1996

Meredith Gibson v. US West Communications, Inc. : Reply Brief

Utah Court of Appeals

Charles M. Bennett; Blackburn & Stoll; Attorneys for Appellant.
Floyd A. Jensen; Janet Hugie Smith; Frederick R. Thaler; Ray, Quinney & Nebeker; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

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MEREDITH GIBSON,	)	96-0251-CA
	)	COURT OF APPEALS
PLAINTIFF and APPELLANT,	)	CASE NO. 950546
	)	
vs.	)	THIRD DISTRICT COURT
	)	CASE NO. 930905599CV
US WEST COMMUNICATIONS, INC.,	)	PRIORITY NO. 15 (RULE 29)
	)	
DEFENDANT and APPELLEE.	)	

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REPLY BRIEF OF THE APPELLANT

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF

SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK

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Charles M. Bennett
Blackburn & Stoll, L.C.
77 W. 200 So. St., Suite 400
Salt Lake City, Utah 84101
Attorneys for Meredith Gibson

Floyd Jensen
Ray, Quinney & Nebeker
79 South Main Street, Suite 400
Salt Lake City, Utah 84111
Attorneys for U S West Communications

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77 W. 200 So. St., Suite 400
Salt Lake City, Utah 84101
Attorneys for Meredith Gibson

Floyd Jensen
Ray, Quinney & Nebeker
79 South Main Street, Suite 400
Salt Lake City, Utah 84111
Attorneys for U S West Communications

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ARGUMENT

Ms. Gibson argues that she was not an "at will" employee at the time of her termination, because a US West Employment Office transfer counselor, with apparent authority, promised Ms. Gibson that her employment would be governed by the contract between US West and its union. US West counters that it always intended Ms. Gibson to be an "at will" employee (apparently even while she was a union member working in bargained-for units). In making its arguments, US West mischaracterizes key evidence, fails to acknowledge disputed evidence, seeks inferences in its favor, and fails to apply Utah law regarding apparent authority to the facts of this case. To rectify these errors, Ms. Gibson files this Reply Brief.

I. US WEST'S EVOLVING "INTENT" WAS NEVER COMMUNICATED TO MS. GIBSON.

In large measure, this case will depend on whether the Court of Appeals follows US West's characterization of the facts. US West ignores evidence disputing its story and asks the Court to draw inferences in its favor. According to US West, it had long ago decided that all of its employees were "at will" employees, and it clearly communicated that information to Ms. Gibson. *See* Appellee's Brief at 8. But Ms. Gibson's evidence shows that US West had a large body of employees working under a union contract, including Ms. Gibson, that it told its non-union workers that they would be treated as union employees, that it promised Ms. Gibson that the union contract would govern her employment when she moved to the non bargained-for security office, that it only revised in Code of Conduct *after* Ms. Gibson began her work in the Security Office, and that it never communicated its self-serving "at will" disclaimer language to Ms. Gibson. Appellant's Brief at 3-6.

A. THERE ARE MATERIAL DISPUTES AS TO WHETHER US WEST COMMUNICATED TO MS. GIBSON ITS "INTENT" THAT MS. GIBSON WAS AN AT WILL EMPLOYEE.

US West states that Ms. Gibson was familiar with the 1986 Code and reviewed it every year. Further, it boldly asserts that Mr. Gomez's supervisor reviewed the 1989 Code with her every year. Appellee's Brief at 8. While the 1986 Code was silent concerning an employee's status being "at will," the 1989 Code expressly includes this self serving disclaimer language. From this, US West then argues that Ms. Gibson's employment was "at will." However, Ms. Gibson denied she saw the 1989 Code and its self serving language until after her discharge. R. 663-664. Further, she joined the Security Office in the spring of 1989 while the 1989 Code was published in August 1989. R. 002., R. 042, R. 165.

Similarly, US West quotes from its Human Resource Guide and its "at will" disclaimer language. Appellee Brief at 8. There is no evidence that US West showed this document to any of its non-management employees, specifically including Ms. Gibson. R. 184. However, US West tries to resolve this problem in its evidence by noting that Ms. Gibson quoted from the Human Resource Guide in her brief. Appellee Brief at 19. Thus, US West asks the Court to infer that when her counsel used language from the Human Resource Guide against US West in Ms. Gibson's brief, that indicates that Ms. Gibson read the disclaimer language. Assuming that such an inference is logical and reasonable, in a motion for summary judgment, Utah law requires inferences to be taken in Ms. Gibson's favor, not against her interest. *Winegar v. Froerer Corp.*, 813 P.2d 104 (Utah 1991).

Finally, US West quotes from a handbook describing retirement benefits. Appellee's Brief at 8. That language provides that an employee's right to retirement benefits does not

preclude US West from terminating an employee with or without cause. Ms. Gibson's right to employment under the terms of the union contract is based on an express promise made to her, not the fact that she was entitled to any retirement benefits. As a result, this fact is irrelevant. Moreover, there is again no record evidence that US West ever communicated this information to Ms. Gibson.

Thus, resolving disputed evidences and inferences in Ms. Gibson's favor, the Court should find that at the time US West promised Ms. Gibson that her employment in the Security Office would be governed by the union contract, US West's 1986 Code (with no "at will" disclaimer language) was in effect and that it did not at any time communicate the self serving disclaimer language in its 1989 Code or any other of its publications to Ms. Gibson.

B. US WEST INTENDED TO ENCOURAGE ITS EMPLOYEES *NOT* TO JOIN ITS UNION SO THAT IT COULD TERMINATE THEM AT WILL.

US West argues that it is 'impossible to conclude that US West intended anything other than at-will employment." Appellee's Brief at 20. Reasonable inferences from the disputed evidence refute this statement. Had the Security Office been a bargained-for unit, no one could dispute that Ms. Gibson's employment would have been governed by the union contract. However, US West faced and faces an obvious problem in keeping units non-bargained-for and its employees outside the umbrella of the union contract's protections. If the benefits available to union employees are better than non-union employees, more and more units will become bargained-for. In order to dissuade employees from voting to come under the union contract, US West developed a corporate culture that treated union and non-union employees alike. This

inference is not only supported by Ms. Gibson's testimony (R. 285-297), but the testimony of her managerial supervisor, Daniel Gomez, also supports this inference (R. 665).

For this reason, until August of 1989, US West's "intent" that all of its employees were "at will" was not mentioned in its Code of Conduct. It was only with the 1989 Edition that US West clearly stated its "intent." However, that was after Ms. Gibson had received her promise and joined the Security Office. What happened in this case was that US West's Employment Office transfer counselor, trying to walk the fine line that US West had set, promised Ms. Gibson that her employment would be handled under the union contract. Ms. Gibson relied on that promise, made the transfer and now seeks to enforce the benefits of that promise. US West, still *hoping that it is on the right side of that fine line, seeks to deny the benefits of that promise to* Ms. Gibson. Ms. Gibson asks the Court to prevent this unfair result.

II. THE FACTS SHOW THAT US WEST USED A SURPRISE ATTACK ON MS. GIBSON.

Ms. Gibson complains that she was denied a fair hearing because of US West's surprise attack on the foundation and credibility of her testimony. While US West continues to deny that it attacked the foundation or credibility of Ms. Gibson's testimony, it also argues in contrast that it "raised the issue" of her testimony in its initial and Reply Memoranda. Appellee Brief at 14 and 28.

At the hearing, US West argued:

> First of all, there is no foundation as to who made the statement. She simply says it was someone in the employment office of US West who made the statement. She didn't say who it was, whether it was a management employee, a secretary, or anyone else so there is no foundation, and if that kind of evidence were presented at the trial, it would not be admitted because it has insufficient foundation.

> More importantly, the person who made the statement, there is no evidence in the record that that person had any authority to make the statement, and by making the statement alter the express intent of US West that employment was at will . . ..

R. 900-01. One will search in vain to find any argument concerning the foundation of Ms. Gibson's testimony or the failure to establish the transfer counselor's authority in either of US West's memoranda. US West only argued in its Reply Memorandum that notwithstanding her testimony, Ms. Gibson had still failed to meet the test for an implied contract articulated in *Johnson v. Morton Thiokol* (an employee's understanding alone was insufficient). US West made no arguments about the foundation of Ms. Gibson's testimony or the failure to establish the authority of the person making the statement. Since Ms. Gibson's testimony concerned a promise made to her, not her understanding of company policy, there was no way to discern from US West's memoranda that it was attacking either the foundation of Ms. Gibson's testimony or that it was arguing the transfer counselor did not have authority to make the statement.

III. US WEST ATTACKED MS. GIBSON'S CREDIBILITY.

US West not only denies that it attacked Ms. Gibson's credibility, but even disparages Ms. Gibson for raising the issue. Appellee's Brief at 31-35. Even so, US West still cannot resist even now attacking Ms. Gibson's credibility. In its Appellee Brief, US West refers to the transfer counselor's promise as a "phantom statement." Appellee's Brief at 19.

US West's attack on Ms. Gibson's credibility is subtle but pervasive. For instance, in describing the facts of this case, US West notes that Ms. Gibson had a telephone call with Ms. Mehl in the fall of 1990 and recognized who she was. Appellee Brief at 9-10. That fact has no relevancy *except* to attack the credibility of Ms. Gibson's testimony that her disclosure that a Brenda called the Security Office was inadvertent. Similarly, US West's points out that Ms.

Gibson's disclosed her belief that she had inadvertently compromised Ms. Mehl's trap and trace request in her *second* telephone call with Mr. Gomez. The only relevancy that fact has is to attack Ms. Gibson's credibility.

Moreover, US West attempts to minimize the use of "supposedly" in relationship to its arguments concerning Ms. Gibson's testimony that the US West transfer counselor promised her that the union contract would govern her employment. Appellee Brief at 32. Rather than acknowledging that this constitutes an indirect attack on Ms. Gibson's credibility, US West suggests that the use of this word was its way of saying that Ms. Gibson had failed to establish the transfer counselor's authority to represent US West and its Employment Office. One wonders why US West would use a coded message (the word "supposedly" in quotation marks) rather than simply stating: "Ms. Gibson has failed to identify the authority of the US West employee who made the promise."

US West's refusal to acknowledge that it has attacked, and continues to attack, Ms. Gibson's credibility does not change the fact that it has and does.

IV. MS. GIBSON HAS ESTABLISHED A PRIMA FACIE CASE THAT US WEST'S EMPLOYMENT OFFICE TRANSFER COUNSELOR HAD APPARENT AUTHORITY TO MAKE THE PROMISE MADE TO MS. GIBSON.

As explained in Ms. Gibson's Appellant's Brief, "[b]asic agency law dictates that a principal is bound by the acts of an agent clothed with apparent authority." *Horrocks v. Westfalia Systemat*, 802 P.2d 14 (Utah App. 1995); Appellant's Brief at 12. Based on *Larson v. Wycoff,* 624 P.2d 1151 (Utah 1981), US West argues that Ms. Gibson has failed to establish a factual basis for a finding of apparent authority. US West is mistaken.

In *Larson*, the plaintiff employee sued to recover medical payments. Pursuant to the contract between the employer and the insurance company, the plaintiff would be covered as a full-time employee, but not as a part-time employee. When the plaintiff changed assignments and became a part time employee, the insurance company did not initially withhold payments. However, it eventually did so. When that happened the employee sued.

The employer published a handbook for its employees that explained the terms of the insurance contract. Upon becoming a full time employee, the plaintiff read the handbook and completed applications for medical benefits coverage.

The plaintiff argued that the employer should be bound to continue his insurance coverage because, at the time he had changed assignments, his immediate supervisor, a work foreman, erroneously advised him that changing his assignments would not affect his insurance coverage.

In this context, the Utah Supreme Court ruled that admissions of an officer of a corporation are not binding against the corporation "unless . . . made by the officer on behalf of the corporation . . . and within the scope of his authority." *Horrocks v. Westfalia Systemat*, 802 P.2d 14 (Utah App. 1995). Since the plaintiff had presented no facts that the work foreman was acting as an agent for the corporation and within the scope of his authority, the Supreme Court ruled there was no basis for a finding that the work foreman had apparent authority to make promises to the employee concerning insurance coverage issues.

In contrast, Ms. Gibson has established that she went to the US West Employment Office to discuss the impact of her possible transfer, that the person she talked to worked in that office as a transfer counselor, that the promise made to Ms. Gibson was consistent with the statements

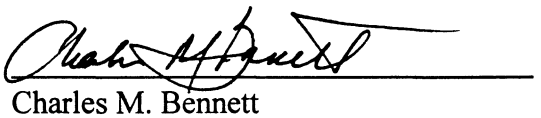
of others and US West's practices, and that her immediate supervisor collaborated the promise made. Although Ms. Gibson has never been able to identify the counselor by more than a first name, she has established a *prima facie* case directly and by inference that the person making the promise to her was acting as an agent of US West to resolve employment issues and that the promise made was within the scope of the authority of the transfer counselor's authority. In essence, US West would require Ms. Gibson to establish that the transfer counselor had *actual* authority in order to prove that the transfer counselor had *apparent* authority. This is illogical and not the law.

CONCLUSION

Ms. Gibson presented sufficient facts for the trial court to find directly and by inference that a US West Employment Office transfer counselor, acting with apparent authority, promised Ms. Gibson that her employment would be governed by the union contract. Had the trial court given full weight to Ms. Gibson's testimony, given full weight to the reasonable inferences therefrom, and refused to permit US West improperly to attack the foundation and weight to be given Ms. Gibson's evidence, pursuant to the *Johnson v. Morton Thiokol* test, it should have ruled that Ms. Gibson had made a *prima facie* case that US West "manifest[ed its] intent" to Ms. Gibson and the manifestation was "sufficiently definite to operate as a contract provision." *Johnson v. Morton Thiokol*, 812 P.2d 997, 1002 (Utah 1991). Under those circumstances, the trial court should have denied US West's Motion for Summary Judgment. To rectify this error, Ms. Gibson asks this Court to reverse the trial court's summary judgment and to remand this action for a trial on the merits.

Dated November 7, 1996.

BLACKBURN & STOLL



Charles M. Bennett
Attorneys for Meredith Gibson

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of Ms. Gibson's **APPELLANT'S REPLY BRIEF** was mailed on this 8 day of November, 1996, to the following:

Floyd Jensen
Ray, Quinney & Nebeker
79 South Main St.
Suite 400
Salt Lake City, UT 84111

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