

2018

**STEVEN ERIC GRAHAM Plaintiff/Appellant, vs. ALBERTSON'S LLC  
Defendant/Appellee. : Brief of Appellant**

Utah Supreme Court

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**Recommended Citation**

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IN THE UTAH SUPREME COURT

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STEVEN ERIC GRAHAM )

Plaintiff/Appellant, )

vs. )

) Appellate Case No. 20180885-SC

ALBERTSON'S LLC )

Defendant/Appellee. )

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**BRIEF OF THE APPELLANT**

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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

LIST OF CURRENT AND FORMER PARTIES

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## INTRODUCTION

The Plaintiff/Appellant Steven Eric Graham (“Mr. Graham”) was granted permission to file this Appeal by the Utah Supreme Court pursuant to Rule 5 of the Utah Rules of Appellate Procedure, by Order dated December 26, 2018.

This Appeal is taken from an interlocutory Order of the District Court, which denied Mr. Graham’s motion for partial summary judgment, and granted Defendant/Appellee’s cross-motion for partial summary judgment, on the issue of whether Mr. Graham’s First Cause of Action, for Wrongful Termination in Violation of Public Policy, is pre-empted by the administrative remedy established by Utah Code §34A-6-203 of the Utah Occupational Safety and Health Act (“UOSH Act”).

The District Court’s ruling upon the parties’ cross-motions for partial summary judgment recognizes that the UOSH Act “does not contain an express exclusive remedy provision....” However, the District Court held that “a preemptive intent is implied by the structure and purpose of the UOSH Act.” Mr. Graham submits that the District Court’s decision on this issue is incorrect based upon the following grounds: (1) the District Court

did not apply the appropriate legal standards in deciding this issue; (2) the District Court did not properly consider Mr. Graham's evidence against pre-emption; and; (3) the limited remedies under Utah Code §34A-6-203(2)(c) establish an inference against pre-emption.

#### STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue presented for review in this Appeal is whether the administrative remedy provided by Utah Code §34A-6-203 of the Utah Occupational Safety and Health Act pre-empts Mr. Graham's claim for Wrongful Termination in Violation of Public Policy. The District Court decided that such claim is pre-empted based upon the parties' cross-motions for partial summary judgment. The District Court's ruling 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). The Order of the District Court upon the parties' cross-motions for summary judgment, which is attached hereto as Addendum "A", indicates that this issue was preserved in the District Court. [R. 565-569].

## STATEMENT OF THE CASE

### A. Statement of the Facts.<sup>1</sup>

1. Plaintiff/Appellant Steven Eric Graham (“Mr. Graham”) commenced employment with Defendant Albertson’s LLC (“Albertson’s”) on June 6, 2016, as an Order Puller at Albertson’s Salt Lake City Distribution Center. [R. 55].

2. On December 6, 2016, Mr. Graham injured his back while lifting cases of product at work. [R. 55].

3. On January 30, 2017, Mr. Graham complained to Albertson’s Human Resources Manager that he was being harassed by his supervisors and coworkers in retaliation for reporting his workplace injury. [R. 4].

4. Mr. Graham was discharged from his employment with Albertson’s on February 10, 2017. [R. 66].

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<sup>1</sup> Appellant’s Statement of the Facts is based upon Plaintiff’s Motion for Partial Summary Judgment and Supporting Memorandum, which was filed in the District Court on April 17, 2018. [R.53-62.] The factual allegations of said Motion are supported by the Declaration of Steven Eric Graham, dated April 17, 2018 [R. 75-77]. As the party against whom summary judgment was granted, Mr. Graham is entitled to have all disputed issues of fact construed in his favor for purposes of this Appeal. *Retherford v. AT & T Communications*, 844 P.2d 954 (Utah 1992).



5. Mr. Graham alleges I this action that he was discharged in retaliation for reporting his injury, and for complaining about harassment and retaliation that he received from his supervisors and co-workers as a result of his injury [R. 65-67].

6. The limitations period for filing an administrative claim under Utah Code §34A-6-203 is 30 days.

7. The administrative remedy provided by Utah Code §34A-6-203 is limited to: “reinstatement of the employee to the employee’s former position with back pay.”

B. Procedural History of the Case.

8. Mr. Graham filed his Complaint in this action in the District Court on January 29, 2018. Said Complaint alleges three Causes of Action, as follows: (1) Wrongful Termination in Violation of Public Policy; (2) Breach of Contract; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing. [R. 1-14].

9. Mr. Graham’s First Cause of Action alleges that he was discharged in retaliation for reporting a work place injury in violation of the public policy of the State of Utah. The specific public policy asserted by Mr. Graham in his First Cause of Action is indicated by Utah Code §34A-6-203. [R. 7-8].

10. Subsequent to the filing of Mr. Graham's Complaint, the parties filed cross-motions for partial summary judgment on the issue of whether Mr. Graham's wrongful termination claim is pre-empted by the administrative remedy established by Utah Code §34A-6-203. [R. 53-72;132-136].<sup>2</sup>

11. In support of his Motion for Partial Summary Judgment, Mr. Graham asserted that certain provisions of the Utah Occupational Safety and Health Act, specifically, Utah Code §34A-6-201, §34A-6-301(3)(b)(iii), and §34A-6-301(3)(b)(vi)-(vii), create a right and obligation on the part of employees to report workplace injuries which result in, inter alia, medical treatment and restriction of work, and that Utah Code §34A-6-203 indicates a public policy within the State of Utah which prohibits employers from retaliating against employees for exercising such rights. [R. 55-58]. Albertson's did not dispute these assertions.

12. On July 30, 2018, Mr. Graham filed Plaintiff's Notice of Supplemental Authority. [R. 215-216]. Said Notice of Supplemental Authority advised the District Court of certain provisions of R614-1-10.L.3-

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<sup>2</sup> The parties filed opposition and reply memoranda in the District Court as provided by Rule 7 of the Utah Rules of Civil Procedure. [R.114-131; 139-151;154-200]. The District Court held oral argument upon said motions on September 7, 2018. [R.536-537].

5 of the Utah Administrative Code, which provide for the deferral of the administrative remedy under Utah Code §34A-6-203, “Where a complainant is in fact pursuing remedies other than those provided by Section 34A-6-203.”

13. On September 21, 2018, Mr. Graham filed a Second Notice of Supplemental Authority. [R. 541-542]. Said Second Notice of Supplemental Authority advised the District Court of certain provisions of Utah Code §34A-6-110, which provide that the remedies established by the Utah Occupational Safety and Health Act are not “deemed to limit or repeal requirements imposed by statute or otherwise recognized by law.”

C. Disposition in the District Court.

14. On October 12, 2018, the District Court entered its 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. (“District Court’s Order”<sup>3</sup>). [R. 565-569]. The District Court’s Order states in part:

3. The Court finds that the UOSH Act preempts plaintiff’s claim for wrongful discharge in violation of public policy. This finding is based on the Court’s analysis of the UOSH Act itself. Although the UOSH Act does not contain an express exclusive remedy provision, when

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<sup>3</sup> A true and correct copy of the District Court’s Order is attached hereto as Addendum “A”.

examining the legislative intent behind the UOSH Act, the court finds that in passing the UOSH Act, the legislature put in place a comprehensive piece of legislation to provide for the safety and health of workers and provided a coordinated plan to establish standards to do so. The Court finds that a preemptive intent is implied by the structure and purpose of the UOSH Act. The UOSH Act establishes standards, procedures, a scheme of regulation, and a bureaucratic system to implement its aims in a timely and cost-effective approach.

4. The Court notes plaintiff's argument that Utah Administrative Code rule R614-1-10.L indicates that the Legislature did not intend to preempt his tort claim, in that that administrative code provision provides for a postponement of the Administrator's determination in circumstances where other proceedings are ongoing and for deferral to the results of such proceedings. The Court's reading of that provision is that it applies to arbitration and other agency proceedings, and it does not change the Court's reading of the UOSH Act as it relates to a common-law tort claim, such as the one at issue here.

5. The Court further finds that allowing plaintiff's common-law tort claim runs counter to the purpose of the UOSH Act in that it could discourage employees from making a claim under the UOSH Act in order to pursue broader remedies than those provided under the UOSH Act, and that claims 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 address Mr. Graham's argument that Utah Code §34A-6-110 establishes that the remedies under the Utah Occupational Safety and Health Act are not "deemed to limit or repeal requirements imposed by statute or otherwise recognized by law." [R. 565-69].

## SUMMARY OF THE ARGUMENT

The District Court erred in this case by denying Plaintiff's motion for partial summary judgment, and granting the Defendant's motion for partial summary judgment, on the issue of whether Mr. Graham's wrongful termination is pre-empted by the administrative remedy established by Utah Code §34A-6-203. The District Court failed to apply the appropriate legal standards in deciding this issue, first, by failing to allocate the burden of proof to the Defendant, and second, by failing to require a "clear and manifest" intent to pre-empt on the part of the Utah Legislature, as required by applicable law.

The District Court further erred by relying upon unsupported factual assumptions in support of its decision on pre-emption. The District Court assumed, without evidence, that recognition on Mr. Graham's wrongful termination claim would deter other workers from pursuing administrative claims under §34A-6-203, and impair the "broader purpose" of the UOSH Act in providing for the safety and welfare of all workers. Mr. Graham submits, to the contrary, that recognition of his wrongful termination claim would further the purpose of protecting the safety of Utah workers, and would not interfere with the administrative procedures under the UOSH Act.

Finally, the District Court failed to properly consider evidence that was presented by Mr. Graham indicating that the UOSH Act was not intended to pre-empt alternative remedies, including Mr. Graham's wrongful termination claim. Utah Code §34A-6-110 expressly states that the UOSH Act does not limit or repeal requirements imposed by statute or otherwise recognized by law, or supersede any common law or statutory rights with respect to injuries arising out of the course of employment. The District Court did not consider this Statute. Further, R614-1-10.L.3-5 of the Utah Administrative Code sets forth detailed provisions for the deferral of administrative proceedings under §34A-6-110 where "other proceedings" asserting "substantially the same as rights" are asserted in "other forums." The District Court incorrectly construed such deferral as being limited to alternative administrative proceedings and arbitration proceedings under labor contracts, and failed to consider the significance of these provisions on the broader issue of pre-emption.

## ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANT'S CLAIM FOR WRONGFUL TERMINATION IS BARRED BY THE ADMINISTRATIVE REMEDY UNDER THE UTAH OCCUPATIONAL SAFETY AND HEALTH ACT.

In *Gottling v. P.R. Incorporated*, 2002 UT 95; 61 P.3d 989, 991 (Utah 2002), the Utah Supreme Court held that a common law claim for wrongful termination in violation of public policy was pre-empted by the exclusive remedy provision of the Utah Anti-Discrimination Act ("UADA"). Although the UADA contains an express exclusive remedy provision, the *Gottling* court considered possible circumstances in which pre-emption might occur in the absence of such a provision, stating:

Sometimes courts, when facing the pre-emption question, find language in the... statute that reveals an explicit [legislative] intent to pre-empt [common] law. More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the ... statute's "structure and purpose," or nonspecific statutory language, nonetheless reveal a clear, but implicit, preemptive intent. [a] A... statute, for example, may create a scheme of [statutory] regulation "so pervasive as to make reasonable the inference that [the legislature] left no room for the [common law] to supplement it." [b] Alternatively, [statutory] law may be in "irreconcilable conflict" with [the common] law. Compliance with both ..., for example, may be a "physical impossibility," or, [c] the [common] law may "stand as an obstacle to the accomplishment and execution of the full purpose and objectives of [the legislature]." *Gottling*, 61 P.3d at 992. (quoting *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996)).

The present Appeal directly raises the issue that was discussed within the above-quoted language from *Gottling*. It is undisputed that the UOSH Act contains no express exclusive remedy or pre-emption provision. Nevertheless, the District Court held that the administrative remedy established by the UOSH Act pre-empts Mr. Graham's wrongful termination claim because a legislative intent to pre-empt such claim "is implied by the structure and purpose of the UOSH Act." Specifically, the District Court held that the "UOSH Act establishes standards, procedures, a scheme of regulation, and a bureaucratic system to implement its aims in a timely and cost-effective approach." However, while purporting to follow *Gottling*, the District Court in this case did not properly allocate the burden of proof on the issue of pre-emption, and did not fully consider evidence presented by Mr. Graham establishing that the administrative remedy under the UOSH Act is not intended to be exclusive.

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

The Defendant bears the burden of proof with respect to a defense of statutory pre-emption. *Robertson v. Gem Insurance*, 828 P.2d 496, 500 (Utah App. 1992); *State v. Jones*, 958 P.2d 938, 940-41 (Utah App. 1998).

In the present case, the District Court's Order provides no express reference to the burden of proof relating to the Defendant's pre-emption



defense.<sup>4</sup> However, proper application of the burden of proof is crucial in determining this issue, and would result in a ruling in favor of Mr. Graham.

The *Gottling* court did not expressly discuss the proper burden of proof for determining a statutory pre-emption defense. However, the *Gottling* court stated that pre-emption only occurs where a statute's structure and purpose “reveal a clear, but implicit, pre-emptive intent.” 61 P.3d at 992. This language from *Gottling* places a burden upon the party asserting pre-emption to establish a clear legislative intent to pre-empt the claim in question.

*Gottling* expressly relied upon decisions of the U.S. Supreme Court in adopting the above-quoted principles relating to pre-emption. In fact, the Utah courts have generally relied upon Federal precedents in deciding pre-emption issues. For example, in *Gilger v. Hernandez*, 2000 UT 23; 997 P.2d 305 (Utah 2000), the Utah Supreme Court stated that decisions of the U.S. Supreme Court relating to federal pre-emption of state statutes are

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<sup>4</sup> Mr. Graham’s attorney argued that Albertson’s bears the burden of proof upon its pre-emption defense at the hearing held in the District Court upon the parties’ cross-motions for partial summary judgment on September 7, 2018.

“analytically useful” in determining whether a Utah statute pre-empts a plaintiff’s common law claims. 997 P.2d at 308.<sup>5</sup>

In *State v. Jones*, 958 P.2d 938 (Utah App. 1998), the defendant moved to dismiss criminal charges brought against him for communications fraud under Utah law, on the grounds that the state law offense was pre-empted by the Federal Employees Retirement System (FERS”). In upholding the district court’s denial of said motion, the Utah Court of Appeals relied upon Utah and Federal precedents regarding the scope of statutory pre-emption, as follows:

We do not "lightly infer preemption." *International Paper Co. v. Ouellette*, 479 U.S. 481, 491, 107 S.Ct. 805, 811, 93 L.Ed.2d 883 (1987); accord *State v. Sterkel*, 933 P.2d 409, 412 (Utah Ct.App.1997); see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)(stating Court assumed "historic police powers of the States were not to be superseded" by federal legislation). In fact, it is inappropriate for us to conclude that federal legislation has preempted state law "unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230, 67 S.Ct. at 1152. This "clear and manifest purpose" to preempt state law can be shown either by express statutory language or by implication from the statutory structure and purpose. See *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990). We infer preemption only when "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or when an "[a]ct of Congress ... touch[es] a field in which the federal interest is

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<sup>5</sup> See also *Price Development Co. v. Orem City*, 2000 UT 26; 995 P.2d 1237,1243 (Utah 2000); *In re Estate of Hannifin*, 2013 UT 46; 311 P.3d 1016, 1018 (Utah 2013).

so dominant that the federal system [is] assumed to preclude enforcement of state laws on the same subject." *Rice*, 331 U.S. at 230, 67 S.Ct. at 1152.

Under *State v. Jones*, and the authorities cited therein, pre-emption occurs only where there is a "clear and manifest" intention to pre-empt expressed by the statutory language or by implication from the statutory structure and purpose.

Further, a legislative intent to pre-empt may not be inferred merely from the comprehensiveness of a statute. In *Wintergreen Group, LC v. Utah Dep't of Transportation*, 2007 UT 75; 171 P.3d 418 (Utah 2007), the defendant (UDOT) asserted that the plaintiff's inverse condemnation claims under 29 U.S.C. §1983 were pre-empted by the defendant's previously-filed claims under Utah's direct condemnation statute. The Utah Supreme Court reversed the trial court's dismissal of the plaintiff's claims on pre-emption grounds, stating:

[I]t is clear that to extinguish a §1983 claim that is based on an underlying constitutional right, a defendant must establish that by passing a comprehensive statutory scheme "Congress has expressly withdrawn" the underlying constitutional remedy. "The statutory framework must be such that 'allowing a plaintiff' to bring a §1983 action 'would be inconsistent with Congress' carefully tailored scheme." Moreover, the presence of a comprehensive statutory scheme, by itself, "is not necessarily sufficient to demonstrate that Congress intended to foreclose a §1983 remedy." This difficult burden signals to us that the preemption of claims based on underlying constitutional rights is disfavored. In fact, the Court itself emphasized that it does not "lightly conclude that Congress intended to preclude

reliance on §1983 as a remedy for a federally secured right.” 171 P.3d at 422 (citations omitted).<sup>6</sup>

The District Court failed to follow and apply the above-stated legal standards in the present case. First, the District Court failed to allocate the burden of proof to the defendant. Second, although the District Court found that “a preemptive intent is implied by the structure and purpose of the UOSH Act,” it did not find a “clear and manifest purpose” on the part of the Legislature to pre-empt Mr. Graham’s claim. The District Court did not find that the UOSH Act is “so pervasive as to make reasonable the inference that [the legislature] left no room for the [common law] to supplement it,” or that Mr. Graham’s claim is in “irreconcilable conflict” with the UOSH Act, as required by *Gottling*, 61 P.3d at 991.

The one specific basis for pre-emption identified by the District Court appears in Paragraph 5 of the District Court’s Order, which states:

5. The Court further finds that allowing plaintiff’s common-law tort claim runs counter to the purpose of the UOSH Act in that it could discourage employees from making a claim under the UOSH Act in order to pursue broader remedies than those provided under the UOSH Act, and that claims under the UOSH Act address the concerns not only of individual employees but also the broader purpose of

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<sup>6</sup> See also, *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985)(“we seldom infer, solely from the comprehensiveness of federal regulations, an intent to preempt in its entirety a field related to health and safety”).

providing for the safety and welfare of all workers through the broader regulatory structure of the UOSH Act. [R. 566-67].

There are several flaws in the District Court's reasoning. First, it is based upon an unsupported factual assumption that workers will forego an administrative claim under the UOSH Act to pursue their common law remedy. Although common law claims may provide for recovery beyond the extremely limited remedy that is available under the UOSH Act, they also require far greater time and resources to pursue. There is no reason to assume that workers who will benefit from the limited remedies under the UOSH Act will be less likely to pursue their administrative remedy.

Perhaps more importantly, there is no basis to conclude that the availability of common law claims would undermine the purposes of the UOSH Act, rather than supporting and furthering those purposes. As noted by the District Court, the purpose of the UOSH Act is to provide "for the safety and welfare of all workers...." The recognition of Mr. Graham's common law claim would further that same purpose. *See Touchard v. La-Z-Boy Inc.*, 2006 UT 71; 148 P.3d 945, 952 (Utah 2006).

Unlike the circumstances at issue in *Gottling*, where the Utah Legislature balanced the interests of remedying employment discrimination with the burden that such remedy would place upon "small employers," the present case involves no conflicting interest to the public policy asserted by

Graham. Utah employers do not have any legitimate interest in preventing their workers from reporting workplace injuries, or in retaliating against workers who do report their injuries. Nor has Albertson's identified any conflicting interest on the part of the State of any of its Agencies. To the contrary, the administrative procedures established under the UOSH Act are harmonious with the claim asserted by Mr. Graham. The mere fact that workers may have a choice between alternative remedies does not conflict with the administrative procedures, particularly when the relevant Agency has established rules for deferring to claims in other forums.

The District Court failed to apply the appropriate legal standards in this case and based its finding of pre-emption upon unsupported factual assumptions, requiring reversal of the District Court's ruling upon summary judgment.

B. The District Court Did Not Properly Consider Mr. Graham's Evidence Against Pre-emption.

In the District Court, Mr. Graham argued that a legislative intent against pre-emption of his common law claim is reflected within the provisions of the UOSH Act. Specifically, Utah Code §34A-6-110 states in relevant part:

Requirements of other laws not limited or repealed – Worker's Compensation or rights under other laws with respect to employment injuries not affected.

(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).

These provisions indicate that the rights created under the UOSH Act are not intended to be exclusive, and expressly preserve common law claims with respect to workplace injuries. The statutory language certainly must extend to the reporting of such injuries. Although Mr. Graham argued §34A-6-110 in the District Court, the District Court's Order contains no reference to the Statute.

Mr. Graham also argued in the District Court that a legislative intent against pre-emption is reflected within R614-1-10.L.3-5 of the Utah Administrative Code which states:

L. Arbitration or other agency proceedings.

1. An employee who files a complaint under Section 34A-6-203(2) of the Act may also pursue remedies under grievance arbitration proceedings in collective bargaining agreements. In addition, the complainant may concurrently resort to other agencies for relief, such as the National Labor Relations Board. The Administrator's jurisdiction to entertain Section 34A-6-203 complaints, to investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction of other agencies or bodies. The Administrator may

file action in district court regardless of the pendency of other proceedings.

2. However, the Administrator also recognizes the policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements. By the same token, *due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to Section 34A-6-203 complaints.*

3. Where a complainant is in fact *pursuing remedies other than those provided by Section 34A-6-203, postponement of the Administrator's determination and deferral to the results of such proceedings may be in order.*

4. *Postponement of determination. Postponement of determination would be justified where the rights asserted in other proceedings are substantially the same as rights under Section 34A-6-203 and those proceedings are not likely to violate the rights guaranteed by Section 34A-6-203. The factual issues in such proceedings must be substantially the same as those raised by Section 34A-6-203 complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination.*

5. Deferral to outcome of other proceedings. A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-to-case basis, after careful scrutiny of all available information. Before deferring to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the Act. In this regard, if such other actions initiated by a complainant are dismissed without adjudicative hearing thereof, such dismissal will not ordinarily be regarded as determinative of the Section 34A-6-203 complaint. (citations omitted; emphasis added).



The District Court held that this provision relates only to “arbitration and other agency proceedings,” and not to Mr. Graham’s common-law claim. [R. 566-67]. However, the District Court’s interpretation is contrary to the language of R614-1-10.L.3-5. Paragraph 1 (quoted above) states: “The Administrator’s jurisdiction to entertain Section 34A-6-203 complaints, to investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction *of other agencies or bodies.*” (emphasis added). The phrase “or bodies” clearly signifies that R614-1-10.L.3-5 is not limited to other agencies, nor is that phrase consistent merely with deferral to arbitration proceedings under labor agreements. Similarly, Paragraph 2 refers to “other forums” and Paragraph 3 refers to “remedies other than those provided by Section 34A-6-203” without limitation. Paragraph 4 provides for agency deferral where “other proceedings are substantially the same as rights under Section 34A-6-203.” Deferral under R614-1-10.L.3-5 is determined not by the nature of the forum, but by whether the rights involved in the alternative forum are similar to those provided by §34A-6-203.<sup>7</sup>

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<sup>7</sup> Further, R614-1-10.L.3-5 provides no rational basis for distinguishing proceedings in other agencies and labor arbitration proceedings from other types of remedies. In particular, there is no basis for distinguishing between arbitration proceedings under labor agreements and similar remedies that

Even if the District Court's reading of R614-1-10.L.3-5 was correct, it would miss the point. The fact that administrative claims under §34A-6-203 are subject to deferral for *some types* of claims indicates that it is not considered to be an exclusive remedy or to pre-empt alternative claims. The relevant question under *Gottling* is whether a scheme of statutory regulation is "so pervasive as to make reasonable the inference that [the legislature] left no room for the [common law] to supplement it." *Gottling*, 61 P.3d at 992. Clearly, that is not the case with respect to §34A-6-203.

The District Court's holding on pre-emption conflicts with the practical realities of employment. The reporting of workplace injuries is required in numerous legal contexts, including health insurance, medical leave, disability and workers' compensation benefits. Utah Code §34A-6-110 recognizes this reality by expressly stating that the UOSH Act does not limit or repeal legal requirements imposed by statute or otherwise recognized at law, expressly including common law remedies. The District Court's decision on this issue is incorrect.

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might be provided by non-union employers. In fact, Mr. Graham has alleged such a claim in this case, based upon Albertson's alleged breach of its employment agreement, and Albertson's has not asserted that such claim is preempted by §34A-6-203.

C. The Limited Remedies Under §34A-6-203(2)(c) Establish an Inference Against Pre-emption.

Utah Code §34A-6-203(2)(a) states:

An employee who believes that the employee has been discharged or otherwise retaliated against by any person in violation of this section may, *within 30 days after the violation occurs*, file a complaint with the division alleging discharge or retaliation in violation of this section. (emphasis added).

Utah Code §34A-6-203(2)(c) states:

Upon completion of the investigation, the division shall issue an order:

- (i)
  - (A) finding a violation of this section has occurred;
  - (B) requiring that the violation cease; and
  - (C) which *may include other appropriate relief, such as reinstatement of the employee to the employee's former position with back pay*; or
- (ii) finding that a violation of the section has not occurred. (emphasis added).

The remedies available under Utah Code §34A-6-203(2)(c), for an employee who has been discharged are limited to reinstatement, potentially with back pay.<sup>8</sup> Even an award of backpay under the Statute appears to be

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<sup>8</sup> In his administrative proceeding in the Utah Labor Commission, Mr. Graham filed a motion for partial summary judgment in relation to the scope of his potential remedies. [R 689-690]. On August 8, 2018, the ALJ issued an order stating that she lacked jurisdiction to award damages for reputational injuries, expenses for obtaining alternative employment, mental stress or punitive damages. [R 784-791].

conditioned upon reinstatement. However, reinstatement is generally not available when hostilities exist between the parties or when the employment relationship has been irreparably damaged by the dispute over the discharge or by lack of confidence and loyalty. *Thurston v. Box Elder County*, 892 P.2d 1034, 1041 (Utah 1995). Therefore, §34A-6-203(2)(c) often provides no remedy whatsoever for an employee who has been discharged in retaliation for reporting a workplace injury.

By contrast, tort claims for wrongful termination in violation of public policy are intended to provide a full range of recovery for the vindication of clear and substantial public rights.<sup>9</sup>The Utah Supreme Court recognized such intent in *Peterson v. Browning*, 832 P.2d 1280, 1286 (Utah 1992), stating:

[T]he duty at issue in actions for wrongful termination in violation of public policy does not arise out of the employment contract. It is imposed by law, and thus is properly conceptualized as a tort. Significant consequences flow from this conceptual approach, one of which is the type of damages available. When a contract theory is applied, compensation may be limited to economic losses such as back pay. Moreover, concepts of foreseeability and mitigation apply. In contrast, "[a] tort theory will permit the recovery to transcend these limits and may also serve to avoid limitations on recovery that may be imposed by the collective bargaining agreement or other contract. Most notably, a plaintiff may recover punitive damages under tort law.

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<sup>9</sup>It is undisputed in this case that the UOSH Act indicates a right to report workplace injuries on the part of Utah employees, that said right is clear and substantial, and that Mr. Graham's wrongful termination seeks to assert such a right.

The limited remedy provided by the UOSH Act, if construed as being exclusive, would be grossly insufficient to support the clear and substantial policy in support of reporting workplace injuries. Although the legislature may define the scope of remedies available for a specific injury, the sufficiency of such remedy in comparison to the nature of the protected right may bear upon whether the statutory remedy is comprehensive, as required for pre-emption under *Gottling*. The very limited remedies and limitations period under §34A-6-203(2)(c) may be appropriate for an expedited and non-exclusive administrative process. However, standing alone, they would be insufficient to protect the important public policy favoring the reporting of workplace injuries. The remedy provisions under the UOSH Act are not sufficiently comprehensive to signify an intent to pre-empt alternative claims.

#### 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 claims 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 1st day of April, 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 7,218 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.

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

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2019, I hand-delivered two true and correct copies of the Brief of the Appellant to:

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/s/ Kenneth B. Grimes  
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The Order of the Court is stated below:

Dated: October 12, 2018  
03:04:57 PM

/s/ HEATHER BRERETON  
District Court Judge



Mark A. Wagner (#6353)  
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IN THE THIRD DISTRICT COURT SALT LAKE COUNTY, STATE OF UTAH	
STEVEN ERIC GRAHAM,  Plaintiff,  vs.  ALBERTSON'S, LLC,  Defendant.	<b>ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, GRANTING DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO PERFORM DISCOVERY RELATED TO DEFENDANT'S WEALTH</b>  Case No. 180900781  Judge: Heather Brereton

This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment and supporting Declaration of Steven Eric Graham filed April 17, 2018, and on Albertson's Cross-Motion for Partial Summary Judgment filed May 8, 2018. Defendant filed a Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment on May 8, 2018; plaintiff filed a Combined Reply Memorandum in Support of Motion for Partial Summary Judgment and Memorandum in Opposition to Defendant's Cross-Motion for Partial Summary Judgment on May 17, 2018; defendant filed a Reply Memorandum in Support of Albertson's



Cross-Motion for Partial Summary Judgment on May 24, 2018; and Plaintiff filed a Notice of Supplemental Authority on July 30, 2018. The Court heard oral argument on the foregoing motions on September 7, 2018. Plaintiff was represented at oral argument by Kenneth B. Grimes and defendant was represented by Mark A. Wagner. After oral argument, the Court took the foregoing motions under advisement. Thereafter, plaintiff filed Plaintiff's Second Notice of Supplemental Authority on September 21, 2018. Having considered the pleadings and submissions of the parties, the arguments of counsel, and the relevant law, **the court issued an oral ruling on the motions on September 26, 2018. The court hereby incorporates that oral ruling** and for the reasons set forth below, Plaintiff's Motion for Partial Summary Judgment is **DENIED** and Albertson's Cross-Motion for Partial Summary Judgment is **GRANTED**. In addition, as a result of the foregoing rulings, Plaintiff's Motion for Leave to Perform Discovery Related to Defendant's Wealth is **DENIED** as moot.

1. Both parties relied on essentially the same statement of material facts for the purposes of their cross-motions for partial summary judgment. Accordingly, there are no genuine issues of material fact that would preclude the entry of summary judgment.

2. The parties' cross-motions for partial summary judgment raise the same legal issue; that is, whether plaintiff's claim for wrongful discharge in violation of public policy is preempted by the Utah Occupational Safety and Health Act ("UOSH Act").

3. The Court finds that the UOSH Act preempts plaintiff's claim for wrongful discharge in violation of public policy. This finding is based on the Court's analysis of the UOSH Act itself. Although the UOSH Act does not contain an express exclusive remedy

provision, when examining the legislative intent behind the UOSH Act, the court finds that in passing the UOSH Act, the legislature put in place a comprehensive piece of legislation to provide for the safety and health of workers and provided a coordinated plan to establish standards to do so. The Court finds that a preemptive intent is implied by the structure and purpose of the UOSH Act. The UOSH Act establishes standards, procedures, a scheme of regulation, and a bureaucratic system to implement its aims in a timely and cost-effective approach.

4. The Court's notes plaintiff's argument that Utah Administrative Code rule R614-1-10.L indicates that the legislature did not intend to preempt his tort claim, in that that administrative code provision provides for a postponement of the Administrator's determination in circumstances where other proceedings are ongoing and for deferral to the results of such proceedings. The Court's reading of that provision is that it applies to arbitration and other agency proceedings, and it does not change the Court's reading of the UOSH Act as it relates to a common-law tort claim, such as the one at issue here.

5. The Court further finds that allowing plaintiff's common-law tort claim runs counter to the purpose of the UOSH Act in that it could discourage employees from making a claim under the UOSH Act in order to pursue broader remedies than those provided for under the UOSH Act, and that claims 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.

6. The Court further finds that when it analyzes plaintiff's common-law claim in this action, the UOSH Act provides the public policy supporting his common-law claim, and it establishes a procedure and remedy to address his claim, which is retaliation or discharge for reporting a workplace injury in violation of the UOSH Act. As such, the Court finds that the claim at issue comes within the scope of the UOSH Act's preemptive effect. The Court comes to this conclusion based on the indispensable element test set forth in *Retherford v. AT&T Communications of Mountain States, Inc.*, 844 P.2d 949 (Utah 1992). In applying this test, preemption depends on the nature of the injury for which the plaintiff makes the claim. Here, in Utah Code section 34A-6-203, the UOSH Act specifically addresses retaliation or discharge as a result of reporting a workplace injury, the very injury claimed by plaintiff in this action. The Court finds that the UOSH Act establishes a procedure for reporting and investigating a claim of retaliation and discharge, a forum to issue a decision or order, a remedy, and a procedure for review and appeal of that order. Further, in claiming discharge in violation of public policy in his tort claim, plaintiff relies on the UOSH Act as the statement of public policy. In the absence of the UOSH Act, plaintiff would be unable to make out his common-law claim. As such, the Court finds that the harm the UOSH Act addresses is an indispensable element of plaintiff's tort cause of action and, therefore, the UOSH Act preempts plaintiff's common-law claim here.

7. For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment is **DENIED** and Albertson's Cross-Motion for Partial Summary Judgment is **GRANTED**. Plaintiff's claim for wrongful discharge in violation of public policy is therefore **DISMISSED WITH PREJUDICE**.

8. The only claim asserted by plaintiff in this action that would support a potential recovery of punitive damages is plaintiff's claim for wrongful discharge in violation of public policy. Because that claim is dismissed, the Court finds that Plaintiff's Motion for Leave to Perform Discovery Related to Defendant's Wealth is moot. Accordingly, Plaintiff's Motion for Leave to Perform Discovery Related to Defendant's Wealth is **DENIED**.

-----**END OF ORDER**-----  
**signature and date appear at the top of the first page**

Approved as to form:

/s Kenneth B. Grimes (by Mark A. Wagner with approval of Kenneth Grimes by email)  
Kenneth B. Grimes  
*Attorney for Plaintiff*

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