

2018

**Steven Eric Graham Plaintiff/Appellant, v. Albertson's LLC
Defendant/Appellee : Reply Brief**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STEVEN ERIC GRAHAM)

Plaintiff/Appellant,)

vs.)

) Appellate Case No. 20180885-SC

ALBERTSON'S LLC)

Defendant/Appellee.)

REPLY BRIEF OF THE APPELLANT

Appeal from an Interlocutory Order of the Third Judicial District Court, Salt Lake County, Honorable Heather Brereton, District Court No. 180900781

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
ARGUMENT	6
I. Mr. Graham’s Wrongful Termination Claim is Not Preempted under the <i>Retherford</i> Indispensible Element Test	6
II. The District Court Erred in Holding Mr. Graham’s Wrongful Termination Claim is Barred by the Administrative Remedy Under the UOSH Act	10
A. The District Court Did Not Apply the Appropriate Legal Standards in this Case.	10
B. The District Court Did Not Properly Consider Mr. Graham’s Evidence Against Preemption	15
C. The Limited Remedies Under §34A-6-203(2)(c) Support an Inference Against Pre-emption	20
CLAIM FOR ATTORNEY’S FEES	24
CONCLUSION	20

CERTIFICATE OF COMPLIANCE	21
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

Cases

<i>Barnett Bank of Marion County v. Lockheed Air Terminal, Inc.</i> , 517 U.S. 25, 31, (1996).	8, 10
<i>Craig v. Provo City</i> , 2016 UT 40; 389 P.3d 423, 426 (Utah 2016)	15
<i>Ferro v. Utah Dept. of Commerce</i> , 828 P.2d 507 (Utah App. 1992)	18, 19
<i>Funk v. Utah State Tax Com'n</i> , 839 P.2d 818, 820 (Utah 1992)	17
<i>Gilger v. Hernandez</i> , 2000 UT 23; 997 P.2d 305 (Utah 2000).	9, 10, 11, 14
<i>Gottling v. P.R. Incorporated</i> , 2002 UT 95; 61 P.3d 989, 991 (Utah 2002)	passim
<i>International Paper Co. v. Ouellette</i> , 479 U.S. 481, 491 (1987)).	11
<i>Johnson v. E.A. Miller, Inc.</i> , 172 F.3d 62 (10 th Cir 1999)	15
<i>Retherford v. AT& T Commc'ns of Mountain States, Inc.</i> , 844 P.2d 949 (Utah 1992).	1, 6-10, 20
<i>State v. Jones</i> , 958 P.2d 938, 940-41 (Utah App. 1998).	11
<i>Touchard v. La-Z-Boy Inc.</i> , 2006 UT 71; 148 P.3d 945, 952 (Utah 2006)..	17

Statutes

Utah Code §34A-6-110 7, 17, 18, 21

Utah Code §34A-6-203 1, 2, 4, 5, 6, 8, 9, 20, 22, 23, 24

Utah Code §34A-6-301(3)(b)(iii) 23

Utah Code §34A-6-301(3)(b)(vi)-(vii) 23

INTRODUCTION

The Brief of Appellee argues at length that Mr. Graham's wrongful termination claim is preempted under the "indispensable element test" established by *Retherford v. AT& T Commc 'ns of Mountain States, Inc.*, 844 P.2d 949 (Utah 1992). However, the *Retherford* indispensable element test only applies to determining the scope of preemption after a statute has been found to have a preemptive effect. It does not apply to the initial determination of whether a particular statutory remedy has any preemptive effect at all, which is the issue in the present case.

The proper analytical model for determining whether a statutory remedy has any preemptive effect, in the absence of an express preemption provision, is the "field preemption" analysis applied by this Court in *Gottling v. P.R. Incorporated*, 2002 UT 95; 61 P.3d 989, 991 (Utah 2002). Under *Gottling*, an intent to preempt may be inferred only if the court finds a "clear and manifest" intent to preempt on the part of the Legislature, based upon specific factors, such as where the comprehensive nature of the statutory remedy leaves no room for supplementation, or where the recognition of a common law claim would conflict with the statutory purpose. The burden of proving such an intent is on the party asserting preemption.

In the present case, the District Court did not allocate the burden of proof on the preemption defense, made no finding of a “clear and manifest” Legislative intent, and failed to identify specific factors indicating an intent to preempt on the part of the Legislature, as required by *Gottling*.

The District Court also failed to consider Utah Code §34A-6-110, which expressly states that common law claims are not preempted by the UOSH Act.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Appellee has not contested Mr. Graham’s Statement of the Issue for Review within his principal Brief, which is: whether the administrative remedy provided by Utah Code §34A-6-203 of the Utah Occupational Safety and Health Act (“UOSH Act”) preempts Mr. Graham’s claim for Wrongful Termination in Violation of Public Policy. Appellee admits that the District Court’s decision upon summary judgment is reviewed on appeal for correctness, without deference to the District Court’s legal conclusions. *Gottling v. P.R. Incorporated*, 2002 UT 95; 61 P.3d 989, 991 (Utah 2002). (See Brief of Appellee, pages 2-3)

STATEMENT OF THE CASE

A. Statement of the Facts.

Appellee's Brief does not dispute any of the facts that were set forth within Mr. Graham's principal Brief, at pages 3-4. However, Appellee's Brief alleges additional facts, at pages 3-4, which are disputed by Mr. Graham.

First, Appellee alleges that Mr. Graham "suffered a minor injury to his back." Mr. Graham did suffer a back injury, which was sufficient to require medical treatment and substantial restrictions to his work duties for a period of over two months. [R. 55]. Mr. Graham was still on restricted work duties at the time of his termination on February 10, 2017. Therefore, Mr. Graham objects to the description of his injury as "minor."

Appellee's Brief states at pages 3-4:

"Albertson's contends that Graham's termination which was originally initiated by Graham as a voluntary termination for personal reasons and to focus on school, ultimately was a result of a combination of factors, including various work-related incidents and dishonesty by Graham." (*citing* R. 0289-0294).

Albertson's has produced no evidence that Mr. Graham's termination was "a result of a combination of factors." In the District Court, Albertson's alleged several post-hoc criticisms of Mr. Graham's work performance. [R. 0289-0294]. However, Mr. Graham received no discipline in relation to

these complaints during his employment, nor were they cited in relation to Mr. Graham's termination. To the contrary, Albertson's has consistently asserted that Mr. Graham voluntarily resigned his employment.¹

Additionally, the "Argument" Section of Appellee's Brief includes an important factual assertion, specifically: "that allowing persons to pursue tort claims with more generous damages and a longer limitations period would discourage at least some of them from making administrative complaints to the Division...." (Brief of Appellee at page 14). Although the District Court made a similar finding (*see* District Court's Order at R. 567], no evidence was produced in support of this assertion, and it constitutes mere speculation. The one known specific example – the present case – is

¹ Although Mr. Graham initially submitted a Voluntary Termination form to Albertson's, his resignation was mutually rescinded when he disclosed to Albertson's Human Resources Director, Carrie Burner ("Ms. Burner"), that he had experienced workplace retaliation after reporting his injury. [R. 4]. Ms. Burner subsequently altered Mr. Graham's Voluntary Termination form, without Mr. Graham's knowledge, to reflect a resignation date of February 10, 2017, which was the date that Mr. Graham was terminated. [R. 6-7]. Further, Albertson's written response to Mr. Graham's administrative claim in the Utah Labor Commission states in part: "As outlined above, Graham was not terminated he quit." [R. 101-102].

directly to the contrary, since Mr. Graham filed claims in *both* the Utah Labor Commission *and* the District Court.²

A. Procedural History.

Appellee's Brief states, at page 4: "The Division investigated Graham's complaint and issued an Order that the evidence did not support a finding that Albertson's had terminated Graham in violation of the UOSH Act."

Although this is true, the UOSH Investigator also found that: "Respondent has not alleged a cause for Complainant's termination as it is Respondent's position that Complainant voluntarily terminated his employment." [R. 68]. The Investigator also found that Mr. Graham did *not* voluntarily terminate his employment. [R. 69]. The investigator further found Ms. Burner's claim that she met with Mr. Graham on February 10, 2017 (to revise his resignation notice) to be "an allegation that is not supported by the facts." [*Id.*].

Appellee's Brief states at page 9, in part:

"On December 7, 2018, Graham filed a Motion for Leave to Amend Complaint [R. 0642-0648]. Among other things, Graham sought to amend his Complaint to assert a claim for wrongful discharge in

² Even where a claimant prefers the judicial remedy, the relative speed and informality of the administrative process provides an opportunity for prompt investigation and potential settlement of the claim.

violation of public policy based on allegations that Albertson’s retaliated against him...*not* for exercising a right under the UOSH Act, but ‘for claiming and receiving workers’ compensation benefits....’” (emphasis in original).

This statement incorrectly implies a degree of inconsistency between Mr. Graham’s wrongful termination claims based upon the UOSH Act and the Utah Workers’ Compensation Act, and thereby fundamentally misconstrues the relationship between the two Acts. The reporting of a workplace injury is *both* a protected action under §34A-6-203 of the UOSH Act *and* an essential element in filing a claim for workers compensation benefits under the Utah Workers Compensation Act, *See* Utah Code §34A-2-407. Therefore, no inconsistency exists in claiming that a worker was discharged for reporting his injury and also for claiming workers’ compensation benefits.³

ARGUMENT

I. MR. GRAHAM’S WRONGFUL TERMINATION CLAIM IS NOT PREEMPTED UNDER THE *RETFERFORD* INDISPENSIBLE ELEMENT TEST.

Appellee’s Brief argues at length that Mr. Graham’s wrongful termination claim is barred under the “indispensable element test”

³ The Utah Workers’ Compensation Act includes an anti-retaliation provision which expressly “does not affect the rights or obligations of an employee or employer under common law.” Utah Code §34-2-114(5).

established by *Retherford v. AT& T Commc 'ns of Mountain States, Inc.*, 844 P.2d 949 (Utah 1992). (See Brief of Appellee at pages 10-11; 15-20).

Appellee asserts that the indispensable element test provides an alternative basis for preemption, in addition to “the more generally applicable field preemption analysis applied by this Court...” (Appellee’s Brief at pages 2, 40). However, the *Retherford* indispensable element test applies only to the scope of preemption once a statute has been determined to have a preemptive effect. It does not apply to the initial determination of whether a particular statutory remedy has any preemptive effect at all, which is the issue in the present case.

In *Gottling v. P.R. Incorporated*, 2002 UT 95; 61 P.3d 989, 991 (Utah 2002), this Court recognized that, in many cases, a statutory remedy does not contain an express provision for preemption. In such cases, the Court must determine whether or not preemption should be inferred from the structure and purpose of the statute. In order to infer such an intent, the statutory language must “reveal a clear, but implicit, preemptive intent.” *Gottling*, 2002 UT 95 ¶ 8. The present Appeal involves the issue that was raised in *Gottling*, which is whether the statutory remedy at issue has any preemptive effect; it does not involve the *Retherford* indispensable element test, which

determines the scope of preemption only after a statute has been found to have a preemptive effect.⁴

Notably, *Gottling* did not rely upon *Retherford*'s indispensable element test in reaching its conclusion. Instead, the *Gottling* court applied the analytical model for preemption that is set forth by the United States Supreme Court in *Barnett Bank v. Lockheed Air Terminal, Inc.*, 517 U.S. 25, 31 (1996) and other cases. (*See Gottling*, 2002 UT 95 ¶ 8). In fact, the *Gottling* court expressly declined to apply the *Retherford* preemption test, which it described as a "very specialized test" and applicable only "where the statute at issue offers a remedy for a specific type of injury caused by an act of the defendant and where the asserted common law causes of action, while based on the same facts, offer a remedy for a potentially different injury based on those same facts." (*See Gottling*, 2002 UT 95 ¶ 8 note 1).

⁴ This analysis is consistent with the District Court's Order Denying Plaintiff's Motion for Partial Summary Judgment, Granting Defendant's Motion for Partial Summary Judgment, and Denying Plaintiff's Motion for Leave to Perform Discovery, dated October 12, 2018. ("District Court's Order"). [R. 565-569]. The District Court's Order first determined that the relevant Statute was intended to have a preemptive effect, and thereafter determined that Mr. Graham's wrongful termination claim was within the scope of preemption under *Retherford*. The District Court did *not* find that *Retherford* provides an "alternative" basis for finding preemption, as asserted within the Brief of Appellee at pages 6 and 40.

The present case does not involve the issue addressed in *Retherford*. Rather, it falls within the scope of cases, recognized in *Gottling*, where the statutory remedy does not contain an express provision for preemption.

In *Gilger v. Hernandez*, 2000 UT 23; 997 P.2d 305 (Utah 2000), the plaintiff claimed that the defendant was negligent in serving beer to an assailant at a social event. The defendant asserted that the plaintiff's negligence claim was preempted by the Utah Dramshop Act, Utah Code §32A-14-1 *et seq.* The Dramshop Act contained no preemption provision regarding the liability of social hosts. (*Gilger*, 2000 UT 23 ¶6). As in *Gottling*, this Court applied general field preemption principles to determine whether the Dramshop Act was intended to preempt the Plaintiff's claim.

(*Gilger*, 2000 UT 23 ¶11). The *Gilger* court expressly found that the *Retherford* analytical model was inapplicable, stating:

Hernandez suggests that our analytical model for determining whether the Dramshop Act preempts any common law causes of action should be found in *Retherford v. AT & T Communications*, 844 P.2d 949 (Utah 1992). However, the *Retherford* preemption test only applies to a specific type of preemption: where the statute at issue offers a remedy for a specific type of injury caused by an act of the defendant and where the asserted common law causes of action, while based on the same facts, offer a remedy for a potentially different injury based on those same facts. *See id.* at 965. In such situations, we have held that the intent to preempt is determined by "the nature of the injury for which [the] plaintiff makes [the] claim, not the nature of the defendant's act which the plaintiff alleges to have been responsible for that injury." *Id.* (quotation omitted) (alterations in original). Because we do not face this narrow type of preemption claim here, we need not

engage in the analysis laid out in *Retherford*, although it remains fully appropriate in situations for which it was designed. (*Gilger*, 2000 UT 23 ¶10).

Gottling and *Gilger* establish that the proper analytical model for determining whether a statutory remedy has a preemptive effect towards common law claims is the field preemption analysis developed by the U.S. Supreme Court in *Barnett Bank* and other cases. The *Retherford* indispensable element test applies in determining the scope of preemption after a statutory remedy is found to have a preemptive effect.

II. THE DISTRICT COURT ERRED IN HOLDING THAT MR. GRAHAM'S WRONGFUL TERMINATION CLAIM IS BARRED BY THE ADMINISTRATIVE REMEDY UNDER THE UOSH ACT.

A. The District Court Did Not Apply the Appropriate Legal Standards in this Case.

Mr. Graham argued in his principal Brief that the District Court failed to apply the appropriate legal standards in this case by, inter alia, failing to allocate the burden of proof on the preemption defense to the Appellant, and by failing to find a "clear and manifest purpose" on the part of the Legislature to preempt Mr. Graham's claim, as required by *Gottling*, 2002 UT 95 ¶ 8. (*See* Brief of the Appellant at pages 11-13).

Appellee dismisses these arguments by reading additional language into the District Court's Order. (*See* Brief of Appellee At pages 31-32).

However, the best evidence of the District Court’s reasoning is the express language of its Order, which contains no discussion of the burden of proof or finding as to the Legislature’s “clear and manifest purpose.” These requirements are important to ensure that preemption is not “lightly inferred” based merely upon the existence of a statutory remedy. *State v. Jones*, 958 P.2d 938, 940-41) (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987)).

In enacting a statutory remedy, the Utah Legislature is assumed to have acted advisedly, *Gottling*, 2002 UT 95 ¶ 8.⁵ The Utah Legislature has often created express provisions for preemption where that was its intent. The absence of an express preemption provision in the UOSH Act indicates a lack of such intent in the absence of additional facts or analysis indicating to the contrary, particularly where the Act expressly states that it does not “diminish or affect” common law claims. (See Utah Code 34A-6-110(2)). In order to infer an intent to preempt where none is expressly provided, the courts must find a “clear and manifest” intent based upon specified factors, such as where the statutory remedy is so pervasive that it leaves no room for

⁵ Utah Code §34A-6-203 became effective May 10, 2016, which is after this Court’s decisions in *Gottling* and *Gilger*. Therefore, the Utah Legislature was presumably aware of this Court’s decisions regarding statutory preemption of common law claims at the time of its enactment.

supplementation, or where the recognition of a common law claim would conflict with the statutory purpose. (*Id.*). The District Court's Order in the present case provides no finding of a clear and manifest intent to preempt on the part of the Legislature.

Mr. Graham's principal Brief further argues that the District Court failed to cite sufficient grounds to support preemption. (*See* Brief of the Appellant, 15-17). The only grounds for preemption cited by the District Court are: (1) that claimants would be discouraged from filing administrative claims by the existence of a common law remedy, and (2) that a common law remedy might interfere with the "broader purpose of providing for the safety and health of all workers" in some unspecified manner. [R. 566-670].

As to the first of these grounds, no evidence or analysis has been provided to support a conclusion that recognition of a common law remedy would cause injured workers to forego their administrative remedy. It is just as reasonable to assume that injured workers would utilize *both* remedies, as Mr. Graham did, or that they would forego the administrative process in any event due to its extremely restrictive limitations period and remedies. No evidence has been produced regarding the filing or disposition of

administrative claims under the UOSH Act, or even that the Agency considers its procedure to be exclusive.⁶

The District Court's Order states in part:

“[C]laims under the UOSH Act address the concerns not only of individual employees but also the broader purpose of providing for the safety and welfare of all workers through the broader regulatory structure of the UOSH Act.” [R. 566-67].

The District Court did not expressly state that recognizing Graham's wrongful termination claim would conflict with “the broader purpose of providing for the safety and welfare of all workers...,” nor did it provide any analysis which would lead to that conclusion. To the contrary, recognition of Mr. Graham's wrongful termination claim would further the purposes of the UOSH Act.

In *Touchard v. La-Z-Boy Inc.*, 2006 UT 71; 148 P.3d 945 (Utah 2006), this Court recognized a claim for wrongful termination in violation of public policy based upon employer retaliation for the filing of a workers' compensation claim. This Court rejected the employer's argument that such claim was preempted by the Utah Workers' Compensation Act, and held that

⁶ Appellee's Brief responds to Mr. Graham's argument on this point by stating it is “common sense” that workers will forego their administrative claims in lieu of a judicial remedy, but provides no evidence or analysis in support of that assertion. (*See* Brief of Appellee at 33).

recognition of such a claim would further the purposes of the Act by protecting workers against retaliation. *Touchard*, 2006 UT 71 ¶22. This Court's reasoning in *Touchard* seems to be equally applicable in the present case.

In *Gottling* and *Gilger*, this Court conducted an extensive analysis of the relationship between the statutory remedies and the proposed common law claims. In both cases, this Court identified competing interests with which the proposed common law claims would conflict – In *Gottling*, the interest of protecting small employers against costs associated with discrimination claims, and in *Gilger*, the interest of protecting social hosts against costs associated with negligence claims. In each case, this Court found that recognition of the common law claim would conflict with the competing interest in a manner that was inconsistent with the intent of the Legislature. However, there is no such competing interest in the present case. Neither the District Court nor Appellee have asserted that the UOSH Act is intended to shield employers who retaliate against their workers for reporting workplace injuries. Recognition of Mr. Graham's common law claim would not conflict with the purposes of the UOSH Act, but would promote such purposes.

Appellee’s Brief at pages 25-26 discusses various provisions of the UOSH Act in an attempt to show that the UOSH Act is “comprehensive.” However, comprehensiveness for purposes of field preemption does not mean merely that the statute is lengthy or detailed, but that it reflects a legislative intent to exclude other remedies.⁷ Further, to determine comprehensiveness, the court must focus on the particular portion of the statute that is at issue. *Craig v. Provo City*, 2016 UT 40 ¶16; 389 P.3d 423, 426 (Utah 2016). In the present case, although the UOSH Act contains extensive provisions relating to workplace safety and employer records, the portion of the Act devoted to anti-retaliation is very brief and limited. See Utah Code §34A-6-203(1) and (2). By contrast, the Utah Anti-Discrimination Act, which was at issue in *Gottling* and *Retherford*, contains extensive provisions relating to the investigation and resolution of complaints, in addition to an express exclusive remedy provision. See 34A-5-101, *et seq.*⁸

⁷ See *Gottling*, 2002 UT 95 ¶ 8 (“Thus, where a statute’s plain language or its structure and purpose *demonstrate a legislative intent to preempt an area of law*, the statute becomes the only source of law in that area....” (emphasis added)).

⁸ Appellee’s Brief at page 19 cites the unpublished opinion in *Johnson v. E.A. Miller, Inc.*, 172 F.3d 62 (10th Cir 1999) in which the court held that “to the extent plaintiff’s wrongful termination claims are based on UOSHA...they are preempted....” However, the court’s brief statement in

The District Court in this case failed to allocate the burden of proof, and failed to find a “clear and manifest intent” to preempt on the part of the Legislature. Further, the grounds for preemption cited by the District Court are unsupported by sufficient evidence, and fail to show either that the Legislature intended to preempt the field of remedies relating to employer retaliation arising from reports of workplace injuries, or that recognition of Mr. Graham’s wrongful termination claim would conflict with the Legislature’s intent.

B. The District Court Did Not Properly Consider Mr. Graham’s Evidence Against Preemption.

In the District Court, Mr. Graham argued that the UOSH Act expressly reflects a legislative intent against preemption of his common law claim. (Brief of the Appellant at 17-18). Specifically, Utah Code §34A-6-110 states in relevant part:

(1) Nothing in this chapter is deemed to limit or repeal requirements imposed by statute *or otherwise recognized by law*.

(2) *Nothing in this chapter shall be construed or held to supersede or in any manner affect workers’ compensation or enlarge or diminish or affect the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, occupational or other diseases, or death of employees arising out of, or in the course of employment. (emphasis added).*

Johnson provides no analysis of the UOSH Act or the standards relating to statutory preemption.

These provisions indicate that the rights created under the UOSH Act are not intended to be exclusive, and expressly preserve requirements “otherwise imposed by law” and do not “diminish or affect” common law rights. However, the District Court’s Order contains no reference to §34A-6-110.

Appellee argues that the above-quoted language of §34A-6-110 is limited to workers compensation claims, relying upon the heading of §34A-6-110, which states: “Requirements of other laws not limited or repealed – Worker’s Compensation or rights under other laws with respect to employment injuries not affected.” (Brief of Appellee at 35-36).

As an initial matter, the title or caption of a statute is generally not part of the statute’s text, and is only considered where the statutory language is ambiguous. *Funk v. Utah State Tax Com’n*, 839 P.2d 818, 820 (Utah 1992). Moreover, the heading of §34A-6-110 actually supports Mr. Graham’s position in this case, since it refers to “other laws” in addition to workers’ compensation claims. (*Id.*).

Appellee argues that §34A-6-110 is limited to claims arising out of physical or mental injuries in the workplace. (*See* Brief of Appellee at 35-36). However, Appellee makes no argument that Mr. Graham’s claim fails to

meet that requirement. Mr. Graham's workplace injury is an essential element of his wrongful termination claim. Appellee does not argue that Mr. Graham's claim falls outside the scope of the UOSH Act. To the contrary, Appellee's preemption defense is based upon the premise that Mr. Graham's claim does fall within the scope of the UOSH Act. Accordingly, the preservation of rights established by §34A-6-110 applies to Mr. graham's claim.

Mr. Graham argued in the District Court that a legislative intent against preemption is reflected within certain provisions of R614-1-10.L.3-5 of the Utah Administrative Code which expressly defer to "other forums established to resolve disputes which may also be related to Section 34A-6-203 complaints." *See* R614-1-10.L.2.⁹

Appellee's Brief argues, at page 37, that, since R614-1-10.L is an administrative rule, it "provides no evidence of legislative intent." This is a valid point.¹⁰ However, the Agency's position with respect to the exclusivity of its administrative remedy is relevant to the District Court's suggestion

⁹ *See* Brief of the Appellant at pages 18-21 for Mr. Graham's full argument regarding R614-1-10.L.3-5.

¹⁰ *See Ferro v. Utah Dept. of Commerce*, 828 P.2d 507, 512 and note 7 (Utah App. 1992)("Agency rules are therefore of little value in interpreting a statute unless the discretion to interpret the statute has been explicitly or implicitly granted to the agency by the Legislature").

that Mr. Graham's common law claim might interfere with the administrative process.

The District Court found that the deferral provisions of R614-1-10.L apply only to "arbitration and other agency proceedings." [R. 566]. However, that construction is contrary to the broad language of R614-1-10.L which generally defers to "remedies other than those provided by Section 34A-6-203" so long as they meet certain criteria.

Appellee's Brief at page 37 argues that the District Court's interpretation of R614-1-10.L.3-5 is correct, based upon the caption to the Rule, which states: "Arbitration or other agency proceedings." However, this argument elevates the language of the caption over the actual text of the Rule, contrary to general principles of statutory construction, which are applicable to administrative rules. *Ferro v. Utah Dept. of Commerce*, 828 P.2d 507, 512 (Utah App. 1992). Further, Appellee's argument misses the relevant point, which is not that R614-1-10.L.3-5 expressly defers to Mr. Graham's common law claim, but rather that the administrative remedy is not exclusive. Since the administrative remedy under §34A-6-203 defers to other forums to adjudicate "disputes which may also be related to Section

34A-6-203,” the administrative remedy is clearly not exclusive, and does not preempt the field relating to such claims.¹¹

Appellee did not respond to Mr. Graham’s point that numerous types of legal claims may arise from the reporting of workplace injuries which are independent from the OSHA Act.¹² The administrative remedy provided by Utah Code §34A-6-203 cannot reasonably be construed as the exclusive remedy for employer retaliation arising from the reporting of workplace injuries.

C. The Limited Remedies Under §34A-6-203(2)(c) Support an Inference Against Preemption.

Mr. Graham’s principal Brief argues that the very short limitations period (30 days) and limited remedies (reinstatement with back pay) under §34A-6-203(2)(a) support an inference that the Statute is not intended to be

¹¹ Notably, the Agency’s Rules expressly incorporate numerous court decisions, supporting a conclusion that common law remedies supplement, rather than conflict with, the administrative remedy. *See* R614-1-10.L.3-5 and cases cited therein.

¹² Such claims include workers’ compensation benefits under the Utah Workers’ Compensation Act, Utah Code §34A-2-101, *et seq.*; claims for private health, disability insurance and sick leave under the Employee Retirement Income Security Act (“ERISA”) 29 U.S.C. §1001, *et seq.*; claims for medical leave under the Family and Medical Leave Act (“FMLA”) 29 U.S.C. §2601 *et seq.*; claims for reasonable accommodation and disability discrimination under the Americans with Disabilities Act (“ADA”), 42 U.S.C. §12101 *et seq.*; and claims of employer retaliation under the Occupational Safety and Health Act (“OSHA”), 29 U.S.C. §660(c).

an exclusive remedy. It strains credulity to assert that the Legislature intended to provide such limited protection for workers who report their workplace injuries.

Appellee correctly observes that limitations on remedies alone do not create an inference against preemption. (Brief of Appellee at 41, citing *Gottling*, 2002 UT 95 ¶¶ 8-14). However, the present case does not involve an express preemption provision as in *Gottling* and *Retherford*. In the present case, where the issue involves the determination of whether a statutory remedy has any preemptive effect at all, narrow limitations on the scope of the statutory remedy may be relevant in determining whether it is intended to preempt alternative remedies.

CLAIM FOR ATTORNEYS' FEES

Mr. Graham has claimed his attorney's fees in this case based upon his breach of contract claim in the District Court. Such claim is not at issue on this Appeal.

CONCLUSION

This Court should reverse and vacate the Order of the District Court dismissing Mr. Graham's claim for wrongful termination in violation of public policy on the grounds of pre-emption under Utah Code §34A-6-203 and remand the case for further proceedings in the District Court.

DATED this 30th day of August, 2019.

/s/ Kenneth B. Grimes
Kenneth B. Grimes
Attorney for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 24(g)(1) because this Brief contains 4,092 words, excluding the parts of the brief excepted by Utah R. App. P. 24(g)(2).
2. This brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2019, I hand-delivered two copies of the foregoing Reply Brief of the Appellant to:

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