

2000

Mark Plaskon v. Craig Dearden et al : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARK PLASKON

:

Plaintiff/Appellant.

:

:

Priority No. 15

Vs.

:

Case No. 20000066-CA

CRAIG DEARDAN et al

:

Defendant/Appellee

BRIEF OF APPELLANT

This is an appeal from a decision granting Summary
Judgement and dismissing Plaintiffs complaint in the
Third Judicial District Court of Salt Lake County, Judge Tyrone Medley
presiding

FILED

JUN 25 2000

COURT OF APPEALS

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POINT I

The lower Court abused its discretion and misintriuted the law in determining that the defendants actions in continuing to maintain plaintiffs personnel records showing that he was discharged for various problems during his employment were not a continuing violation which would therefore toll the statute of limitations allowing consideration of all wrongful acts of the defendant retroactive to the time of Plaintiffs discharge.

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IN THE UTAH COURT OF APPEALS

MARK PLASKON

:

Plaintiff/Appellant.

:

:

Vs.

:

Case No. 20000066-CA

CRAIG DEARDAN et all

:

Defendant/Appelle

JURISDICTION AND NATURE OF PROCEEDINGS

This is a direct appeal from a decision by Judge Tyrone E. Medley of the Third Judicial District Court granting Defendants Motion to Dismiss. Jurisdiction is conferred upon this court pursuant to §78-2-2(3)(j)UCA(1996).

**STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARD OF
REVIEW**

1. Whether the Trial Court erred in dismissing the plaintiffs complaint pursuant to an analysis of Retherford vs. AT&T Communications 844 P. 2d 949 (Utah 1992). As the case turns on an interpretation of law this Court must review the Lower Courts decision for correctness.

STATEMENT OF THE CASE

This is an appeal from a decision by Judge Tyrone E. Medley dismissing the Plaintiffs claims with prejudice. The plaintiff originally brought this action in 1998 against the defendants alleging various causes of action that arose during the period of his employment as a documents examiner for the Utah State Department of Public Safety Crime Laboratory from December 1985 until August 1986 when he was terminated.

Plaintiffs complaint particularly focused on the period subsequent to his termination that documents contained in his personnel file were inaccurate and defamatory and alleged and were shown to or discussed with potential employers and these false and deliberately misleading and incomplete statements constituted a continuing effort on the part of the defendants to prevent plaintiff from working in his chosen career.

The defendants filed a motion to dismiss in February of 1999. Plaintiff responded to Defendants motion and Oral Argument was held thereon on October 18, 1999. In the Oral argument Judge Medley requested that both parties brief the case of Deborah S. Retherford vs. AT&T Communications 844 P. 2d 949,(UT 1992) which the court believed may be depositive of the issues. Both parties filed supplemental Memoranda and on December 20, 1999 the Court entered its decision dismissing the plaintiffs case with prejudice. The plaintiff filed his notice of appeal on January 18, 2000.

STATEMENT OF THE FACTS

(With respect to citations to the record there was no testimony taken and therefore no citation to a transcript will be made. The following facts are taken from plaintiffs complaint, the defendants Memorandum in support of Motion to Dismiss and the Plaintiffs response to Defendants Motion to Dismiss which documents are on file as part of the record herein.)

This case involved an employment action. The Defendant State of Utah was Plaintiff's former employer. Plaintiff was hired in 1985 by the State of Utah as a Questioned Documents Examiner to work in the crime laboratory of the Department of Public Safety. He was hired as a six month probationer. His immediate supervisor was Robert Brinkman . John T. Neilson was,at that time the Director of the Department of Public Safety.

In the ensuing months following the initiation of his employment the plaintiff performed his work in an acceptable manner in accordance with his prior training and the

applicable standards of his profession. Shortly after he began employment however, the defendant Robert Brinkman consistently began to impede the plaintiffs work and to arbitrarily reprimand or discipline him on the basis that Brinkmans methods were more preferable than the plaintiffs in the area of document examinations. Even though Brinkman had no specialized training in the field, Plaskon and Brinkman openly clashed in the office.

In July of 1996 Brinkman attempted to discharge the plaintiff. The plaintiff met with John T. Neilson and the discharge was voluntarily rescinded. Plaintiff agreed to undergo a psychiatric examination. It was determined that the plaintiff suffered from hypo-glycemia which caused problems when he was placed under stress and this condition caused him on some occasions to have problems with social skills and inhibited his ability to be tolerant of others and work with them. The issues between Brinkman and the Plaintiff were not resolved and the Plaintiff was ultimately terminated in August of 1996.

After his termination Petitioner attempted to obtain employment in the area of crime scene investigation, document examination, and other forensic fields, but has been consistently denied employment based upon false reports generated from the defendants. Documents and statements contained in the plaintiffs personnel file have either been shown to or discussed with potential employers. Many of the statements contained therein are either false, deliberately misleading or incomplete and constitute a continuing deliberate attempt on the part of Brinkman and the representatives of the State of Utah to prevent Plaintiff from working in his chosen field.

The continuing efforts by the defendants to defame the Petitioner by the dissemination of the statements contained in his personnel file have effectively chilled his

ability to obtain any type of employment in his chosen field and this defamation continues to the present time.

SUMMARY OF THE ARGUMENT

The case upon which both the defendants and the court relied to dismiss plaintiffs claims, Retherford vs. AT&T Communications 844 P. 2d 949 (UT 1992) in actuality supports plaintiffs analysis that he has demonstrated at least to the extent of surviving a motion to dismiss that the continuing nature of the defamation allows the filing of the Complaint to relate back to the time of Plaintiffs termination in 1986.

ARGUMENT

This Court must review the Lower Courts ruling in this case regarding the Supreme Courts decision in Retherford vs. AT&T Communications 844 P. 2d 949 (UT 1992) for correctness. The entire case is appended hereto as Addendum "A"

It is Plaintiff's position that the Retherford case is fact specific, and therefore the facts are extremely critical in analyzing the cases' impact on the Plaintiffs claim in the Court below..

In 1976 Retherford was hired as a telephone operator in Grand Junction, Colorado, by Mountain States Telephone and Telegraph Company. In 1983 she was transferred to the Wasatch office in Salt Lake City where she continued to work as a telephone operator. During her employment she was covered by two different agreements. One was a collective bargaining agreement between AT&T and her Union, the Communication Workers of America, the other a code of conduct promulgated by AT&T that outlined employees rights and responsibilities.

Retherford contended throughout her lawsuit that this code of conduct created an implied employment contract. Both of these agreements prohibited sexual harassment and outlined procedures for grieved employees to process complaints. Immediately upon her arrival in Salt Lake City, Retherford noticed a sexually uninhibited atmosphere in the office. In fact on her very first day at work she was shown an obscene Valentines card and was subjected to obscene jokes and foul language. She changed shifts six months later to a night shift and continued to encounter more sexually suggestive discussions. During the night shift she also found herself the target of sexually suggestive commentary, in the form of unwelcome sexual advances. This conduct continued for approximately ten (10) months and she discussed the possibility of filing an EEO Complaint if the conduct continued. She then began to be retaliated against by other employees. She complained to her supervisor and other managers of the retaliatory harassment and then ultimately filed a written complaint to AT&T's EEO coordinator.

Ultimately the stress of her work and coping with the retaliatory actions began to take its toll. In September of 1985, Retherford took medical leave to recover from the stress and anxiety. Approximately six (6) months later she was told that she was being transferred to Boise Idaho, which she refused. She was given a deadline to report to Boise, and was fired on March 26, 1986. She had filed a written grievance through the union but the grievance was not timely filed, pursuant to the agreement and therefore was dismissed. Approximately two and a half years later, in September, 1988, she filed suit in the United States District Court for the District of Utah, alleging various Federal and State claims. The Court dismissed the Federal claims with prejudice, as being untimely, and dismissed the

State claims without prejudice for lack of pendant jurisdiction. (This Court should take specific note that this procedural history is very similar to the present case.)

Retherford then filed suit in the Third Judicial District Court in Utah, alleging the State claims. One of the causes of action filed was the intentional infliction of emotional stress by the various individuals during the period of her employment. The defendant's filed a Motion to Dismiss on the basis that she had alleged that she was subjected to approximately eighteen (18) months of retaliatory abuse during the period of March 1984 to September of 1985, when she took a leave from her job to seek psychiatric attention. The applicable statute of limitations was four years. She did not file her suit until April of 1989. The defendant's argued that because the abuse had taken place over an eighteen (18) month period, and it was obvious to her that she was being abused, the statute began running in March of 1984, and therefore her suit was barred by the Statute of Limitations.

The Court was asked to consider the continuing nature of the emotional harassment as to whether or not it tolled the statute of limitations. The Court essentially determined that it did not need to make a ruling as to whether there was a continuing violation, because the Court determined that the critical time frame was when the plaintiff left her job to seek medical and psychiatric attention, and did not return to work for six months. Therefore, there was a factual inference that the extreme emotional distress did not come into existence before September of 1985, and this was enough for the claim to survive a motion for Summary Judgement with respect to the problem of the statute of limitations. The Court specifically noted that the Defendant's would have their chance at trial to prove that the element of extreme emotional distress occurred sometime before the leave of absence.

Although the Court was not called upon to decide the issue of what a continuing violation is, the Court does reference in Footnote 18 other Federal cases, which discuss the issue and also notes that other Courts consider certain factors which are relevant to but not dispositive of the issue of what a continuing violation is. The first is subject matter. Obviously Petitioner's allegations of disseminating untrue information about him over a period of years qualifies. The frequency issue clearly favors Petitioner. They are not isolated incidents, but continuing incidents that extend over a number of years of making his file available through GRAMMA and other reporting services so that any potential employer could review the documents. The third area is the permanence issue, which focuses upon the degree of permanence which should trigger an employee's awareness of duty to protect his rights. Part of the problem in this case is that petitioner was not aware of the accessibility to her personnel file or what was included in his file until two years ago. He filed his notice of claim within one year of discovering the contents, and the subsequent lawsuit was within the statute of limitation. Therefore even if the Court believes that the law in Utah, as set forth in Footnote 18 Plaskon is within the statute of limitations. The case is still in effect and has not been modified or overruled, nor have the comments made in footnote 18 been made part of any official decision of this Court or utilized in any subsequent decision. In effect the law is not settled in the State of Utah on this particular subject.

The Plaintiff believes that while the footnote is persuasive, it is dicta and is not part of the holding of the case, and therefore the case does not provide any precedential value for this Court. Notwithstanding, that argument Plaintiff believes that his case falls within the parameters of footnote 18 and therefore would meet its requirements. The actual holding of

the Retherford case would leave the whole issue of the effect of the continuing defamation and interference with economic ability to a fact finder, and certainly that survives a motion to dismiss.

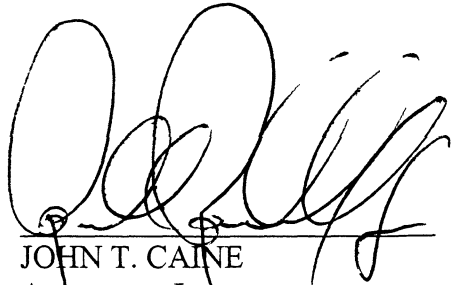
Motions to dismiss or for Summary Judgement are not favored unless it is clear that there are no issues of fact or law that are in dispute. On appeal the Appellate Court must review the facts presented and all the references fairly arising therefrom in a light most favorable to the party against whom the judgement has been granted, in this case the Plaintiff. See Winegar vs. Froerer Corporation 813 P. 2d. 1405 (UT1991). In addition an Appellate Court should accord no deference to a Trial Courts legal conclusions given support of Dismissal and reviews them for correctness. Shurtz vs. BMW of N.M. Inc. 814 P. 2d 1108 (Utah 1991) There are clearly factual disputes in this case and the interpretation and application of Retherford was clearly in dispute before the lower Court and therefore requires resolution by this Court. The case was therefore not appropriate for either dismissal or summary judgement and this Court should review Judge Medley's decision for correctness and determine that the granting of Defendants Motion was improper and the case should be remanded for a full evidentiary trial.

CONCLUSION

This Court should review the Lower Courts ruling to dismiss Plaintiff's Complaint on the basis of its legal analysis of the Retherford case for correctness and must review the Plaintiffs factual allegations in a light most favorable to the Plaintiff. In this case the Courts granting of the Motion to Dismiss. Under those standards of the Courts granting of the

Motion to Dismiss was not appropriate. The case should be remanded for a full trial on the merits.

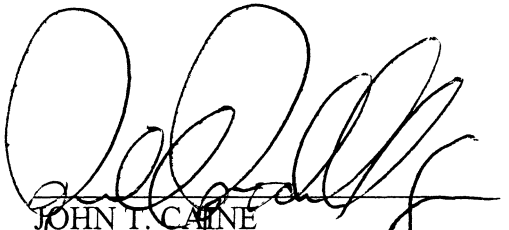
DATED this 28 day of June, 2000.



JOHN T. CAINE
Attorney at Law

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellant to counsel for the Defendant, Jan Graham, Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, 84111, postage prepaid this 28 day of June, 2000.



JOHN T. CAINE
Attorney for Appellant

ADDENDUM “A

tation/Title

4 P.2d 949, Retherford v. AT & T Communications of Mountain States, Inc.,
tah 1992)

***949** 844 P.2d 949

142 L.R.R.M. (BNA) 2668, 124 Lab.Cas. P 57,203,
8 IER Cases 405

Debra S. RETHERFORD, Plaintiff and Appellant,
v.
AT & T COMMUNICATIONS OF the MOUNTAIN STATES, INC.; Cathy
Bateson; Louise Johnson; Vickie Randall; and
Doe I through Doe X, Defendants and Appellees.

No. 890464.
Supreme Court of Utah.
Dec. 9, 1992.

Former employee brought suit against employer, supervisors, and co-workers
ising from alleged sexual harassment and retaliation for complaining about
xual harassment by co-workers. Summary judgment was granted in favor of
fendants on all claims by the Third District Court, Salt Lake County, J.
anis Frederick, J., and former employee appealed. The Supreme Court,
nmerman, J., held that: (1) tort action for discharge in violation of Utah
olic policy is not limited to employees at-will; (2) exclusive remedy for
scharge in violation of public policy was the Utah Anti-Discriminatory Act;
) Labor Management Relations Act (LMRA) preempted former employee's claims for
each of implied contract and malicious interference with contractual
lations, and preempted some of claims for intentional infliction of emotional
stress; and (4) employee stated cause of action against co-workers for
entional infliction of emotional distress.

Affirmed in part, reversed in part, and remanded.

Howe, Associate C.J., filed opinion concurring with reservations.

Stewart, J., concurred in result.

APPEAL AND ERROR 934(1)

30 ----

30XVI Review

30XVI(G) Presumptions

30k934 Judgment

30k934(1) In general.

h 1992.

Although failure of trial court to issue statement of grounds for granting
mary judgment is not reversible error absent unusual circumstances,
sumption of correctness ordinarily afforded trial court rulings on appeal has
tle operative effect when members of Supreme Court cannot define trial

4 P.2d 949, Retherford v. AT & T Communications of Mountain States, Inc.,
tah 1992)

urt's reasoning because of cryptic nature of its ruling. Rules Civ.Proc.,
les 52(a), 56(c).

APPEAL AND ERROR 863

30 ----

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed
from

30k863 In general.
ah 1992.

Because summary judgment resolves only questions of law, Supreme Court gives
deference to trial court's determinations, and affirms only if decision
fore it is correct. Rules Civ.Proc., Rule 56(c).

MASTER AND SERVANT 34.1

255 ----

255I The Relation

255I(C) Termination, Discharge, and Discipline

255I(C)2 Discharge or Discipline

255k34 Actions for Wrongful Discharge

255k34.1 In general.

Formerly 255k34
ah 1992.

Tort of discharge in violation of public policy is available to all
employees, even those with employment contract protecting them from discharge
without just cause.

MASTER AND SERVANT 30(1.10)

255 ----

255I The Relation

255I(C) Termination, Discharge, and Discipline

255I(C)2 Discharge or Discipline

255k30 Grounds and Liabilities

255k30(1.10) Public policy considerations.
ah 1992.

Not every discharge in violation of contractual just-cause provision rises to
level of violation of public policy; only those policies that are clear and
substantial and arise from statutes or Constitutions qualify for vindication
through tort of discharge in violation of public policy.

MASTER AND SERVANT 30(1.10)

255 ----

255I The Relation

255I(C) Termination, Discharge, and Discipline

255I(C)2 Discharge or Discipline

255k30 Grounds and Liabilities

4 P.2d 949, Retherford v. AT & T Communications of Mountain States, Inc.,
tah 1992)

255k30(1.10) Public policy considerations.
ah 1992.

While any employer violating contractual just-cause standard of dismissal is
able for breaking its promise to its employee, employer who violates clear and
bstantial public policies, so as to give rise to tort of discharge in
olation of public policy, should be liable for more expensive penalties of
rt, a potentially harsher liability commensurate with greater wrong against
ciety; when employer's act violates both its own contractual just-cause
andard and clear and substantial public policy, employer is liable for two
eaches, one in contract and one in tort, and must bear consequences of both.

MASTER AND SERVANT 35

255 ----

255I The Relation

255I(C) Termination, Discharge, and Discipline

255I(C)2 Discharge or Discipline

255k34 Actions for Wrongful Discharge

255k35 Nature and form.
ah 1992.

Under Utah Anti-Discriminatory Act in effect at time of employee's firing in
36, Act was exclusive remedy for employer retaliation against employee who
nplained of sexual harassment, preempting common-law causes of action for
etiation for complaints of employment discrimination. U.C.A.1953,
-35-6(1)(a)(i), 34-35-7.1(15); U.C.A.1953, 34-35-2(7), 24-25-7.1(11) (1989).

STATUTES 190

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 Existence of ambiguity.
ah 1992.

Where statutory language is plain and unambiguous, Supreme Court will not
ok beyond it to define legislative intent.

STATUTES 205

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k205 In general.
h 1992.

Statute is interpreted as a whole, not piecemeal.

MASTER AND SERVANT 10.5

255 ----

255I The Relation


255I(B) Statutory Regulation

4 P.2d 949, Retherford v. AT & T Communications of Mountain States, Inc.,
Utah 1992)

255k10.5 Statutory provisions.

Formerly 255k101/2
ah 1992.

Amendment to Utah Anti-Discriminatory Act to prohibit retaliation was not
change in substantive law, so as to indicate that prior law did not prohibit
retaliation, but, rather, was only clarification. U.C.A.1953, 34-35-6(1)(a)(i),
-35-7.1(15); U.C.A.1953, 34-35-2(7), 34-35-7.1(11) (1989).

ACTION  35

13 ----

13II Nature and Form

13k33 Statutory Remedies

13k35 Cumulative or exclusive remedies.
ah 1992.

"Indispensable element test," under which exclusive statutory cause of action
exempts common-law claim based on same facts when statutory scheme supplies
dispensable element of tort claim, is correct analytical model for determining
whether statutory cause of action forecloses common-law remedy.

see publication Words and Phrases for other judicial constructions and
definitions.

ACTION  35

13 ----

13II Nature and Form

13k33 Statutory Remedies

13k35 Cumulative or exclusive remedies:
ah 1992.

"Indispensable element test" for determining when legislative enactment
supplies exclusive remedy relies on neither timing nor conduct to determine
exemption; instead, under such test, preemption depends on nature of injury
for which plaintiff makes claim, not nature of defendant's act which plaintiff
alleges to have been responsible for that injury.

WORKERS' COMPENSATION  2093

413 ----

413XX Effect of Act on Other Statutory or Common-Law Rights of Action
and Defenses

413XX(A) Between Employer and Employee

413XX(A)1 Exclusiveness of Remedies Afforded by Acts

413k2093 Willful or deliberate act or negligence.
ah 1992.

Tort suit by employee against fellow employee for injury caused by
intentional tort is not barred by exclusivity provision of workers' ***949**
compensation law.

DAMAGES  50.10

4 P.2d 949, Retherford v. AT & T Communications of Mountain States, Inc.,
tah 1992)

115 ----

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or
Losses

115III(A)2 Mental Suffering

115k50.10 Intentional, reckless, or outrageous conduct.

[See headnote text below]

MASTER AND SERVANT 🔑 35

255 ----

255I The Relation

255I(C) Termination, Discharge, and Discipline

255I(C)2 Discharge or Discipline

255k34 Actions for Wrongful Discharge

255k35 Nature and form.

ah 1992.

Utah Anti-Discriminatory Act preempted state law tort claims by former
employee, who was discharged after she complained about sexual harassment, for
discharge in violation of public policy, but did not preempt other claims for
breach of implied contract, intentional infliction of emotional distress,
tortious interference with contractual relations, and negligent employment of
assessors. U.C.A.1953, 34-35-1 to 34-35-7.1.

MASTER AND SERVANT 🔑 30(1.10)

255 ----

255I The Relation

255I(C) Termination, Discharge, and Discipline

255I(C)2 Discharge or Discipline

255k30 Grounds and Liabilities

255k30(1.10) Public policy considerations.

ah 1992.

In determining whether public policy is sufficiently "clear and substantial"
support cause of action for discharge in violation of public policy, one must
examine strength of policy as well as extent to which it affects public as
a whole; words "clear and substantial" require lack of ambiguity on both points,
and all statements made in statute are not expressions of public policy.

Publication Words and Phrases for other judicial constructions and
definitions.

MASTER AND SERVANT 🔑 30(1.10)

255 ----

255I The Relation

255I(C) Termination, Discharge, and Discipline

255I(C)2 Discharge or Discipline

255k30 Grounds and Liabilities

255k30(1.10) Public policy considerations.

4 P.2d 949, Retherford v. AT & T Communications of Mountain States, Inc.,
tah 1992)

ah 1992.

Questions relevant to determining whether statute embodies "clear and
bstantial public policy," so as to support tort of discharge in violation of
blic policy, include: whether policy in question is one of overarching
portance to public, as opposed to parties only; and whether public interest
so strong and policy so clear and weighty that we should place policy beyond
ach of contract, thereby constituting bar to discharge that parties cannot
dify, even when freely willing and with equal bargaining power.

e publication Words and Phrases for other judicial constructions and
finitions.

MASTER AND SERVANT ☞ 40(3.1)
255 ----
255I The Relation
255I(C) Termination, Discharge, and Discipline
255I(C)2 Discharge or Discipline
255k34 Actions for Wrongful Discharge
255k40 Evidence
255k40(3) Weight and Sufficiency
255k40(3.1) In general.

Formerly 255k40(3)

ah 1992.

For employee to prevail on claim of breach of implied contract, employee must
ove existence of implied contract, created by mutual assent, and employer's
ilure to comply with its terms.

DAMAGES ☞ 50.10
115 ----
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or
Losses
115III(A)2 Mental Suffering
115k50.10 Intentional, reckless, or outrageous conduct.

ah 1992.

To prevail on claim of intentional infliction of emotional distress arising
om sexual harassment by co-workers, former employee was required to prove that
: co-workers either intentionally or recklessly engaged in intolerable and
:rageous conduct that caused her severe emotional distress.

MASTER AND SERVANT ☞ 341
255 ----
255V Interference with the Relation by Third Persons
255V(A) Civil Liability
255k341 Injury to servant by malicious procurement of discharge.

ah 1992.

To prevail on claim of malicious interference with contractual relations,

4 P.2d 949, Retherford v. AT & T Communications of Mountain States, Inc.,
tah 1992)

rmer employee was required to prove that her co-workers, whether separately or
conspiracy, intentionally and improperly persuaded employer to breach its
ployment contract with employee.

MASTER AND SERVANT 🔑303

255 ----

255IV Liabilities for Injuries to Third Persons

255IV(A) Acts or Omissions of Servant

255k303 Incompetency of servant.

ah 1992.

To prevail on claim of negligent employment against employer, employee was
quired to prove that employer's negligence in hiring, supervising, or
taining its employees proximately caused her harm.

LABOR RELATIONS 🔑45

232A ----

232AII Labor Relations Acts

232Ak42 Validity

232Ak45 Effect of federal legislation.

Formerly 360k18.45

[See headnote text below]

STATES 🔑18.46

360 ----

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.45 Labor and Employment

360k18.46 In general.

ah 1992.

Preemption provision of the LMRA preempts any common-law claim that is
bstantially dependent on analysis of collective bargaining agreement. Labor
nagement Relations Act, 1947, §§ 301, 301(a), 29 U.S.C.A. §§ 185, 185(a).

LABOR RELATIONS 🔑45

232A ----

232AII Labor Relations Acts

232Ak42 Validity

232Ak45 Effect of federal legislation.

Formerly 360k18.45

[See headnote text below]

STATES 🔑18.46

360 ----

360I Political Status and Relations

4 P.2d 949, Retherford v. AT & T Communications of Mountain States, Inc.,
tah 1992)

360I(B) Federal Supremacy; Preemption

360k18.45 Labor and Employment

360k18.46 In general.

ah 1992.

Even if dispute resolution pursuant to collective bargaining agreement, on
e hand, and state law, on other, would require addressing precisely same set
facts, state law claim is "independent" of agreement, and not preempted by
RA, as long as state law claim can be resolved without interpreting agreement
self. Labor Management Relations Act, 1947, §§ 301, 301(a), 29 U.S.C.A. §§
5, 185(a).

e publication Words and Phrases for other judicial constructions and
finitions.

MASTER AND SERVANT ☞ 34.1

255 ----

255I The Relation

255I(C) Termination, Discharge, and Discipline

255I(C)2 Discharge or Discipline

255k34 Actions for Wrongful Discharge

255k34.1 In general.

Formerly 255k34

ah 1992.

Claims by former employee, who alleged that she was discharged in retaliation
complaining about sexual harassment, that discharge breached obligation
der implied contract and that co-workers maliciously interfered with
tractual relation, resulting in breach of implied contract, were based on
plied contract that was unenforceable as inconsistent with collective
rgaining agreement; providing any remedy under implied contract where no
edy was available under collective bargaining agreement, because time for
itration has passed, would put former employee in more advantageous position
an other employees bound by collective bargaining agreement. Labor Management
ations Act, 1947, § 301, 29 U.S.C.A. § 185; National Labor Relations Act, §
a), as amended, 29 U.S.C.A. § 159(a).

TORTS ☞ 12

379 ----

379k12 Interference with or injuries in contractual relations.

ah 1992.

Plaintiff may not maintain cause of action for malicious interference with
tract if contract was illegal or contrary to public policy.

DAMAGES ☞ 50.10

115 ----

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or
Losses

4 P.2d 949, Retherford v. AT & T Communications of Mountain States, Inc.,
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115III(A)2 Mental Suffering
115k50.10 Intentional, reckless, or outrageous conduct. *949

[See headnote text below]

STATES ⚙️ 18.15

360 ----

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.15 Particular cases, preemption or supersession.

ah 1992.

Intentional infliction of emotional distress claims against co-workers and supervisors by former employee, who alleged that she was sexually harassed and at when she complained other harassment intensified, were preempted by LMRA to tent that claims were against supervisors for reprimanding her, ordering her report to another city to work within ten days, and assigning her certain sks, raising questions about authority under collective bargaining agreement, t other allegations that co-workers, followed her around office and attempted frighten her as she crossed street involved purely personal misconduct, and re not preempted. Labor Management Relations Act, 1947, §§ 301, 301(a), 29 S.C.A. §§ 185, 185(a).

DAMAGES ⚙️ 50.10

115 ----

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering

115k50.10 Intentional, reckless, or outrageous conduct.

ah 1992.

To sustain her claim for intentional infliction of emotional distress, aintiff must show that defendant's conduct was outrageous and intolerable and at it offended against generally accepted standards of decency and morality, at defendants intended to cause, or acted in reckless disregard of likelihood causing, emotional distress, that plaintiff suffered severe emotional stress, and that defendants' conduct proximately caused emotional distress.

DAMAGES ⚙️ 50.10

115 ----

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering

115k50.10 Intentional, reckless, or outrageous conduct.

[See headnote text below]

STATES ⚙️ 18.15

4 P.2d 949, Retherford v. AT & T Communications of Mountain States, Inc.,
tah 1992)

360 ----

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.15 Particular cases, preemption or supersession.
ah 1992.

In determining whether LMRA preempts tort claims alleging intentional
fiction of emotional distress by supervisor or fellow employee, distinction
made between situations in which defendant has misused his or her authority
der collective bargaining agreement to torment plaintiff and situations in
ich defendant has inflicted distress through conduct that is purely personal
d does not implicate exercise of supervisory authority; the former is
eempted, while the latter is not. Labor Management Relations Act, 1947, §§
1, 301(a), 29 U.S.C.A. §§ 185, 185(a).

MASTER AND SERVANT 🔑325

255 ----

255IV Liabilities for Injuries to Third Persons

255IV(C) Actions

255k325 Nature and form.

Formerly 360k18.45

[See headnote text below]

STATES 🔑18.46

360 ----

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.45 Labor and Employment

60k18.46 In general.
ah 1992.

Tort claim of negligent employment asserted by former employee, who claimed
at she was sexually harassed by co-workers, against employer was not shown by
mployee to have been preempted by the LMRA, despite employer's claim that court
uld have to consider collective bargaining agreement's termination and
scipline provisions; source of obligation by employer and supervisors was
olic law and public policy, not private agreements, and employer failed to
ow that trial court would be required to resort to bargaining agreement to
termine whether employer dealt appropriately with co-workers. Labor
agement Relations Act, 1947, §§ 301, 301(a), 29 U.S.C.A. §§ 185, 185(a).

MASTER AND SERVANT 🔑330(3)

255 ----

255IV Liabilities for Injuries to Third Persons

255IV(C) Actions

255k330 Evidence

255k330(3) Weight and sufficiency.
ah 1992.

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tah 1992)

To prevail on claim of "negligent employment," employee, who claimed that employer was negligent in hiring co-workers who sexually harassed her, and then retaliated when she complained, was required to show that employer knew or could have known that co-workers posed foreseeable risk of retaliatory harassment to third parties, including fellow employees, that co-workers did inflict such harm, and that employer's negligence in hiring, supervising, or retaining employees proximately caused injury.

See publication Words and Phrases for other judicial constructions and definitions.

. MASTER AND SERVANT ☞ 300
255 ----
255IV Liabilities for Injuries to Third Persons
255IV(A) Acts or Omissions of Servant
255k300 Nature of master's liability.
ah 1992.

Employer's duty toward people whom its employees place in position of reasonably foreseeable risk or injury does not stem from its private employment contract, but rather stems from duty imposed by state common law.

. LIMITATION OF ACTIONS ☞ 55(1)
241 ----
241III Computation of Period of Limitation
241III(A) Accrual of Right of Action or Defense
241k55 Torts
241k55(1) In general.
ah 1992.

Tort cause of action accrues for limitation purposes when all its elements come into being and claim is actionable.

. LIMITATION OF ACTIONS ☞ 55(4)
241 ----
241III Computation of Period of Limitation
241III(A) Accrual of Right of Action or Defense
241k55 Torts
241k55(4) Injuries to person.
ah 1992.

Claim by former employee against co-workers for intentional infliction of emotional distress as result of alleged harassment and retaliation for complaining about sexual harassment "accrued" for limitations purposes when employee, after almost 18 months of allegedly retaliatory abuse by co-workers, took medical disability leave at insistence of her psychiatrist, from which she never returned to job. U.C.A.1953, 78-12-1, 78-12-25(3).

. LIMITATION OF ACTIONS ☞ 55(4)
241 ----
241III Computation of Period of Limitation

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241III(A) Accrual of Right of Action or Defense

241k55 Torts

241k55(4) Injuries to person.

ah 1992.

Statute of limitations for intentional infliction of emotional distress does
t begin to run until distress is "actually inflicted," i.e., when plaintiff
ffers severe emotional disturbance. U.C.A.1953, 78-12-1, 78-12-25(3).

e publication Words and Phrases for other judicial constructions and
finitions.

. DAMAGES 50.10

115 ----

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or
Losses

115III(A)2 Mental Suffering

115k50.10 Intentional, reckless, or outrageous conduct.

ah 1992.

While standard for determining whether plaintiff claiming intentional
fliction of emotional distress has experienced emotional stress is subjective,
andard for determining outrageousness of alleged conduct is objective;
nsequently, plaintiff must show both that reasonable person would consider
leged conduct to be outrageous and that plaintiff actually experienced
bjective severe emotional anguish because of objectively outrageous conduct.

. LIMITATION OF ACTIONS 55(2)

241 ----

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k55 Torts

241k55(2) Negligence.

ah 1992.

Generally, statute of limitations on negligent employment claim will *949
: begin to run until all elements of employer's tort are present.

. DAMAGES 50.10

115 ----

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or
Losses

115III(A)2 Mental Suffering

115k50.10 Intentional, reckless, or outrageous conduct.

ah 1992.

Allegations by former employee that, after she complained about sexual
assment, co-workers shadowed her movements, intimidated her with threatening
oks and remarks, and manipulated circumstances at her work in ways that made
: job more stressful were sufficient to satisfy objective conduct requirement

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tort of intentional infliction of emotional distress that conduct was
outrageous and intolerable."

e publication Words and Phrases for other judicial constructions and
finitions.

. DAMAGES 50.10
115 ----
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or
Losses
115III(A)2 Mental Suffering
115k50.10 Intentional, reckless, or outrageous conduct.
ah 1992.

Standard for determining whether conduct of defendant is sufficiently
fensive to permit recovery for intentional infliction of emotional distress is
ether defendant's actions offend against generally accepted standards of
cency and morality.

. DAMAGES 50.10
115 ----
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or
Losses
115III(A)2 Mental Suffering
115k50.10 Intentional, reckless, or outrageous conduct.
ah 1992.

Conduct generally labeled as sexual harassment on job satisfies "outrageous
& intolerable" requirement for tort of intentional infliction of emotional
stress, and therefore, retaliation for complaining of sexual harassment must
so be considered "outrageous and intolerable."

***953** Richard W. Perkins, Salt Lake City, for plaintiff and appellant.

Richard M. Hymas, Salt Lake City, for defendants and appellees.

ZIMMERMAN, Justice:

This case is before us on appeal from a grant of summary judgment dismissing
aintiff's complaint. Debra S. Retherford sued her former employer, AT & T
munications, under several theories for harms arising from alleged sexual
harassment by her co-employees. Specifically, she alleged that AT & T fired her
retaliation for complaining of being sexually harassed by her AT & T co-
workers. She argued that such a discharge violated Utah public policy barring
disals for reports of sexual harassment. She also contended that the
discharge breached a term of her implied contract with AT & T, which prohibited
disal for reports of sexual harassment and was entirely separate from the
reement between her union's collective bargaining unit and AT & T. Retherford

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Retherford asserted that AT & T was liable for negligently employing her harassers. Retherford sued former co-workers Cathy Bateson (aka Cathy Bateson-ugh), Louise Johnson, and Vickie Randall, claiming that their retaliatory conduct constituted intentional infliction of emotional distress and malicious interference with her contractual relations with AT & T.

Defendants moved to dismiss the complaint, claiming, *inter alia*, that workers covered by employment contracts that prohibit discharge other than for just cause should not be able to maintain a tort action for discharge in violation of public policy; that the Utah Anti-Discriminatory Act ("UADA") preempted Retherford's common law causes of action, see Utah Code Ann. §§ 34-35-1 to -8 (1988) (amended 1989, 1990 & 1991); that federal labor law preempted Retherford's common law causes of action, see 29 U.S.C. § 185(a); and that Retherford had failed to state tort claims against her former co-workers or to bring those claims within the period fixed by the relevant statute of limitations.

The district judge considered affidavits in support of and in opposition to Retherford's motion to dismiss and granted defendants summary judgment on all claims. Retherford appeals.

To summarize our ruling today, we hold as follows: first, that both employees covered by employment contracts that limit the bases for discharge and employees who are at-will can maintain a tort action for ***954** discharge in violation of Utah public policy; second, that the UADA provides the exclusive remedy for Retherford's claim for discharge in violation of public policy but does not bar her other causes of action; third, that federal labor law preempts Retherford's claims for breach of implied contract and malicious interference with contractual relations and partially preempts Retherford's claim for intentional infliction of emotional distress; and fourth, that Retherford brought her claims for emotional distress and negligent employment in a timely manner and has stated a cause of action for intentional infliction of emotional distress against her former co-workers. We therefore reverse the order granting summary judgment and remand this case for further proceedings on Retherford's claim of negligent employment and the nonpreempted portion of her claim for intentional infliction of emotional distress.

In reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party. *Smith v. Batchelor*, 832 P.2d 467, 468 (Utah 1992); *Rollins v. Petersen*, 3 P.2d 1156, 1158 (Utah 1991); *Utah State Coalition of Senior Citizens v. Utah Power & Light Co.*, 776 P.2d 632, 634 (Utah 1989). We state the facts of the instant case--which we draw primarily from Retherford's affidavit submitted in opposition to AT & T's motion to dismiss--accordingly. See *Sandy City v. Salt Lake County*, 827 P.2d 212, 215 (Utah 1992).

In 1976, Mountain States Telephone and Telegraph Company hired Retherford to work as a telephone operator in Grand Junction, Colorado. In 1983, due to the

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tionwide restructuring of AT & T and its subsidiary companies, Retherford was
ansferred to AT & T's Wasatch office, located in Salt Lake City, where she
ntinued working as a telephone operator.

Retherford alleges that two separate agreements governed her employment with
& T. As an AT & T employee, Retherford was covered by a collective
rgaining agreement between AT & T and her union, the Communications Workers of
erica ("CWA"). Independent of the collective bargaining agreement, AT & T
so had promulgated a code of conduct that outlined employees' rights and
sponsibilities and was specifically brought to the attention of and
knowledged in writing by all employees. Retherford argues that the code of
nduct created an implied employment contract between AT & T and its employees.

Both the collective bargaining agreement and the code of conduct prohibited
xual harassment and outlined procedures for aggrieved employees to press any
mplaints. The collective bargaining agreement stated, "[N]either the Company
r the Union shall unlawfully discriminate against any employee because of such
mployee's race, color, religion, sex, age or national origin or because he or
e is handicapped, a disabled veteran or a veteran of the Vietnam era." The
llective bargaining agreement required resort to arbitration to resolve
g]rievances arising out of or resulting from the application or interpretation
the provisions of this Agreement" and "[g]rievances arising out of or
sulting from the dismissal, suspension, or demotion of a regular employee...."

The code of conduct's provision on sexual harassment was more detailed than
at in the collective bargaining agreement. The code of conduct read in
levant part:

Any sexually harassing conduct in the workplace, whether physical or
verbal, committed by any employee is also prohibited. This includes:
repeated offensive sexual flirtations, advances, propositions; continued or
repeated verbal abuse of a sexual nature; graphic verbal commentaries about
an individual's body; sexually degrading words used to describe an
individual; and the display in the workplace of sexually suggestive objects,
pictures or posters.

Employees who have complaints of sexual harassment should report such
conduct to their supervisors. If this is not appropriate, employees are
urged to seek the assistance of their EEO coordinator. Where the
investigation confirms *955 the allegations, prompt corrective action
should be taken.

....

Any reprisal against an employee because the employee, in good faith,
reported a violation or suspected violation is strictly forbidden.

Soon after Rutherford transferred to Salt Lake City, manager Fayonne

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hanneson required Retherford meet with her to discuss the provisions of the
nduct code and to sign a statement saying that she had read and understood
em. This procedure was repeated every year during Retherford's tenure at the
satch office. In an affidavit submitted in opposition to defendants' motion
dismiss, Retherford termed this annual procedure "a condition of her
ntinued employment" with AT & T.

Among Retherford's co-workers at the Wasatch office were Cathy Bateson-Hough,
AT & T manager, Louise Johnson, a supervisor, Vickie Randall, a fellow
ployee and union steward, and Jolene Gailey, (FN1) a fellow telephone
erator. Upon her arrival in Salt Lake City, she noticed the sexually
inhibited atmosphere of the Wasatch office. In her affidavit, Retherford
stified that during her first day at work, Bateson-Hough showed her an obscene
lentine's Day card. Soon Retherford became aware that obscene jokes and foul
nguage were commonplace among her co-workers.

After approximately six months, Retherford switched to the night shift. At
is time, she encountered a more sexually suggestive work environment, one she
und threatening. As before, she noted that sex was a common topic of
scussion. For example, in her affidavit she described Johnson's loud accounts
an alleged sexual relationship with another AT & T employee.

For the first time, however, Retherford found herself a target of the
xually suggestive commentary. Specifically, she alleges that Jolene Gailey
bjected her to unwelcome sexual advances. Retherford's affidavit describes
ese advances as follows:

Retherford complains that Gailey touched her, made numerous comments
garding her appearance, and regularly suggested that Retherford join her "in
rious activities." Gailey's friends, including defendant Johnson, also began
congregate around Retherford, conversing frequently and explicitly about
bjects of a sexual nature. As time passed, Gailey became more aggressive.
en "visibly intoxicated," Gailey sat next to Retherford, touched her
fectionately on the arm, and said, "I'm going to save you from Dave Todd," a
le AT & T employee with whom Retherford had been sitting at meals. Gailey
bsequently asked Retherford to pose nude while Gailey painted or sculpted her
keness, told Retherford that she was looking for a roommate, and informed
therford that she hated men and even the sound of men's voices on the
lephone. Retherford also believes that Gailey passed a note around the office
ating that Retherford was having an affair with a male AT & T employee.

After approximately ten months of such treatment, Gailey telephoned
therford at home and asked her if she intended to file an EEOC complaint about
iley's conduct. (FN2) Retherford testified in her affidavit that she replied
at she would file a complaint if Gailey continued to bother her. According to
therford's affidavit, Gailey responded, "I'm sorry if I offended you, but I
el I shouldn't have to apologize for my sexuality."

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Retherford testified in her affidavit that after she informed Gailey that she was considering filing a complaint of sexual harassment, Gailey and other AT & T employees began to retaliate by staring at her, making "threatening facial expressions" at her, walking extremely close to *956 her, and following her around the office. During March of 1984, Retherford twice complained to her supervisor and manager of the retaliatory harassment from Gailey and other co-workers. Two months later, she wrote manager Bateson-Hough a letter complaining that Gailey continued to harass her despite her requests that Gailey leave her alone. The next day, May 10, 1984, Retherford submitted a written complaint to AT & T's Equal Employment Opportunity ("EEO") coordinator.

About five days later, Richard Salazar, an AT & T employee and a CWA union steward, called Retherford at home to discuss the complaint she had submitted. Retherford testified that Salazar told her, "You're the new kid on the block-- you're not going to win this. We don't know you very well, but we do know Darlene [Gailey], she is a respectable person in the community and an artist." Salazar added, "Somebody could get fired over this." Darlene Anderson, a first-level manager of the Wasatch office, also cautioned Retherford, saying, "Just be careful what you say and do; this is a strong and big group that you are dealing with." Several weeks after Retherford complained to the AT & T EEO coordinator, she was attempting to cross the street at 1:15 a.m. when Gailey drove past her. When Retherford reached her own car and drove away, Gailey followed her for a few miles.

During June of 1984, Linda Johnston, an AT & T employee who Retherford says is a personal friend of Bateson-Hough's, investigated Retherford's complaint. Retherford said that Johnston's investigation consisted solely of personal interviews with and submission of written statements by Retherford and Gailey. About one month later, Johnston submitted the EEO coordinator's report, which commended that Retherford and Gailey have as little contact with each other as possible. Subsequently, Retherford received a telephone call from Reta Pehrson, AT & T supervisor and CWA vice president, who told her, "You have to be satisfied with the [EEO coordinator's] decision.... If anybody asks you about this, don't tell them and don't say anything." Pehrson added, "Cathy [Bateson-Hough] wanted me to also tell you that if you would like a transfer, she will transfer you to the Sundance Office."

Retherford stated in her affidavit that the harassment in the Wasatch office did not abate following the issuance of the EEO coordinator's report and commendations. At one point, Retherford overheard an AT & T employee say to a group of co-workers, including defendant Johnson, "Debi [Retherford] would make good stripper--she has big boobs." Looking directly at Retherford, Johnson replied, "My bra size is 34B." Retherford said that Gailey and other co-workers continued to stare at her, walk close to her, follow her, and make faces at her. She also said that on at least one occasion, Gailey and Johnson accused Retherford of staring at them.

In late August of 1984, Retherford filed a charge letter with the EEOC,

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leging that some of her co-workers had sexually harassed her for a year and at AT & T had done nothing to remedy the situation. Several months later, Fred Aros, an EEOC investigator, called Retherford at home to tell her that of the four witnesses he had interviewed while investigating her complaint, three had told him there was a "lesbian problem" at the Wasatch office. He said he intended to issue a warning to AT & T management about this situation. Around the same time, the AT & T EEO coordinator surveyed the workers in the Wasatch office about sexual harassment and eventually issued a report concluding that employees at the Wasatch office engaged in a great deal of sexually oriented discussion, including many obscene jokes. This report failed to curb the sexual atmosphere in the Wasatch office. Indeed, Retherford testified in her affidavit that after its issuance, the obscene jokes and explicit sexual conversations increased in frequency and offensiveness.

In late December of 1984, Retherford again delivered a written complaint to Bateson-Hough. Retherford says that Bateson-Hough summoned her and told her at the AT & T EEO coordinator had issued a letter chastising both Retherford and Gailey for their continued quarreling. *957 She refused to show Retherford the letter. Bateson-Hough also informed Retherford that Retherford's warning of dismissal and told her that AT & T would fire her if she continued to complain about Gailey.

Retherford testified in her affidavit that the abuse by her co-workers continued, exacerbated by the perception that she was an informant. In Retherford's presence, Johnson and others made various comments lamenting the fact that someone was watching them and would report them if they broke company rules. Following one such comment, Johnson looked at Retherford and said, "Isn't that right, Debi?" Retherford also said that Bateson-Hough made no effort to protect her from this retaliation. In fact, she said, Bateson-Hough arranged the seating in the Wasatch office, placing Retherford next to some of her harassers and assigning her to "slow" work stations, which hampered her productivity.

To cope with the stress of her work place, Retherford began visiting a psychiatrist and a physician in the summer of 1985. In September of 1985, Retherford says, she took medical disability leave to recover from the stress and anxiety caused by the harassment. Following her psychiatrist's instructions that she must not work in proximity to "the people who started the panic in the office," she never returned to the Wasatch office.

Retherford testified in her affidavit that on or about March 12, 1986, Douglas Erickson, group manager of the Wasatch office, and Vickie Randall, an AT & T employee and union steward, called Retherford to tell her that because she was medically incapable of returning to the Wasatch office, AT & T was transferring her to its office in Boise, Idaho. Erickson ordered her to report to her new assignment within ten days. When Retherford protested that her family obligations and medical treatment in Salt Lake City prevented her from traveling to Boise on such short notice, Randall responded, "What do you expect us

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do, build you a new building?" Erickson then advised Retherford that if she
iled to report to the Boise office within ten days, AT & T would fire her.

Retherford did not report to Boise by the deadline, and AT & T fired her on
rch 26, 1986. She filed a written grievance with the CWA, Local 7704, on
ril 9th. On September 29th, the vice president of Local 7704 told Retherford
at due to an oversight on the part of the CWA, the union had not submitted her
ieivance for arbitration and that the time for processing her grievance, as
tablished by the bargaining agreement, had expired.

On July 21, 1988, two years and four months after she was fired, Retherford
led suit in United States District Court for the District of Utah, alleging
deral claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§
00e-2, -3, and section 301 of the Labor Management Relations Act, 29 U.S.C. §
5, and pendent state UADA and common law claims. On March 21, 1989, the court
smissed the federal claims with prejudice as being untimely and dismissed the
ate claims without prejudice for lack of pendent jurisdiction. *Retherford v.*
& T, No. C-88-648W, slip op. (D.Utah Mar. 16, 1989) (unpublished).

On April 7, 1989, Retherford filed suit in the Third Judicial District Court,
leging the following: first, that AT & T fired her in violation of Utah
blic policy, which bars reprisals for reporting sexual harassment; second,
at AT & T's discharging her in retaliation for complaining of sexual
rassment violated a term of an employment contract implied from AT & T's code
conduct; third, that AT & T was liable for negligently employing
therford's sexual harassers; fourth, that Bateson-Hough, Johnson, and Randall
entionally inflicted emotional distress on Retherford; and fifth, that
teson-Hough, Johnson, and Randall maliciously interfered with Retherford's
ntractual relations.

Defendants moved to dismiss, arguing first, that Utah does not recognize a
mon law cause of action for discharge in violation of public policy; second,
at even if Utah did recognize such a cause of action, federal and state anti-
scrimination ***958** laws would preempt any such claim; third, that as a
tter of federal labor law, the AT & T-CWA collective bargaining agreement
rred Retherford's state claims; fourth, that Retherford had failed to timely
sert her state law claims for negligent employment, breach of implied
ntract, and intentional infliction of emotional distress; and fifth, that
therford had failed to state a claim of intentional infliction of emotional
stress because the conduct she alleged did not "offend against the generally
epted standards of indecency and immorality," as required by Utah case law.
N3)

[1] Relying on affidavits in reaching its decision, the trial court treated
fendants' motion to dismiss as a motion for summary judgment. See Utah
Civ.P. 12(c), 56(c). The court entered judgment in favor of AT & T, Bateson-
ugh, Johnson, and Randall, offering the following explanation for the ruling:

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[T]he Court having found that there are no genuine issues of material fact; and the Court having further determined that Defendants are entitled to judgment as a matter of law ... [,] Defendants' Motion to Dismiss, which is being treated as a motion for summary judgment, is hereby granted. (FN4)

Retherford appeals.

[2] Before addressing the merits, we note the applicable standard of review. Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Utah Civ.P. 56(c); *Sandy City*, 827 P.2d at 217-18; *Rollins*, 813 P.2d at 1159; *Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990). Because a summary judgment resolves only questions of law, we give no deference to the trial court's determinations. We affirm only if the decision before us was correct. *Sandy City*, 827 P.2d at 218; *Rollins*, 813 P.2d at 1159; *Landes*, 795 P.2d at 29.

The present appeal requires that we examine the interplay between statutory uses of action and common law tort and contract causes of action for discharge in retaliation for complaining of sexual harassment. We first address the common law. In the last decade, state courts have shown a growing willingness to increase employer exposure to suit for claims relating to the discharge of employees, a trend that has taken a number of different forms. James N. Martouzos & Lynn A. Karoly, *Labor-Market Responses to Employer Liability* viii (The RAND Institute for Civil Justice 1992). In Utah, this court has joined the national trend by converting into a rebuttable presumption the common law rule that absent an express agreement, employment was at-will, see *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1044 (Utah 1989) (Durham, J., joined by Stewart, J.); *id.* at 1051-52 (Zimmerman, J., concurring in the result), by recognizing implied employment contracts, see *id.* at 1044-46, 1049 (Durham, J., joined by Stewart, J.); *id.* at 1052-53 (Zimmerman, J., concurring in the result), and by opting the tort of discharge in violation of public policy, see *Peterson v. Downing*, 832 P.2d 1280, 1282 (Utah 1992) (Durham, J., joined by Stewart, J.); *id.* at 1285 (Howe, A.C.J., concurring). See generally Janet Hugie Smith & Lisa Yerkovich, *Utah Employment Law Since Berube*, Utah Bar J., Oct. 1992, at 15.

***959** In making these changes to Utah's common law, we did not address the extent to which the availability of preexisting statutory and contractual remedies for employers' malfeasance against employees would affect the availability of these new common law contract and tort causes of action. Retherford puts this question squarely before us. She asserts only common law tort and contract claims, apparently because the statute of limitations has run on any claims for relief she might have had under federal and state antidiscrimination statutes, see 42 U.S.C. § 2000e-5(e); Utah Code Ann. § 34-35-7.1; see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 93 S.Ct. 1817, 1822, 36 L.Ed.2d 668 (1973), and federal labor law, see *DelCostello*

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International Bhd. of Teamsters, 462 U.S. 151, 171-72, 103 S.Ct. 2281, 2294,
L.Ed.2d 476 (1983).

Her appeal presents the following novel questions: First, when an employee has a contractual right to be fired only for just cause and therefore has a claim of contract breach if he or she can demonstrate discharge on some other ground, such as retaliation for exercising a legal right, should we allow a common law tort action for discharge in violation of public policy that is based on the same facts that underlie the claim for breach of contract? Second, does the Utah Anti-Discriminatory Act's exclusive remedy provision preempt common law causes of action based on the same facts necessary to prove a cause of action under the statute, including common law causes of action for discharge in violation of public policy, breach of implied contract, negligent employment, intentional infliction of emotional distress, or malicious interference with contract? Third, does federal labor law preempt these same claims? Fourth, neither state nor federal statute preempts her claims against her co-workers, Retherford's assertion of these claims timely? Fifth, if neither state nor federal statute preempts Retherford's claim for intentional infliction of emotional distress, is the conduct Retherford alleges sufficiently severe to satisfy the standard we have set for this tort? We will discuss each issue in turn.

[3] We begin with defendants' contention that we should not allow an employee with an employment contract that protects him or her from discharge without just cause--a contract that would prohibit discharge in violation of public policy--to maintain a common law tort action for discharge in violation of public policy. Defendants argue that because the facts Retherford alleges constitute a cause of action for breach of her collective bargaining agreement's just-cause provision, she is precluded from seeking tort damages for the same conduct.

The AT & T-CWA collective bargaining agreement provides the premise for defendants' argument. It requires arbitration for "[g]rievances arising out of discharge resulting from the dismissal ... of a regular employee," and it states that a dismissal "shall stand unless it is established that the dismissal ... was effected without *just cause*." (Emphasis added.) Defendants contend that the concept of "just cause" should exclude all reasons for discharge that are consistent with public policy. They argue that because the contractual provision protecting an employee from all but a just-cause dismissal protects the same interests as a tort cause of action for discharge in violation of public policy, no purpose is served by permitting a discharged employee to proceed on the tort claim when he or she has a contractual cause of action. Defendants contend that the contractual provision adequately vindicates the public policy underlying the tort claim.

We disagree. Our recent decision in *Peterson*, which adopted a tort action for discharges in violation of public policy and was decided after the briefing and argument of the present case, requires rejection of defendants' argument. adopted in *Peterson*, the tort of discharge in violation of public policy

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ffers in both scope and sanction from any contractual provision that might
mit an employer's power to discharge an employee for other than just cause.
e *Peterson* 832 P.2d at 1282-83, 1285 (Durham, J., joined by Stewart, J.); *id.*
1285-86 (Howe, A.C.J., concurring). Both respect for precedent and sound
blic *960 policy compel the conclusion that the tort of discharge in
olation of public policy should be available to all employees, regardless of
eir contractual status.

Our reasoning is as follows: First, the logic of *Peterson* and of the earlier
Brube decision indicates that the cause of action for discharge in violation of
blic policy limits the power of all employers to discharge employees, without
gard to whether the employee is at-will or protected by an express or implied
ployment contract. See *id.* at 1287 n. 2 (Zimmerman, J., concurring and
ssenting, joined by Hall, C.J.); *Berube*, 771 P.2d at 1043 n. 10 (Utah 1989)
pinion of Durham, J., joined by Stewart, J.); *id.* at 1051 (Zimmerman, J.,
ncurring in the result). A primary purpose behind giving employees a right to
e for discharges in violation of public policy is to protect the vital state
terests embodied in such policies. We cannot fulfill such a purpose if we
nge this cause of action on employees' contractual status and thus limit its
ailability to any one class of employees. See *Peterson*, 832 P.2d at 1287 n. 2
immerman, J., concurring and dissenting); see also *Petermann v. International*
d. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local 396, 174
1.App.2d 184, 344 P.2d 25, 27 (1959).

[4] Second, not every discharge in violation of a contractual just-cause
ovision rises to the level of a violation of public policy. As Justice Durham
inted out in *Peterson*, only those public policies that are "clear" and
ubstantial" and arise from statutes or constitutions qualify for vindication
rough the tort of discharge in violation of public policy. 832 P.2d at 1282.
nsequently, the overlap of a contractual just-cause cause of action and a
blic policy tort cause of action is not as great as defendants would have us
lieve.

[5] Finally, the vindication of public policy worked by the tort cause of
tion cannot be accomplished by a contractual provision that prohibits
scharges for any but just cause. Even when a contract prohibits conduct that
so would violate public policy, the remedies for breach of that contract would
tisfy only the private interests of the parties to the agreement, i.e., by
storing a wrongfully discharged employee to his or her position and making him
her whole. There is no reason to expect that these remedies would be as
aconian as those that might be available under the tort cause of action,
medies that are designed not only to remedy the breach and make the employee
ole, but to deter and punish violations of vital state interests. While any
ployer violating a contractual just-cause standard of dismissal should be
able for breaking its promise to its employee, *Peterson* dictates that an
ployer who violates clear and substantial public policies should be liable for
e more expansive penalties of tort, a potentially harsher liability
mmensurate with the greater wrong against society. When an employer's act

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olates both its own contractual just-cause standard and a clear and
bstantial public policy, we see no reason to dilute the force of the double
nction. In such an instance, the employer is liable for two breaches, one in
ntract and one in tort. It therefore must bear the consequences of both.

For the foregoing reasons, we reject defendants' argument. We hold that the
rt of discharge in violation of public policy is a limitation on all
scharges, not merely an exception to the at-will doctrine. See *Peterson*, 832
2d at 1287 n. 2 (Zimmerman, J., concurring and dissenting, joined by Hall,
J.); *Berube*, 771 P.2d at 1043 n. 10 (opinion of Durham, J., joined by
ewart, J.); *id.* at 1051 (Zimmerman, J., concurring in the result); see also
dgett v. Sackett-Chicago, Inc., 105 Ill.2d 143, 85 Ill.Dec. 475, 478-79, 473
E.2d 1280, 1283-84 (1984), *cert. denied*, 474 U.S. 909, 106 S.Ct. 278, 88
Ed.2d 243 (1985); *Ewing v. Koppers Co.*, 312 Md. 45, 537 A.2d 1173, 1175
988); *Lepore v. National Tool & Mfg. Co.*, 224 N.J.Super. 463, 540 A.2d 1296,
01 (1988), *aff'd*, 115 N.J. 226, 557 A.2d 1371, *cert. denied*, 493 U.S. 954, 110
Ct. 366, 107 L.Ed.2d 353 (1989); *cf. Johnson v. Transworld Airlines, Inc.*,
9 Cal.App.3d 518, 196 Cal.Rptr. 896, 899 (1983); ***961** *K Mart Corp. v.*
nsock, 103 Nev. 39, 732 P.2d 1364, 1369-70 (1987).

We next turn to the UADA to determine whether it preempts Retherford's common
w claims for discharge in violation of public policy, breach of implied
ntract, malicious interference with contract, negligent employment, and
tentional infliction of emotional distress. Retherford argues that the UADA
s no preemptive effect because she hopes to avoid its provisions and pursue
r common law remedies.

[6] Our analysis of this question breaks down into two subsidiary issues.
rst, does the UADA preempt common law causes of action for retaliation against
employee for complaints of sexual harassment? Second, if the UADA does have
is preemptive effect, do the causes of action Retherford alleges fall within
e UADA's preemptive scope? We discuss these questions in turn.

The starting place for a determination of the preemptive effect of the UADA
the statute itself. The legislature enacted the UADA in 1969 as part of a
mprehensive state labor law scheme. See 1969 Utah Laws ch. 85, §§ 160-67. As
ssed, the statute neither prohibited employer retaliation against employees
mplaining of discrimination nor provided that the UADA supplied the exclusive
medy for discriminatory or prohibited employment practices. In 1985, the
gislature added both a provision barring employer retaliation against
ployees opposing any employment practices prohibited by the chapter, 1985 Utah
ws ch. 189, § 3, and a provision making the UADA's remedies exclusive, *id.* §
The 1985 exclusivity provision read as follows:

The procedures contained in this section and Section 34-35-8 are the
exclusive remedy under state law for employment discrimination because of
race, color, sex, age, religion, national origin, or handicap.

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Utah Code Ann. § 34-35-7.1(11) (1988) (amended 1990 & 1991) (current version § 34-35-7.1(15)). (FN5) The 1985 exclusivity provision, while listing specific grounds that had been theretofore prohibited, did not mention expressly the newly added prohibited action: employer retaliation against employees who posed prohibited employment practices. See 1985 Utah Laws ch. 189, § 4. In 1990, the legislature added retaliation to the listed grounds covered by the exclusivity provision. See 1990 Utah Laws ch. 63, § 2.

In arguing that the UADA is not the exclusive remedy for employer retaliation against employees who oppose prohibited discrimination, *Retherford* seizes upon the fact that the exclusivity provision in effect in 1986, when she was fired, did not expressly mention retaliation. She claims that this omission excepts common law claims from the UADA's exclusivity provision. We disagree. We find that taken as a whole, the plain text of the statute then in effect exempts common law causes of action for retaliation for complaints of employment discrimination. Furthermore, the circumstances surrounding the 1990 amendment of the statute bolster this construction. We discuss our construction of the statute below.

[7] [8] As *Retherford* correctly notes, the word "retaliation" does not appear in the exclusivity provision in effect at the time she was fired. She also correctly notes that where statutory language is plain and unambiguous, this court will not look beyond it to divine legislative intent. See *Schurtz v. BMW North Am., Inc.*, 814 P.2d 1108, 1112 (Utah 1991); *Allisen v. American Legion Post No. 134*, 763 P.2d 806, 809 (Utah 1988). However, she neglects to mention that we interpret a statute as a whole, not piecemeal. See *Schurtz*, 814 P.2d at 12; *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1045 (Utah 1991); *Hansen v. Salt Lake County*, 794 P.2d 838, 841 (Utah 1990); *Madsen v. Borthick*, 769 P.2d 245, 252 n. 11 (Utah *962 1988); *Peay v. Board of Ed. of Provo City School Dist.*, 14 Utah 2d 63, 66, 377 P.2d 490, 492 (1962). Consequently, we begin by examining the statute as a whole.

Although the exclusivity provision itself specifies only "discrimination," the statute as a whole defines retaliation as "discrimination," thereby explicitly including retaliation within the exclusivity provision. Section 34-35-6(1)(a)(i) defines retaliation as a "discriminatory or prohibited" employment practice. Utah Code Ann. § 34-35-6(1)(a)(i). One could argue that interpreting this provision as defining retaliation as discrimination would slight the importance of the words "or prohibited" in section 34-35-6(1)(a)(i). However, this argument fails in light of the fact that another section of the statute defines "prohibited" employment practices as nothing more than those specified as discriminatory, and therefore unlawful, in Section 34-35-6." *Id.* 34-35-2(7). Because sections 34-35-6(1)(a)(i) and 34-35-2(7) together define retaliation as nothing more than a form of prohibited employment discrimination, retaliation must fall within the section 34-35-7.1(11) direction that the UADA's procedures "are the exclusive remedy under state law for employment discrimination." *Id.* § 34-35-7.1(11) (1988) (amended 1990 & 1991) (current version at § 34-35-7.1(15)). Therefore, as a matter of statutory construction,

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find that the version of the UADA in effect at the time of Retherford's
ring was the exclusive remedy for employer retaliation against an employee who
mplained of sexual harassment. We hold that the UADA preempts common law
uses of action for discharge in retaliation for complaints of employment
scrimination. See *Sauers v. Salt Lake County*, 735 F.Supp. 381, 386 (D.Utah
90); cf. *Wolk v. Saks Fifth Ave., Inc.*, 728 F.2d 221, 223-24 (3d Cir.1984);
rauss v. A.L. Randall Co., 144 Cal.App.3d 514, 194 Cal.Rptr. 520, 523 (1983).

[9] As a final matter, we recognize that the legislature's later amendment of
e exclusivity provision to prohibit retaliation explicitly might indicate that
e earlier exclusivity provision had not included retaliation within its scope.
wever, Retherford has produced no evidence that the legislature intended this
endment to change the substantive law rather than merely to clarify it. Our
n research into the history of this amendment has been similarly unavailing.
sent some evidence to the contrary, we conclude that taken as a whole, the
rsion of the UADA in effect at the time of Retherford's firing defined
taliation as discrimination and provided the exclusive remedy for this type of
scrimination. In reaching this conclusion, we are mindful of our statutory
ndate to construe liberally statutes in derogation of the common law. See
ah Code Ann. § 68-3-2.

[10] Having determined that the UADA is the exclusive remedy for a claim of
ployer retaliation for complaints of employment discrimination, we turn to the
estion of whether Retherford's tort and contract claims come within the scope
the UADA's preemptive effect. This question presents us with an apparently
vel question in Utah: What analytical model should determine when an
clusive statutory cause of action preempts a common law claim based on the
me facts? Although the Code provides that courts are to construe liberally
atutes that are in derogation of the common law, see *id.* § 68-3-2, and
though we have considered that statute when examining the scope of statutorily
eated causes of action or duties, see, e.g., *Asay v. Watkins*, 751 P.2d 1135,
36-37 (Utah 1988); *AAA Fencing Co. v. Raintree Dev. & Energy Co.*, 714 P.2d
9, 290-91 (Utah 1986) (per curiam); *Niblock v. Salt Lake County*, 100 Utah
3, 581-82, 111 P.2d 800, 804 (1941), we have yet to propound a generic test
r determining when a statutory cause of action functions as the exclusive
medy for the wrong, thereby foreclosing enforcement of either a preexisting
mmon law remedy or a common law remedy recognized after the enactment of the
atute.

Because we lack an analytical model to answer this question, we have looked
law outside our jurisdiction. Our research has revealed a diversity of
proaches. ***963** Courts have described at least three separate tests for
termining the preemptive effect of statutes on the common law. First, in
aming the very issue that confronts us now, the United States District Court
r the District of Utah decided that the relevant inquiry was whether the
mmon law cause of action was "based upon the very conduct which is necessary
prove sexual harassment or sex discrimination under the [UADA], namely,
nduct expressly prohibited by the Act...." *Davis v. Utah Power & Light Co.*,

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. 87-C-0659G, slip op. at 12, 1988 WL 217350 (D.Utah Nov. 23, 1988)
 npublished).

Second, in similar contexts, other courts have articulated a test grounded on
 at can be termed "antecedent existence." These courts hold that the
 atutory action is the exclusive remedy if the common law cause of action did
 t exist before the statutory cause of action was created. See *Bernstein v.*
tna Life & Casualty, 843 F.2d 359, 365 (9th Cir.1988); *Froyd v. Cook*, 681
 Supp. 669, 674 (E.D.Cal.1988); *Guevara v. K-Mart Corp.*, 629 F.Supp. 1189,
 91 (S.D.W.Va.1986); *Mahoney v. Crocker Nat'l Bank*, 571 F.Supp. 287, 293
 .D.Cal.1983); *Register v. Coleman*, 130 Ariz. 9, 633 P.2d 418, 423 (1981);
lley Drive-In Theatre Corp. v. Superior Court, 79 Ariz. 396, 291 P.2d 213, 215
 955); cf. *Lui v. Intercontinental Hotels Corp.*, 634 F.Supp. 684, 688
 .Haw.1986).

Finally, in determining the preemptive scope of workers' compensation
 atutes, courts have established a test that inquires whether the statutory
 rome supplies an indispensable element of the tort claim. See *Foley v.*
laroid Corp., 381 Mass. 545, 413 N.E.2d 711, 716 (1980); *Gambrell v. Kansas*
ty Chiefs Football Club, Inc., 562 S.W.2d 163, 168 (Mo.Ct.App.1978). We have
 opted this test in determining whether the Utah workers' compensation statute
 oplants common law causes of action for injuries on the job. See *Mounteer v.*
ah Power & Light Co., 823 P.2d 1055, 1058 (Utah 1991).

Because we see no reason why the indispensable element test should not apply
 the area before us as well as to workers' compensation (FN6) and because the
 er two approaches appear to be cumbersome and indeterminate, we hold that the
 dispensable element test is the correct analytical model for determining
 ither a statutory cause of action forecloses a common law remedy. To explain
 is choice, we briefly outline our objections to the other two models courts
 re followed in this area.

We begin with the federal district court's test in *Davis*, under which the
 A would preempt only "those common law causes of action which are based upon
 e very conduct which is necessary to prove [a claim under the act]." Slip op.
 12. We think that this test is simply too ambiguous. First, the *Davis*
 rt itself seems uncertain as to precisely how the test should be applied. In
 nsidering whether the UADA preempted several different claims, the court
 iculated the standard in varying and not wholly consistent ways. At one
 nt, the court found that the UADA did not preempt a claim for intentional or
 gligent infliction of emotional distress "because the theoretical basis [sic]
 : the two claims are separate and distinct," *id.* at 21, while at another, the
 rt found that the UADA did not preempt a claim for negligent supervision
 ause it "may encompass more than acts defined to be 'discriminatory or
 ohibited employment practices' under the Utah Act," *id.* at 22. Second, we
 e unconvinced that inquiring whether a common law cause of action is broader
 n a statutory cause of action will result in defensible distinctions between
 ose causes of action that are preempted and those that are not. (FN7)

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nsequently, ***964** we decline to adopt the *Davis* test as the standard for
termining preemption in this state.

Similarly flawed is the test of antecedent existence, which appears most
veloped in California. This test focuses on timing. The general rule is that
the common law cause of action did not exist before the statutory cause of
tion was created, the statutory cause of action preempts the common law. See
rnstein, 843 F.2d at 365; *Froyd*, 681 F.Supp. at 674; *Guevara*, 629 F.Supp. at
91; *Mahoney*, 571 F.Supp. at 293; *Register*, 633 P.2d at 423; *Valley Drive-In*
eatre Corp., 291 P.2d at 215; *Strauss*, 194 Cal.Rptr. at 522-23; *Gay Law*
udents Ass'n v. Pacific Tel. & Tel. Co., 24 Cal.3d 458, 156 Cal.Rptr. 14, 34,
5 P.2d 592, 612 (1979); *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara*
ounty Transit Dist., 65 Cal.App.3d 121, 135 Cal.Rptr. 192, 197 (1976).

We reject the test of antecedent existence for two reasons. First, we are
sure of its scope. Despite the apparently general statement of the rule, we
nnot tell whether, in fact, the rule applies to anything other than a common
w claim for discharge in violation of public policy, which is the usual
ntext in which the rule has been applied. See, e.g., *Bernstein*, 843 F.2d at
2-64; *Froyd*, 681 F.Supp. at 673 & n. 10; *Mahoney*, 571 F.Supp. at 292-93;
rauss, 194 Cal.Rptr. at 522. The few cases in which courts have addressed
ner common law causes of action, ostensibly under the antecedent existence
st, are so cryptic as to appear conclusory. See, e.g., *Real v. Continental*
oup, Inc., 627 F.Supp. 434, 445 (N.D.Cal.1986); *Diem v. City & County of San*
ancisco, 686 F.Supp. 806, 811-12 (N.D.Cal.1988). Although it is at least
guable that the rule should not apply to such common law claims as breach of
ntract, which generally predate state antidiscrimination statutes, we have
und no reasoned analysis of this question.

This uncertainty contributes to our second reason for declining to adopt the
st of antecedent existence. At its logical extremes, the theory of antecedent
istence could infringe upon constitutional and statutory mandates. The United
ates Constitution protects against state interference with contracts, see U.S.
nst. art. I, § 10, cl. 1, and the Utah Constitution's open courts provision
stricts the extent to which the state can limit common law remedies, see Utah
nst. art. I, § 11. If the test of antecedent existence applies to venerable
nmon law remedies such as breach of contract or malicious interference with
ntract, it might trench upon these constitutional provisions. Conversely, if
e test of antecedent existence is limited to claims for discharge in violation
public policy, as suggested by a case in which the court applied the test to
claim of discharge in violation of public policy but failed to consider the
st's possible application to the plaintiff's other common law claims, see
rnstein, 843 F.2d at 364-66, we cannot reconcile it with Utah's statutory
ndate to construe liberally statutes in derogation of the common law, see Utah
de Ann. § 68-3-2. In sum, we are reluctant to adopt a test of uncertain scope
en it may pose constitutional questions at one extreme and statutory questions
the other.

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[11] We now turn to what we term the indispensable element test, which we opt as the analytical model for determining when a legislative enactment applies the exclusive remedy for a certain wrong. We think that the dispensable element model will avoid much of the vagueness and uncertainty at plague the *Davis* test and the test of antecedent existence. The dispensable element test relies on neither timing nor conduct to determine exemption. *965 Instead, under this test, preemption depends on " 'the nature of the injury for which [the] plaintiff makes [the] claim, not the nature the defendant's act which the plaintiff alleges to have been responsible for at injury.' " *Foley*, 413 N.E.2d at 716 (quoting *Gambrell*, 562 S.W.2d at 168).

[12] An illustration is in order. In *Mounteer*, 823 P.2d 1055 (Utah 1991), in which we adopted the indispensable element test in the context of workers' compensation, we applied the test as follows: Initially, we identified the injury that the workers' compensation statute is designed to address, i.e., only physical and mental injuries on the job. *Id.* at 1057. Then we examined the elements of the plaintiff's tort claims against his employer to determine whether physical or mental injury was a necessary element of each cause of action. *Id.* at 1058-59. This inquiry led us to the following conclusions. First, we determined that the plaintiff's claim for slander did not require that the plaintiff prove physical or mental injury; it required defamation, or injury to reputation, which was not an injury the statute addressed. Consequently, we held that the nature of the injury was not among those injuries protected by the statute and therefore the Workers' Compensation Act did not provide the exclusive remedy for the plaintiff's slander claim. *Id.* at 1058. Second, we determined that the plaintiff's claims for intentional and negligent infliction of emotional distress *did* require that the plaintiff prove mental injury because " 'mental harm is the essence' of [those] tort[s]." *Id.* (quoting *Foley*, 413 N.E.2d at 716); see *id.* at 1059. Because mental injury is among those injuries addressed by the statute and because the plaintiff could not prove intentional and negligent infliction of emotional distress without proving mental injury, we held that the Workers' Compensation Act provided the exclusive remedy for the plaintiff's mental distress. (FN8)

[13] Applying this analysis to the case at hand, we begin with the task of determining what injuries the UADA is designed to address. This purpose is revealed on the face of the Act itself, which provides that it is a discriminatory or prohibited employment practice

for an employer to refuse to hire, or promote, or to discharge, demote, terminate any person, or to retaliate against, or discriminate in matters of compensation or in terms, privileges, and conditions *966 of employment against any person otherwise qualified, because of race, color, sex, age, if the individual is 40 years of age or older, religion, national origin, or handicap.

Utah Code Ann. § 34-35-6(1)(a)(i) (amended 1989). From this language, we infer that the legislature intended the UADA to address all manner of employment

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scrimination against any member of the specified protected groups. As
scussed above, the legislature included employer retaliation for complaining
employment discrimination within its definition of discrimination. Thus, the
xt step in our analysis requires us to determine whether employment
scrimination, including employer retaliation, supplies an indispensable
ement of any of Retherford's causes of action.

[14] [15] We begin with Retherford's claim for discharge in violation of
blic policy. In order to prove this tort, Retherford must show that AT & T
scharged her in a manner or for a reason that contravened a "clear and
bstantial public policy" of the State of Utah, a public policy rooted in
ah's constitution or statutes. (FN9) *Peterson*, 832 P.2d at 1281; see also
rube, 771 P.2d at 1051 (Zimmerman, J., concurring in the result). The only
ssible source in Utah's statutes or constitution for a clear and substantial
blic policy allegedly violated by Retherford's discharge is the UADA's
hibition of retaliation for good faith complaints of employment
scrimination. (FN10) See Utah Code Ann. § 34-35-2(15). Without deciding that
e statute at issue rises to the level of a clear and substantial public
licy, we find that in the absence of this public policy declaration,
therford would be unable even to allege an action for this tort. Simply put,
there were no UADA policy against retaliation, there could be no tort for
scharge in violation of this public policy. Applying the *Mounteer* test, it is
ain that the harm the UADA addresses is an indispensable element in
therford's tort cause of action; therefore, the UADA must preempt this claim.

Moving to Retherford's other common law causes of action, the *Mounteer*
alytical model leads to the conclusion that the UADA does not preempt these
her causes of action because discrimination is not an indispensable element of
ese claims. A more detailed discussion of the elements of each of these
aims is included in the analysis of the federal labor law preemption issue
scussed below; however, for the purposes of determining the state law
emption question, it is enough to lay out the indispensable elements of
therford's remaining claims and to note that none of them comprehends an
jury that is the target of the UADA.

***967** [16] [17] [18] [19] The elements of Retherford's claims are as follows:
prevail on a claim of breach of implied contract, Retherford must prove the
istence of an implied contract, created by mutual assent, and AT & T's failure
comply with its terms. (FN11) See *Lowe v. Sorenson Research Co.*, 779 P.2d
3, 670 (Utah 1989); *Caldwell v. Ford, Bacon & Davis Utah, Inc.*, 777 P.2d 483,
5-86 (Utah 1989); *Berube*, 771 P.2d at 1044-45; *Gilmore v. Salt Lake Area*
mmunity Action Program, 775 P.2d 940, 942-43 (Utah Ct.App.1989), *cert. denied*,
9 P.2d 33 (Utah 1990). To prevail on her claim of intentional infliction of
otional distress, Retherford must prove that her co-workers either
entionally or recklessly engaged in intolerable and outrageous conduct that
used her severe emotional distress. See *Samms v. Eccles*, 11 Utah 2d 289, 293,
3 P.2d 344, 346-47 (1961); *White v. Blackburn*, 787 P.2d 1315, 1317 (Utah
.App.1990). To prevail on her claim of malicious interference with

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contractual relations, Retherford must prove that her co-workers, whether
 separately or in conspiracy, intentionally and improperly persuaded AT & T to
 breach its implied employment contract with Retherford. (FN12) See *Leigh*
Furniture & Carpet Co. v. Isom, 657 P.2d 293, 301 (Utah 1982); *Bunnell v.*
Hills, 13 Utah 2d 83, 90, 368 P.2d 597, 602 (1962). And to prevail on her claim
 of negligent employment, Retherford must prove that AT & T's negligence in
 hiring, supervising, or retaining its employees proximately caused her harm.
 See *Stone v. Hurst Lumber Co.*, 15 Utah 2d 49, 51-52, 386 P.2d 910, 911-12 (1963)

Noticeably absent from this list of the indispensable elements of the four
 claims is an injury that is a target of the UADA: retaliation for complaints of
 sexual harassment. While it is true that all four claims arise out of
 defendants' retaliatory conduct, preemption depends on the nature of the injury,
 not on the nature of the conduct allegedly responsible for that harm. See
Id., 413 N.E.2d at 716. The injuries Retherford alleges--the broken promise,
 mental anguish, the wrongful interference with her contract, and the
 unchecked misconduct of her fellow employees--are distinct from the injury of
 retaliation. Because Retherford would be able to maintain these claims without
 alleging retaliatory harassment, we hold that under the *Mounteer* test, the UADA
 does not preempt Retherford's claims for breach of implied contract, intentional
 infliction of emotional distress, tortious interference with contract, and
 negligent employment.

Having determined that the UADA preempts only Retherford's claim for
 discharge in violation of public policy, we next address whether federal labor
 law ***968** preempts any of Retherford's remaining causes of action. We recap
 the substance of these remaining claims. Retherford alleges that, first, AT &
 T's failure to prevent retaliation for her complaints of sexual harassment
 breached a contract implied from AT & T's code of conduct; second, Gailey,
 Adall, Johnson, and Bateson-Hough maliciously interfered with her contractual
 relations, resulting in AT & T's breach of its implied contract prohibiting
 reprisal for good-faith complaints of sexual harassment; third, Gailey,
 Adall, Johnson, and Bateson-Hough intentionally inflicted emotional distress
 on her through their retaliatory conduct; and fourth, AT & T negligently
 employed Retherford's harassers, thereby allowing them to inflict emotional
 distress on her.

The legislative enactment that determines the federal preemption question is
 section 301 of the Labor Management Relations Act ("LMRA"), which reads as
 follows:

Suits for violation of contracts between an employer and a labor organization
 representing employees in an industry affecting commerce as defined in this
 Act, or between any such labor organizations, may be brought in any district
 court of the United States having jurisdiction of the parties, without
 respect to the amount in controversy or without regard to the citizenship of
 the parties.

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Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a)
ereinafter section 301].

On its face, it is not apparent that section 301 preempts state law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208, 105 S.Ct. 1904, 1909, 85 L.Ed.2d 206 (1985). However, the United States Supreme Court has interpreted section 301 as not only providing federal jurisdiction over controversies involving collective bargaining agreements, but also as vesting exclusive power in "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Textile Workers Union of Am. v. Lincoln Mills of Alabama*, 353 U.S. 206, 451, 77 S.Ct. 912, 915, 1 L.Ed.2d 972 (1957); accord *Allis-Chalmers Corp.*, 471 U.S. at 210, 105 S.Ct. at 1910; *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 103-04, 82 S.Ct. 571, 577, 7 L.Ed.2d 593 (1962); see also *Sperver v. Galigher Ash Co.*, 747 P.2d 1025, 1027 (Utah 1987).

The policy underlying this expansive interpretation of section 301 is well-founded. If the terms of collective bargaining agreements were subject to differing interpretations by state and federal courts, it could severely disrupt both the negotiation and the administration of collective bargaining agreements. *Lucas Flour Co.*, 369 U.S. at 103, 82 S.Ct. at 576. To avoid this possibility, the Court held that the meaning to be given to the terms of collective bargaining agreements must be determined exclusively by uniform federal law. *Id.* at 103-04, 82 S.Ct. at 577; see *Allis-Chalmers Corp.*, 471 U.S. at 210, 105 S.Ct. at 1910.

[20] An elaboration on this doctrine of federal exclusivity in the interpretation of collective bargaining agreements is the Supreme Court's conclusion that section 301 preempts any common law cause of action where the trial court, in adjudicating that cause of action, must interpret the terms of a collective bargaining agreement. See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06, 108 S.Ct. 1877, 1881, 100 L.Ed.2d 410 (1988). In essence, the Supreme Court has held that section 301 preempts any common law claim that " 'substantially dependent on analysis of a collective bargaining agreement,' " *Caterpillar Inc. v. Williams*, 482 U.S. 386, 395, 107 S.Ct. 2425, 2431, 96 L.Ed.2d 318 (1987) (quoting *International Bhd. of Electric Workers, AFL-CIO v. NLRB*, 481 U.S. 851, 859 n. 3, 107 S.Ct. 2161, 2167 n. 3, 95 L.Ed.2d 791 (1987)), lest the common law provide a vehicle for state courts to intrude into the exclusive federal preserve that is the interpretation of collective bargaining agreements. The justification for this expansive view of section 301 preemption is the ease with which an aggrieved employee otherwise could turn a claim for breach of a collective bargaining agreement into a state tort or contract claim, thereby obtaining *969 a state law holding that might result in an inconsistent interpretation of the collective bargaining agreement. As the Court has explained:

The interests in interpretive uniformity and predictability that require that

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labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

Allis-Chalmers Corp., 471 U.S. at 211, 105 S.Ct. at 1911.

[21] The question before us, then, is whether resolution of the state law claim depends upon the interpretation of the collective bargaining agreement. If it does, section 301 preempts the state law cause of action. *Lingle*, 486 S. at 405-06, 108 S.Ct. at 1881. However, "even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." *Id.* at 409-10, 108 S.Ct. at 1883. Under such circumstances, there is no section 301 preemption.

[22] Defendants argue that the *Lingle* test bars Retherford's claims of breach of implied contract, tortious interference with contract, intentional infliction of emotional distress, and negligent employment because evaluation of the state law claim is "inextricably intertwined with consideration of the terms of the labor contract." In order to determine whether resolution of Retherford's claims indeed depends upon the meaning of the collective bargaining agreement, we must examine the discrete elements of each claim. See *Douglas v. American Info. Technologies Corp.*, 877 F.2d 565, 570 (7th Cir.1989).

We first address Retherford's claim for breach of implied contract. Defendants argue that section 301 bars Retherford's implied contract claim because the state court must interpret the collective bargaining agreement in order to determine whether the AT & T code of conduct upon which the claim is based is separate from or subsumed into the collective bargaining agreement. We hold that Retherford's implied contract claim is inactionable, but on somewhat different grounds. See *Hill v. Seattle First Nat'l Bank*, 827 P.2d 241, 246 (tah 1992).

Under federal labor law, only duly authorized union representatives can bargain for the terms and conditions of employment for those within the bargaining unit. See 29 U.S.C. § 159(a); cf. *Caterpillar Inc.*, 482 U.S. at 17, 107 S.Ct. at 2432. The Supreme Court has held that although any employee group of employees can reach a separate agreement with the employer, that separate contract must be consistent with the collective bargaining agreement

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 104 F.2d 1049 (9th Cir. 1932), cert. denied, 288 U.S. 666 (1933).

negotiated by the union. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339, 64 S.Ct. 515, 581, 88 L.Ed. 762 (1944); see also *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180, 87 S.Ct. 2001, 2006, 18 L.Ed.2d 1123, reh'g denied, 389 U.S. 892, 899, 87 S.Ct. 13, 19 L.Ed.2d 202 (1967). Thus, inconsistent separate agreements are unenforceable. See *Eitmann v. New Orleans Pub. Serv., Inc.*, 730 F.2d 359, 362 (5th Cir.), cert. denied, 469 U.S. 1018, 105 S.Ct. 433, 83 L.Ed.2d 359 (1984).

In applying this rule, at least two federal circuits have found unenforceable separate agreements that were more favorable to the individual employees than the collective bargaining agreement. See *Chmiel v. Beverly Wilshire Hotel Co.*, 833 F.2d 1283, 1285-86 (9th Cir.1989); *Eitmann*, 730 F.2d at 362-63. For example, the Ninth Circuit has held that an employee whose collective bargaining agreement defined his tenure as at-will could not enforce an implied contract for just-cause dismissal because the extra protections would contradict the collective bargaining agreement. See *Chmiel*, 833 F.2d at 1285.

We think that the policy underlying these decisions is sound. Nothing could undermine the authority of the collective bargaining unit more thoroughly than allowing individuals or cohorts of employees to enforce separate contracts that are more advantageous to those employees than was the collective bargaining agreement itself. Although the interests of individual employees may be sacrificed in the process, Congress apparently is of the view that such sacrifices are necessary in order to match the power of the employer with the aggregate power of unionized employees. Cf. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n*, 427 U.S. 512, 514, 96 S.Ct. 2548, 2556, 49 L.Ed.2d 396 (1976); *Allis-Chalmers Mfg. Co.*, 388 U.S. at 180, 87 S.Ct. at 2006; *J.I. Case*, 321 U.S. at 338-39, 64 S.Ct. at 515. See generally Annotation, *Collective Bargaining Under Labor Relations Act Related to Freedom of Contract Between Employer and Individual Employees*, 88 L.Ed. 770 (1944). Accordingly, we decline to upset this balance by allowing individual agreements to undercut the union as the bargaining agent. In the instant case, providing any remedy under an implied contract when no remedy is available under the collective bargaining agreement--because the time for mitigation has passed--obviously would put *Retherford* in a more advantageous position than *AT & T* employees bound by the collective bargaining agreement, thereby undermining the collective bargaining unit. Consequently, *Retherford's* alleged implied contract is unenforceable.

[23] Our holding that *Retherford's* implied contract is invalid requires us to hold that her claim for malicious interference with contract is similarly defective. Although some courts have held that the contract at issue in a case of malicious interference need not be enforceable, courts generally agree that a contract must not be illegal or contrary to public policy. See generally 45 *American Jur.2d Interference* §§ 8-9 (1969 & Supp.1992). Allowing a plaintiff to sue for malicious interference with a contract that is invalid would gut the federal policy of consolidating bargaining power in union representatives. Consequently, we affirm the summary judgment on *Retherford's* claim for malicious

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terference with contract, albeit on grounds different from those relied upon
the trial court.

[24] Having determined that the LMRA bars Retherford's claims stemming from
r implied contract, we next consider her tort claims for intentional
fiction of emotional distress and negligent employment. We begin with her
aim for emotional distress because AT & T can be held liable for negligent
ployment only if its employees Randall, Johnson, Gailey, (FN13) and Bateson-
ugh are liable for an independent tort. See *Focke v. United States*, 597
Supp. 1325, 1344 (D.Kan.1982); *Mulhern v. City of Scottsdale*, 165 Ariz. 395,
9 P.2d 15, 18 (Ct.App.1990). See generally Restatement (Second) of Agency §
3 (1958). Here, Retherford alleges that AT & T's employees committed the tort
intentional infliction of emotional distress.

[25] To sustain her claim for intentional infliction of emotional distress,
therford must show that (i) Gailey's, Randall's, Johnson's, and Bateson-
ugh's conduct was outrageous and intolerable in that it offended against the
nerally accepted standards of decency and morality; (ii) they intended to
use, or acted in reckless disregard of the likelihood of causing, emotional
71 distress; (iii) Retherford suffered severe emotional distress; and (iv)
eir conduct proximately caused Retherford's emotional distress. See *Samms v.*
cles, 11 Utah 2d 289, 293, 358 P.2d 344, 346-47 (1961); *White v. Blackburn*,
7 P.2d 1315, 1317 (Utah Ct.App.1990). To decide whether this tort claim is
eempted, we must determine whether, on the record before us, there is any
sis for concluding that defendants' conduct alleged to provide a basis for the
rt claim might reasonably implicate any of the terms of the collective
rgaining agreement. See *Lingle*, 486 U.S. at 405-06, 108 S.Ct. at 1881.

A necessary element of Retherford's claim is that Bateson-Hough's, Gailey's,
ndall's, and Johnson's behavior was outrageous and intolerable in that it
fended against the generally accepted standards of decency and morality. See
mms, 11 Utah 2d at 293, 358 P.2d at 347. Before analyzing this tort under
e test for section 301 preemption, it is helpful to identify the conduct that
therford alleges. Retherford details the conduct of each co-worker as
llows: With respect to Bateson-Hough, Retherford contends that Bateson-Hough
sponded to her complaining of sexual harassment by requiring her to sit next
Gailey, telling her she had a letter sanctioning her and Gailey, assigning
r to certain "slow" work stations that hampered her productivity, reprimanding
d criticizing her, and threatening to fire her if she continued to complain
out Gailey.

As for Gailey, Retherford alleges that Gailey avenged Retherford's complaint
the AT & T EEO coordinator by following her, making threatening faces at her,
d speeding by her late at night when she was trying to cross the street. (FN14
As for Randall, Retherford charges that Randall told her she must report to
ise within ten days or lose her job. In addition, although the record is
oiguous, Randall may have been among Gailey's friends who retaliated against
therford by staring at her, making "threatening facial expressions" at her,

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lking extremely close to her, and following her around the office. Finally,
hanson also may have been among the group of Gailey's friends who discomfited
therford by their staring and their threatening facial expressions. The
cord shows that on at least one occasion, Johnson accused Retherford of
aring at her. Retherford also alleges that in her presence, Johnson and
hers lamented the fact that someone was watching them and would report them if
ey broke company rules. After one such comment, Johnson looked at Retherford
d said, "Isn't that right, Debi?" Viewing the facts in the light most
vorable to Retherford, as we must, see *Rollins v. Petersen*, 813 P.2d 1156,
58 (Utah 1991), we accept for the purposes of this appeal that Retherford has
leged at least that Randall and Johnson made a habit of following her and
cking her after she complained of Gailey's sexual harassment.

Defendants argue that section 301 preempts Retherford's claims of intentional
fliction of emotional distress because a court deciding whether this conduct
s intolerable and outrageous must interpret the collective bargaining
reement to determine whether Bateson-Hough exceeded her supervisory authority
d whether Gailey's, Randall's, and Johnson's work-place conduct was improper.
agree in part.

[26] In considering section 301 preemption of tort claims alleging infliction
emotional distress by a supervisor or fellow employee, courts seem to have
stinguished between situations in which the defendant has misused his or her
thority under a collective bargaining agreement to torment the plaintiff and
tuations in which the defendant has inflicted the distress through conduct
at is purely personal and does not implicate the exercise of supervisory
thority. See *Paradis v. United Technologies Pratt & Whitney Div.*, 672 F.Supp.
, 71 (D.Conn.1987). Compare *Douglas*, 877 F.2d at 571-72 and *Newberry v.*
cific Racing Ass'n, 854 F.2d 1142, 1149-50 (9th Cir.1988) and *Truex v. Garrett*
eightlines, Inc., 784 F.2d 1347, 1350-51 (9th Cir.1985) with *972 *Keehr v.*
nsolidated Freightways of Delaware, Inc., 825 F.2d 133, 136-38 (7th Cir.1987)
d *Tellez v. Pacific Gas & Elec. Co.*, 817 F.2d 536, 539-40 (9th Cir.), cert.
nied, 484 U.S. 908, 108 S.Ct. 251, 98 L.Ed.2d 209 (1987) and *Garibaldi v.*
cky Food Stores, Inc., 726 F.2d 1367, 1369 n. 4 (9th Cir.1984), cert. denied,
1 U.S. 1099, 105 S.Ct. 2319, 85 L.Ed.2d 839 (1985).

The *Douglas* and *Keehr* cases, both from the Seventh Circuit, illustrate this
stinction. In *Douglas*, the plaintiff charged her employer with "extreme and
rageous" treatment because of the employer's allegedly arbitrary denials of
r requests for days off, an "unjustified" final warning, and "unwarranted and
cessive" scrutiny of her work. 877 F.2d at 572. The Seventh Circuit
ncluded that a state court would have to interpret the collective bargaining
reement's provisions regulating the terms and conditions of the plaintiff's
ployment to determine whether the employer's actions were indeed arbitrary,
justified, unwarranted, and excessive. It therefore held that section 301
cred *Douglas*'s state tort claim. *Id.* at 572-73.

In contrast, the *Keehr* court found that section 301 did not preempt a claim

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r intentional infliction of emotional distress. There, Keehr complained that company supervisor had engaged him in an altercation during which the supervisor allegedly made outrageous comments about the sexual activities of ehr's wife, and the verbal abuse escalated into a fist fight. 825 F.2d at 5. The court reasoned that there was no section 301 preemption because the supervisor's abuse of the employee could not reasonably be seen as implicating a supervisor's authority under the collective bargaining agreement, even though it would have been possible for Keehr to file a grievance against his supervisor for using abusive language. *Id.* at 137-38.

We find that this distinction has merit and apply it to Retherford's emotional distress claim. Retherford's allegations that Randall ordered her to report to Boise within ten days or lose her job and that Bateson-Hough primanded Retherford, warned her to stop complaining, told her where to sit, and assigned her certain tasks raise questions about their respective authority under the collective bargaining agreement. Therefore, to the extent that this conduct constitutes a ground for the claim of intentional infliction of emotional distress, section 301 preempts Retherford's cause of action.

However, other allegations regarding the conduct of Gailey, Randall, and Johnson can withstand the section 301 preemption analysis. Specifically, Retherford alleges that Gailey responded to Retherford's complaint to the AT & T coordinator with conduct ranging from following her around the office to attempting to frighten her as she crossed the street. She alleges that Randall and Johnson retaliated by following her and making threatening faces at her. Such alleged behavior raises issues of purely personal misconduct. Evaluating the severity and the consequences of this conduct in order to adjudicate Retherford's claim of intentional infliction of emotional distress should require no interpretation of the collective bargaining agreement. These allegations are analogous to those in *Keehr*, not to those in *Douglas*. To the extent that Retherford's tort claim is premised upon allegations of purely personal misconduct, as opposed to misconduct under color of possible contractual authority, section 301 does not preempt the cause of action.

[27] Having determined that Gailey, Johnson, and Randall may be held liable for the tort of intentional infliction of emotional distress without implicating the collective bargaining agreement, we turn to the question of whether Retherford can hold AT & T liable for Gailey's, Johnson's, and Randall's behavior under a theory of negligent employment without running afoul of section 301 preemption. The issue is whether, in determining AT & T's liability under its claim, a court could avoid determining any issue that would implicate the collective bargaining agreement.

[28] Negligent employment is a tort of some novelty in Utah. Although we have recognized this cause of action, see *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, ***973** 1048 (Utah 1991); *Birkner v. Salt Lake County*, 771 P.2d 1053, 1059 (Utah 1989), *Stone v. Hurst Lumber Co.*, 15 Utah 2d 49, 51, 386 P.2d 910, 1012 (1963), our cases do not describe its elements in detail. Consequently,

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look to other jurisdictions to provide a detailed description of this tort. prevail on her claim of negligent employment against AT & T, Retherford must show that (i) AT & T knew or should have known that its employees posed a foreseeable risk of retaliatory harassment to third parties, including fellow employees; (ii) the employees did indeed inflict such harm; and (iii) the employer's negligence in hiring, supervising, or retaining the employees proximately caused the injury. (FN15) See, e.g., *Pruitt v. Pavelin*, 141 Ariz. 5, 685 P.2d 1347, 1354-55 (Ct.App.1984); *Kassman v. Busfield Enters., Inc.*, 1 Ariz. 163, 639 P.2d 353, 356-57 (Ct.App.1981); *Najera v. Southern Pac.*, 191 Cal.App.2d 634, 13 Cal.Rptr. 146, 149 & n. 3 (1961); *Destefano v. Abrian*, 763 P.2d 275, 287-88 (Colo.1988); *Tatham v. Wabash R.R.*, 412 Ill. 3, 107 N.E.2d 735, 739 (1952); *Plains Resources, Inc. v. Gable*, 235 Kan. 580, 2 P.2d 653, 662 (1984); *LaBonte v. National Gypsum Co.*, 113 N.H. 678, 313 2d 403, 405 (1973); *F & T Co. v. Woods*, 92 N.M. 697, 594 P.2d 745, 746-49 979); *Valdez v. Warner*, 106 N.M. 305, 742 P.2d 517, 519-20 (Ct.App.), cert. *granted* sub nom. *Z & E, Inc. v. Valdez*, 106 N.M. 353, 742 P.2d 1058 (1987); *Stard v. Four Seasons Motor Inn, Inc.*, 101 N.M. 723, 688 P.2d 333, 339-41 (Ct.App.), writ *quashed*, 101 N.M. 555, 685 P.2d 963 (1984); *Kelley v. Oregon Shipbuilding Corp.*, 183 Or. 1, 189 P.2d 105, 106-07 (1948); *Chesterman v. Armon*, 82 Or.App. 1, 727 P.2d 130, 131-32, *aff'd and remanded*, 305 Or. 439, 753 2d 404 (1988); *Dempsey v. Walso Bureau, Inc.*, 431 Pa. 562, 246 A.2d 418, 9-22 (1968); *Banks v. Nordstrom, Inc.*, 57 Wash.App. 251, 787 P.2d 953, 960 990). See generally Kenneth R. Wallentine, *Negligent Hiring: The Dual Sting Pre-Employment Investigation*, Utah Bar Journal, October 1989, at 15; Donald Armstrong, *Negligent Hiring and Negligent Entrustment: The Case Against Conclusion*, 52 Or.L.Rev. 296, 298-300 (1973); Restatement (Second) of Agency § 3 (1958); Restatement (Second) of Torts § 317 (1965).

For the purposes of this discussion, we will assume that Retherford can prove that Gailey, Randall, and Johnson intentionally inflicted emotional distress on her. Also we note that because the tort of negligent employment can impose liability on the employer even when the employer would not otherwise be liable under the doctrine of respondeat superior, we have no need to consult the collective bargaining agreement to determine whether Gailey, Randall, and Johnson were acting in the scope of their employment. See *Clover*, 808 P.2d at 18; *Birkner*, 771 P.2d at 1059.

Defendants argue that a state court cannot determine the elements of the tort--i.e., that AT & T knew or reasonably should have known that Gailey, Randall, and Johnson posed a hazard of such tortious conduct and could have taken steps to avoid this hazard--without referring to any provision of the collective bargaining agreement. Defendants insist that the court will have to resort to the collective bargaining agreement's termination and discipline provisions to determine whether *974 AT & T acted "appropriately" in dealing with Gailey, Johnson, and Randall. We cannot agree that the record before us makes clear that the trial court must resort to the collective bargaining agreement to adjudicate this claim.

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[29] In analyzing this issue, we first note that AT & T misunderstands the source of its duty to control the conduct of its employees. AT & T suggests that this obligation arises from the collective bargaining agreement. This is incorrect. The employer's duty toward those people whom its employees place in position of reasonably foreseeable risk or injury does not stem from its private employment contract. *Cf. Valdez*, 742 P.2d at 519. Instead, it is a duty imposed by the common law of the state. The common law of tort expresses public policy, the scope of which is not generally determined by reference to privately contracted obligations. Certainly, we may vindicate some public policies by implying them as covenants to private contracts. See, e.g., *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801 (Utah 1985). However, such covenants are judicial creations that express public policy and constitute public law; they are not private agreements between private parties, and they are not avoidable contract. See *id.* at 801 n. 4.

In the present case, the duty that Retherford relies upon arises from the public law of tort, not from the private collective bargaining agreement. Therefore, the existence of the duty and the determination of its scope do not require resort to any term of the collective bargaining agreement. Other duties might be due to Retherford and other employees by reason of the collective bargaining agreement, but their existence is not relevant to the duty inquiry purposes of the tort of negligent employment.

It is true, however, that in an action for negligent employment, the plaintiff must show that the employer's failure to fulfill the duty owed the injured party in hiring, supervising, or retaining the malfeasing employee proximately caused the injury of which the plaintiff complains. In making this factual determination, a court might have to resort to the collective bargaining agreement to discover whether contractual limitations on the power of the employer to deal with the employee precluded it from taking steps to prevent the harm. Although such an eventuality might raise questions of section 301 preemption, the defendants in the present case have made no showing that the trial court, in adjudicating this particular matter, would have to refer to the collective bargaining agreement to determine whether AT & T could have prevented Wiley's, Johnson's, and Randall's allegedly tortious acts. It is not enough that we might imagine a situation where a court might have to make such a reference. There must be a realistic possibility that it may occur. Because the defendants have not shown any such realistic possibility, we hold that there is no section 301 preemption of the claim for negligent employment. (FN16)

To summarize the preemptive effects of state and federal statutes on Retherford's claims, the UADA preempts only Retherford's claim for discharge in violation of public policy, while the LMRA preempts Retherford's claims for breach of implied contract and malicious interference with contract and partially preempts her claim for intentional infliction of emotional distress. We therefore affirm the trial court's summary judgment against Retherford on these preempted claims. The only claims to survive state and federal preemption are Retherford's claim for negligent employment and the part of her emotional

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stress claim that alleges purely personal misconduct on the part of Gailey,
Inson, and Randall.

We now examine defendants' objections to Retherford's nonpreempted causes of
action *975 for intentional infliction of emotional distress and negligent
employment. First, defendants argue that Retherford's claims of negligent
employment and intentional infliction of emotional distress are untimely.
Second, they argue that the conduct alleged is insufficient as a matter of law
to support a cause of action for intentional infliction of emotional distress.
We discuss these arguments in turn.

Defendants base their untimeliness contention on section 78-12-25(3)'s four-
year period of limitations. See Utah Code Ann. § 78-12-25(3). Defendants argue
that the four years began to run May 10, 1984, when Retherford's submission of a
written complaint to the AT & T EEO coordinator first indicated that she thought
she was being harassed. Because more than four years had elapsed by April 7,
1989, when Retherford filed her state action, defendants claim that she failed
to file her claims of negligent employment and intentional infliction of
emotional distress in a timely manner. We disagree.

[30] The question presented is whether, taking the facts in a light most
favorable to Retherford, the statute of limitations ran before April 7, 1989.
Defendants contend that as a matter of law, the statute began to run at the time
of the first complaint. Under Utah law, the statute of limitations begins to
run when the cause of action accrues. See *id.* § 78-12-1; *Davidson Lumber
Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 19 (Utah 1990). A tort cause
of action accrues when all its elements come into being and the claim is
actionable. *Davidson Lumber Sales, Inc.*, 794 P.2d at 19; see *State Tax Comm'n
Spanish Fork*, 99 Utah 177, 181, 100 P.2d 575, 577 (1940). In order to
determine when the limitations period began to run, then, we must determine when
each of the causes of action became actionable in the courts.

[31] We begin with Retherford's claim of intentional infliction of emotional
distress. Because of the nature of this cause of action, it can be difficult to
determine when all its elements--intentional, outrageous conduct proximately
causing extreme distress--have come into being. Of particular difficulty is the
element of injury--extreme emotional distress. Sometimes, to be sure, a single
outrageous incident, such as an egregiously vicious practical joke, see
Statement (Second) of Torts § 46 cmt. d, illus. 1 (1965), results in immediate
easily identifiable emotional distress. Often, however, emotional distress
does not so much occur as *unfold*--for example, where a defendant subjects a
plaintiff, not to a single outrageous act, but to a pattern or practice of acts
endurable by themselves though clearly intolerable in the aggregate.

[32] Here, Retherford alleges a pattern of retaliatory harassment. Such
cases present courts with the difficult task of identifying when during a
series of related acts the element of emotional distress "occurred." We have
been unable to locate authority that is directly on point concerning the

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application of statutes of limitation to a pattern of conduct that constitutes, in the aggregate, intentional infliction of emotional distress. However, we find the treatment of claims of alienation of affections instructive in this regard. In adjudicating such claims, which often allege a series of wrongful acts over a substantial period of time, courts have determined that the statute of limitations begins to run when the alienation is accomplished, i.e., when love and affection are finally lost. See e.g., *Gibson v. Gibson*, 244 Ark. 327, 195 S.W.2d 871, 874 (1968); *Dobrient v. Ciskowski*, 54 Wis.2d 419, 195 N.W.2d 449, 451 (1972); see also *Flink v. Simpson*, 49 Wash.2d 639, 305 P.2d 803, 804 (1957); *Strode v. Gleason*, 9 Wash.App. 13, 510 P.2d 250, 254 (1973). Applying this standard by analogy, we hold that the statute of limitations for intentional infliction of emotional distress does not begin to run until the distress is actually inflicted, i.e., when the plaintiff suffers severe emotional disturbance.

[33] Although easy to describe, this standard is difficult to apply, particularly because the element of emotional distress is specific to the plaintiff in each case. Because the tort of intentional infliction of emotional distress requires *actual* emotional distress, see Restatement (Second) Torts § 46(1) (1965), this element is to be gauged subjectively. (FN17) A particularly hardy or calloused plaintiff may never accrue a cause of action for intentional infliction of emotional distress, even though he or she is subjected to outrageous conduct that no reasonable person could be expected to bear. Consequently, our task is to determine when, given these allegations, Retherford experienced severe emotional distress, not when an ordinarily sensitive person would have experienced such suffering.

The record before us identifies this moment. (FN18) In September of 1985, after almost eighteen months of retaliatory abuse by her co-workers, during which she repeatedly sought assistance from her immediate supervisors, the AT & EO coordinator, and the EEOC, Retherford took medical disability leave at the recommendation of her psychiatrist. She never returned to her job because, physically and emotionally, she could not work in proximity to "the people who started the problem in her." Retherford's dramatic steps of taking leave from her job, seeking medical and psychiatric attention to heal the stresses of her work environment, and remaining on leave for approximately six months because she could not bring herself to face her harassers all support a factual inference that the element of extreme emotional distress did not come into existence before September of 1985. *977 This is sufficient to support the conclusion that the statute had not run by April of 1989, when the action was filed.

Of course, at trial defendants will have the opportunity to prove to the satisfaction of the finder of fact that the element of extreme emotional distress accrued some time before Retherford's leave of absence. However, on the facts before us, we cannot say as a matter of law that it accrued before April of 1985. Consequently, the four-year statute of limitations poses no bar to Retherford's recovery for defendants' entire course of conduct. See Utah Code Ann. § 78-12-25(3).

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[34] The next question is whether Retherford's claim for negligent employment so was filed within the four-year statute of limitations. Before an employer can be found liable for negligent employment, one of its employees must have committed a tort. See *Mulhern v. City of Scottsdale*, 165 Ariz. 395, 799 P.2d 18 (Ct.App.1990); Restatement (Second) of Agency § 213 cmt. a (1958). As, as a general matter, the statute of limitations will not begin to run on a cause of action for negligent employment until all elements of the employee's tort are present. However, although the tort of negligent employment requires the employee's tort as a condition precedent, we note that in situations where the victim does not accrue a cause of action until she or he suffers a subjective harm, it may be contended that the employer's breach of duty has become evident long before that point, i.e., that the conduct element of the tort, the employee malfeasance, has become sufficiently apparent that the employer should have taken steps to correct it, even before the victim has fully accrued a cause of action. As a consequence, one might argue that the statute of limitations against the employer for negligent employment should begin to run before the statute begins to run on the tort by the employee. Such a situation might exist where, as here, the victim alleges intentional infliction of emotional distress.

We need not decide today whether such an argument has merit or whether it applies to the facts of this case. Defendants did not advance the argument before this court or the trial court, we have found no legal authority that speaks to the issue, and most important, the record provides no basis for our concluding as a matter of law that if the cause of action against AT & T for negligent supervision did accrue before the cause of action against the employees, all this occurred before April of 1985. There is therefore no basis for sustaining a summary judgment on the ground that the four-year statute of limitations bars the negligent employment claim. See Utah Code Ann. § 12-25(3).

[35] [36] As a final objection to Retherford's claim of intentional infliction of emotional distress against Randall and Johnson, defendants argue that the conduct alleged is insufficiently outrageous and intolerable to support such a claim. We disagree. The standard Utah has adopted for determining whether the conduct of a defendant is sufficiently offensive to permit recovery is whether the defendant's actions "offend against the generally accepted standards of decency and morality." (FN19) *978 *Samms v. Eccles*, 11 Utah 2d 293, 358 P.2d 344, 347 (1961).

Applying this standard to the facts at bar and viewing those facts in a light most favorable to plaintiff, we can say as a matter of law that Retherford has engaged in outrageous and intolerable conduct sufficient to support a cause of action for intentional infliction of emotional distress. Certainly, as defendants claim, merely following or making faces at someone, without more, does not constitute conduct of such objective offensiveness that it can give rise to a claim of intentional infliction of emotional distress. However, Retherford alleges more than simple insult or annoyance. She alleges months of

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rsecution by her co-workers, during which Gailey, Johnson, and Randall
adowed her movements, intimidated her with threatening looks and remarks, and
nipulated circumstances at her work in ways that made her job markedly more
ressful, all in retaliation for her good-faith complaint of sexual harassment.
dulgung all inferences in favor of Retherford, as we must, *Rollins v.*
tersen, 813 P.2d 1156, 1158 (Utah 1991), such allegations are sufficient to
tisfy the objective conduct requirement of the tort of intentional infliction
emotional distress.

It is worth stating forcefully that any other conclusion would amount to an
tolerable refusal to recognize that our society has ceased seeing sexual
rassment in the work place as a playful inevitability that should be taken in
od spirits and has awakened to the fact that sexual harassment has a corrosive
fect on those who engage in it as well as those who are subjected to it and
at such harassment has far more to do with the abusive exercise of one
erson's power over another than it does with sex. See, e.g., Louise F.
itzgerald, *Science v. Myth: The Failure of Reason in the Clarence Thomas*
arings, 65 S.Cal.L.Rev. 1399, 1399 (1992); Carol Sanger, *The Reasonable Woman*
d the Ordinary Man, 65 S.Cal.L.Rev. 1411, 1415 (1992). This consensus extends
o all sectors of our society. Indeed, although Utah Senator Orrin Hatch
ver wavered from his conviction that law professor Anita Hill had fabricated
e allegations that Supreme Court nominee Clarence Thomas had sexually harassed
e, he reportedly condemned the alleged conduct in the strongest terms.
neone who would make such vulgar and degrading comments "would not be a normal
erson," Senator Hatch said. "That person ... would be a psychopathic sex fiend
a pervert." Fitzgerald at 1405.

[37] As Senator Hatch recognized, sexual harassment is simply unacceptable in
lay's society. To refuse to label the retaliatory conduct alleged here as
outrageous and intolerable would be a travesty. Prosser and Keeton quite
properly call sexual harassment on the job "undoubtedly an intentional
infliction of emotional distress." W. Page Keeton et al., *Prosser & Keeton on*
the Law of Torts § 12, at 18 (Supp.1988). By this, we take them to mean that
conduct generally labeled sexual harassment is outrageous and intolerable
l, when performed with the requisite intent, satisfies the elements of the
t of intentional infliction of emotional distress. If the conduct that
stitutes sexual harassment is per se outrageous and intolerable, it stands to
son that retaliation for complaining of sexual harassment must also be
sidered outrageous and intolerable. Retherford has stated a claim for *979.
entional infliction of emotional distress through retaliatory harassment,
reby meriting the opportunity to establish all the elements of this tort
ore the finder of fact. The trial court erred in granting summary judgment
the nonpreempted portion of that claim.

In sum, we hold as follows: First, both employees covered by just-cause
loyment contracts and employees who are at-will can assert a claim in tort
discharge in violation of public policy; second, the UADA preempts only
herford's claim for discharge in violation of public policy; third, the LMRA

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preempts Retherford's claims for breach of implied contract and malicious interference with contract, and partially preempts her claim for intentional infliction of emotional distress; fourth, the statute of limitations does not preempt Retherford's claim for negligent employment and the nonpreempted portion of her claim for intentional infliction of emotional distress; and fifth, Retherford has stated a claim for intentional infliction of emotional distress. Consequently, we affirm the summary judgment in part, reverse in part, and remand for disposition consistent with this opinion.

HALL, C.J., and DURHAM, J., concur.

HOWE, Associate Chief Justice: (concurring with reservation).

I concur in the majority opinion with the following reservation:

I would not reach the question whether Retherford can pursue a tort action for discharge in violation of public policy and also a claim for breach of her collective bargaining agreement's just-cause provision. It is not necessary to resolve this issue because assuming such tort cause of action exists, it is preempted by UADA, as explained in the majority opinion.

The majority holds that Retherford could pursue both a tort action and a contract claim, except for the preemption. Not only would this be duplicative, at least in part, but it possibly may violate the collective bargaining agreement, which requires that all grievances arising out of or resulting from the dismissal of a regular employee must be arbitrated. I therefore prefer to reserve judgment on this issue.

STEWART, J., concurs in the result.

.. Retherford originally named Gailey as a defendant in this suit, but dismissed her when Gailey declared bankruptcy.

. The EEOC, or Equal Employment Opportunity Commission, is a federal agency charged with administering complaints under Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e-5(b).

. AT & T also argued that Bateson-Hough could not be liable for interference with contractual relations between Retherford and AT & T because she was an agent of one of the contracting parties and that Retherford's pleadings failed to state a claim that Johnson and Randall had interfered with contractual relations. Because of the result we reach in this case, we have no cause to address these issues.

. Such a blanket statement provides us with no guidance as to the trial court's reasoning. It therefore does not comply with rule 52(a) of the Utah Rules of Civil Procedure, which requires trial judges to issue brief written statements of their grounds for granting summary judgment when multiple

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grounds are presented. See Utah R.Civ.P. 52(a). Although failure to issue a statement of grounds is not reversible error absent unusual circumstances, we take this opportunity to remind trial judges that the presumption of correctness ordinarily afforded trial court rulings "has little operative effect when members of this court cannot divine the trial court's reasoning because of the cryptic nature of its ruling." *Allen v. Prudential Property & Casualty Ins. Co.*, 839 P.2d 798, 800 (Utah 1992).

5. The exclusivity provision now reads, "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, relation, national origin, or handicap." Utah Code Ann. § 34-35-7.1(15) (Supp.1992).

5. In fact, we have employed a similar analysis in the area of governmental immunities. See *Gillman v. Department of Fin. Insts.*, 782 P.2d 506, 511-12 (Utah 1989).

7. The *Davis* court's analysis of a claim for intentional infliction of emotional distress caused by sexual harassment highlights this uncertainty. The court found that the UADA did not preempt the claim because it went "beyond the discriminatory conduct prohibited by the Utah Act." *Davis*, slip op. at 17. Apparently, the court believed that the extra element of outrage made the tort broader than the statutory claim. However, it could just as well be argued that the extra element makes the tort narrower than the statutory claim, i.e., that the UADA covers all sexual harassment, whether or not it is inflicted in a particularly egregious manner. Furthermore, recent critical commentary suggests that sexual harassment on the job always constitutes an intentional infliction of emotional distress. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 12, at 18 (Supp.1988). If sexual harassment is per se outrageous and intolerable, it is difficult to see how the tort of intentional infliction of emotional distress can survive the *Davis* test. As this example illustrates, the *Davis* test is not a model of predictability or exactitude.

9_ FN8. Defendants have not argued that workers' compensation is the exclusive remedy for Retherford's claims of intentional infliction of emotional distress and negligent employment. However, we realize that the preceding discussion may raise questions about the application of the Workers' Compensation Act to the present case on remand. Therefore, we take this opportunity to clarify some potential areas of confusion. See Utah R.App.P. 30(a); *State v. James*, 819 P.2d 781, 795 (Utah 1991); *Reeves v. Gentile*, 813 P.2d 111, 119 (Utah 1991); *Hiltsley v. Ryder*, 738 P.2d 1024, 1026 (Utah 1987) (Zimmerman, J., concurring).

Regarding Retherford's claim against her fellow employees for intentional infliction of emotional distress, we have long held that an employee injured by the intentional tort of a fellow employee may sue the fellow employee

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personally. See *Bryan v. Utah Int'l*, 533 P.2d 892, 894 (Utah 1975).
 Therefore, the Workers' Compensation Act poses no bar to Retherford's suing
 her fellow employees for intentional torts.

However, the Act's applicability to Retherford's claim against AT & T for
 negligent employment is less clear. We have yet to address directly whether
 a plaintiff who is mentally or physically injured by the intentional torts of
 a fellow employee can sue his or her employer for negligent employment or
 whether workers' compensation provides the exclusive remedy for the
 employer's negligence. Neither the Act itself nor judicial interpretations
 of it in Utah or elsewhere supply an explicit exception for the tort of
 negligent employment in such an instance. Our ruling in *Mounteer*, based as
 it is on an injury-oriented analysis rather than on an analysis centered on
 the legal theory of the claim, would suggest that workers' compensation would
 be an exclusive remedy. However, because the parties have neither raised nor
 briefed this issue, we decline to determine whether there is nonetheless some
 reason to allow the tort claim to go forward. In the event that this issue
 develops on remand, we do note that if *Mounteer* does not govern and workers'
 compensation does not supply an exclusive remedy, our previous case law may
 provide some guidance in determining AT & T's liability for Bateson-Hough's
 alleged intentionally tortious conduct. We have already determined that a
 managerial employee's tortious intent can be imputed to his or her employer
 under certain circumstances. See *Hodges v. Gibson Prods. Co.*, 811 P.2d 151,
 157 (Utah 1991).

. In determining whether a public policy is sufficiently "clear and
 substantial" to support a cause of action for discharge in violation of
 public policy, one must examine the strength of the policy as well as the
 extent to which it affects the public as a whole. The very words "clear and
 substantial" require a lack of ambiguity on both points. As the majority of
 this court recognized in *Peterson*, all statements made in a statute are not
 expressions of public policy. Many statutes merely regulate conduct between
 private individuals or " 'impose requirements whose fulfillment does not
 implicate fundamental public policy concerns.' " *Id.* at 1282 (quoting *Foley*
v. Interactive Data Corp., 47 Cal.3d 654, 254 Cal.Rptr. 211, 217, 765 P.2d
 373, 379 (1988)).

The following questions are relevant to determining whether a statute
 embodies a clear and substantial public policy. First, one must ask whether
 the policy in question is one of overarching importance to the public, as
 opposed to the parties only. Second, one must inquire whether the public
 interest is so strong and the policy so clear and weighty that we should
 place the policy beyond the reach of contract, thereby constituting a bar to
 discharge that parties cannot modify, even when freely willing and of equal
 bargaining power. Since these are the consequences of qualifying a policy as
 a basis for the tort action, these considerations should inform the
 evaluation of the policy itself. See *id.* at 1288 (Zimmerman, J., concurring
 and dissenting, joined by Hall, C.J.); see also *Foley*, 765 P.2d at 379-80 &

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n. 12.

10. The UADA defines retaliatory conduct as follows:

"Retaliate" means the taking of adverse action by an employer ... against one of its employees ... because he [or she] has opposed any employment practice prohibited under this chapter or because he [or she] has filed charges, testified, assisted, or participated in any way in any proceeding, investigation, or hearing under this chapter.

Utah Code Ann. § 34-35-2(15).

79 FN11. As discussed more fully above, the UADA does not preempt Retherford's cause of action for breach of implied contract because none of the indispensable elements of this claim implicates an injury targeted by the UADA. However, even if there were an overlap between the indispensable elements of the contract claim and the injury addressed by the statute, that overlap would not dispose of the question of preemption. When dealing with the realm of contracts, we must add another step to our preemption analysis. First, we must examine, as we do with all common law causes of action, whether the statute at issue supplies an indispensable element of the breach of contract claim. If not, our analysis is at an end. If so, we must proceed to the second step, applicable only to contract claims. This step is premised on the unique nature of contracts. Tort law embodies statements of public policy, and therefore it is appropriate for a statutory policy to preempt a judicially declared policy. Contracts, by contrast, involve voluntary private agreements that our society endows with the force of law. Before we can interfere with the enforcement of this private agreement, we must find that the private agreement offends the public policy embodied in the statute, offends it so severely that it requires striking the term or clause as unenforceable. Consequently, the second step for determining preemption of a contract claim is whether public policy forbids parties to contract on such a subject, for such a remedy, or in such a manner.

2. Retherford's complaint does not specify whether she is alleging interference with her collective bargaining agreement or with her contract implied from the code of conduct. Because the federal Labor Management Relations Act, 29 U.S.C. § 185(a), would preempt any claim that defendants interfered with Retherford's collective bargaining agreement, see *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 377-78 (3d Cir.1981), we interpret her complaint as alleging interference with her implied contract of employment.

3. Although Retherford stipulated to Gailey's dismissal upon Gailey's declaration of bankruptcy, Gailey's absence from this suit does not affect Retherford's ability to prove Gailey's tortious conduct in order to find AT & T liable for negligent employment. It merely prevents Retherford from seeking damages from Gailey personally. Any finding that Gailey engaged in

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tortious conduct would, of course, have no preclusive effect in a subsequent suit against Gailey herself.

14. Because Retherford claims only retaliatory harassment, not sexual harassment, we will not consider evidence of Gailey's unwelcome sexual advances.

15. Because the tort of negligent employment has received little explication in our cases, we take this opportunity to provide some background. The causes of action variously termed "negligent hiring," "negligent supervision," and "negligent retention" are all basically subsets of the general tort of negligent employment. See generally 53 Am.Jur.2d *Master and Servant* §§ 212, 422 (1970 & Supp.1992). These variants differ only in that they arise at different points in the employment relationship. By way of illustration only, we offer the following: a day-care provider who knowingly or negligently hires a convicted child molester might be liable for negligent hiring, see *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1221 (Alaska 1991), while a day-care provider who unwittingly hires a convicted child molester but retains him or her once his or her record and proclivities become apparent might risk liability for negligent retention. In both instances, once the day-care provider knows of the child molester's background, it might be liable for negligent supervision if it allows him or her unsupervised interaction with the children in its care. See generally Restatement (Second) of Agency § 213 (1958).

6. As this case develops on remand, it may become apparent that the trial court may have to resort to the terms of the collective bargaining agreement. If this occurs, defendants are free to raise the question of preemption with the trial court, which should determine the issue. If the court finds section 301 preemption, the preempted portion of the claim must be dismissed. Today, we hold only that it is improper to find preemption on the basis of unsupported speculation as to how a case may evolve.

7. For the guidance of the bench and bar, we make clear that while the standard for determining whether a plaintiff has experienced emotional distress is subjective, the standard for determining the outrageousness of the alleged conduct is objective. Consequently, a plaintiff claiming intentional infliction of emotional distress must show both that a reasonable person would consider the alleged conduct to be outrageous and that the plaintiff actually experienced subjective severe emotional anguish because of this objectively outrageous conduct.

9_ FN18. We realize that not all cases will reveal so clearly the point at which the plaintiffs actually experienced emotional distress. Although we do not at this time adopt their analysis, we note that courts facing similar difficulties in adjudicating Title VII claims, see 42 U.S.C. § 2000e-2, have enunciated a theory of continuing violation in order to allow plaintiffs to recover for patterns of employment discrimination. Like intentional

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infliction of emotional distress, employment discrimination often manifests itself as a series of small wrongful acts instead of one dramatic injustice. Indeed, changing attitudes toward minorities and women in the work place may have contributed to the incidence of long-term patterns of employment discrimination because as social opprobrium of racial and sexual harassment has increased, people may have become more subtle in acting on or expressing their prejudices. While a defendant may be able to dismiss separate acts of subtle discrimination as merely coincidences or attempts at humor, an examination of these acts as a whole often will reveal their underlying pattern of malignity. To address these patterns, courts adjudicating Title VII claims allow recovery for an entire pattern of employment discrimination so long as one act of the continuing violation occurs within the statute of limitations period. See, e.g., *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 979 (5th Cir.1983); *Nelson v. Williams*, 25 Fair Empl.Prac.Cas. (BNA) 1214, 1215 (D.D.C.1981); *Williams v. Atchison, Topeka & Santa Fe Ry.*, 627 F.Supp. 752, 756-57 (W.D.Mo.1986); *Tarvesian v. Carr Div. of TRW, Inc.*, 407 F.Supp. 336, 339 (D.Mass.1976); *Loo v. Gerarge*, 374 F.Supp. 1338, 1340 (D.Haw.1974); *Sciaraffa v. Oxford Paper Co.*, 310 F.Supp. 891, 896 (D.Me.1970); *Johnson v. Ramsey County*, 424 N.W.2d 800, 810 (Minn.Ct.App.1988). At least one state has adopted the Title VII continuing violation theory for causes of action brought under the state's antidiscrimination act, see *Sumner v. Goodyear Tire & Rubber Co.*, 427 Mich. 505, 398 N.W.2d 368, 380-81 (1986), and at least two states have codified the Title VII continuing violation theory in their administrative regulations governing employment, see *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 527 (Iowa 1990); *Rock v. Massachusetts Comm'n Against Discrimination*, 384 Mass. 198, 424 N.E.2d 244, 248 & nn. 12-13 (1981).

In determining the existence of a continuing violation, courts focus on the following factors, which are relevant to, but not dispositive of the existence of, a continuing violation:

The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

Berry, 715 F.2d at 981.

9. Although *Samms v. Eccles* cites the second Restatement of Torts in support of this standard, see 11 Utah 2d 289, 293 n. 14, 358 P.2d 344, 347 n. 14

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(1961), we note that *Samms* states a somewhat different threshold for outrageousness than does the Restatement. The Restatement requires that the conduct at issue be "extreme and outrageous," which it describes as "so outrageous in character, and so extreme in degree, as to go *beyond all possible bounds* of decency." Restatement (Second) of Torts § 46, cmt. d (1965). On the other hand, *Samms* holds that conduct is considered "outrageous and intolerable" if it offends against "the *generally accepted standards* of decency and morality." 11 Utah 2d at 293, 358 P.2d at 347 (emphasis added).

We have reviewed *Samms* and our subsequent cases dealing with intentional infliction of emotional distress and have found no evidence whatsoever that the court intended to weaken the Restatement's standard by this formulation. *Cf. Pentecost v. Harward*, 699 P.2d 696, 700 (Utah 1985) (citing both *Samms* and the Restatement without mentioning distinction). Moreover, although we recognize a theoretical difference between conduct that transgresses "all possible bounds of decency" and conduct that transgresses only "generally accepted standards of decency," we believe that in application, the distinction will be irrelevant, particularly in light of the Restatement's explanation that "[g]enerally, the case [of intentional infliction of emotional distress] is one in which the recitation of the facts to an average *member of the community* would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" Restatement (Second) of Torts § 46, cmt. d (1965) (emphasis added). We retain *Samms*' formulation of outrageousness to prevent any apprehension that we limit the tort of intentional infliction of emotional distress to conduct that offends "all possible bounds of decency," an unrealistic and impossible standard. However, we stress that although our formulation differs slightly from the Restatement's, this difference is only a concession to the reality that no court would or could establish that certain conduct exceeds "all possible bounds of decency." We have in no way softened the Restatement's requirement of extraordinarily vile conduct, conduct that is "atrocious, and utterly intolerable in a civilized community." *Id.*