STATE ANTI-DISCRIMINATION STATUTES AND IMPLIED PREEMPTION OF COMMON LAW TORTS: VALUING THE COMMON LAW

Jarod S. Gonzalez
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“[E]mployment discrimination cases, by their very nature, involve several causes of action arising from the same set of facts. A responsible attorney handling an employment discrimination case must plead a variety of statutory, tort and contract causes of action in order to fully protect the interests of his or her client.” Brown v. Superior Court, 691 P.2d 272, 277 (Cal. 1984).

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ABSTRACT

Many states have their own antidiscrimination statute that, like federal law, prohibits discrimination in employment because of prohibited characteristics such as race, sex, age, religion, national origin, and disability. In certain cases, a particular set of facts involving sexual, racial, or disability harassment could satisfy the required elements of a state common law tort and a state statutory antidiscrimination claim. It benefits the aggrieved plaintiff to pursue both a common law tort action and a state statutory discrimination action against the employer when the common law tort provides for greater remedies, as is sometimes the case. But when a common law tort claim is asserted, employers often argue that the presence of the state antidiscrimination statute impliedly preempts the common law tort claim.

In the absence of specific preemption language in a state antidiscrimination statute, principles must be established for determining whether the antidiscrimination statute preempts the common law. My article, State Anti-Discrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law, argues that the legal analysis for determining whether a state antidiscrimination statute preempts common law tort claims based on employment 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 have no recognition under a state’s common law prior to the enactment of the state antidiscrimination statute. Recognized common-law wrongful discharge torts that exist prior to the enactment of a state antidiscrimination statute are not impliedly preempted.

The implied preemption question has been addressed by the highest courts in several states with varying results. Some states have yet to fully address this question. The article adds a voice to the continuing development of the law in this area and also applies to future implied preemption questions that may arise because of state legislative actions and the development of the common law in the employment law arena.
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 your mind. Perhaps it a despicable sexual harassment case in which the victim informed the employer of the harassment but was left to suffer immeasurably as the employer did nothing to stop the situation.\(^1\) Maybe it is a racial harassment case that follows along the same lines.\(^2\) Regardless of the fact pattern that is most outrageous to you, Title VII of the Civil Rights of 1964, as amended, places a cap on the amount of compensatory damages—i.e., emotional pain, suffering, and mental anguish—and punitive damages recoverable against an employer under federal law for sexual or racial harassment, or any other type of employment discrimination for that matter.\(^3\) 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 remedy or a lesser remedy for such a violation than federal law.\(^6\)

The vast majority of states, in fact, have their own antidiscrimination statutes that, like federal law, prohibit discrimination because of 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 a violation of their particular state antidiscrimination statute. For example, some state antidiscrimination statutes cap the amount of compensatory and punitive damages recoverable in an employment discrimination case along the lines of Title VII.\(^9\) Other

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\(^1\) See Ford v. Revlon, Inc., 734 P.2d 580 (Ariz. 1987) (sexual harassment victim attempts suicide after employer repeatedly fails to intervene to stop the harassment).
\(^2\) See Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991) (racial harassment over a decade-long period of time that involved racist name-calling, jokes, graffiti, and threats among other racially-harassing actions).
\(^3\) See 42 U.S.C. § 1981a(b)(3).
\(^4\) Id. at § 1981a(b)(3)(D).
\(^5\) See 42 U.S.C. § 2000e-7 (“Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, 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) (Title VII does not preempt state common law claim for intentional infliction of emotional distress based on sexual harassment).
\(^7\) Mississippi and Alabama do not have state antidiscrimination statutes. Georgia does not have a state antidiscrimination statute applicable to private employers. It does have a state antidiscrimination statute that applies to public employers called the Georgia Fair Employment Practices Act of 1978, GA. CODE ANN. § 45-19-20 et seq. (2007).
state statutes do not allow for the recovery of compensatory or punitive damages at all.\textsuperscript{10} Some state statutes permit the recovery of compensatory damages but not punitive damages.\textsuperscript{11} Conversely, other state statutes allow the recovery of both compensatory and punitive damages and place no specific discrimination-related caps on the recovery of those types of damages.\textsuperscript{12}

As a practical matter, unless an aggrieved employment discrimination plaintiff is in a state jurisdiction that has a state 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 evaluate whether the employer can be sued for violating the state’s common law. For example, almost all state jurisdictions recognize a cause of action for intentional infliction of emotional distress.\textsuperscript{13} Egregious employment discrimination in the form of sexual or racial harassment can satisfy the elements of an intentional infliction of emotional distress claim. And, 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.\textsuperscript{14} In addition,
some states also recognize common law “public policy” exception claims for employment discrimination, which provide traditional tort remedies. The torts of assault, battery, and negligent employment could also apply to claims of supervisory harassment based on race or sex with traditional tort remedies available.

These common law torts may be beneficial to aggrieved employment discrimination plaintiffs for two further reasons. First, numerous state antidiscrimination statutes do not cover employers that have a small number of employees. These state statutes roughly parallel the 15-employee threshold for coverage under Title VII, although some provide broader coverage than Title VII. If an aggrieved employment discrimination plaintiff works for a smaller company that is not covered by the state antidiscrimination statute, common law torts may be the only viable option for seeking redress for his or her injuries. Second, many state antidiscrimination statutes require exhaustion of administrative remedies (i.e., filing a charge of discrimination with the state equal employment opportunity commission) before suing in court for a violation of the statute. 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, the Texas Workforce Commission, Civil Rights Division. 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

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17 See NEV. REV. STAT. § 613.310(2) (2007) (Nevada) (15-employee threshold for coverage); N.M. STAT. § 28-1-2(B) (2007) (New Mexico) (4-employee threshold for coverage); OHIO REV. CODE § 4112.01(A)(2) (2007) (Ohio) (4-employee threshold for coverage); TENN. CODE ANN. § 4-22-102(4) (Tennessee) (8-employee threshold for coverage); TEX. LAB. CODE § 21.002(8)(A) (Texas) (15-employee threshold for coverage); UTAH CODE ANN. § 34A-5-102(8)(a)(iv) (Utah) (15-employee threshold for coverage); WASH. REV. CODE § 49.60.040(3) (Washington) (8-employee threshold for coverage); W. VA. CODE § 5-11-3(d) (West Virginia) (12-employee threshold for coverage).

18 Id.

19 See Weaver v. Harpster & Shipman Financial Services, 885 A.2d 1073, 1078 (Pa. Super. Ct. 20005) (appellate court recognized a common-law wrongful discharge claim for sexual harassment as a public policy exception to the at-will rule where the employer was not covered by the Pennsylvania Human Rights Act because it had less than four employees).


least two years.\textsuperscript{22} Give 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 explained, the common law can be a critical resource for employment discrimination complainants. It is very clear that Title VII does not stand in the way of a complainant utilizing his or her own state’s common law to pursue a recovery against his or her employer.\textsuperscript{23} 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 been struggling 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.\textsuperscript{24} Second, whether the state’s antidiscrimination statute preempts common law tort claims based on unlawful discriminatory harassment.\textsuperscript{25}

\footnotesize
\textsuperscript{22} Claims for intentional infliction of emotional distress under Louisiana law are governed by the one-year prescriptive period for delictual actions in \textsc{La. Civ. Code Ann.} art. 3492. \textit{See} King v. Phelps Dunbar, L.L.P., 743 So.2d 181, 187 (La. 1999). The applicable limitations period for claims of intentional infliction of emotional distress, assault, and battery under Texas law is two years. \textit{See} \textsc{Tex. Civ. Prac. & Rem. Code} § 16.003(a); Bhalli v. Methodist Hospital, 896 S.W.2d 207, 211 (Tex. App.—Houston [1st Dist.] 1995) (applicable limitations period for a claim of intentional infliction of emotional distress is two years from the accrual of the cause of action); Brandon v. Southwest Airlines Co., 2006 Tex. App. LEXIS 7630, *4 (Tex. App.—San Antonio August 30, 2006) (limitations period applicable to battery, negligence, and intentional infliction of emotional distress is two years).

\textsuperscript{23} \textit{See supra} note 5.

\textsuperscript{24} \textit{Compare} Konstantopoulos v. Westvaco Corp., 690 A.2d 936 (Del. 1996) (Delaware Workers’ Compensation Act bars an employee from asserting a common law tort claim against her employer for a claim of sexual harassment arising out of employment) \textit{with} Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099 (Fla. 1989) (exclusivity rule of Florida workers’ compensation statute does not bar the common law tort claims of assault, intentional infliction of emotional distress, or battery arising from sexual harassment).

\textsuperscript{25} \textit{Compare} Greenland v. Fairtron Corp., 500 N.W.2d 36 (Iowa 1993) (Iowa Civil Rights Act is the exclusive state remedy for employment discrimination and therefore preempts a common law claim for intentional infliction of emotional distress premised upon events that constitute sexual harassment) \textit{with} Helmick v. Cincinnati Word Processing, Inc., 543 N.E.2d 1212 (Ohio 1989) (Ohio antidiscrimination statute does not preempt common law intentional tort claims like intentional infliction of emotional distress, battery, assault, and invasion of privacy arising out of workplace sexual harassment).
This article is directed at the second of these two questions. Some states have already had their highest state court rule on the state antidiscrimination statute preemption issue, but several states have not directly addressed the issue. 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, it is hoped that this inquiry sheds light on resolving perceived conflicts between future state statutory enactments and state common law in the employment arena.

The article assumes, as it must, as a bedrock principle that a state legislature has the power to preempt common law tort claims based on unlawful discrimination if it so

26 The first question is certainly important. In general, 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 Busby v. Truswal Sys. Corp., 551 So.2d 322 (Ala. 1989). Other courts hold that discriminatory harassment is not an “accidental injury” or a risk inherently connected to the workplace and thus no preemption. See Horodyski v. Karanian, 32 P.3d 470 (Colo. 2001); Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1005 (N.M. 1999); Furukawa v. Honolulu Zoological Society, 936 P.2d 643, 653 (Haw. 1997); Murphy v. ARA Servs., Inc., 298 S.E.2d 528, 531-32 (Ga. Ct. App. 1982); Burns v. Mayer, 175 F. Supp. 2d 1259, 1267 (D. Nev. 2001). The most persuasive reason is simply that public policy against discriminatory harassment is undermined where a court applies the exclusivity rule of workers’ compensation to preclude any and all tort liability. See Byrd v. Richardson-Greenshields Securities, Inc., 552 So.2d 1099, 1104 (Fla. 1989) (“The clear public policy emanating from federal and Florida law holds than 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 the 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 (2d Cir. 2001) (applying New York law); Konstantopoulos v. Westvaco Corp., 690 A.2d 936 (Del. 1996); Knox v. Combined Ins. Co. of America, 542 A.2d 363, 364-367 (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, LARSON’S WORKER’S COMPENSATION LAW § 103-§ 105 (Matthew Bender 2005). 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.

desires and may exercise that power through explicit preemption language. 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 the aggrieved plaintiff against his or her employer or former employer, not a suit against an individual.

This article proposes that the legal analysis for determining whether a state antidiscrimination statute preempts common law tort claims based on employment 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 have no recognition under a state’s common law prior to the enactment of the state antidiscrimination statute. Recognized common-law wrongful discharge torts that exist 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.

28 See Maksimovic v. Tsogalis, 687 N.E.2d 21, 24 (Ill. 1997) (“Common law rights and remedies are in full force in this state [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).

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, also known as the tort of outrage. Originally recognized by the First Restatement in 1934, most all jurisdictions have now adopted intentional infliction of emotional distress as an actionable tort. The elements of an outrage claim are as follows: (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 emotional distress was severe. The Second Restatement places strict limits on the tort by appropriately setting a high standard for outrageous conduct and severe emotional distress. In determining the severity of the distress, physical injury is not required, but evidence of physical harm is a factor. The tort is applicable to employment disputes but is not necessarily aimed at employment disputes. Intentional infliction of emotional distress claims have arisen in a variety of contexts including domestic and commercial life. Indeed, none of the illustrations in the Second Restatement concerning liability for the tort of outrage directly involve employment-related fact patterns.

30 See Restatement (Second) of Torts § 46 (1965).
31 See First Restatement of Torts § 46 (1934); John Diamond, Lawrence Levine, and M. Stuart Madden, Understanding Torts 22 (1996 ed.) (“general recognition of the [IIED] tort was roughly commensurate with its endorsement by the First Restatement in 1934.”); supra note 13.
33 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 Restatement (Second) of Torts § 46 cmt. j (1965) (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.”).
34 See Hatfield, 606 P.2d at 953-54; Restatement (Second) of Torts § 46 cmt. k (1965).
36 See Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993) (intentional infliction of emotional distress may be brought in a divorce proceeding); Dawson v. Associates Financial Services, 520 P.2d 104, 111 (Kan. 1974) (holding that “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 results to the debtor from it, for such bodily harm.”).
37 See Restatement (Second) of Torts § 46 illustrations 1-22 (1965).
2. **ASSAULT AND BATTERY**

Assault and battery are long-standing intentional torts recognized at common law.\(^{38}\) A battery takes place when “the defendant’s acts intentionally cause harmful or offensive contact with the victim’s person.”\(^{39}\) Assault occurs when “the defendant’s acts intentionally cause the victim’s reasonable apprehension of immediate harmful or offensive contact.”\(^{40}\) Assault and battery existed long before state and federal legislatures became interested in sexual harassment and redress violations of bodily integrity and personal liberty.\(^{41}\) 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.\(^{42}\)

3. **NEGLIGENCE 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.\(^{43}\) The general negligent hiring rule is geared toward protecting fellow employees and the public from workers who are unsafe or dangerous on the job.\(^{44}\) In some jurisdictions, a negligent hiring and retention claim can be based on an employee’s intentional tort committed outside the scope of employment.\(^{45}\) 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.\(^{46}\) The tort is broad enough to cover all sorts of wrongdoing committed by employees while on the job.\(^{47}\) It may include, but is not limited to, claims of discriminatory harassment committed by a supervisor against a subordinate employee.\(^{48}\)

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\(^{39}\) Diamond, supra note 31 at 6. See also Restatement (Second) of Torts §§ 13, 18 (1965); Black’s Law Dictionary 104-05 (Abridged 6th ed. 1991).

\(^{40}\) Diamond, supra note 31 at 9. See also Restatement (Second) of Torts § 21 (1965); Black’s Law Dictionary 75 (Abridged 6th ed. 1991).

\(^{41}\) See Maksimovic v. Tsogalis, 687 N.E.2d 21, 24 (Ill. 1997).

\(^{42}\) See Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990); Minn. Stat. § 363A.03, Subd. 43 (2006) (“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 . . . (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).


\(^{44}\) See Wise v. Complete Staffing Servs., Inc., 56 S.W.3d 900, 903 (Tex. App.—Texarkana 2001, no pet.); Estate of Arrington v. Fields, 578 S.W.2d 173, 178 (Tex. App.—Tyler 1979, writ ref’d n.r.e.).


\(^{46}\) Id.; but see Urdales v. Concord Tech. Delaware, Inc., 120 S.W.3d 400 (Tex. App.—Houston [14th Dist.] 2003) (employee’s negligent hiring claim, based on supervisor’s battery, barred by worker’s comp.).

\(^{47}\) See, e.g., Richard Carlson, Employment Law 105-108 (2005).

\(^{48}\) See, e.g., Retherford v. AT&T Communications, 844 P.2d 949 (Utah 1992).
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 common law intentional infliction of emotional distress, battery, assault, negligent retention, negligent hiring, and negligent supervision. With respect to the negligence causes of action, the employee is directly liable for its own acts or omissions in hiring, supervising, and retaining employees which proximately cause injury to the harassed victim. 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. Intentional torts arising from sexual harassment, racial harassment, and disability harassment are typically not considered to be actions within the scope of employment. 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 aided-in-agency standard of the Second Restatement of Agency is satisfied. In other words, the discriminatory harassment victim may prevail against the employer based on these intentional torts if he or she presents sufficient evidence that the harasser’s supervisory authority aided him in the commission of the torts. Under Washington law, an employer’s liability for intentional torts based on harassment is possible because harassment may take place within the scope of employment. In a unique case, a deli worker who was tormented by fellow employees allegedly because of her disability won a judgment against her employer on her intentional infliction of emotional distress claim. The Washington Supreme Court upheld the judgment on the ground that the employer was vicariously liable for the intentional infliction of emotional distress claim.

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49 See supra Part II.A.1.-3.
50 See supra note 43.
51 See Ocana v. American Furniture Co., 91 P.3d 58, 70-71 (N.M. 2004) (“an 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.”).
52 See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 757 (U.S. 1998) (“The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.”).
53 Ocana, 91 P.3d at 70-72 (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).
54 Ocana, 91 P.3d at 71-72. 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 his or her 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. RESTATEMENT (SECOND) OF AGENCY, § 219(2)(d) cmt. e (1958).
55 See infra notes 56-58.
because the co-workers tormented the worker while on company property during work hours, as they interacted with co-workers and customers and performed the duties they were hired to perform.\footnote{Id.} The harassment occurred within the scope of the deli workers’ employment.\footnote{Id.}

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.\footnote{RESTATEMENT (SECOND) OF AGENCY, § 219(2)(a) (1958) (“A master is not subject to liability for the torts of his servants acting outside the scope of employment, unless the master intended the conduct or the consequences.”); Ellerth, 524 U.S. at 758 (§ 219(2)(a) addresses liability where the agent’s high rank in the company renders him or her the employer’s alter ego). \textit{Cf.} Ackel v. Nat’l Communications, Inc., 339 F.3d 376, 383 (5th Cir. 2003) (employer is vicariously liable for its employees activities when the harasser is a proxy for the employer).} Under South Carolina law, for example, an employee’s action against a company for intentional infliction of emotional distress, assault, and battery will lie when the tortfeasor is the company’s alter ego.\footnote{See Dickert v. Metropolitan Life Ins. Co., 428 S.E.2d 700, 701 (S.C. 1993); McSwain v. Shei, 402 S.E.2d 890 (S.C. 1991); Stewart v. McLellan’s Store Co., 9 S.E.2d 35 (S.C. 1940).} Only dominant corporate owners and officers may constitute alter egos.\footnote{Dickert, 428 S.E.2d at 701.} A slightly different theory also exists for subjecting employers to direct liability for an agent’s intentional torts. Under Tennessee law, for example, directly liability for intentional infliction of emotional distress attaches when the employer recklessly disregards the outrageous conduct of its agents.\footnote{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 for the tort is not based 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.”).} This is essentially a ratification theory.\footnote{See Hogan v. Forsyth Country Club Co., 340 S.E.2d 116 (N.C. 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); \textit{RESTATEMENT (SECOND) OF AGENCY, §§ 93, 94 (1958)}; Brown v. Burlington Industries, Inc., 378 S.E.2d 232, 236 (N.C. App. 1989) (employer liable in intentional infliction of emotional distress case based on sexual harassment because employer ratified the plant manager’s sexual harassment by failing to rectify the problem after being informed of complaint).}

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.\footnote{See Cronin v. Sheldon, 991 P.2d 231 (Ariz. 1999) (wrongful discharge action for employment discrimination allowed but available remedies are limited to those provided by antidiscrimination statute); Stevenson v. Superior Court, 941 P.2d 1157 (Cal. 1997) (California Fair Employment Housing Act’s age discrimination remedies are not exclusive and do not bar a tort claim for wrongful discharge in violation of} Many states do not

\footnote{\textit{Id.}}
recognize such actions. When allowed, these wrongful discharge actions are exceptions to the at-will rule and duplicate the state statutory action. These torts are dependent upon a “public policy” outlawing a particular discrimination type; the “public policy” against that discrimination, however, is already specifically expressed and remedied by statute. Unlike the intentional infliction of emotional distress, assault and battery, and negligent employment claims, the 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 none was intended.

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

A state legislature retains control over the preemptive effect, if any, that the antidiscrimination statute has on state tort law. Subject to constitutional constraints, it has plenary authority to explicitly preempt common law tort claims for wrongful discharge, intentional infliction of emotional distress, assault and battery, and negligent employment that relate to claims of employment discrimination.


66 Weaver, 885 A.2d at 1076-78.

67 Makovi, 540 A.2d at 498 (common-law tort action for wrongful discharge, based on sex discrimination, does not lie when there is a specific state statutory procedure and remedy for the redress of that kind of conduct).

68 Gottling, 61 P.3d at 997-98 (refusing to craft a common law action for sex discrimination against small employers where the legislature intended no remedy to exist).

69 See supra note 28.

70 See E.B. & A.C. v. Whiting Co. v. City of Burlington, 175 A. 35, 44 (Vt. 1934) (“rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language”); Van Waters v. Rogers, Inc. v. Keelan, 840 P.2d 1070, 1076 (Colo. 1992) (“statutes 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 manifests its intent either expressly . . .”);
makes its intentions on preemption explicitly clear, whether the legislature adopts preemption or rejects preemption, the courts must adhere to the expressed intent. Montana law is an excellent example of a state antidiscrimination statute that has explicit preemption language faithfully enforced by the Montana courts. The development of Montana law in this area is instructive and models the appropriate interaction between court and legislature.

The Montana Human Rights Act bars discrimination in employment because of race, creed, religion, color, national origin, age, disability, marital status or sex. In Drinkwater v. Shipton Supply Co., the Montana Supreme Court permitted a workplace sexual harassment victim to pursue several tort-based sexual harassment claims under Montana common law even though the state’s antidiscrimination statute made such harassment unlawful and provided a remedy. The Drinkwater 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. 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. The Montana Supreme Court correctly decided the Drinkwater case based on the lack of explicit preemption language in the antidiscrimination statute.

In response to Drinkwater, the Montana Legislature enacted an exclusive remedy provision into its state antidiscrimination statute. The legislative history of the

Brooke v. Restaurant Services, Inc., 906 P.2d 66, 68 (Colo. 1995) (“the 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”); In re Shetsky, 60 N.W.2d 40, 45 (Minn. 1953) (law presumes that statutory law is consistent with common law and so abrogation of the common law by statutory enactment must be by express wording or necessary implication); Helmick v. Cincinnati Word Processing, Inc., 543 N.E.2d 1212, 1216 (Ohio 1989) (“an existing common-law remedy may not be extinguished by a statute except by direct enactment or necessary implication.”); Silver v. Slusher, Okl., 770 P.2d 878, 884 (Okla. 1989) (Oklahoma law does not permit legislative abrogation of the common law by implication, rather its alteration must be clearly and plainly expressed).

71 Id.

72 See MONT. CODE ANN. § 49-2-509(7) (2005) (“The provisions of this chapter [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.”).

73 Arizona law developed in a similar fashion to Montana law. See infra notes 75-80. The Arizona Supreme Court initially issued a decision finding no preemption and the Arizona Legislature subsequent 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 (Ariz. 1999) (wrongful termination action for employment discrimination permitted by the Arizona Employment Protection Act (EPA) but EPA limits available remedies to remedies provided for by the Arizona Civil Right Act). Arizona law also illustrates the appropriate interaction between the judicial and legislative branches.

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


76 Id.

77 Id.

78 See supra note 72.
exclusive remedy provision, the passage of the provision so near in time to the Drinkwater 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. Consequently, in a post-exclusive remedy enactment case, Harrison v. Chance, the Montana Supreme Court interpreted the exclusive remedy provision to preempt an employee’s common law claims against his employer for battery, intentional infliction of emotional distress, wrongful discharge, and breach of the implied covenant of good faith and fair dealing. 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. Many state antidiscrimination statutes have either no preemption language at all, or, if any preemption language exists, ambiguous language. In this context, guidelines for

80 Harrison v. Chance, 797 P.2d 200, 205 (Mont. 1990) (“any 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.”).
81 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 Gottling, 61 P.3d at 992-93; UTAH CODE ANN. § 34A-5-107(15) (2007) (“The procedures contained in this section are the exclusive remedy under state law for employment discrimination based upon race, color, sex, retaliation, pregnancy, childbirth, or pregnancy-related conditions, age, religion, national origin, or disability.”).
82 Nevada, New Mexico, North Dakota, Oklahoma, Tennessee, and Texas are examples of states which have no preemption language. See NEV. REV. STAT. §§ 613.310-.435 (2007); New Mexico Human Rights Act, N.M. STAT. ANN. § 28-1-1 et seq. (Michie 2007); North Dakota Human Rights Act, N.D. CENT. CODE § 14-02.4-01 et seq. (2007); OKLA. STAT. tit. 25, § 1301 et seq. (2007), OKLA. STAT. tit. 25, § 1501 et seq. (2007); Tennessee Human Rights Act, TENN. CODE ANN. § 4-21-101 et seq. (2007); Texas Commission on Human Rights Act (Chapter 21), TEX. LAB. CODE § 21.001 et seq. (2007). 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; it could be argued, however, that the language maintains some ambiguity in terms of antipreemptive scope. See CAL. GOV’T CODE § 12993(a) (Deering 2007) (“The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. 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, medical disability, marital status, sex, age, or sexual orientation.”); MINN. STAT. § 363A.04 (2006) (“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 (2007) (“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 (2007) (“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 (Consol. 2007) (“Nothing contained in this article shall be deemed to repeal any of the provisions of the
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.

A. **NO IMPLIED PREEMPTION OF “SEPARATE AND APART” TORTS**

There is no universally applied test for determining whether the presence of a state antidiscrimination statute implicitly preempts common law torts based upon the same facts. The fundamental starting point of any analysis is the often-stated principle that statutes in derogation of the common law must be strictly construed, but this is only a starting point. There are several possible analytical methods for determining whether the 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.

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. If the common law tort existed prior to the statute’s enactment, it is not preempted. But the statute preempts any common law tort that did not exist before the statutory enactment. The application of the test produces mixed results in the context of assault, battery, intentional infliction of emotional distress, and

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83 See Van Waters & Rogers, Inc. v. Keelan, 840 P.2d 1070, 1076 (Colo. 1992) (“statutes 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.”).

84 For a good discussion of some of these tests, see Retherford v. AT&T Communications, 844 P.2d 949, 962-67 (Utah 1992).

85 Retherford, 844 P.2d at 963.

86 See Retherford, 844 P.2d at 963 (antecedent test “holds 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.”); Brooke, 906 P.2d at 68 (“the 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.”); Covell v. Spengler, 366 N.W.2d 76, 79 (Mich. Ct. App. 1985) (“when a statute creates a new right or imposes a new duty having no counterpart in the common law, the remedies provided in the statute for violation are exclusive and not cumulative. Correlatively, a statutory remedy for enforcement of a common-law right is deemed only cumulative.”).
negligent employment claims. Assault and battery are such long-standing common law
torts that a state antidiscrimination statute would never impliedly preempt such claims.\footnote{Assault and battery have their roots in English common law. See supra note 38. 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. See S.D. CODIFIED LAWS § 20-13-1 et seq. (Michie 2007).} 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.\footnote{The North Dakota Legislature passed the North Dakota Human Rights Act in 1983. See North Dakota Fair Hous. Council, Inc. v. Peterson, 625 N.W.2d 551, 556 (N.D. 2001). Although intentional infliction of emotional distress claims were brought in North Dakota prior to 1983, see Eakman v. Robb, 237 N.W.2d 423, 424 (N.D. 1975), it does not appear that the tort was thoroughly discussed and adopted by the North Dakota Supreme Court until 1989 in the leading case of Muchow v. Lindblad, 435 N.W.2d 918 (N.D. 1989).}

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 the legislature intended to cover the entire subject and thus leave no room for the common law.\footnote{See Rojo v. Kliger, 801 P.2d 373, 381 (Cal. 1990) (“The general rule is that statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject.”); Barnett Bank of Marion County 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.”) (citations omitted); Gilger v. Hernandez, 997 P.2d 305, 308-09 (Utah 2000) (adopting language from Barnett Bank case). See also William R. Casto, The New Federal Common Law of Tort Remedies for Violations of International Law, 37 RUT.-CAM. L.J. 657-59 (2006) (explaining the dangers in recognizing a judicially created tort remedy if a comprehensive statutory remedy exists).} 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.\footnote{See Rojo, 801 P.2d at 381; Schweitzer, 586 A.2d at 386-89; Helmick, 543 N.E.2d at 1215; Brooke, 906 P.2d at 69.} 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 for the recovery of compensatory or punitive damages.\footnote{Id.}

The same conduct test looks at the state antidiscrimination statute to see whether the common law action is based on the very same conduct which is necessary to prove unlawful discrimination under the statute. If the conduct is the same, the common law is impliedly preempted.\footnote{See Retherford, 844 P.2d at 963.} The best example of the application of this test involves jurisdictions that view state antidiscrimination statutes as impliedly preempts common law intentional infliction of emotional distress claims on the ground that such claims are merely gap-filler torts.\footnote{See Messick v. Toyota Motor Manufacturing, Kentucky, Inc., 45 F. Supp. 2d 578, 582 (E.D. Ky. 1999) (Kentucky Civil Rights Act impliedly preempts intentional infliction of emotional distress claim based on...}
sexually harassed by her supervisor. The harassment that gives rise to the intentional infliction of emotional distress claim also violates the state antidiscrimination statute. 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. 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 otherwise might go without a remedy; therefore the tort should not be extended to circumvent a legislative limitation on statutory claims for mental anguish and punitive damages. 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.

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 claims are distinct from the injury that is the target of the state antidiscrimination statute. The interests protected by the common law claims and antidiscrimination statute are compared to check for variations. Under this approach, an intentional infliction of emotional distress claim is not impliedly preempted by a state antidiscrimination when the interests of the antidiscrimination statutory claim and outrage tort are not the same. 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. The Pennsylvania courts explain that the Pennsylvania antidiscrimination statute targets the state’s interest in eradicating very specific forms of discrimination; whereas the intentional infliction of emotional distress tort vindicates the personal interest of freedom from intentionally-imposed mental anguish.

sexual harassment because the outrage tort is not intended to “swallow up” an existing statutory recovery); Hoffman-LaRoche v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004) (Texas Commission on Human Rights Act impliedly preempts intentional infliction of emotional distress claim based on sexual harassment because the outrage tort 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.”); Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993) (Iowa’s antidiscrimination statute preempts intentional infliction of emotional distress claim based on sexual harassment because plaintiff could not establish IIED claim without first proving discrimination in violation of the statute).

94 Hoffman-LaRoche, 144 S.W.3d at 441-45.
95 Id. at 446.
96 Id. at 446.
97 Id. at 447.
98 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 of emotional distress claim regardless of whether he or she succeeds on, or even makes, a statutory claim.”).
99 Retherford, 844 P.2d at 964-68.
100 Id.
101 Id.
102 Helmick, 543 N.E.2d at 1215 (Ohio) (burden of proof for discrimination under statute is different from any existing common-law tort like intentional infliction of emotional distress and has its own elements and presumptions); Schweitzer, 586 A.2d at 389 (Pennsylvania) (interests sought to be protected by the Pennsylvania Human Rights Act and the intentional infliction of emotional distress tort are fundamentally different); Shaffer v. National Can Corporation, 565 F. Supp. 909, 914 (E.D. 1983) (Pennsylvania) (same).
103 Schweitzer, 586 A.2d at 389; Shaffer, 565 F. Supp. at 914.
With respect to the common law claims of assault, battery, intentional infliction of emotional distress, and negligent employment, the proper analytical approach for determining implied preemption should not involve a timing test or a same conduct test for several reasons. First, 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. An intentional infliction of emotional distress tort is a valid tort that cuts across different areas of the law. It should not receive second-class treatment. If it exists, it should be applied evenly. Second, a same conduct test has similar shortcomings. The intentional infliction of emotional distress claim is now an almost universally recognized tort. It may be historically correct to say that the tort initially originated to fill perceived gaps in the law, but that is how all common law torts develop. 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, 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 winning such a case (which is to say that to win such a case the behavior involved has to be the lowest of low in terms of conduct that society will not accept). Lawyers know that safeguards have been put in place to make the tort of outrage especially difficult to prove. Thus, it is certainly a rarity when facts rise to the level of meeting each of the elements of this tort claim. It is a relatively settled

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104 See supra note 13.
105 See 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).
106 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 has existed prior to the recognition of the tort. Id. at 41-42. Such objections undoubtedly persist to this day.
107 See Robel v. Roundup Corp., 59 P.3d 611, 620 (Wash. 2002) (“the standard for an outrage claim is admittedly very high (by which we mean that the conduct supporting the claim must be appallingly low”).
108 See Archer v. Farmer Bros. Co., 70 P.3d 495, 499 (Colo. Ct. App. 2002) (the level of outrageousness required to prove intentional infliction of emotional distress is extremely high); Burroughs v. FFP Operating Partners, L.P., 28 F.3d 543, 549 (5th Cir. 1994) (plaintiff’s emotional injuries which included being upset, depressed, unnerved, and mortified insufficient to meet standard for severe emotional distress given that plaintiff offered “no medical testimony describing any clinical manifestations of depression or other medical infirmities.”).
109 For some rare cases, see Agis v. Howard Johnson Co., 355 N.E.2d 315, 317 (Mass. 1976) (outrageous conduct established when restaurant fired waitresses in alphabetical order until one of the waitresses admitted to a theft) and GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 617 (Tex. 1999) (manager’s
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 intentional infliction claim requires a higher level of proof, more appalling conduct, and greater emotional suffering and injury than the statutory claim.\textsuperscript{110} Since the law has developed in this way, it is not fair to say anymore 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 such actions.

The preferred approach for determining whether a state antidiscrimination statute impliedly preempts the common law tort claims of assault, battery, intentional infliction of emotional distress and negligent employment is four-fold. First, begin with the long-standing rule that statutes in derogation of the common law must be strictly construed.\textsuperscript{111} Second, recognize that the interests protected by the state antidiscrimination statute are different from the interests protected by these common law torts.\textsuperscript{112} 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 are merely claims of general applicability in which facts can arise to satisfy their elements.\textsuperscript{113} Their existence separate and apart from discrimination belies any intent to have them impliedly preempted. These first three principles establishes 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 that legislatures know how to expressly provide an exclusive remedy by statute when desired.\textsuperscript{114} Finally, the rebuttable presumption will only be overcome when there is clear and compelling evidence that the structure of the antidiscrimination statute demonstrates a legislative intent to cover the field.\textsuperscript{115} 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 statute.\textsuperscript{116}

\textsuperscript{111} See supra text accompanying note 83.
\textsuperscript{112} See supra text accompanying notes 102-103.
\textsuperscript{113} See supra Part II.A.
\textsuperscript{114} See Tate, 833 P.2d at 1231 (citing presence of Oklahoma statutes that do express exclusivity of the created remedy as a reason not to find preemption of common law tort claims by Oklahoma antidiscrimination statute where antidiscrimination statute does not have an exclusive remedy provision); Rojo, 801 P.2d at 378 (California Legislature knows how to abrogate an employee’s common law remedies when it so intends [workers’ compensation exclusive remedy provision] and failure to include such a provision in the California FEHA is a reason why the FEHA does not preempt common law remedies).
\textsuperscript{116} See supra notes 90-91.
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 the fact that they 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.117 State antidiscrimination statutes were enacted in an era where state common law almost universally did not recognize common law claims for employment discrimination.118 If a unique state did recognize a common law remedy for some forms of employment discrimination, the state’s legislature, when considering enactment of an 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 deemed only cumulative, a legislature intending to preempt a preexisting common law claim for employment discrimination needed to do so explicitly.119 Absent explicit preemption language, both the common law claim and statutory claim survive.120

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 necessarily will craft an action and a remedy that is based on policy judgments. The legislature will decide what constitutes discrimination in employment. In other words, what are the various categories of protection (race, sex, age, religion, national origin, disability, marital status, sexual orientation) that state law wants to protect. Some legislatures will extend protection to more groups than other legislatures and the decisions made with respect to including or

117 See supra note 86.
119 See supra note 86.
120 The illustration is somewhat hypothetical in that several Lexis searches did not reveal any jurisdictions that had formally recognized a common law remedy for discrimination prior to the enactment of a state antidiscrimination statute. Yet, some of these jurisdictions likely do exist. Even if a jurisdiction had not formally recognized such a common law remedy, a cobbled together common law right from public policy expressed in constitutions, other statutes, and case law, could be found in some jurisdictions. See Froyd v. Cook, 681 F. Supp. 669, 673-77 (E.D. Cal. 1988) (prior to enactment of FEHA, California public policy prohibited employment discrimination based on sex).
excluding protection for certain groups is entirely a legislative prerogative. The legislature will also have to decide whether exemptions from the law will be created based on the size of the employer. 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. 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, critical policy choices must be made concerning whether to provide a judicial avenue for private litigants to enforce the antidiscrimination statute and tailoring a remedial package for obtaining relief under the statute.

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 discrimination claim; other plaintiffs will be able to bring a claim but may not like the forum available or the choice of remedies. 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. Incorporated. The Utah Supreme Court performed yeoman’s work in avoiding the old adage that tough cases can make bad law. In Gottling, a former female employee of the defendant-employer sued the employer for allegedly terminating her employment because she refused to maintain a

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122 See supra note 17 for a partial list of state antidiscrimination statutes with a small employer exemption. Not all state antidiscrimination statutes have such an exemption. The South Dakota statute is an example. See S.D. CODIFIED LAWS § 20-13-1(7) (Michie 2007).

123 See supra note 17.

124 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, NEB. REV. STAT. § 20-148, that allows plaintiffs to bring suit in state district court for violations of the Nebraska Fair Employment Practice Act, NEB. REV. STAT. § 48-1101 et seq., without first exhausting administrative remedies. See Goolsby v. Anderson, 549 N.W.2d 153 (Neb. 1996). The rationale for this alternative remedy is to aid plaintiffs who would otherwise be trapped in bureaucratic backlogs at the Nebraska Equal Opportunity Commission. Id. at 157.

125 See supra notes 121-124.

126 61 P.3d 989 (Utah 2002).
sexual relationship with the owner.\textsuperscript{127} 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.\textsuperscript{128} Unfortunately, the \textit{Gottling} plaintiff’s employer had less than fifteen employees and therefore she could not pursue an action under UADA.\textsuperscript{129} Instead, she pursued an action for wrongful termination in contravention of an alleged public policy against sex discrimination.\textsuperscript{130} The Court concluded, however, that the structure and purpose of the UADA exhibited an implicit to preempt common law causes of action for employment discrimination by both large and small employers. Therefore, the Court disallowed the action.\textsuperscript{131}

The Court made two central points in its decision that bolster the argument here. First, no common law remedy for employment discrimination existed prior to the enactment of the UADA in 1969. Thus, the 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.\textsuperscript{132} 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. Whether or not it is a good idea to exempt approximately 70% of the Utah workforce from the state antidiscrimination statute through the small employer exemption is not the question. The Court could not in good faith make an end run around a legislative judgment because to do so would threaten government by the people through their elected representatives. If the small employer exemption is bad idea, the petition for change should be made to the Utah Legislature.\textsuperscript{133}

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.\textsuperscript{134} For example, Oregon takes the exact opposite approach: presuming that the courts are free to create a duplicative common law wrongful discharge action for resisting sexual harassment after the enactment of the state antidiscrimination statute because a legislature cannot intend to eliminate certain remedies unless those remedies already exist.\textsuperscript{135} 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 adhering to the will of the citizenry acting through its chosen representatives.

\textsuperscript{127} Id. at 990.
\textsuperscript{128} Id. at 990-91.
\textsuperscript{129} Id. at 991.
\textsuperscript{130} Id. at 990.
\textsuperscript{131} Id. at 994.
\textsuperscript{132} Id. at 994-97.
\textsuperscript{133} Id. at 991, 997-98.
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 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 its own state antidiscrimination statute that prohibits discrimination in employment called the New Mexico Human Rights Act (NMHRA).136 The NMHRA was passed in 1969 and amended in 1991, 1993, 1995, and 2000.137 The statute makes it illegal for an employer to discriminate in employment on the basis of race, sex, age, etc.138 An employer means any person “employing 4 or more persons and any person acting for an employer.”139 The Act allows an aggrieved person to sue in court after exhausting administrative remedies with the New Mexico Human Rights Division of the Department of Labor.140 A prevailing plaintiff in an NMHRA case is entitled to actual damages and attorney’s fees.141 The phrase “actual damages” as used in the NMHRA includes compensatory damages, but does not include punitive damages.142 The NMHRA does not contain any exclusive remedy or preemption language.143

New Mexico law recognizes common law actions for intentional infliction of emotional distress, prima facie tort, assault, and battery.144 The New Mexico Workers’ Compensation Act’s exclusivity provision does not bar an employee’s common law tort claims based on injuries from sexual harassment in the workplace.145 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 the NMHRA, the rebuttable presumption is that the intentional infliction of emotional distress, prima facie tort, assault, and battery claims based on facts that would also apply to the 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

136 See N.M. STAT. ANN. § 28-1-1 et seq. (Michie 2007).
137 See Gonzales v. New Mexico Dep’t of Health, 11 P.3d 550, 553 (N.M. 2001).
138 See N.M. STAT. ANN. § 28-1-7 (Michie 2007).
139 See N.M. STAT. ANN. § 28-1-2(B) (Michie 2007).
140 See N.M. STAT. ANN. § 28-1-13(A) (Michie 2007).
141 See N.M. STAT. ANN. § 28-1-13(D) (Michie 2007).
143 See supra note 136.
exhaustion of administrative remedies, coverage does not apply to all employers. Moreover, the statutory remedies are limited because punitive damages are disallowed.

The New Mexico Supreme Court has never directly spoken to the antidiscrimination preemption question in the context of the independent torts like intentional infliction of emotional distress, but the New Mexico Court of Appeals ruled in a 1995 opinion that the NMHRA does not preclude plaintiffs from pursuing common-law tort claims, such as intentional infliction of emotional distress, prima facie tort, assault, and battery, arising from conduct, sexual harassment, that is also actionable under the NMHRA.\textsuperscript{146} If the question ever comes before the New Mexico Supreme Court, the state court of appeals decision should be followed. In fact, relatively recent case law out of the New Mexico Supreme Court suggests that the NMHRA does not impliedly preempt intentional infliction of emotional distress claims. In \textit{Coates v. Wal-Mart Stores}, the Court upheld a jury verdict on an intentional infliction of emotional distress claim that provided compensatory and punitive damages to the plaintiffs.\textsuperscript{147} The plaintiffs based their intentional infliction of emotional distress claims upon allegations that their Wal-Mart supervisor sexually harassed them and Wal-Mart allowed the harassment to continue with utter indifference to the consequences. The combined compensatory damages for the plaintiffs’ IIED claims were $45,000. The combined punitive damages for these claims were $1,755,000.\textsuperscript{148} The full damages amount was upheld by the Court.\textsuperscript{149}

Another reason to believe that the 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 \textit{Gandy v. Wal-Mart Stores}, 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.\textsuperscript{150} Her allegations of retaliation were actionable under the retaliation provision in the NMHRA, yet she phrased her claim as a common law retaliatory discharge claim and not as a statutory retaliation claim.\textsuperscript{151} The \textit{Gandy} court held that the common law retaliatory discharge claim was not impliedly preempted by the NMHRA because the statutory administrative scheme and remedy was not comprehensive.\textsuperscript{152}

The \textit{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. Under the antecedent test outlined in this article, the \textit{Gandy} court should

\textsuperscript{147} 976 P.2d 999 (N.M. 1999).
\textsuperscript{148} Id. at 1003.
\textsuperscript{149} Id. at 1010-11.
\textsuperscript{150} 872 P.2d 859 (N.M. 1994).
\textsuperscript{151} Id. at 859-861.
\textsuperscript{152} Id. at 861-62.
have ruled that the NMHRA impliedly preempted the claim if the retaliatory discharge tort was not recognized in New Mexico law until after the enactment of the NMHRA. This appears to be the case. The New Mexico Legislature enacted the NMHRA in 1969. New Mexico law did not recognize the retaliatory discharge tort until 1983.\textsuperscript{153}

2. \textbf{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.\textsuperscript{154} The statute only applies to employers with 15 or more employees.\textsuperscript{155} Complainants must exhaust administrative remedies under the state statute before filing a case in state court.\textsuperscript{156} It appears that the statutory remedies available to a prevailing plaintiff under the Nevada antidiscrimination statute violation include back pay, injunctive relief, compensatory damages, and punitive damages.\textsuperscript{157} Nevada law recognizes the tort of intentional infliction of emotional distress in the employment termination context.\textsuperscript{158}

The Nevada antidiscrimination statute, like the New Mexico statute, does not have any express preemption language.\textsuperscript{159} Therefore, the rebuttable presumption is that independent torts like intentional infliction of emotional distress are not preempted by the Nevada statute.\textsuperscript{160} 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.\textsuperscript{161} New Mexico covers more employers than Nevada.\textsuperscript{162} The primary factor weighing in favor of preemption in Nevada is that the Nevada statutory remedy appears to provide a fuller remedial system, including compensatory and punitive damages, than New Mexico.\textsuperscript{163} If the Nevada statutory scheme applied to more employers, the preemption question would hang in the balance given the strong remedial system. Because of the significant small employer exemption, however, the presumption against implied preemption for intentional infliction of emotional distress should not be overcome.\textsuperscript{164}

\textsuperscript{153} \textit{Id}. at 860.
\textsuperscript{154} \textit{See} \textit{NEV. REV. STAT.} § 613.330(1)(a) (2007).
\textsuperscript{155} \textit{See} \textit{NEV. REV. STAT.} § 613.310(2) (2007).
\textsuperscript{158} \textit{See} \textit{Shoen v. Amerco, Inc.}, 896 P.2d 468 (Nev. 1995).
\textsuperscript{159} \textit{See} \textit{NEV. REV. STAT.} § 613.310-613.435 (2007).
\textsuperscript{160} \textit{See supra} Part.III.A.
\textsuperscript{161} \textit{See supra} notes 140 and 156.
\textsuperscript{162} \textit{See supra} notes 139 and 155.
\textsuperscript{163} \textit{See supra} notes 142 and 157.
\textsuperscript{164} 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 that Nevada’s antidiscrimination law does not preempt that type of common law tort claim. \textit{See} \textit{Burns v. Mayer}, 175 F. Supp. 2d 1259, 1267-68 (D. Nev. 2001). The federal district court decision cited to Arizona and California case law as the basis for its decision. \textit{Id}. 
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. Thus, the Nevada courts should rebuff the understandable impulse to create such a post-statutory enactment action for equitable reasons. In *Chavez v. Sievers*, 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 due to a less than 15-employee workforce. The *Chavez* court reasoned that, though racial discrimination is wrong and against Nevada public policy, the public policy choice made by the Nevada Legislature—that small businesses should not be subject to racial discrimination suits—must be honored.

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 Practices Act (NFEPAA) includes a 15-employee threshold for coverage and a remedial package that includes general and special damages but does not specifically provide for the recovery of punitive damages. Nebraska has also enacted a procedural statute that allows plaintiffs to sue in state district court for NFEPAA violations without first exhausting administrative remedies. The case against implied preemption of independent torts is iron clad because the NFEPAA specifically states that it does not “repeal any other law of this state . . . relating to discrimination because of race, creed, color, religion, sex, disability, or national origin.” 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 because refusing to create such a duplicative action should not constitute repealing a state employment discrimination law. Deference to the legislature concerning public 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 the 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. The

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165 See supra note 120.
166 43 P.3d 1022, 1024 (Nev. 2002).
167 Id. at 1025-26.
171 See supra note 124.
172 See supra note 124.
173 See supra Part IV.A.
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 the article, it makes the most sense to treat independent torts differently from dependent torts for purposes of implied preemption.\textsuperscript{174} Legislative silence is insufficient to preempt torts that exist outside the employment discrimination arena, but is sufficient to preempt common law wrongful discharge claims that would simply replace policy choices made by the legislature.\textsuperscript{175}

Of course, all of this line drawing would be unnecessary if legislatures took more care in providing explicit direction in the statute 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.\textsuperscript{176} Legislatures do, in other areas, provide guidance concerning the exclusiveness, or lack thereof, of a statutory remedy.\textsuperscript{177} For whatever reason, that guidance is often lacking in this area and thus, out of necessity, the courts are placed 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 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 unpredictably 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 statute, especially if the courts in a particular jurisdiction are resolving the unanswered preemption questions in a satisfactory manner. However, this issue is not one that will go away. The common law develops to address present and future problems in the employment field. When the 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.\textsuperscript{178} 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

\textsuperscript{174} See supra Parts II and III.
\textsuperscript{175} See supra Part III.
\textsuperscript{176} See supra Part IV.A.1. and A.2.
\textsuperscript{177} See supra note 114.
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 and, if such claim is established, 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.