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Jared S. Gonzalez
Texas Tech University School of Law

STATE ANTIDISCRIMINATION STATUTES AND IMPLIED PREEMPTION OF COMMON LAW TORTS: VALUING THE COMMON LAW

JAROD S. GONZALEZ*

*Associate Professor of Law, Texas Tech University School of Law; B.B.A., summa cum laude, University of Oklahoma, 1997; J.D., with highest honors, University of Oklahoma College of Law, 2000. I thank Allison Grossman for research assistance and my colleagues at Texas Tech University School of Law for allowing me to share my ideas for this Article during a presentation at the law school in May 2007. I am solely responsible for any mistakes or errors that appear.

I. INTRODUCTION

If you are an attorney, judge, legislator, employer, employee, or concerned citizen, reflect for a moment on the most egregious employment discrimination case that comes to mind. Perhaps it is a despicable sexual harassment case in which the victim suffered immeasurably as a result of the employer's failure to stop the harassment after the victim informed the employer of the situation.[1] Maybe it is a racial harassment case that follows along the same lines.[2] Regardless of the fact pattern most outrageous to you, Title VII of the Civil Rights Act of 1964 (Title VII), as amended, places a cap on the amount of compensatory damages—emotional pain, suffering, and mental anguish—and punitive damages recoverable against an employer, under federal law, for any type of employment discrimination.[3] At most, the aggrieved employee may recover a total of $300,000 for compensatory and punitive damages.[4] Fortunately, Title VII does not preempt state law regulating employment discrimination.[5] Each individual state can choose to make discrimination in employment, based on whatever prohibited factors it so desires, a violation of state law and may provide a greater or lesser remedy for such a violation than federal law provides.[6]

The vast majority of states, in fact, have their own antidiscrimination statutes that, like federal law, prohibit discrimination based on race, sex, age, religion, national origin, and disability.[7] Some state antidiscrimination statutes expand the categories of protected groups.[8] These states vary immensely in terms of the remedies available for violations of their particular state antidiscrimination statutes. For example, some state antidiscrimination statutes cap the amount of compensatory and punitive damages recoverable in an employment discrimination

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1. *See* Ford v. Revlon, Inc., 734 P.2d 580, 582–83 (Ariz. 1987) (in banc) (involving a sexual harassment victim's attempted suicide after her employer repeatedly failed to stop the harassment).

2. *See* Daniels v. Essex Group, Inc., 937 F.2d 1264, 1266–67 (7th Cir. 1991) (involving racial harassment, including racist name-calling, jokes, graffiti, and threats, that persisted over a decade-long period of time).

3. *See* 42 U.S.C. § 1981a(b)(3) (2000).

4. *Id.* § 1981a(b)(3)(D).

5. *See id.* § 2000e-7 ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State . . . ."); Trimble v. Circuit City Stores, Inc., 469 S.E.2d 776, 779 (Ga. Ct. App. 1996) (ruling that Title VII does not preempt a common law claim for intentional infliction of emotional distress based on sexual harassment).

6. *See* 42 U.S.C. § 2000e-7.

7. 6 ARTHUR LARSON ET AL., EMPLOYMENT DISCRIMINATION §§ 114.01–.02 (2d ed. 2006). Mississippi and Alabama do not have state antidiscrimination statutes. Georgia does not have a state antidiscrimination statute applicable to private employers but does have an antidiscrimination statute, Fair Employment Practices Act of 1978, GA. CODE ANN. §§ 45-19-20 to -46 (2002), that applies to public employers. *Id.* § 45-19-21(a).

8. For example, the New Hampshire Law Against Discrimination, N.H. REV. STAT. ANN. §§ 354-A:1–25 (LexisNexis 1995 & Supp. 2006), prohibits discrimination in employment because of marital status or sexual orientation. *Id.* § 354-A:7(I) (LexisNexis Supp. 2006).

case along the lines of Title VII.[9] Other state statutes do not allow for the recovery of compensatory or punitive damages at all.[10] Some state statutes permit the recovery of compensatory damages but disallow the recovery of punitive damages.[11] Conversely, other state statutes allow prevailing plaintiffs to recover both compensatory and punitive damages, and place no specific caps on the recovery of those types of damages.[12]

As a practical matter, unless an aggrieved employment discrimination plaintiff is in a state that has an antidiscrimination statute that allows for a full recovery of compensatory and punitive damages without legislative restriction, it only makes sense in a case of egregious discrimination for a plaintiff to consider suing the employer for violating the state's common law. For example, almost all state jurisdictions recognize a cause of action for intentional infliction of emotional distress.[13] Egregious employment discrimination in the form of sexual or racial

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9. *See* ME. REV. STAT. ANN. tit. 5, § 4613(2)(B)(8)(e) (2002); TEX. LAB. CODE ANN. § 21.2585(d) (Vernon 2006). In Texas, the punitive damages cap in the state antidiscrimination statute may be superseded in some cases by another *lower* state statutory cap on punitive damages. *See* Arismendez v. Nightingale Home Health Care, Inc., 493 F.3d 602, 612 (5th Cir. 2007) (holding that the maximum amount of punitive damages recoverable in a claim under the Texas Commission on Human Rights Act—the Texas antidiscrimination statute—was determined not by section 21.2585(d), but by section 41.008 of the Texas Civil Practice and Remedies Code).

10. *See* Fields v. Cummins Employees Fed. Credit Union, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989) ("Compensatory and punitive damages are not available under the Indiana Civil Rights Act."), *overruled on other grounds by* Wine-Settergren v. Lamey, 716 N.E.2d 381, 389 n.8 (Ind. 1999); *see also* IND. CODE ANN. § 22-9-1-6(k)(A) (LexisNexis 1997) (limiting relief to only wages, salary, or commissions); N.D. CENT. CODE § 14-02.4-20 (2004) (limiting relief for violation of the Act to equitable relief and back pay).

11. *See* KY. REV. STAT. ANN. § 344.450 (LexisNexis 2005); LA. REV. STAT. ANN. § 23:303(A) (1998); S.D. CODIFIED LAWS § 20-13-35.1 (1995).

12. *See* N.J. STAT. ANN. § 10:5–3 (West 2002); OHIO REV. CODE ANN. § 4112.99 (LexisNexis 2001); Rice v. CertainTeed Corp., 704 N.E.2d 1217, 1218–20 (Ohio 1999) (interpreting Ohio's antidiscrimination law as permitting punitive damages).

13. *See* Busby v. Truswal Sys. Corp., 551 So. 2d 322, 324 (Ala. 1989) (per curiam) (citing Am. Rd. Serv. Co. v. Inmon, 394 So. 2d 361, 365 (Ala. 1980)); Wal-Mart, Inc. v. Stewart, 990 P.2d 626, 634–35 (Alaska 1999) (citing Chizmar v. Mackie, 896 P.2d 196, 208–09 (Alaska 1995)); Ford v. Revlon, Inc., 734 P.2d 580, 585 (Ariz. 1987); Templeton v. United Parcel Serv., Inc., 216 S.W.3d 563, 566 (Ark. 2005) (citing Brown v. Tucker, 954 S.W.2d 262, 266 (Ark. 1997)); Rojo v. Kliger, 801 P.2d 373, 382 (Cal. 1990); Archer v. Farmer Bros., 70 P.3d 495, 499 (Colo. Ct. App. 2002); Metro. Life Ins. Co. v. McCarson, 467 So. 2d 277, 278 (Fla. 1985) (citing Thomas v. Ronald A. Edwards Constr. Co., 293 S.E.2d 383, 386 (Ga. Ct. App. 1982); Dunn v. W. Union Tel. Co., 59 S.E. 189, 191–92 (Ga. Ct. App. 1907)); Bridges v. Winn-Dixie Atlanta, 335 S.E.2d 445, 447 (Ga. Ct. App. 1985); Hac v. Univ. of Haw., 73 P.3d 46, 60–61 (Haw. 2003); Hatfield v. Max Rouse & Sons Nw., 606 P.2d 944, 950 (Idaho 1980); Swick v. Liautaud, 662 N.E.2d 1238, 1247 (Ill. 1996) (McMorrow, J., specially concurring) (citing Knierim v. Izzo, 174 N.E.2d 157, 163–65 (Ill. 1961)); Cullison v. Medley, 570 N.E.2d 27, 31 (Ind. 1991); Vaughn v. AG Processing, Inc., 459 N.W.2d 627, 635–36 (Iowa 1990) (citing Vinson v. Linn-Mar Cmty. Sch. Dist., 360 N.W.2d 108, 118 (Iowa 1984)); Dawson v. Assocs. Fin. Servs. Co. of Kan., 529 P.2d 104, 109–11 (Kan. 1974); Craft v. Rice, 671 S.W.2d 247, 250–51 (Ky. 1984); White v. Monsanto Co., 585 So. 2d 1205, 1209–10 (La. 1991); Champagne v. Mid-Maine Med. Ctr., 711 A.2d 842, 847 (Me. 1998) (citing Loe v. Town of Thomaston, 600 A.2d 1090, 1093 (Me. 1991)); Harris v. Jones, 380 A.2d 611, 613–14 (Md. 1977); Brown v. Inter-City Fed. Bank for Sav., 738 So. 2d 262, 264–65 (Miss. Ct. App. 1999); Kiphart v. Cmty. Fed. Sav. & Loan Ass'n, 729 S.W.2d 510, 516 (Mo. Ct. App. 1987); Gall v. Great W. Sugar Co., 363 N.W.2d 373, 376 (Neb. 1985); Shoen v. Amerco, Inc.,

harassment can potentially satisfy the elements of an intentional infliction of emotional distress claim.[14] If such elements are satisfied, the aggrieved plaintiff may generally recover the full panoply of compensatory and punitive damages that are available at common law.[15] In addition, some states also recognize common law "public policy" claims for employment discrimination which provide traditional tort remedies.[16] Assault, battery, and negligent employment tort claims could also potentially apply to allegations of supervisory harassment based on race or sex, claims which also provide traditional tort remedies.[17]

These common law torts may be beneficial to aggrieved employment discrimination plaintiffs for two additional reasons. First, numerous state antidiscrimination statutes do not cover employers that have a small number of

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896 P.2d 469, 476 (Nev. 1995) (per curiam); Taylor v. Metzger, 706 A.2d 685, 694 (N.J. 1998) (citing Buckley v. Trenton Sav. Fund Soc., 544 A.2d 857, 863 (N.J. 1988)); Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1009 (N.M. 1999); S. Furniture Hardware, Inc. v. Branch Banking & Trust Co., 526 S.E.2d 197, 201 (N.C. Ct. App. 2000); Muchow v. Lindblad, 435 N.W.2d 918, 923–24 (N.D. 1989); Yeager v. Local Union 20, 453 N.E.2d 666, 670–71 (Ohio 1983); Gaylord Entm't Co. v. Thompson, 958 P.2d 128, 149 (Okla. 1998); Harris v. Pameco Corp., 12 P.3d 524, 529 (Or. Ct. App. 2000) (citing McGanty v. Staudenraus, 901 P.2d 841, 849 (Or. 1995) (in banc)); Hoy v. Angelone, 691 A.2d 476, 482 (Pa. Super. Ct. 1997) (citing Hooten v. Pa. Coll. of Optometry, 601 F. Supp. 1151, 1154 (E.D. Pa. 1984)); Curtis v. State Dep't for Children & Their Families, 522 A.2d 203, 208 (R.I. 1987); Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 401, 596 S.E.2d 42, 48 (2004) (citing Ford v. Huston, 276 S.C. 157, 162, 276 S.E.2d 776, 778–79 (1981)); Bain v. Wells, 936 S.W.2d 618, 622 (Tenn. 1997) (citing Medlin v. Allied Inv. Co., 398 S.W.2d 270, 274–75 (Tenn. 1966)); Twyman v. Twyman, 855 S.W.2d 619, 620 (Tex. 1993); Samms v. Eccles, 358 P.2d 344, 346–47 (Utah 1961); Crump v. P & C Food Markets, Inc., 576 A.2d 441, 448 (Vt. 1990); Dicomes v. State, 782 P.2d 1002, 1012–13 (Wash. 1989) (en banc); Alsteen v. Gehl, 124 N.W.2d 312, 316 (Wis. 1963). This is not an exhaustive list of states that recognize the intentional infliction of emotional distress tort.

14. *See* Brewer v. Hillard, 15 S.W.3d 1, 7–8 (Ky. Ct. App. 1999) (upholding a jury's verdict that found an employer liable on a sexual harassment plaintiff's intentional infliction of emotional distress claim); *Taylor*, 706 A.2d at 698 (discussing the appropriate analysis in New Jersey for examining an intentional infliction of emotional distress claim stemming from an allegation of racial harassment).

15. *See Coates*, 976 P.2d at 1003, 1009–10 (upholding a $45,000 compensatory damages award for an intentional infliction of emotional distress claim and $1,755,000 punitive damages award for all other tort claims based upon sexual harassment).

16. *See* Stevenson v. Superior Court, 941 P.2d 1157, 1158 (Cal. 1997) ("[B]ecause the FEHA expressly does *not* preempt *any* common law tort claims, the FEHA's age discrimination remedies are not exclusive and do not bar a tort claim for wrongful discharge in violation of the public policy against age discrimination."); Saint v. Data Exch., Inc., 145 P.3d 1037, 1038–39 (Okla. 2006) (recognizing a common law wrongful discharge tort based on age discrimination in employment); Collier v. Insignia Fin. Group, 981 P.2d 321, 325–26 (Okla. 1999) (recognizing a common law wrongful discharge tort based on sexual harassment in employment); Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1225 (Okla. 1992) (recognizing a common law wrongful discharge tort based on racial discrimination in employment).

17. *See* Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 377–79 (Minn. 1990) (en banc) (holding that a plaintiff may bring a common law battery claim based on sexual harassment); Schweitzer v. Rockwell Int'l, 586 A.2d 383, 387–89 (Pa. Super. Ct. 1990) (holding that Pennsylvania's antidiscrimination statute does not bar a common law action for assault based on sexual harassment); Retherford v. AT&T Commc'ns of the Mountain States, Inc., 844 P.2d 949, 967 (Utah 1992) (allowing a common law action for negligent employment where plaintiff's coworkers retaliated against her after she made complaints of sexual harassment against them).

employees.[18] The threshold requirements found in these state statutes roughly parallel the fifteen-employee threshold for coverage under Title VII,[19] although some provide broader coverage than Title VII.[20] If an aggrieved employment discrimination plaintiff works for a smaller company not covered by his state's antidiscrimination statute, common law torts may be his only viable option to seek redress for his injuries.[21] Second, many state antidiscrimination statutes require exhaustion of administrative remedies—filing a charge of discrimination with the state equal employment opportunity commission—before bringing a suit alleging a violation of the statute.[22] The deadlines for filing a discrimination charge are often compressed, especially in comparison to the statute of limitations applicable to a common law tort claim. For example, the Texas state antidiscrimination statute sets a 180-day deadline for filing a discrimination charge with the relevant state agency.[23] In contrast, a short deadline for filing a common law tort claim is typically one year, and in many cases, the limitations period extends to at least two years.[24] Given this state of affairs, a common law tort may be the only option for an aggrieved person who did not file a timely charge under the state antidiscrimination statute.

As is obvious from the previous discussion, the common law can be a critical resource for employment discrimination complainants. It is clear that Title VII does not stand in the way of a complainant utilizing state common law to pursue a

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18. *See* NEV. REV. STAT. ANN. § 613.310(2) (LexisNexis 2006) (fifteen-employee threshold for coverage); N.M. STAT. ANN. § 28-1-2(B) (LexisNexis 2004) (four-employee threshold for coverage); OHIO REV. CODE ANN. § 4112.01(A)(2) (LexisNexis Supp. 2007) (four-employee threshold for coverage); TENN. CODE ANN. § 4-21-102(4) (2005) (eight-employee threshold for coverage); TEX. LAB. CODE ANN. § 21.002(8)(A) (Vernon 2006) (fifteen-employee threshold for coverage); UTAH CODE ANN. § 34A-5-102(8)(a)(iv) (2005) (fifteen-employee threshold for coverage); WASH. REV. CODE ANN. § 49.60.040(3) (West Supp. 2007) (eight-employee threshold for coverage); W. VA. CODE ANN. § 5-11-3(d) (LexisNexis 2006) (twelve-employee threshold for coverage).

19. 42 U.S.C. § 2000e (2000).

20. *See* sources cited *supra* note 18.

21. *See* Weaver v. Harpster, 885 A.2d 1073, 1078 (Pa. Super. Ct. 2005) (recognizing a common law wrongful discharge claim for sexual harassment as a public policy exception to the at-will employment doctrine where the employer was not covered by the Pennsylvania Human Rights Act because it had less than four employees).

22. *See, e.g.*, Brooke v. Rest. Servs., Inc., 906 P.2d 66, 70 (Colo. 1995) (en banc) (explaining that exhaustion of administrative remedies is required only for claims filed pursuant to the Colorado Antidiscrimination Act).

23. TEX. LAB. CODE ANN. §§ 21.0015, 21.202(a) (Vernon 2006).

24. "Claims for intentional infliction of emotional distress [under Louisiana law] are . . . governed by the one-year prescriptive period for delictual actions . . . ." King v. Phelps Dunbar, L.L.P., 743 So. 2d 181, 187 (La. 1999) (citing LA. CIV. CODE ANN. art. 3492 (Supp. 2007)). Under Texas law, the applicable limitations period for claims of intentional infliction of emotional distress, assault, and battery is two years. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 2006); Brandon v. Sw. Airlines Co., No. 04-05-00379-CV, 2006 Tex. App. LEXIS 7630, at *4 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 2006)) (recognizing that the limitations period applicable to battery, negligence, and intentional infliction of emotional distress claims is two years); Bhalli v. Methodist Hosp., 896 S.W.2d 207, 211 (Tex. App. 1995) ("[T]he applicable limitations period for a claim of intentional infliction of emotional distress is two years from the accrual of the cause of action.").

recovery against the complainant's employer.[25] Whether state statutory law stands in the way of the common law is an entirely different story—this issue is typically anything *but* clear. State courts in multiple jurisdictions have struggled with two crucial preemption issues for the last twenty-five plus years. First, whether the state's workers' compensation statute preempts common law tort claims based on unlawful discriminatory harassment.[26] Second, whether the state's antidiscrimination statute preempts common law tort claims based on unlawful discriminatory harassment.[27]

This Article addresses the second of these two questions.[28] Some states have already had their highest state court rule on the state antidiscrimination statute

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25. *See supra* note 5 and accompanying text.

26. *Compare* Konstantopoulos v. Westvaco Corp., 690 A.2d 936, 939 (Del. 1996) (finding that the Delaware Workers' Compensation Act bars employees from asserting common law tort claims against their employers for claims of sexual harassment arising out of their employment), *with* Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1104 (Fla. 1989) (finding that the exclusivity rule of Florida's workers' compensation statute does not bar the common law tort claims of assault, intentional infliction of emotional distress, or battery arising from sexual harassment).

27. *Compare* Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993) (finding that the Iowa Civil Rights Act is the exclusive state remedy for employment discrimination and preempts a common law claim for intentional infliction of emotional distress premised upon sexual harassment), *with* Helmick v. Cincinnati Word Processing, Inc., 543 N.E.2d 1212, 1215–16 (Ohio 1989) (holding that Ohio's antidiscrimination statute does not preempt common law tort claims arising out of workplace sexual harassment).

28. The first question is certainly important. It seems the correct view is that workers' compensation statutes do not bar common law tort claims based on discriminatory harassment. The rationale for this position varies among jurisdictions. Some courts hold that common law actions are not barred when the injury entails only emotional distress because mental injuries are noncompensable under the applicable workers' compensation. *See, e.g.*, Busby v. Truswal Sys. Corp., 551 So. 2d 322, 325 (Ala. 1989) (per curiam). Other courts hold that discriminatory harassment is not an "accidental injury" or a risk inherently connected to the workplace and thus find no preemption. *See* Burns v. Mayer, 175 F. Supp. 2d 1259, 1267–68 (D. Nev. 2001); Horodyskj v. Karanian, 32 P.3d 470, 478 (Colo. 2001) (en banc); Murphy v. ARA Servs., Inc., 298 S.E.2d 528, 531–32 (Ga. Ct. App. 1982); Furukawa v. Honolulu Zoological Soc'y, 936 P.2d 643, 654 (Haw. 1997); Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1004–05 (N.M. 1999). The most persuasive reason is simply that the public policy against discriminatory harassment is undermined where a court applies the exclusivity rule of workers' compensation to preclude all tort liability. *See* Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1104 (Fla. 1989) ("The clear public policy emanating from federal and Florida law holds that an employer is charged with maintaining a workplace free from sexual harassment. Applying the exclusivity rule of workers' compensation to preclude any and all tort liability effectively would abrogate this policy, undermine the Florida Human Rights Act, and flout Title VII of the Civil Rights Act of 1964. This we cannot condone."). Nonetheless, a number of courts hold that workers' compensation statutes do bar common law tort claims based on discriminatory harassment because such injuries are connected to the workplace. *See* Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 137–38 (2d Cir. 2001) (applying New York law); Konstantopoulos v. Westvaco Corp., 690 A.2d 936, 939–40 (Del. 1996); Knox v. Combined Ins. Co. of Am., 542 A.2d 363, 365–67 (Me. 1988). This Article does not analyze the workers' compensation angle in detail, but it presupposes that workers' compensation statutes should, in general, not bar common law tort claims based on discriminatory harassment. For a more extensive explanation and discussion of the workers' compensation preemption issue, see 6 ARTHUR LARSON & LEX LARSON, LARSON'S WORKERS' COMPENSATION LAW §§ 103–05 (2007). To some degree, the antidiscrimination statute preemption issue is less relevant in a state in which workers' compensation bars common law tort claims based on discriminatory harassment.

preemption issue, but several states have not directly addressed the issue.[29] A scholarly inquiry into the issue may be of some aid when the issue does arise in the highest appellate courts of those undecided states. Moreover, hopefully this inquiry will assist in the resolution of potential conflicts between future state statutory enactments and state common law in the employment arena.

Assuming as a bedrock principle—as it must—this Article proposes that a state legislature has the power to preempt common law tort claims based on unlawful discrimination, if it so desires, and may exercise that power through explicit preemption language.[30] However, when the legislature is not explicit—as is usually the case—it becomes necessary to devise principles for determining whether the mere presence of a state antidiscrimination statute and the concomitant administrative regime impliedly preempts a variety of common law tort claims based on employment discrimination or discriminatory harassment. This Article attempts to do just that. It focuses on preemption of such common law claims in the context of a lawsuit between an aggrieved plaintiff and the plaintiff's employer or former employer, not on suits between individuals.[31]

The legal analysis this Article proposes for determining whether a state antidiscrimination statute preempts common law tort claims based on employment

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29. States that have addressed the issue in their Supreme Court in some form or fashion include Arizona, California, Colorado, Illinois, Iowa, Minnesota, Montana, New Jersey, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Washington, West Virginia, and Wyoming. *See* Cronin v. Sheldon, 991 P.2d 231, 235–39 (Ariz. 1999) (en banc); Rojo v. Kliger, 801 P.2d 373, 376–83 (Cal. 1990) (in bank); Brooke v. Rest. Servs., Inc., 906 P.2d 66, 68–70 (Colo. 1995) (en banc); Geise v. Phoenix Co. of Chi., Inc., 639 N.E.2d 1273, 1275–78 (Ill. 1994); Greenland v. Fairtron Corp., 500 N.W.2d 36, 38–39 (Iowa 1993); Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 377–79 (Minn. 1990) (en banc); Harrison v. Chance, 797 P.2d 200, 202–05 (Mont. 1990); Tarr v. Ciasulli, 853 A.2d 921, 924–28 (N.J. 2004); Taylor v. Metzger, 706 A.2d 685, 701 (N.J. 1998); Helmick v. Cincinnati Word Processing, Inc., 543 N.E.2d 1212, 1215–16 (Ohio 1989); Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1225–31 (Okla. 1992); Schweitzer v. Rockwell Int'l, 586 A.2d 383, 387–91 (Pa. Super. Ct. 1991); Hoffmann-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 446–50 (Tex. 2004); Gottling v. P.R. Inc., 61 P.3d 989, 991–97 (Utah 2002); Retherford v. AT&T Commc'ns of the Mountain States, Inc., 844 P.2d 949, 961–62 (Utah 1992); Roberts v. Dudley, 993 P.2d 901, 904–07 (Wash. 2000) (en banc); Hoflund v. Airport Golf Club, 105 P.3d 1079, 1086 (Wyo. 2005). This is a non-exhaustive list.

30. *See* Maksimovic v. Tsogalis, 687 N.E.2d 21, 24 (Ill. 1997) ("Common law rights and remedies are in full force in [Illinois] unless repealed by the legislature or modified by the decision of our courts. A legislative intent to abrogate the common law must be *clearly and plainly expressed*, and such an intent will not be presumed from ambiguous or doubtful language." (emphasis added) (citations omitted)).

31. In Texas, the state antidiscrimination statute preempts intentional infliction of emotional distress causes of action arising out of discriminatory harassment claims filed against employers. *See* Hoffmann-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 446–50 (Tex. 2004). The Texas courts disagree on whether this rule extends to intentional infliction of emotional distress claims against individual supervisors where the gravamen of the complaint involves discriminatory workplace harassment. *Compare* Swafford v. Bank of Am. Corp., 401 F. Supp. 2d 761, 763–65 (S.D. Tex. 2005) (disallowing a plaintiff to assert a claim for intentional infliction of emotional distress against an individual supervisor to circumvent legislative prohibitions), *with* Dixon v. State Farm Mut. Auto. Ins. Cos., 433 F. Supp. 2d 785, 788–90 (N.D. Tex. 2006) (disagreeing with the *Swafford* court and finding that nothing in the Texas Commission on Human Rights Act prevents a plaintiff from asserting a claim for intentional infliction of emotional distress against an individual supervisor).

discrimination or discriminatory harassment should depend on the type of common law tort in question. It identifies separate categories of common law torts, each of which is given different treatment. Torts that have an existence separate and apart from employment discrimination are not impliedly preempted by the mere presence of a state antidiscrimination statute. Torts that do not have an existence separate and apart from employment discrimination are impliedly preempted if they were not recognized under a state's common law prior to the enactment of the state antidiscrimination statute. Common law wrongful discharge torts that existed prior to the enactment of a state antidiscrimination statute are not impliedly preempted.

Part II of this Article categorizes and describes the different types of common law discrimination torts. Part III examines the conditions under which a particular type of common law discrimination tort should be impliedly preempted by a state antidiscrimination statute and explains why the law should distinguish between the various torts. Part IV applies the principles established in Part III to specific jurisdictions that have an antidiscrimination statute and also recognize certain common law discrimination torts. Part IV concludes with a reminder that the resolution of the preemption issue reflects the standing of the common law in our judicial and governmental systems. Part V completes the Article by summarizing the proposed outcome of the implied preemption question as to two specific common law torts.

II. CATEGORIES OF COMMON LAW "DISCRIMINATION" TORTS

A. Torts that Exist Separate and Apart from Employment Discrimination

1. Intentional Infliction of Emotional Distress

The *Restatement (Second) of Torts* recognizes a cause of action for intentional infliction of emotional distress,[32] also known as the tort of outrage.[33] Originally recognized by the *Restatement of Torts* in 1934,[34] almost all jurisdictions have now adopted intentional infliction of emotional distress as an actionable tort.[35] Courts require four elements in an outrage claim: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's action caused the plaintiff emotional distress; and (4) the resulting

32. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

33. *See* State *ex rel.* Davidson v. Hoke, 532 S.E.2d 50, 56–57 (W. Va. 2000) (Starcher, J., concurring).

34. *See* RESTATEMENT (FIRST) OF TORTS § 46 (1934).

35. *See* Twyman v. Twyman, 855 S.W.2d 619, 621–22 (Tex. 1993) ("Today we become the forty-seventh state to adopt the tort of intentional infliction of emotional distress as set out in [section] 46(1) of the RESTATEMENT (SECOND) OF TORTS."); *see also* sources cited *supra* note 13 (listing various states which recognize a cause of action for intentional infliction of emotional distress).

emotional distress was severe.[36] The *Restatement (Second) of Torts* places strict limits on the tort by appropriately setting high standards for outrageous conduct and severe emotional distress.[37] In determining the severity of the distress, physical injury is not required, but evidence of physical harm is a factor.[38] The tort is applicable to employment disputes but is not necessarily aimed at employment disputes.[39] Intentional infliction of emotional distress claims have arisen in a variety of contexts, including domestic and commercial life.[40] Indeed, none of the illustrations in the *Restatement (Second) of Torts* concerning liability for the tort of outrage directly involve employment-related fact patterns.[41]

2. *Assault and Battery*

Assault and battery are longstanding intentional torts recognized at common law.[42] A battery takes place when "the defendant's acts intentionally cause harmful or offensive contact with the victim's person."[43] Assault occurs when "the defendant's acts intentionally cause the victim's reasonable apprehension of

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36. *See* Hatfield v. Max Rouse & Sons Nw., 606 P.2d 944, 953 (Idaho 1980); Vaughn v. AG Processing, Inc., 459 N.W.2d 627, 635–36 (Iowa 1990) (citing Vinson v. Linn-Mar Cmty. Sch. Dist., 360 N.W.2d 108, 118 (Iowa 1984)); Dawson v. Assocs. Fin. Servs. Co. of Kan., 529 P.2d 104, 111 (Kan. 1974); Bain v. Wells, 936 S.W.2d 618, 622 (Tenn. 1997) (citing Medlin v. Allied Inv. Co., 398 S.W.2d 270, 274–75 (Tenn. 1966), *overruled in part on other grounds by* Camper v. Minor, 915 S.W.2d 437, 444–46 (Tenn. 1996) (overruling requirement that some kind of physical manifestation must exist for a plaintiff to recover for negligent infliction of emotional distress)); Standard Fruit & Veg. Co. v. Johnson, 985 S.W.2d 62, 65 (Tex. 1998) (citing *Twyman*, 855 S.W.2d at 621).

37. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) ("Liability has been found only where the conduct has been 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 community. . . . The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."); *see also id.* § 46 cmt. j ("[Emotional distress] includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. . . . The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.").

38. *See Hatfield*, 606 P.2d at 953–54; RESTATEMENT (SECOND) OF TORTS § 46 cmt. k (1965).

39. *See* Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 392–411 (1994) (discussing the development of the tort of intentional infliction of emotional distress and its application to the field of employment law).

40. *See, e.g.*, *Dawson*, 529 P.2d at 111 ("A creditor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to the debtor is subject to liability for such emotional distress and, if bodily harm to the debtor results from it, for such bodily harm."); *Twyman*, 855 S.W.2d at 620 (allowing a claim for intentional infliction of emotional distress in a divorce proceeding).

41. *See* RESTATEMENT (SECOND) OF TORTS § 46 illus. 1–22 (1965).

42. *See* I de S et Ux v. W de S, Y.B. Lib. Ass. fol. 99, pl. 60 (Assizes 1348), *reprinted in* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 37 (11th ed. 2005); Cole v. Turner, 90 Eng. Rep. 958 (Nisi Prius 1704); WILLIAM BLACKSTONE, 3 COMMENTARIES *119–20.

43. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 6 (1996); *see also* RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965); BLACK'S LAW DICTIONARY 162 (8th ed. 2004).

immediate harmful or offensive contact."[44] Assault and battery existed long before state and federal legislatures became interested in sexual harassment and redressing violations of bodily integrity and personal liberty.[45] Nonetheless, a sexually motivated assault or battery in violation of the common law could also satisfy the elements of a state statutory claim for sexual harassment.[46]

3. *Negligent Employment, Negligent Retention, Negligent Hiring*

Under general principles of tort law, an employer may be directly liable for its own negligence in hiring, supervising, and retaining employees.[47] The general negligent hiring rule aims to protect fellow employees and the public from workers who are unsafe or dangerous on the job.[48] In some jurisdictions, a negligent hiring and retention claim can be based on an employee's intentional tort committed outside the scope of employment.[49] It is not unusual for a third party customer or invitee, or a fellow employee to sue an employer for negligent hiring or retention based on an employee's intentional tort that occurred outside the scope of employment.[50] The tort is broad enough to cover all sorts of wrongdoing committed by employees while on the job.[51] It may include, but is not limited to, claims of discriminatory harassment committed by a supervisor against a subordinate employee.[52]

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44. DIAMOND ET AL., *supra* note 43, at 9; *see also* RESTATEMENT (SECOND) OF TORTS § 21 (1965); BLACK'S LAW DICTIONARY 122 (8th ed. 2004).

45. *See* Maksimovic v. Tsogalis, 687 N.E.2d 21, 24 (Ill. 1997).

46. *See* Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 379 (Minn. 1990) (en banc); *see also* MINN. STAT. ANN. § 363A.03, subdiv. 43 (West Supp. 2007) ("'Sexual harassment' includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when: (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment . . . , (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment . . . , or (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.").

47. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 501–02 (5th ed. 1984); *see also, e.g.*, J.H. v. W. Valley City, 840 P.2d 115, 124 (Utah 1992) (citing Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1048 (Utah 1991)) ("[A]n employer may be directly liable for its acts or omissions in hiring or supervising its employees.").

48. *See* Wise v. Complete Staffing Servs., Inc., 56 S.W.3d 900, 903 (Tex. App. 2001) (citing Estate of Arrington v. Fields, 578 S.W.2d 173, 178 (Tex. App. 1979)).

49. *See* TGM Ashley Lakes, Inc. v. Jennings, 590 S.E.2d 807, 814 (Ga. Ct. App. 2003) (citing Henderson v. Nolting First Mortgage Corp., 193 S.E. 347, 353–54 (Ga. 1937)).

50. *See TGM Ashley Lakes*, 590 S.E.2d at 811–12. *But see* Urdiales v. Concord Techs. Del., Inc., 120 S.W.3d 400, 405 (Tex. App. 2003) (citing Walls Reg'l Hosp. v. Bomar, 9 S.W.3d 805, 806–08 (Tex. 1999) (per curiam)) (holding that the workers' compensation act barred an employee's negligent hiring claim based on a supervisor's battery).

51. *See, e.g.*, RICHARD CARLSON, EMPLOYMENT LAW 105–08 (2005) (providing various situations in which employers may be liable for negligent employment).

52. *See, e.g.*, Retherford v. AT&T Commc'ns of the Mountain States, Inc., 844 P.2d 949, 974 (Utah 1992) (holding that an employee's negligent employment claim based on sexual harassment by supervisors and coemployees was not preempted).

4. Employer Liability

Discriminatory harassment, whether it takes the form of sexual harassment, racial harassment, or disability harassment, can, in certain situations, satisfy the elements of the common law torts of intentional infliction of emotional distress, battery, assault, negligent retention, negligent hiring, and negligent supervision.[53] With respect to the negligence causes of action, the employer is directly liable for its own acts or omissions in hiring, supervising, and retaining employees that proximately cause injury to the harassed victim.[54] With respect to the intentional tort causes of action, the employer's possible liability for the intentional acts of company personnel is predicated on various theories, depending on the jurisdiction.

a. Vicarious Liability

An employer is generally not liable for an employee's intentional torts committed outside the scope of employment.[55] Intentional torts arising from a supervisor's discriminatory harassment of his employee are typically not considered to be actions within the scope of employment.[56] Vicarious liability under the common law in workplace harassment scenarios may nevertheless still attach in several jurisdictions. Under New Mexico law, for example, an employer may be vicariously liable for the intentional torts of assault, battery, and intentional infliction of emotional distress committed by a supervisor, arising out of sexual harassment, if the supervisor was "aided by his status as [the plaintiff's] supervisor in committing his alleged torts."[57] In other words, the discriminatory harassment victim may prevail against the employer based on these intentional torts by presenting sufficient evidence that the harasser's supervisory authority aided in the commission of the torts.[58] Washington law allows employer liability for intentional torts based on harassment because harassment may take place within the scope of employment. In a unique case, a deli worker tormented by fellow employees, allegedly because of her disability, won a judgment against her employer on her intentional infliction of emotional distress claim.[59] The Washington Supreme Court

53. *See* discussion *supra* Part II.A.1–3.

54. *See supra* note 47 and accompanying text.

55. *See* Ocana v. Am. Furniture Co., 91 P.3d 58, 70–71 (N.M. 2004) ("[A]n employer is not generally liable for an employee's intentional torts because an employee who intentionally injures another individual is generally considered to be acting outside the scope of his or her employment.").

56. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 757 (1998) ("The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.").

57. *Ocana*, 91 P.3d at 71 (adopting the aided-in-agency theory of vicarious liability in the context of employee's intentional tort claims against employer based on the supervisor's sexual harassment).

58. *Id.* The aided-in-agency theory provides that an employer may be held liable for the intentional torts of an employee acting outside the scope of employment if the employee "was aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). The rationale for the theory is that the employee "may be able to cause harm because of his position as agent" of the employer. *Id.* § 219 cmt. e.

59. Robel v. Roundup Corp., 59 P.3d 611, 621 (Wash. 2002) (en banc).

ruled that the employer was vicariously liable for intentional infliction of emotional distress because its employees "tormented [the worker] on company property during working hours, as they interacted with co-workers and customers and performed the duties they were hired to perform."[60] Therefore, the harassment occurred within the scope of the deli workers' employment.[61]

b. Direct Liability

An employee victim of discriminatory harassment may also proceed directly against the employer for the intentional torts of a company agent when the agent is the alter ego of the company.[62] Under South Carolina law, for example, an employee's action against her employer for intentional infliction of emotional distress, assault, and battery will lie when the tortfeasor is the employer's alter ego.[63] However, only dominant corporate owners and officers may constitute alter egos.[64] A slightly different theory also exists for subjecting employers to direct liability for an agent's intentional torts. Under Tennessee law, for example, direct liability for intentional infliction of emotional distress attaches when the employer recklessly disregards the outrageous conduct of its agents.[65] This is essentially a ratification theory.[66]

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60. *Id.*

61. *Id.*

62. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758 (1998) (stating that section 219(2)(a) of the *Restatement (Second) of Agency* addresses liability "where the agent's high rank in the company makes him or her the employer's alter ego"); *see also* Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 383 (5th Cir. 2003) (ruling that one situation in which an employer is vicariously liable for its employees' activities is when the harasser is a proxy for the employer (agreeing with Johnson v. West, 218 F.3d 725, 730 (7th Cir. 2000))).

63. *See* Dickert v. Metro. Life Ins. Co., 311 S.C. 218, 220, 428 S.E.2d 700, 701 (1993); McSwain v. Shei, 304 S.C. 25, 29–30, 402 S.E.2d 890, 892 (1991), *overruled on other grounds by* Sabb v. S.C. State Univ., 350 S.C. 416, 422 & n.2, 567 S.E.2d 231, 234 & n.2 (2002) (discussing subject matter jurisdiction in negligent employment cases); Stewart v. McLellan's Stores Co., 194 S.C. 50, 55–56, 9 S.E.2d 35, 37 (1940).

64. *Dickert*, 311 S.C. at 221, 428 S.E.2d at 701 (citing 2A ARTHUR LARSON & LEX LARSON, LARSON'S WORKERS' COMPENSATION LAW §§ 68.21–.22 (2007)).

65. *See* Pollard v. E.I. Dupont de Nemours, Inc., 412 F.3d 657, 665 (6th Cir. 2005) ("[A] corporate body may be liable for the infliction of emotional distress if its corporate supervisors and officials engage in conduct that rises to the level of reckless disregard of outrageous conduct . . . . [Corporate] liability is based not on vicarious liability. Rather, it is based on the entity's failure to act in the face of outrageous conduct by persons under its immediate control who are causing serious harm within the general scope of employment and within the knowledge of its officials.").

66. *See* Hogan v. Forsyth Country Club Co., 340 S.E.2d 116, 121 (N.C. Ct. App. 1986) ("As a general rule, liability of a principal for the torts of his agent may arise . . . when the agent's act is ratified by the principal.") (citing Snow v. De Butts, 193 S.E. 224, 226 (N.C. 1937)); RESTATEMENT (SECOND) OF AGENCY §§ 93, 94 (1958); *see also* Brown v. Burlington Indus., Inc., 378 S.E.2d 232, 236 (N.C. Ct. App. 1989) (upholding a jury finding that an employer's failure to rectify the problem posed by an employee's sexual harassment showed ratification of the conduct).

B. *Torts that Do Not Exist Separate and Apart from Employment Discrimination*

Some states that have antidiscrimination statutes recognize common law wrongful discharge actions for some forms of employment discrimination.[67] Many states do not recognize such actions.[68] When allowed, these wrongful discharge actions are exceptions to the at-will rule and mimic the state statutory action.[69] These torts are dependent upon a "public policy" outlawing a particular type of discrimination; however, the "public policy" against that discrimination is already specifically expressed and remedied by statute.[70] Unlike claims for intentional infliction of emotional distress, assault, battery, and negligent employment, common law wrongful discharge claims for employment discrimination generally serve no purpose other than to provide an overlapping remedy for behavior that already violates a state statute or to provide a civil action where the legislature intended none to exist.[71]

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67. *See* HAW. REV. STAT. ANN. § 378-3(10) (LexisNexis 2004) (permitting a civil action for sexual harassment irrespective of the statutory rights provided under the antidiscrimination law); Cronin v. Sheldon, 991 P.2d 231, 241 (Ariz. 1999) (en banc) (allowing a wrongful discharge action for employment discrimination but limiting available remedies to those provided under Arizona's antidiscrimination statute); Stevenson v. Superior Court, 941 P.2d 1157, 1158 (Cal. 1997) (holding that California's statutory age discrimination remedies are not exclusive and do not bar a tort claim for wrongful discharge in violation of public policy); Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1004–06 (N.M. 1999) (ruling that the exclusivity provision of the New Mexico Workers' Compensation Act does not bar an employee's common law sexual harassment tort claim); Saint v. Data Exch., Inc., 145 P.3d 1037, 1038–39 (Okla. 2006) (recognizing a common law wrongful discharge tort based on age discrimination in employment); Collier v. Insignia Fin. Group, 981 P.2d 321, 326 (Okla. 1999) (recognizing a common law wrongful discharge tort based on sexual harassment in employment); Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1230–31 (Okla. 1992) (recognizing a common law wrongful discharge tort based on racial discrimination in employment); Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 1300–03 (Or. 1984) (in banc) (recognizing a common law wrongful discharge action for resisting workplace sexual harassment); Weaver v. Harpster, 885 A.2d 1073, 1078 (Pa. Super. Ct. 2005) (recognizing a common law wrongful discharge claim for sexual harassment against a small employer not covered by the Pennsylvania Human Relations Act); Roberts v. Dudley, 993 P.2d 901, 908–11 (Wash. 2000) (en banc) (recognizing a common law wrongful discharge claim for gender discrimination against a small employer not covered by the Washington Law Against Discrimination).

68. *See* Hartleip v. McNeilab, Inc., 83 F.3d 767, 777–78 (6th Cir. 1996) (applying Michigan law); Santiago v. City of Vineland, 107 F. Supp. 2d 512, 568 (D.N.J. 2000) (applying New Jersey law); Atkins v. Bridgeport Hydraulic Co., 501 A.2d 1223, 1226 (Conn. App. Ct. 1985); Makovi v. Sherwin-Williams Co., 540 A.2d 494, 497–98 (Md. Ct. Spec. App. 1988); Harrison v. Chance, 797 P.2d 200, 203 (Mont. 1990); Lewis v. Fairview Hosp., 806 N.E.2d 185, 188–89 (Ohio Ct. App. 2004); Gottling v. P.R. Inc., 61 P.3d 989, 992 (Utah 2002).

69. *See Weaver*, 885 A.2d at 1076–78.

70. *See Makovi*, 540 A.2d at 498 (finding that a common law wrongful discharge claim based on gender discrimination is preempted when a state statute provides a remedy for such conduct).

71. *See Gottling*, 61 P.3d at 997–98 (refusing to craft a common law remedy where the legislature intended no remedy to exist).

III. DISTINGUISHING CATEGORIES OF COMMON LAW "DISCRIMINATION" TORTS FOR PREEMPTION PURPOSES

A state legislature retains control over the preemptive effect, if any, that its antidiscrimination statute has on state tort law.[72] Subject to constitutional constraints, state legislatures have plenary authority to explicitly preempt common law tort claims for wrongful discharge, intentional infliction of emotional distress, assault, battery, and negligent employment that relate to claims of employment discrimination.[73] When a legislature makes its intentions on preemption explicitly clear, whether the legislature adopts preemption or rejects preemption, the courts must adhere to the expressed intent.[74] Montana law is an excellent example of a state antidiscrimination statute that has explicit preemption language faithfully enforced by the Montana courts.[75] The development of Montana law in this area is instructive and models the appropriate interaction between court and legislature.[76]

The Montana Human Rights Act bars discrimination in employment based on race, creed, religion, color, national origin, age, disability, marital status, or sex.[77]

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72. *See supra* note 30 and accompanying text.

73. *See* Brooke v. Rest. Servs., Inc., 906 P.2d 66, 68 (Colo. 1995) (en banc) ("[T]he creation of a private right of action by state statute does not bar pre-existing common law rights of action unless the legislature clearly expressed its intent to do so."); Van Waters & Rogers, Inc. v. Keelan, 840 P.2d 1070, 1076 (Colo. 1992) (en banc) ("[S]tatutes in derogation of the common law must be strictly construed, so that if the legislature wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent either expressly or by clear implication."); Shetsky v. Hennepin County, 60 N.W.2d 40, 45 (Minn. 1953) (explaining that since the presumption is that statutory law is consistent with common law, abrogation of the common law by statutory enactment must be "by express wording or necessary implication") (citations omitted); Helmick v. Cincinnati Word Processing, Inc., 543 N.E.2d 1212, 1216 (Ohio 1989) ("[A]n existing common-law remedy may not be extinguished by a statute except by direct enactment or necessary implication."); Silver v. Slusher, 770 P.2d 878, 884 (Okla. 1988) ("The common law supplements our statutes. It remains in full force unless it is clearly and expressly modified or abrogated by our constitution or by statute."); E.B. & A.C. Whiting Co. v. City of Burlington, 175 A. 35, 44 (Vt. 1934) ("[R]ules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language.").

74. *See Gottling*, 61 P.3d at 997–98.

75. *See* Act of March 22, 2007, ch. 28, § 8, 2007 Mont. Laws__, (to be codified at MONT. CODE ANN. § 49-2-508(1)), *available at* 2007 ALS 28 *9 ("The provisions of this chapter [of the Montana Human Rights Act] establish the exclusive remedy for acts constituting an alleged violation of . . . this chapter, including acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana constitution or 49-1-102. A claim or request for relief based upon the acts may not be entertained by a district court other than by the procedures specified in this chapter.").

76. Arizona law developed in a fashion similar to Montana law. *See infra* notes 79–85 and accompanying text. The Arizona Supreme Court initially issued a decision finding no preemption, and the Arizona Legislature subsequently enacted legislation that expressly limits available remedies for wrongful discharge claims based on violations of the state's antidiscrimination statute. *See* Cronin v. Sheldon, 991 P.2d 231, 236 (Ariz. 1999) (en banc) (recognizing that the Arizona Employment Protection Act permits a wrongful termination action for employment discrimination, but that it also limits the available remedies to those provided by the Arizona Civil Rights Act).

77. MONT. CODE ANN. § 49-2-303(1)(a) (2005).

In *Drinkwalter v. Shipton Supply Co.*,[78] the Montana Supreme Court permitted a workplace sexual harassment victim to pursue several sexual harassment based tort claims under Montana common law even though the state's antidiscrimination statute made such harassment unlawful and provided a remedy.[79] The *Drinkwalter* court held that, because the legislature had not expressed a clear intent to abolish other common law remedies, the antidiscrimination statute did not provide the exclusive remedy for sexual harassment.[80] The court based its decision on the fact that the antidiscrimination statute, as it existed at the time of the case, had no preemption language.[81] The Montana Supreme Court correctly decided the *Drinkwalter* case based on the *lack* of explicit preemption language in the antidiscrimination statute.

In response to *Drinkwalter*, the Montana legislature enacted an exclusive remedy provision into its state antidiscrimination statute.[82] The legislative history of the exclusive remedy provision, the passage of the provision so near in time to the *Drinkwalter* decision, and its plain language made clear that the Montana legislature intended for the state antidiscrimination statute to preempt common law tort claims based on employment discrimination.[83] Consequently, in a post-exclusive remedy enactment case, *Harrison v. Chance*,[84] the Montana Supreme Court interpreted the exclusive remedy provision to preempt an employee's common law claims against her employer for battery, intentional infliction of emotional distress, wrongful discharge, and breach of the implied covenant of good faith and fair dealing.[85] The Montana Supreme Court correctly decided the *Harrison* case based on the *presence* of explicit preemption language in the statute.

Montana is the exception, rather than the rule, in terms of a clear expression of legislative intent to preempt common law claims related to employment discrimination.[86] Many state antidiscrimination statutes have either no preemption

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78. 732 P.2d 1335 (Mont. 1987), *superseded by statute*, Act of Apr. 16, 1987, ch. 511, 1987 Mont. Laws 1240, *as recognized in* Romero v. J & J Tire, JMH, Inc., 777 P.2d 292, 294–95 (Mont. 1989).

79. *Drinkwalter*, 732 P.2d at 1338–39.

80. *Id.*

81. *Id.*

82. Act of Apr. 16, 1987, ch. 511, § 1(7), 1987 Mont. Laws 1240, 1242.

83. *See* Harrison v. Chance, 797 P.2d 200, 203 (Mont. 1990).

84. *Id.* at 200.

85. *Id.* at 205 ("[A]ny claim based on sexual harassment can be framed in terms of numerous tort theories. The legislature expressed its intent that the Commission provide the exclusive remedy for illegal discrimination when it enacted subsection (7) of § 49-2-509, MCA. To allow such recharacterization of what is at heart a sexual discrimination claim, would be to eviscerate the mandate of the Human Rights Commission.").

86. Utah is another exception to the general rule. The plain language of the Utah Anti-discrimination Act demonstrates an explicit intent to preempt all common law remedies for wrongful discharge based upon employment discrimination. *See* UTAH CODE ANN. § 34A-5-107(15) (2005) ("The procedures contained in this section are the exclusive remedy under state law for employment discrimination based upon: (a) race; (b) color; (c) sex; (d) retaliation; (e) pregnancy, childbirth, or pregnancy-related conditions; (f) age; (g) religion; (h) national origin; or (i) disability."); Gottling v. P.R. Inc., 61 P.3d 989, 992–93 (Utah 2002) (citing Retherford v. AT&T Commc'ns of the Mountain States, Inc., 844 P.2d 949, 961 (Utah 1992)).

language at all, or, if preemption language exists, the language is ambiguous.[87] In this context, guidelines for determining whether a state antidiscrimination statute preempts a particular common law action are necessary. Distinguishing between types of common law discrimination torts is particularly useful.

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87. Nevada, New Mexico, North Dakota, Oklahoma, Tennessee, and Texas are examples of states which have no preemption language. *See* NEV. REV. STAT. ANN. §§ 613.310–.435 (LexisNexis 2006); New Mexico Human Rights Act, N.M. STAT. ANN. §§ 28-1-1 to -15 (LexisNexis 2004 & Supp. 2006); North Dakota Human Rights Act, N.D. CENT. CODE §§ 14-02.4-01 to -23 (2004 & Supp. 2007); OKLA. STAT. ANN. tit. 25, §§ 1301–1901 (West 1987 & Supp. 2007); Tennessee Human Rights Act, TENN. CODE ANN. §§ 4-21-101 to -1004 (2005 & Supp. 2006); Texas Commission on Human Rights Act, TEX. LAB. CODE ANN. §§ 21.001–.556 (Vernon 2006 & Supp. 2006). California, Minnesota, Nebraska, New Hampshire, New York, Ohio, Washington, and West Virginia are examples of states that have preemption language in their antidiscrimination statutes that should be construed as demonstrating the intent not to preempt certain common law claims related to discrimination; one could argue, however, that the language maintains some ambiguity in terms of antipreemptive scope. *See* CAL. GOV'T CODE § 12993(a) (West 2005) ("The provisions of this part shall be construed liberally for the accomplishment of the purposes of this part. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation . . . ."); MINN. STAT. ANN. § 363A.04 (West 2004) ("The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of the civil rights law or of any other law of this state relating to discrimination because of race, creed, color, religion, sex, age, disability, marital status, status with regard to public assistance, national origin, sexual orientation, or familial status . . . ."); NEB. REV. STAT. § 48-1124 (2004) ("Nothing contained in the Nebraska Fair Employment Practice Act shall be deemed to repeal any of the provisions of the civil rights law, any other law of this state, or any municipal ordinance relating to discrimination because of race, creed, color, religion, sex, disability, or national origin."); N.H. REV. STAT. ANN. § 354-A:25 (LexisNexis 1995) ("Nothing contained in this chapter shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination because of age, sex, race, creed, color, marital status, physical or mental disability or national origin . . . ."); N.Y. EXEC. LAW § 300 (McKinney 2005) ("Nothing contained in this article shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination because of race, creed, color or national origin . . . ."); OHIO REV. CODE ANN. § 4112.08 (LexisNexis 2001) ("Nothing contained in this chapter shall be considered to repeal any of the provisions of any law of this state relating to discrimination because of race, color, religion, sex, familial status, disability, national origin, age, or ancestry . . . ."); WASH. REV. CODE ANN. § 49.60.020 (Supp. 2007) ("Nothing contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination because of race, color, creed, national origin, sex, marital status, sexual orientation, age, or the presence of any sensory, mental, or physical disability, other than a law which purports to require or permit doing any act which is an unfair practice under this chapter."); W. VA. CODE ANN. § 5-11-13(a) (LexisNexis 2006) ("[N]othing contained in this article shall be deemed to repeal or supersede any of the provisions of any existing or hereafter adopted municipal ordinance, municipal charter or of any law of this state relating to discrimination because of race, religion, color, national origin, ancestry, sex, age, blindness or disability . . . .").

In *Rojo v. Kliger*, 801 P.2d 373 (Cal. 1990) (in bank), the California Supreme Court determined that CAL. GOV'T CODE § 12993(a) expressly proclaimed an intent not to preempt common law remedies for injuries relating to employment discrimination. *Id.* at 378. The court noted that the "laws" of California encompass both statutory and common law. *Id.* at 377. That is a sensible interpretation.

A. No Implied Preemption of "Separate and Apart" Torts

No universally applied test exists for determining whether the presence of a state antidiscrimination statute implicitly preempts common law torts based on the same facts. The fundamental starting point of any analysis is the oft-stated principle that statutes in derogation of the common law must be strictly construed,[88] but this is only a starting point. Several possible analytical methods exist for determining whether a state antidiscrimination statute preempts a common law tort. They include a timing test, a field preemption test, a same conduct test, and an independence test.[89] The timing approach, sometimes referred to as the antecedent test, looks to whether the common law tort existed before or after the enactment of the state antidiscrimination statute.[90] If the common law tort existed prior to the statute's enactment, it is not preempted.[91] If the common law tort did not exist before the statutory enactment, the tort is preempted.[92] The application of this test produces mixed results in the context of assault, battery, intentional infliction of emotional distress, and negligent employment claims. Because assault and battery are longstanding common law torts, a state antidiscrimination statute would never impliedly preempt those claims.[93] The same is not necessarily true for intentional infliction of emotional distress and negligent employment claims. In some states, recognition of an intentional infliction of emotional distress claim may not have come until after the enactment of the state antidiscrimination statute. Thus, this approach could lead to the implied preemption of outrage claims in certain jurisdictions.[94]

The field preemption test presumes that a legislature can supplant the common law by implication when the statute is so comprehensive that it can be inferred that

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88. *See* Van Waters & Rogers, Inc. v. Keelan, 840 P.2d 1070, 1076 (Colo. 1992) (en banc) ("[S]tatutes in derogation of the common law must be strictly construed, so that if the legislature wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent either expressly or by clear implication.").

89. *See* Retherford v. AT&T Commc'ns of the Mountain States, Inc., 844 P.2d 949, 962–67 (Utah 1992) (discussing the various available tests).

90. *Id.* at 964.

91. *Id.*

92. *Id.* at 963 ("[Courts which apply the antecedent test] hold that the statutory action is the exclusive remedy if the common law cause of action did not exist before the statutory cause of action was created."); *see also* Brooke v. Rest. Servs., Inc., 906 P.2d 66, 68 (Colo. 1995) (en banc) ("[T]he creation of a private right of action by state statute does not bar pre-existing common law rights of action unless the legislature clearly expressed its intent to do so.").

93. Assault and battery have their roots in English common law. *See supra* note 42 and accompanying text. State antidiscrimination statutes in this country did not arrive until the latter part of the twentieth century. The South Dakota legislature, for example, passed the South Dakota Human Relations Act in 1972. South Dakota Human Relations Act, ch. 11, 1972 S.D. Sess. Laws 46–55.

94. The North Dakota legislature passed the North Dakota Human Rights Act in 1983. North Dakota's Human Rights Act, ch. 173, 1983 N.D. Laws 466. Although intentional infliction of emotional distress claims were brought in North Dakota prior to 1983, *see* Eakman v. Robb, 237 N.W.2d 423, 425 (N.D. 1975), it does not appear that the tort was thoroughly discussed and adopted by the North Dakota Supreme Court until 1989. *See* Muchow v. Lindblad, 435 N.W.2d 918, 923–25 (N.D. 1989).

the legislature intended to cover the entire subject and thus leave no room for the common law.[95] In judging whether a state antidiscrimination statute is comprehensive enough to invoke field preemption, it is common to consider the statutory coverage and the scope of the remedies.[96] For example, several courts have held that a state antidiscrimination statute is insufficiently comprehensive to impliedly preempt the common law when the statute did not apply to small employers, or the statutory remedial scheme did not authorize the recovery of compensatory or punitive damages.[97]

The same conduct test looks at the state antidiscrimination statute to see whether the common law action is based on the very same conduct that is necessary to prove unlawful discrimination under the statute.[98] If the required conduct is the same, the common law is impliedly preempted.[99] The best example of the application of this test involves jurisdictions that view state antidiscrimination statutes as impliedly preempting common law intentional infliction of emotional distress claims on the ground that such claims are merely gap-filler torts.[100] The typical fact pattern involves a plaintiff who has been sexually harassed by her supervisor.[101] The harassment that gives rise to the intentional infliction of

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95. *See* Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (U.S. 1996) ("A . . . statute, for example, may create a scheme of . . . regulation 'so pervasive as to make reasonable the inference that [the legislature] left no room for the [common law] to supplement it.'") (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); Rojo v. Kliger, 801 P.2d 373, 381 (Cal. 1990) (in bank) ("The general rule is that statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject.") (citing I.E. Assocs. v. Safeco Title Ins. Co., 702 P.2d 596, 598 (Cal. 1985)); Gilger v. Hernandez, 997 P.2d 305, 308–09 (Utah 2000) (adopting language from *Barnett Bank*, 517 U.S. at 31); *see also* William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 657–59 (2006) (explaining the dangers in recognizing a judicially created tort remedy if a comprehensive statutory remedy exists).

96. *See Rojo*, 801 P.2d at 381; *Brooke*, 906 P.2d at 69; Helmick v. Cincinnati Word Processing, Inc., 543 N.E.2d 1212, 1215 (Ohio 1989); Schweitzer v. Rockwell Int'l, 586 A.2d 383, 387–89 (Pa. Super. Ct. 1990).

97. *See* cases cited *supra* note 96.

98. *See* Retherford v. AT&T Commc'ns of the Mountain States, Inc., 844 P.2d 949, 963 (Utah 1992) (citation omitted).

99. *Id.*

100. *See* Messick v. Toyota Motor Mfg., Inc., 45 F. Supp. 2d 578, 582 (E.D. Ky. 1999) (citing Rigazio v. Archdiocese of Louisville, 853 S.W.2d 295, 298–99 (Ky. Ct. App. 1993)) (stating that the Kentucky Civil Rights Act impliedly preempts intentional infliction of emotional distress claims based on sexual harassment because the tort of outrage is not intended to swallow up existing statutory recovery); Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993) (finding that Iowa's antidiscrimination statute preempts intentional infliction of emotional distress claims based on sexual harassment because the plaintiff could not establish the claim without first proving discrimination in violation of the statute); Hoffmann-La Roche Inc.v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004) (citing Standard Fruit & Veg. Co. v. Johnson, 985 S.W.2d 62, 68 (Tex. 1998)) (explaining that the Texas Commission on Human Rights Act impliedly preempts intentional infliction of emotional distress claims based on sexual harassment because outrage is "first and foremost, a 'gap-filler' tort, judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress").

101. *See, e.g.*, *Hoffmann-La Roche*, 144 S.W.3d at 442–45 (detailing an example of harassment by a supervisor).

emotional distress claim also violates the applicable state antidiscrimination statute.[102] The state antidiscrimination statute makes the employer liable for the conduct and provides a remedy, but the remedy includes a statutory cap on mental anguish and punitive damages.[103] The court reasons that the purpose of the intentional infliction of emotional distress claim is to provide a cause of action for egregious conduct that might otherwise go without a remedy; therefore, the tort should not be extended to circumvent a legislative limitation on claims for mental anguish and punitive damages.[104] When the statutory remedy is designed to cover the facts of the case, a plaintiff may not pursue an intentional infliction of emotional distress claim.[105]

The independence test—or indispensable element test—is a more nuanced test that considers whether the nature of the injuries alleged by the common law tort claim are distinct from the injuries that are the target of the state antidiscrimination statute.[106] Courts compare the interests protected by the antidiscrimination statute and those protected by the common law claim to check for variations.[107] Under this approach, an intentional infliction of emotional distress claim is not impliedly preempted by a state antidiscrimination statute when the interests sought to be protected by the statutory claim are not the same as those sought to be protected by the tort.[108] For example, Ohio and Pennsylvania courts have determined that intentional infliction of emotional distress claims and statutory discrimination claims are independent enough to thwart implied preemption.[109] This results from the fact that the Pennsylvania antidiscrimination statute targets the state's interest in eradicating specific forms of discrimination, whereas the intentional infliction of emotional distress tort "vindicates the personal interest of freedom from intentionally imposed mental anguish."[110]

With respect to the common law claims of assault, battery, intentional infliction of emotional distress, and negligent employment, the proper analytical approach for

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102. *See id.* at 446–48.

103. *See id.* at 446.

104. *Id.* at 447 (citing *Standard Fruit & Veg. Co.*, 985 S.W.2d at 68).

105. *See id.* at 448 ("If the gravamen of a plaintiff's complaint is the type of wrong that the statutory remedy was meant to cover, a plaintiff cannot maintain an intentional infliction claim regardless of whether he or she succeeds on, or even makes, a statutory claim.").

106. *See* Retherford v. AT&T Commc'ns of the Mountain States, Inc., 844 P.2d 949, 964–65 (Utah 1992).

107. *See, e.g.*, *id.* at 964–66 (detailing the inquiry made by the court when applying the indispensable element test).

108. *Id.*

109. Shaffer v. Nat'l Can Corp., 565 F. Supp. 909, 914 (E.D. Pa. 1983) (stating that plaintiff's interests sought to be protected by the Pennsylvania Human Relations Act and the intentional infliction of emotional distress tort are fundamentally different); Helmick v. Cincinnati Word Processing, Inc., 543 N.E.2d 1212, 1215 (Ohio 1989) ("[T]he burden of proof for discrimination under statute is quite different from any existing common-law tort and has its own elements and presumptions."); Schweitzer v. Rockwell Int'l, 586 A.2d 383, 389 (Pa. Super. Ct. 1990) (stating that the plaintiff's interests sought to be protected by the Pennsylvania Human Relations Act and those sought to be protected by the assault and outrage torts are fundamentally different).

110. *Shaffer*, 565 F. Supp. at 914.

determining implied preemption should not involve a timing test or a same conduct test. A timing test would draw lines between newer torts—intentional infliction of emotional distress and negligent employment—and older torts—assault and battery—that simply do not need to be drawn. It would be unfair to presume that the legislature intended to preempt newer torts that exist separate and apart from employment discrimination but not older torts that have a separate existence. Intentional infliction of emotional distress is a valid tort that cuts across different areas of the law. As such, it should not receive second class treatment. If the tort exists, it should be applied evenly. A same conduct test has similar shortcomings. The tort of intentional infliction of emotional distress is currently recognized almost universally as an actionable tort.[111] It may be historically correct to say that the tort originated to fill perceived gaps in the law, but that is how all common law torts developed.[112] It is not appropriate to single out intentional infliction of emotional distress claims for implied preemption because they do not have as much history behind them. If there is an underlying concern that the tort of outrage has become too unwieldy,[113] the tort should be outlawed across the board. But if the tort is to continue in existence, it should stand on equal footing with the older torts in the context of implied preemption arguments.

The gap-filler argument also loses some luster if one views the intentional infliction of emotional distress claim as especially significant in terms of the tort having an extremely high bar for recovery—to win such a case, the behavior involved has to be the lowest of the low in terms of conduct that society will not accept.[114] Lawyers know that safeguards have been put in place to make the tort of outrage especially difficult to prove.[115] Thus, it is certainly a rarity when facts rise

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111. *See supra* note 13 and accompanying text.

112. *See, e.g.*, William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 42–43 (1956) (explaining how the intentional infliction of emotional distress tort came to be recognized around 1930 as a cause of action in and of itself because there were too many cases involving intentional behavior that caused emotional disturbance that could not be grounded upon the traditional common law torts of assault, battery, false imprisonment, trespass to land, nuisance, or invasion of the right to privacy).

113. Objections to the tort of intentional infliction of emotional distress on the grounds of being incapable of measurement, too dependent on the variation of individual victims, and opening the flood gates to litigation based on trivialities, have existed prior to the recognition of the tort. *Id.* at 41–42 (citations omitted). Such objections undoubtedly persist to this day. *See, e.g.*, Leslie Benton Sandor & Carol Berry, *Recovery of Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment*, 37 ARIZ. L. REV. 1247, 1253–60 (1995) (describing the policy issues implicated by the tort of intentional infliction of emotional distress).

114. *See* Robel v. Roundup Corp., 59 P.3d 611, 620 (Wash. 2002) (en banc) ("[T]he standard for an outrage claim is admittedly very high (by which we mean that the conduct supporting the claim must be appallingly low) . . . .").

115. *See* Burroughs v. FFP Operating Partners, L.P., 28 F.3d 543, 549 (5th Cir. 1994) (explaining that the plaintiff's emotional injuries, which included being upset, depressed, unnerved, and mortified, were insufficient to meet the requisite standard for *severe* emotional distress since the plaintiff offered no "medical testimony describing any clinical manifestations of depression or other medical infirmities"); Archer v. Farmer Bros., 70 P.3d 495, 499 (Colo. Ct. App. 2002) ("[T]he level of outrageousness required to [prove intentional infliction of emotional distress] is extremely high.").

to the level of meeting each of the elements of this tort.[116] It is a relatively settled principle that proving a sexual harassment case under Title VII or a state antidiscrimination statute does not translate into proving an intentional infliction of emotional distress claim. The outrage claim requires a higher level of proof, more appalling conduct, and greater emotional suffering and injury than the statutory claim.[117] Because the law has developed in this way, it is no longer fair to say that the intentional infliction claim is just a gap-filler tort. The tort possesses a deeper meaning nowadays: It sets an extremely high standard so that satisfaction of that standard informs citizens that the conduct involved is of the type that the law considers to be the most egregious and which violators will pay the most for.

The preferred approach for determining whether a state antidiscrimination statute impliedly preempts the common law torts of assault, battery, intentional infliction of emotional distress, and negligent employment is four-fold. First, begin with the longstanding rule that statutes in derogation of the common law must be strictly construed.[118] Second, recognize that the interests protected by the state antidiscrimination statute are different from the interests protected by these common law torts.[119] Third, understand that these common law torts were not designed to address the problem of discrimination or some perceived gap in the discrimination statute; they were designed as claims of general applicability in which facts can arise to satisfy their elements.[120] Their existence separate and apart from discrimination belies any intent to have them impliedly preempted. These first three principles establish a strong, but rebuttable, presumption that the legislature did not intend to preempt the application of these claims to fact patterns that also give rise to a claim of statutory discrimination. This presumption is especially appropriate given the fact that legislatures know how to expressly provide an exclusive remedy by statute when desired.[121] Finally, the rebuttable presumption will only be overcome when there is *clear and compelling* evidence that the

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116. For some rare cases, see *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 317, 319 (Mass. 1976) (overruling the dismissal of an employee's outrage claim against her employer where the employer fired waitresses in alphabetical order until one of the waitresses admitted to a theft), and *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 617 (Tex. 1999) (finding that a manager's ongoing acts of harassment, physical intimidation, and humiliation, along with daily obscene and vulgar behavior, constituted extreme and outrageous conduct).

117. *See* Bigby v. Big 3 Supply Co., 937 P.2d 794, 800–01(Colo. Ct. App. 1996); Metro. Atlanta Rapid Transit Auth. v. Mosley, 634 S.E.2d 466, 470 n.7 (Ga. Ct. App. 2006); Fields v. Cummins Employees Fed. Credit Union, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989), *overruled on other grounds by* Wine-Settergren v. Lamey, 716 N.E.2d 381, 389 & n.8 (Ind. 1999).

118. *See supra* note 88 and accompanying text.

119. *See supra* notes 109–10 and accompanying text.

120. *See* discussion *supra* Part II.A.

121. *See* Rojo v. Kliger, 801 P.2d 373, 378 (Cal. 1990) (in bank) (finding that common law tort claims were not preempted by California's antidiscrimination statute because the California legislature did not include any express language manifesting an intent to abrogate common law remedies, as it had in other California statutes); Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1230 & n.66 (Okla. 1992) (acknowledging the express exclusivity provisions in other Oklahoma statutes as a reason not to find preemption of common law tort claims by the Oklahoma antidiscrimination statute which did not have an exclusive remedy provision).

structure of the antidiscrimination statute demonstrates a legislative intent to cover the field.[122] It should be very rare that the presumption is overcome. Factors to consider in this analysis include whether the statute applies to all employers in the state regardless of size, whether the statute allows for the filing of a discrimination claim in a court of law (as opposed to limiting a claim for discrimination to an administrative adjudication), and the scope of the remedial structure.[123]

B. Implied Preemption of "Dependent" Torts

The appropriate test to determine implied preemption of common law wrongful discharge claims based on employment discrimination is the antecedent test. The antecedent test works best because of the context in which these types of claims are usually created and because these claims cover the same ground as a statutory discrimination claim. There are several reasons why an antecedent test is preferable for wrongful discharge claims and not appropriate for the independent torts of assault, battery, intentional infliction of emotional distress, and negligent employment.

The antecedent approach—common law claims are not preempted if recognized before the enactment of the statute but are preempted if attempted to be created after the enactment of the statute—is a traditional approach to the preemption question.[124] State antidiscrimination statutes were enacted in an era when state common law almost universally did not recognize claims for employment discrimination.[125] If a unique state did recognize a common law remedy for any type of employment discrimination, the state's legislature, as it drafted and enacted its antidiscrimination statute, should have taken the existence of this unique common law remedy into consideration. Based on the established principle that a statutory remedy that postdates a common law right is presumed only cumulative, a legislature intending to preempt a preexisting common law claim for employment discrimination needed to do so explicitly.[126] Absent explicit preemption language, both the common law claim and statutory claim survive.[127]

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122. *See, e.g.*, Frost v. Geernaert, 246 Cal. Rptr. 440, 442 (Cal. Ct. App. 1988) (citing People v. Zikorus, 197 Cal. Rptr. 509, 512 (Cal. Ct. App. 1983)) ("[T]here is a presumption a statute does not, by implication, repeal the common law.").

123. *See supra* notes 96–97 and accompanying text.

124. *See supra* notes 90–92 and accompanying text.

125. *See, e.g.*, Pompey v. Gen. Motors Corp., 189 N.W.2d 243, 250–51 (Mich. 1971) (stating that prior to passage of its antidiscrimination statute in 1955, Michigan did not recognize a common law remedy for discrimination in employment based on race); Gottling v. P.R. Inc., 61 P.3d 989, 995 (Utah 2002) ("[N]o common law remedy for employment discrimination existed prior to the enactment of the [Utah Anti-Discrimination Act] in 1969.").

126. *See* Brooke v. Rest. Servs., Inc., 906 P.2d 66, 68 (Colo. 1995) ("[T]he creation of a private right of action by state statute does not bar pre-existing common law rights of action unless the legislature clearly expressed its intent to do so.").

127. The illustration is somewhat hypothetical in that several searches on LexisNexis did not reveal any jurisdictions that had formally recognized a common law remedy for discrimination prior to the enactment of a state antidiscrimination statute. However, some of these jurisdictions likely do exist. Even if a jurisdiction had not formally recognized such a common law remedy, a cobbled together

It is an entirely different story when, as is almost always the case, the jurisdiction had no existing common law remedy for employment discrimination prior to the enactment of the state's antidiscrimination statute. In that scenario, the state legislature is writing on a clean slate and deciding to create a new state remedy to address a particular ill—discrimination in employment. The legislature will necessarily craft an action and a remedy based on policy judgments. The legislature will decide what constitutes discrimination in employment, as well as the various categories—race, sex, age, religion, national origin, disability, marital status, sexual orientation—that it wishes the law to protect. The decisions made with respect to including or excluding protection for certain groups is entirely a legislative prerogative, and some legislatures will extend protection to more groups than other legislatures.[128] The legislature will also have to decide whether exemptions from the law will be created based on the size of the employer.[129] The idea that "mom and pop" outfits should not have to bear the burden of creating a personnel system aimed at stopping discrimination and of defending costly discrimination suits is codified in many state antidiscrimination statutes.[130] Whether one agrees with that policy choice is immaterial; it is enough to recognize that a legislative exemption for small employers is a policy choice. Finally, the legislature must make critical policy choices concerning whether it will provide a judicial avenue for private litigants to enforce the antidiscrimination statute and what remedies it will make available for obtaining relief under the statute.[131]

It is inevitable that the policy choices made by the state legislature will leave some plaintiffs out in the cold in terms of being unable to bring a statutory

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common law right from public policy, expressed in constitutions, other statutes, and case law, could be found in some jurisdictions. *See, e.g.*, Froyd v. Cook, 681 F. Supp. 669, 676 (E.D. Cal. 1988) ("[P]rior to enactment of FEHA, California's public policy prohibited . . . employment discrimination based on sex . . . .").

128. *Compare* Louisiana Employment Discrimination Law, LA. REV. STAT. ANN. §§ 23:301–:369 (1998 & Supp. 2007) (prohibiting employment discrimination because of age, disability, race, color, religion, sex, national origin, pregnancy, childbirth, or sickle cell trait), *with* New Hampshire Law Against Discrimination, N.H. REV. STAT. ANN. § 354-A:7 (LexisNexis Supp. 2006) (prohibiting employment discrimination because of age, sex, race, color, marital status, physical or mental disability, religious creed, national origin, or sexual orientation).

129. See *supra* note 18 for a partial list of state antidiscrimination statutes with a small employer exemption. Not all state antidiscrimination statutes have such an exemption. *See, e.g.*, S.D. CODIFIED LAWS § 20-13-1(7) (2004) (containing no specific threshold for coverage under the statute).

130. *See supra* note 18 and accompanying text.

131. *See supra* text accompanying notes 9–12 (summarizing variations in state antidiscrimination remedial packages). There is wide variance among state antidiscrimination statutes concerning administrative processes and when a lawsuit for discrimination under the applicable state statute may be pursued. Many statutes require exhaustion of administrative remedies as a prerequisite to suing in court. *See* COLO. REV. STAT. § 24-34-306(14) (2006). Some states have done away with the exhaustion of administrative remedies requirement. For example, Nebraska has enacted a procedural statute that allows plaintiffs to bring suit in state district court for violations of the Nebraska Fair Employment Practice Act without first exhausting administrative remedies. *See* NEB. REV. STAT. § 20-148 (1997); Goolsby v. Anderson, 549 N.W.2d 153, 157 (Neb. 1996) (per curiam). The rationale for this alternative remedy is to aid plaintiffs who would otherwise be "trapped in bureaucratic backlogs such as the one at [the Nebraska Equal Opportunity Commission]." *Goolsby*, 549 N.W.2d at 157–58.

discrimination claim; other plaintiffs will be able to bring a claim but may not like the forum available or the choice of remedies.[132] Yet, the antecedent test—a traditional test—dictates that the policy choices reflected in the state antidiscrimination statute be honored. The state antidiscrimination statute should preempt post-enactment attempts to mimic the statutory action through a duplicative common law discrimination action aimed at providing a remedy when the legislature has impliedly rejected one.

The model decision that came to the correct result in a case in which the aggrieved party tried to create a common law discrimination action after the enactment of a state antidiscrimination statute is *Gottling v. P.R. Inc.*[133] The Utah Supreme Court performed yeoman's work in avoiding the old adage that hard cases make bad law. In *Gottling*, a former female employee sued her former employer for allegedly terminating her employment because she refused to maintain a sexual relationship with the owner.[134] The Utah Anti-Discrimination Act (UADA) provides a remedy for aggrieved persons subjected to sexual harassment but only so long as the offending employer employs fifteen or more employees.[135] Unfortunately, the defendant employer in *Gottling* had less than fifteen employees; therefore, she could not pursue an action under UADA.[136] Instead, she pursued an action for wrongful termination in violation of an alleged public policy against sex discrimination.[137] The court concluded, however, that "the structure and purpose of . . . UADA clearly exhibit[ed] an implicit intent to preempt common law causes of action for employment discrimination by both large and small employers."[138] Accordingly, the court disallowed the action.[139]

The *Gottling* court made two central points in its decision that bolster the argument here. First, "no common law remedy for employment discrimination existed in Utah prior to the enactment of . . . UADA in 1969."[140] Thus, . . . UADA could in no way be interpreted as taking away a preexisting common law right. Instead, the Utah legislature, acting through . . . UADA, simply indicated its intent to preempt the creation of a new right.[141] Second, the balance of power on which our system of government depends counseled against crafting a remedy where the legislature intended no remedy to exist.[142] Whether or not it was a good idea to exempt approximately 70% of the Utah workforce from the state antidiscrimination statute through the small employer exemption was not the question. The court could not in good faith displace a legislative judgment because to do so would threaten

132. *See supra* text accompanying notes 128–31.
133. 61 P.3d 989 (Utah 2002).
134. *Id.* at 990.
135. *Id.* (citations omitted).
136. *Id.* at 991.
137. *Id.*
138. *Id.* at 994.
139. *Id.* at 997.
140. *Id.* at 995.
141. *Id.* at 997.
142. *Id.* at 998.

government by the people through their elected representatives.[143] If the small employer exemption is a bad idea, the petition for change should be made to the Utah legislature.[144]

The Utah approach to post-enactment attempts to create a common law action to overcome statutory restrictions in a state antidiscrimination statute is not followed by all states.[145] For example, Oregon takes the exact opposite approach, presuming that the courts are free to create a duplicative common law wrongful discharge action for sexual harassment after the enactment of the state antidiscrimination statute because a legislature cannot intend to eliminate certain remedies unless those remedies already exist.[146] In spite of the existence of alternative approaches, the Utah approach still stands out as an example to be followed. It makes the most sense in terms of historical development of employment discrimination law and adherence to the will of the citizenry acting through its chosen representatives.

IV. APPLICATION TO CURRENT LAWS OF SEVERAL STATES AND FUTURE LEGISLATIVE ACTION

A. Application of Principles to Various Jurisdictions

The preemption principles espoused in this Article may be used to analyze whether a state's antidiscrimination statute impliedly preempts the state's common law torts. The following Part analyzes three jurisdictions: New Mexico, Nevada, and Nebraska. Each one of these states has a slightly different antidiscrimination statute, but the end result regarding preemption should be the same: the independent torts should not be preempted; the dependent tort of wrongful discharge should be preempted.

1. New Mexico

New Mexico has a state antidiscrimination statute that prohibits discrimination in employment called the New Mexico Human Rights Act (NMHRA).[147] NMHRA was passed in 1969[148] and has been amended multiple times.[149] The statute makes

143. *Id.*

144. *Id.*

145. *See* Saint v. Data Exch., Inc., 145 P.3d 1037, 1037 (Okla. 2006); Collier v. Insignia Fin. Group, 981 P.2d 321, 326 (Okla. 1999); Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1225–26 (Okla. 1992); Weaver v. Harpster, 885 A.2d 1073, 1078 (Pa. Super. Ct. 2005); Harmon v. Higgins, 426 S.E.2d 344, 346 (W. Va. 1992).

146. Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 1303 (Or. 1984) (in banc).

147. New Mexico Human Rights Act, N.M. STAT. ANN. §§ 28-1-1 to -15 (LexisNexis 2004 & Supp. 2006).

148. New Mexico Human Rights Act, 1969 N.M. Laws 704.

149. *See, e.g.*, Labor Department Act, 1987 N.M. Laws 2515 (amending various provisions throughout the Act); *see also* Gonzalez v. N.M. Dep't of Health, 11 P.3d 550, 553 (N.M. 2000) (enumerating some of the amendments made to NMHRA in 1991, 1993, 1995, and 2000).

it illegal for an employer to discriminate in employment on the basis of race, sex, age, etc.[150] An "employer" means "any person employing four or more persons and any person acting for an employer."[151] The Act allows an aggrieved person to sue in district court after exhausting administrative remedies with the New Mexico Human Rights Commission of the Department of Labor.[152] The statute entitles a prevailing plaintiff in an NMHRA case to actual damages and attorney's fees.[153] The phrase "actual damages," as used in NMHRA, includes compensatory damages but does not include punitive damages.[154] NMHRA does not contain any exclusive remedy or preemption language.[155]

New Mexico law recognizes common law actions for intentional infliction of emotional distress, prima facie tort, assault, and battery.[156] The New Mexico Workers' Compensation Act's exclusivity provision does not bar an employee's common law tort claims based on injuries resulting from sexual harassment in the workplace.[157] Because the Workers' Compensation Act does not bar common law claims arising from sexual harassment, the antidiscrimination preemption question is especially important under New Mexico law.

Due to the absence of any express preemption language in NMHRA, the rebuttable presumption is that claims for intentional infliction of emotional distress, prima facie tort, assault, and battery, based on facts that would also apply to NMHRA, are not impliedly preempted by the statute. The specificities of the statute do not overcome the presumption. Although the statute permits the filing of an action in court after exhaustion of administrative remedies,[158] coverage does not apply to all employers.[159] Moreover, the statutory remedies are limited because punitive damages are disallowed.[160]

The New Mexico Supreme Court has never directly spoken to the antidiscrimination preemption question in the context of independent torts like outrage, but the New Mexico Court of Appeals ruled in a 1995 opinion that NMHRA does not preclude plaintiffs from pursuing common law tort claims that are also actionable under NMHRA.[161] If the question ever comes before the New Mexico Supreme Court, the decision of the state court of appeals should be followed. In fact, relatively recent case law out of the New Mexico Supreme Court suggests that NMHRA does not impliedly preempt intentional infliction of

150. N.M. STAT. ANN. § 28-1-7(A) (LexisNexis Supp. 2006).

151. *Id.* § 28-1-2(B) (LexisNexis 2004).

152. *See id.* § 28-1-13(A) (LexisNexis Supp. 2006).

153. *Id.* § 28-1-13(D).

154. *See* Behrmann v. Phototron Corp., 795 P.2d 1015, 1020 (N.M. 1990).

155. *See* §§ 28-1-1 to -15 (LexisNexis 2004 & Supp. 2006).

156. *See* Weinstein v. Santa Fe, 916 P.2d 1313, 1319–20 (N.M. 1996); Beavers v. Johnson Controls World Servs., Inc., 901 P.2d 761, 769–70 (N.M. Ct. App. 1995).

157. *See* Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1005 (N.M. 1999).

158. *See supra* note 152 and accompanying text.

159. *See supra* note 151 and accompanying text.

160. *See supra* note 154 and accompanying text.

161. *See Beavers*, 901 P.2d at 769 (following Phifer v. Herbert, 848 P.2d 5, 8 (N.M. Ct. App. 1993)).

emotional distress claims. In *Coates v. Wal-Mart Stores, Inc.*,[162] the court upheld a jury verdict on an intentional infliction of emotional distress claim that provided compensatory and punitive damages to the plaintiffs.[163] The plaintiffs based their intentional infliction of emotional distress claims upon allegations that their supervisor sexually harassed them and their employer allowed the harassment to continue with utter indifference to the consequences.[164] The combined compensatory damages for the plaintiffs' intentional infliction of emotional distress claims were $45,000.[165] The combined punitive damages for all of the tort claims were $1,755,000.[166] The court upheld the full damages amount.[167]

Another reason to believe that NMHRA does not preempt independent torts is that the New Mexico Supreme Court has taken the further step of ruling that the statute does not impliedly preempt the tort of retaliatory discharge. In *Gandy v. Wal-Mart Stores, Inc.*,[168] the plaintiff asserted a common law claim for retaliatory discharge based on her contention that she was terminated from her employment after she filed a discrimination charge against her employer with the New Mexico Human Rights Division.[169] Her allegations of retaliation were actionable under the retaliation provision in NMHRA,[170] yet she phrased her claim as a common law retaliatory discharge claim and not as a statutory retaliation claim.[171] The *Gandy* court held that the common law retaliatory discharge claim was not impliedly preempted by NMHRA because the statutory administrative scheme and remedy were not comprehensive.[172]

The *Gandy* court's reasoning would have been entirely appropriate had it been addressing an independent tort like intentional infliction of emotional distress, but the common law retaliatory discharge tort is really a dependent tort, like a common law wrongful discharge claim based on employment discrimination. The retaliatory discharge claim does not exist outside the parameters of employment discrimination and retaliation law.[173] Under the antecedent test outlined in this Article,[174] the *Gandy* court should have ruled that NMHRA impliedly preempted the claim if the retaliatory discharge tort was not recognized under New Mexico law until after the enactment of NMHRA. This appears to be the case. The New Mexico legislature

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162. 976 P.2d 999 (N.M. 1999).
163. *Id.* at 1009.
164. *Id.* at 1002–03.
165. *Id.* at 1003.
166. *Id.*
167. *Id.* at 1010–11.
168. 872 P.2d 859 (N.M. 1994).
169. *Id.* at 859.
170. *See* N.M. STAT. ANN. § 28-1-7(I)(2) (LexisNexis Supp. 2006).
171. *Gandy*, 872 P.2d at 859–60.
172. *Id.* at 861.
173. *See, e.g.*, New Horizons Elecs. Mktg., Inc. v. Clarion Corp. of Am., 561 N.E.2d 283, 285 (Ill. App. Ct. 1990) (noting that the Illinois Supreme Court has not expanded retaliatory discharge outside the employment setting).
174. *See supra* notes 90–92 and accompanying text.

enacted NMHRA in 1969.[175] New Mexico law did not recognize the retaliatory discharge tort until 1983.[176]

2. Nevada

The Nevada antidiscrimination statute makes it unlawful to discriminate in employment on the basis of race, color, religion, sex, sexual orientation, age, disability, or national origin.[177] The statute only applies to employers with fifteen or more employees.[178] Complainants must exhaust administrative remedies under the state statute before filing a case in state court.[179] It appears that the statutory remedies available to a prevailing plaintiff under the Nevada antidiscrimination statute include back pay, injunctive relief, compensatory damages, and punitive damages.[180] Nevada law recognizes the tort of intentional infliction of emotional distress in the employment termination context.[181]

The Nevada antidiscrimination statute, like the New Mexico statute, does not have any express preemption language.[182] Therefore, the rebuttable presumption is that the Nevada statute does not preempt independent torts like intentional infliction of emotional distress.[183] Whether the Nevada statutory scheme is sufficiently comprehensive to overcome the presumption is a closer question under Nevada law than it is under New Mexico law. Both New Mexico and Nevada require administrative exhaustion before filing suit in a court of law.[184] New Mexico covers more employers than Nevada.[185] The primary factor weighing in favor of preemption in Nevada is that the Nevada statutory remedy appears to provide a fuller remedial system than New Mexico, including compensatory and punitive damages.[186] If the Nevada statutory scheme applied to more employers, the

175. New Mexico Human Rights Act, 1969 N.M. Laws 704.

176. *Gandy*, 872 P.2d at 860 (citing Vigil v. Arzola, 699 P.2d 613, 619 (N.M. Ct. App. 1983), *rev'd on other grounds*, 687 P.2d 1038, 1039 (N.M. 1984)).

177. NEV. REV. STAT. ANN. § 613.330(1)(a) (LexisNexis 2006).

178. *Id.* § 613.310(2).

179. *See* Palmer v. State, 787 P.2d 803, 804 (Nev. 1990) (per curiam).

180. *See* Canada v. Boyd Group, Inc., 809 F. Supp. 771, 782 (D. Nev. 1992).

181. *See* L.S. Shoen v. Amerco, Inc., 896 P.2d 469, 476 (Nev. 1995) (per curiam) (citing MGM Grand Hotel-Reno, Inc. v. Insley, 728 P.2d 821, 825–26 (Nev. 1986) (per curiam)).

182. *See* NEV. REV. STAT. ANN. §§ 613.310–.435 (LexisNexis 2006).

183. *See* discussion *supra* Part III.A.

184. *Compare* N.M. STAT. ANN. § 28-1-13(A) (LexisNexis Supp. 2006) (allowing a complainant to sue in district court after exhausting administrative remedies), *with Palmer*, 787 P.2d at 804 (stating complainants must exhaust their administrative remedies under the state statute before filing a claim in state court).

185. *Compare* N.M. STAT. ANN. § 28-1-2(B) (LexisNexis 2004) (applying to employers with four or more employees), *with* NEV. REV. STAT. ANN. §613.310(2) (applying to employers with fifteen or more employees).

186. *Compare* Behrmann v. Phototron Corp., 795 P.2d 1015, 1020 (N.M. 1990) (allowing a plaintiff to recover compensatory damages but not punitive damages), *with* Canada v. Boyd Group, Inc., 809 F. Supp. 771, 782 (D. Nev. 1992) (allowing a plaintiff to recover compensatory and punitive damages).

preemption question would hang in the balance given the strong remedial system. However, because of the significant small employer exemption, the presumption against implied preemption for intentional infliction of emotional distress should not be overcome.[187]

The Nevada statute should preempt common law wrongful discharge actions based on employment discrimination. Nevada did not recognize such claims at common law prior to the enactment of the antidiscrimination statute.[188] Thus, the Nevada courts should rebuff the understandable impulse to create such a post-statutory enactment action for equitable reasons. In *Chavez v. Sievers*,[189] the Nevada Supreme Court appropriately rejected an entreaty to recognize, for the first time, a common law tortious action based on racial discrimination in employment against Nevada employers not covered by the antidiscrimination statute.[190] The *Chavez* court reasoned that, though racial discrimination is wrong and against Nevada public policy, the policy choice made by the Nevada legislature—that small businesses should not be subject to racial discrimination suits—must be honored.[191]

3. *Nebraska*

Nebraska illustrates an even stronger case against implied preemption of independent torts. The Nebraska profile is similar to the states already described. The Nebraska Fair Employment Practice Act (NFEPA)[192] includes a fifteen employee threshold for coverage[193] and a remedial package that includes general and special damages.[194] It does not specifically provide for the recovery of punitive damages.[195] Nebraska has also enacted a procedural statute that allows plaintiffs to sue in state district court for NFEPA violations without first exhausting administrative remedies.[196] The case against implied preemption of independent torts is iron clad because NFEPA specifically states it does not "repeal . . . any other law of this state . . . relating to discrimination because of race, creed, color, religion,

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187. The Nevada Supreme Court has not directly addressed whether the Nevada antidiscrimination statute preempts a plaintiff's intentional infliction of emotional distress claim arising out of discriminatory harassment. There is, however, a Nevada federal district court decision opining that, if presented with the issue, the Nevada Supreme Court would hold Nevada's antidiscrimination law does not preempt that type of common law tort claim. Burns v. Mayer, 175 F. Supp. 2d 1259, 1267–68 (D. Nev. 2001) (citing to Arizona and California case law as the basis for its decision).

188. *See supra* note 127.

189. 43 P.3d 1022 (Nev. 2002) (en banc).

190. *Id.* at 1024.

191. *Id.* at 1025–26.

192. NEB. REV. STAT. §§ 48-1101 to -1126 (2004).

193. *Id.* § 48-1102(2).

194. *Id.* § 48-1119(4). Special damages are generally interpreted to include nonpecuniary damages like emotional distress and mental anguish. *See* Jarod S. Gonzalez, *SOX, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act Whistleblower Claims and Jury Trials*, 9 U. PA. J. LAB. & EMP. L. 25, 49 (2006).

195. *See* NEB. REV. STAT § 48-1119(4).

196. *See id.* § 20-148 (1997).

sex, disability, or national origin."[197] The Nebraska language prohibiting repeal of other state laws relating to employment discrimination should not affect the preemption question, as it relates to post-enactment common law wrongful discharge claims based on employment discrimination, and refusing to create such a duplicative action should not constitute repealing a state employment discrimination law. Deference to the legislature concerning policy choices made as to dependent torts should still prevail.

B. Lessons for Future Legislative Action

It may appear on the surface that the core of this Article's argument is inexplicably inconsistent. The lack of a comprehensive statutory scheme and remedy defeats implied preemption as to intentional infliction of emotional distress claims; yet, the same cuts in favor of implied preemption of post-enactment wrongful discharge claims.[198] The argument is pragmatic, but it is not inconsistent. The illusion of inconsistency exists because of the inherent difficulty in discerning legislative intent from legislative silence. The approach advocated is simply an attempt to infer the intended preemption result in dissimilar situations. For the reasons described in this Article, it makes the most sense to treat independent torts differently from dependent torts for purposes of implied preemption.[199] Legislative silence is insufficient to preempt torts that exist outside the employment discrimination arena, but it is sufficient to preempt common law wrongful discharge claims that would simply replace policy choices made by the legislature.[200]

Of course, all of this line drawing would be unnecessary if legislatures took more care in providing explicit direction in the statutes concerning preemption of common law claims. It is somewhat befuddling, given the sophistication of the preemption issues involved, that state antidiscrimination statutes often contain no preemption language whatsoever.[201] Legislatures do, in other areas, provide guidance concerning the exclusiveness, or lack thereof, of a statutory remedy.[202] For whatever reason, that guidance is often lacking in this area and thus, out of necessity, places the courts in the position of trying to connect the dots without a ruler.

This Article establishes some common sense principles for courts to utilize in ruling on the preemption of common law claims by state antidiscrimination statutes. The principles are informed by a body of law that has developed in individual jurisdictions over the last twenty-five years. The principles may be used by courts that have not addressed these preemption questions or by courts that may wish to reconsider previously decided opinions on these questions. State legislatures should

197. *Id.* § 48-1124 (2004).
198. *See* discussion *supra* Part IV.A.
199. *See* discussion *supra* Parts II, III.
200. *See* discussion *supra* Part III.
201. *See* discussion *supra* Part IV.A.1–2.
202. *See supra* note 121.

also take heed to the default rule established by this Article, as well as to other approaches to the implied preemption question, because the varied approaches demonstrate the unpredictability present in determining implied preemption questions. The power to shape preemption law rests with the legislature, but silence is abdication of that power and will lead the courts to do the best they can to provide a just solution to differing factual scenarios.

State legislatures may choose not to amend their own antidiscrimination statutes, especially if the courts in a particular jurisdiction are resolving the unanswered preemption questions in a satisfactory manner. However, this issue will not go away. The common law develops to address present and future problems in the employment field. When a legislature acts on these problems, sometimes a step behind the common law, the issue of whether the statute supplants the common law or is merely cumulative is an important question.[203] If our judicial system believes in the continued vitality and importance of the law, which it should, the common law should not be lightly eschewed unless there is a clear legislative direction to do so.

V. CONCLUSION

Return at last to your most egregious racial or sexual harassment case. If your jurisdiction has a state antidiscrimination statute and that statute is silent on the preemption question, this Article posits that the aggrieved plaintiff should be able to pursue an intentional infliction of emotional distress claim. If such a claim is established, the plaintiff should be able to seek recovery from amongst the gamut of traditional common law remedies. The common law wrongful discharge claim for discriminatory harassment, however, is impliedly preempted, even if the aggrieved plaintiff has no remedy under the state statute due to lack of coverage.

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203. *See* Nelson v. United Techs., 88 Cal. Rptr. 2d 239, 248 (Cal. Ct. App. 1999) (ruling that the California Family Rights Act does not preempt a wrongful discharge tort claim based upon violation of the Act).

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