. *Proctor v. Caudill*, 820 P.2d 1353, 1356 (Okla. Ct. App. 1991).

***Tortious Interference Claim Against Kelly***

We affirm summary judgment for Kelly on the tortious interference claim because there was no contract of employment, Milatz at all times being an employee-at-will. HN6A claim of tortious interference with employment relationship requires "the existence of a valid, enforceable contract." *Tatum v. Philip Morris, Inc.*, 809 F. Supp. 1452, 1468 (W.D. Okla. 1992), *aff'd*, 16 F.3d 417 (10th Cir. 1993), *cert. denied*, 128 L. Ed. 2d 461, 114 S. Ct. 1833 (1994).

***Retaliatory Discharge Claim Against Frito-Lay***

We affirm the judgment for Frito-Lay on the retaliatory discharge claim, \*9 entered after a jury verdict, finding no abuse of discretion in the trial court's pre-

trial and evidentiary rulings.

The motion for leave to amend the complaint was filed approximately six weeks after the established deadline to add claims of questionable validity. The record does not reflect any abuse of discretion in denying leave to amend, taking into consideration the relevant factors: justification for delay, prejudice to the opposing party, and futility of the proposed amendment. *Castleglen, Inc. v. Resolution Trust Corp.*, 984 F.2d 1571, 1584-85 (10th Cir. 1993).

The case proceeded to trial on Milatz's claim for retaliatory discharge against Frito-Lay only after the district court denied Milatz leave to amend his complaint. At trial, the court refused to allow an expert, proffered by Milatz, to testify on the procedures, intricacies, and history of the workers' compensation system and his personal involvement with Milatz's workers' compensation proceedings. Reviewed under an abuse of discretion standard, *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 647 (10th Cir. 1991), there was no error in excluding this testimony on the ground it was irrelevant to \*10 the controlling issue: whether Milatz's discharge was motivated by his engaging in the concededly protected activity of filing a workers' compensation claim.

**AFFIRMED.**

Entered for the Court

Paul H. Roney

Senior Circuit Judge