IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 20-0054

EDWARD TOMSU,

Plaintiff/Appellant,

v.

UNIVERSITY OF MONTANA; JOHN DOES 1-10; and, ABC CORPORATIONS 1-10,

Defendants/Appellees.

Answer Brief of Appellee University of Montana

On appeal from the Montana Fourth Judicial District Court, Missoula County,
Cause No. DV-16-783
The Honorable Shane A. Vannatta, Presiding

APPEARANCES:

J.R. Casillas
Matthew A. McKeon
Datsopoulos, MacDonald & Lind, P.C.
201 West Main, Suite 201
Missoula, Montana 59802
406/728-0810
406/543-0134
jrcasillas@dmllaw.com;
mmckeon@dmllaw.com

Attorneys for Plaintiff/Appellant

Courtney Cosgrove
Special Assistant Attorney General
Risk Management & Tort Defense Division
P.O. Box 200124
Helena, MT 59620-0124
406/444-3562
406/444-2592 facsimile
ccosgrove@mt.gov

Attorney for Defendant/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

STANDARD OF REVIEW 6

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. This Court should affirm the District Court's ruling allowing the University's designated representative to remain in the courtroom 9

a. The District Court correctly denied Tomsu's request to have the University's designated representative excluded from the courtroom 9

b. Tomsu fails to demonstrate prejudice from the University's presence in the courtroom 13

II. This Court should affirm the District Court's grant of summary judgment to the University on Tomsu's emotional distress claims 15

a. The Wrongful Discharge from Employment Act expressly precludes Tomsu's emotional distress claims 15

b. Tomsu failed to demonstrate that he suffered emotional distress as a matter of law 23

CONCLUSION 30

CERTIFICATE OF COMPLIANCE 31

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

STATUTES

Montana Code Annotated:

§ 39-2-902 15

§ 39-2-903(1) 22

§ 39-2-905 15

§ 39-2-913 ..... 15, 16, 23

Montana Rules of Civil Procedure:

Rule 56, M.R.Civ.P. 6

Montana Rules of Evidence:

Rule 615, M.R.Evid. 6, 7, 9, 10, 11, 12, 13, 14, 30

TREATIES

Restatement (Second) of Torts:

§ 46 cmt. d) 29

CASES

Courts of Appeals:

United States v. Farnham
791 F.2d 331 (4th Cir. 1986) 12

Montana Supreme Court

Basta v. Crago, Inc.
280 Mont. 408, 412, 930 P.2d 78, 80 (1996) 16

Beasley v. Semitool, Inc.
258 Mont. 258, 261, 853 P.2d 84, 86 (1992) 16, 17

Czajkowski v. Meyers
2007 MT 292, ¶¶ 33-34, 339 Mont. 503, 172 P.3d 94 ..... 25, 26

Dagel v. Great Falls
250 Mont. 224, 819 P.2d 186 (1991) 16, 17, 19, 22, 23

Faulconbridge v. State
2006 MT 198, 333 Mont. 186, 142 P.3d 777 ..... 10, 11

First Bank (N.A.)-Billings v. Clark
236 Mont. 195, 206, 771 P.2d 84, 91 (1988) 24, 25, 26

Kulm v. MSU
285 Mont. 328, 948 P.2d 243 (1997) 16

Maloney v. Home & Inv. Ctr., Inc.
2000 MT 34, ¶ 63, 298 Mont. 213, 994 P.2d 1124 ..... 24, 29

Minnie v. City of Roundup
257 Mont. 429, 431, 849 P.2d 212, 214 (1993) 7

Mont. Solid Waste Constrs. V. Mont. Dep't of Pub. Serv. Regulation

2007 MT 154, 338 Mont. 1, 161 P.3d 837 29

Renville v. Fredrickson
2004 MT 324, 324 Mont. 86, 101 P.3d 773 ..... *25*

Rocky Mtn. Enters. v. Pierce Flooring
286 Mont. 282, 294, 951 P.2d 1326, 1333 (1997) 6

Sacco v. High Country Indep. Press, Inc.
271 Mont. 209, 234, 896 P.2d 411, 426 (1995) 8, 24, 25, 26, 28

State v. Love
151 Mont. 190, 440 P.2d 275 (1968) 13

State v. Osborne
1999 MT 149, ¶ 28, 295 Mont. 54, 982 P.2d 1045 6

Wages v. First Nat'l Ins. Co. of Am.
2003 MT 309, ¶ 11, 318 Mont. 232, 79 P.3d 1095 ..... 24, 28

Montana District Courts:

Mohan v. Montana Resources, LLP
Order Denying Defendant's Motion to Dismiss Plaintiff's
First Amended Complaint and demand for Jury Trial (unpublished)
(Appellant's Appendix B) 20, 21

Sorensen v. OMS Partners, Inc.
2000 Mont. Dist. LEXIS 2396, *5 ..... 16, 18, 19, 22

STATEMENT OF THE CASE

The University of Montana (University or UM) agrees with the procedural background of this constructive discharge case set forth in Appellant Tony Tomsu's Statement of the Case. The University disagrees, however, with the legal conclusions embedded therein, and with Tomsu's factual assertions regarding a purported hostile work environment. Tomsu cites to his First Amended Complaint in claiming that his supervisor, Dawn Ressel, "marginalized Tomsu, stripped him of his duties, and did everything she could to keep him in isolation." Appellant's Principal Brief, pp. 8-9. The District Court, after a three-day bench trial, made findings of fact and conclusions of law—none of which support Tomsu's claim for constructive discharge.

For instance, the District Court concluded that "Tomsu's perception of the work environment was not objective and reasonable." Findings of Fact, Conclusions of Law, and Order (hereafter "Order") (Appendix A to Appellant's Principal Brief), ¶ G. The District Court further concluded that "Tomsu's claim for isolation is not supported by the record" and that his "allegation that he was demoted is also not supported by the record." Order, ¶¶ I, J. Tomsu does not appeal any of the Court's findings of fact and conclusions of law with respect to whether he was constructively discharged, allowing this Court to disregard the contrary factual assertions that he failed to establish at trial.

The District Court dismissed Tomsu's negligent and intentional infliction of emotional distress claims on summary judgment following oral argument. UM has attached the portion of that hearing transcript in which the Court offer its rationale in Appendix 1.

STATEMENT OF FACTS

Tomsu began working for UM as a Budget Analyst in January of 1997. Order, ¶ 1. The University promoted Tomsu in 2001, giving him the working title of Assistant Director of Institutional Research. *Id.* at ¶ 2. Tomsu received another promotion in 2004 with the working title of Associate Director of Institutional Research. *Id.* at ¶ 4. At UM, an employee's working title can differ from his or her state classification title. *Id.* at ¶ 3. So, while Tomsu's working title changed over the years, his state classification title remained as either a Budget Analyst or a Program Manager. *Id.* ¶¶, 2,3.

The University hired Dawn Ressel in 2012 as its Associate Vice President of the Office of Planning, Budget and Analysis. *Id.* at ¶ 7. Ressel became Tomsu's supervisor. *Id.* at ¶ 9. Shortly after her arrival, Ressel promoted Tomsu and gave him the working title of Director of Institutional Research. *Id.* at ¶ 10.

Tomsu's allegations of a hostile work environment and of emotional distress began in the fall of 2015. *Id.* at ¶ G. Tomsu felt that Ressel's decision to divide her staff into two teams—one to implement new software and one to maintain the

daily function of the office—created division. *Id.* at ¶ 27. He felt left out of meetings he thought he should have attended. *Id.* ¶ 34. He mistakenly thought he had been demoted despite Ressel expressly telling him he had not and following up with a letter confirming his supervisory role. *Id.* at ¶¶ 33, 41, 42; Trial Ex. A. Tomsu claimed that Ressel refused to acknowledge his Director working title, despite a letter she wrote and placed in his personnel file confirming the title and additionally noting that he "has performed at a director level and deserves to use this working title." *Id.* at ¶¶ 39-42; Trial Ex. A. Tomsu also felt he should have been receiving annual performance reviews despite no UM policy requiring such. *Id.* at ¶¶ 38, 47. To quell his concerns Ressel wrote the aforementioned letter and gave a positive review of Tomsu's performance. *Id.* at ¶¶ 41-42, Trial Ex. A. Tomsu was still not satisfied because the letter was not in what he considered the proper format and because it was not on official letterhead. *Id.* at ¶¶ 43-44.

The "last straw" for Tomsu came on December 1, 2015 when Ressel assigned her entire staff a project designed to broadedn their skill sets. Order, ¶ 53; Trial Ex. F. Tomsu perceived the project as discriminatory and a waste of his time. Order, ¶ 53. When Tomsu learned of the assignment, he went into Ressel's office, yelled at her and told her she was the worst manager that he had ever encountered. Order, ¶ 55; Trial Transcript, Day 2, p. 208, ll. 13-19. He refused to do the project and then he left work for the remainder of the week. Order, ¶ 56. He faced no

consequences for his refusal to complete the project, and Ressel withdraw the assignment for the entire office just days later. Order, ¶ 57. He announced his resignation shortly after, citing these "untenable" working conditions. Trial Ex. 9.

Two of Tomsu's co-workers, Ed Wingard and Debbie Morlock, also had concerns with Ressel. Order, ¶¶ 12, 19, 29. Morlock filed two complaints with the University, raising concerns over the fact that she wasn't chosen to implement the new software. *Id.* at ¶ 29. She refused to allow Mike Reid, Ressel's supervisor, to discuss her grievances with Ressel and she never raised them directly with Ressel, either. *Id.* Ressel was therefore unaware of the complaints against her and deprived of an opportunity to address them. *See id.* The District Court concluded that Wingard's testimony was "less than credible" and that his and Morlock's complaints "are unhelpful and do not support Tomsu's constructive discharge claim." *Id.* at ¶ L. The Court further noted that "neither Wingard or Morlock felt it necessary to quit [the University] because of a hostile work environment." *Id.* at L.

From these benign workplace events, Tomsu sued the University for constructive discharge and negligent and intentional infliction of emotional distress. *See* First Amended Complaint (Doc. # 3). The District Court concluded Tomsu's perception of the work environment was not objective and reasonable.

Order, ¶ G. It further concluded that the record failed to support many of Tomsu's allegations. *Id.* at ¶¶ H-L, P.

With respect to his alleged emotional distress, Tomsu takes liberties with the facts of this case. First, Tomsu states that he "sought medical treatment for his dangerously elevated blood pressure." Appellant's Principal Brief at 10. In fact, Tomsu made one visit to a doctor for a chest cold, and at that visit he *self-reported* his high blood pressure. Trial Ex. 1. His provider did not determine Tomsu's blood pressure was "dangerously elevated" nor did he require a follow-up appointment or prescribe medication. *See id.* Tomsu did not seek any other treatment, medical or otherwise, for his supposed distress. *E.g.,* Transcript of Proceeding, June 21, 2019 (hereafter "Summary Judgment Order"), p. 52 (Appendix 1).

Tomsu further claims that his "emotional distress was corroborated by other witnesses, including Tomsu's former co-workers and his wife." Appellant's Principal Brief at 11. With respect to his co-workers, Morlock and Wingard, Morlock testified she was aware of Tomsu's emotional distress merely because he told her about it and not because of any firsthand knowledge. *See* Ex. D to Answer Brief in Opposition to Defendant's Motion for Partial Summary Judgment on Counts II and III (Doc. # 25), Deposition of Debbie Morlock, p. 171, ll. 19-25, p. 172, ll. 1-24. Wingard testified simply that Tomsu was "completely disappointed."

See Doc. # 25, Deposition of Ed Wingard, p. 98, ll. 8-19. These statements hardly "corroborate" Tomsu's emotional distress.

With respect to the Rule 615 issue, the University does not dispute the exchange between counsel and the Court with respect to Ms. Ressel's presence in the courtroom or that she in fact remained in the courtroom throughout trial. The University disputes, however, that the excerpt of Ressel's testimony represents a "drastic" change in or "tailoring" of her testimony based on previous testimony. The cited exchange itself defeats Tomsu's argument that it resulted in prejudice, as will be explained further below.

STANDARD OF REVIEW

This Court reviews a district court's application of Rule 615, M.R.Evid., as it would a conclusion of law—for correctness. *State v. w*, 1999 MT 149, ¶ 28, 295 Mont. 54, 982 P.2d 1045.

As Tomsu acknowledges, "[n]o civil case shall be reversed by reason of error which would have no significant impact upon the result. When there is no showing of substantial injustice, the error is harmless and may not be used to defeat the judgment." *Rocky Mtn. Enters. v. Pierce Flooring*, 286 Mont. 282, 294, 951 P.2d 1326, 1333 (1997) (citation omitted).

This Court reviews a district court's grant of summary judgment de novo, applying the same criteria used by the district court under Rule 56, M.R.Civ.P.

Minnie v. City of Roundup, 257 Mont. 429, 431, 849 P.2d 212, 214 (1993). This Court determines whether there exist any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Id.*

SUMMARY OF ARGUMENT

The District Court correctly allowed Ms. Ressel to remain in the courtroom for the duration of trial. Rule 615, M.R.Evid. governs the exclusion of witnesses. It requires the court to order witnesses excluded so that they cannot hear the testimony of other witnesses. It contains certain exclusions. Relevant here, Rule 615(2) expressly states that "[t]his rule does not authorize exclusion of . . . an officer or employee of a party which is not a natural person designated as its representative by its attorney[.]" Rule 615(2), M.R.Evid. Counsel for the University designated Ms. Ressel as the University's representative. Rule 615 therefore does not authorize her exclusion from the courtroom and the District Court was not only correct in allowing her to remain but was compelled by the plain language of the rule to do so.

Tomsu's argument hinges on his recasting of Ms. France, the University's general counsel, as both the University's designated representative and as a witness. She was neither. Rule 615 does not govern the presence or exclusion of non-witnesses. Ms. France was not listed as a witness and indeed did not offer any testimony. Rule 615 says nothing about whether she, or anyone else affiliated with

the University that is not a witness, can remain in the courtroom in addition to the University's designated representative. This Court should affirm the District Court.

Regardless, any supposed error was harmless and does not provide a basis to overturn the District Court's judgment. Ms. Ressel did not "drastically" change her testimony. Counsel for Tomsu was afforded, and in fact took advantage of, opportunities to impeach her during her cross-examination. The only example Tomsu can provide reveals no prejudice. This Court should affirm the District Court.

The District Court was also correct in dismissing Tomsu's negligent and intentional infliction of emotional distress claims on summary judgment. The Court did so for two independent reasons. First, Tomsu's emotional distress claims are inextricably intertwined with his constructive discharge claim and are expressly precluded by the Wrongful Discharge from Employment Act. Tomsu effectively concedes as much through his reliance on the identical set of facts to support both his constructive discharge and his emotional distress claims.

Second, Tomsu did not suffer emotional distress as a matter of law. The District Court properly exercised its gatekeeping role by determining that Tomsu's emotional distress does not meet the standard for an independent claim established by this Court in *Sacco v. High County Indep. Press.* And, while not addressed by

the District Court, Tomsu's purported emotional distress was not the foreseeable consequence of the workplace happenings at the University. This Court should affirm the District Court's grant of summary judgment in favor of UM on Tomsu's emotional distress claims.

ARGUMENT

I. This Court should affirm the District Court's ruling allowing the University's designated representative to remain in the courtroom

The District Court correctly determined that Rule 615(2), M.R.Evid., did not authorize the exclusion of the University's designated representative from the courtroom. Regardless, Tomsu fails to demonstrate that her presence resulted in prejudce. This Court should accordingly affirm.

a. The District Court correctly denied Tomsu's request to have the University's designated representative excluded from the courtroom

Rule 615, M.R.Evid. governs the exclusion of witnesses from the courtroom. It provides:

> At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer of employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of a party's case.

The District Court correctly ruled that Rule 615(2), M.R.Evid., did not authorize Ressel's exclusion.

The analysis is straightforward and governed by the plain language of the Rule. Counsel for the University designated Ressel, an employee of UM—a party which is not a natural person—as its representative. Trial Transcript, Day One, p. 7, l. 1 - p. 9, l 4. Rule 615 by its express terms does not authorize her exclusion. This plain language application ends the inquiry and compels this Court to affirm the District Court.

This Court's decision in *Faulconbridge v. State*, 2006 MT 198, 333 Mont. 186, 142 P.3d 777, lends further support. There, this Court addressed whether the State's designated trial representative could testify as a fact witness after the trial court had granted a motion to exclude all witnesses under Rule 615, M.R.Evid. *Faulconbridge*, ¶ 47. This Court recognized, consistent with UM's argument above, that "the plain language of the Rule provides that both a natural person who is a party, and a designated representative of a party which is not a natural person, are permitted to remain in the courtroom notwithstanding the exclusion of other witnesses." *Id.* at ¶ 50. This Court further recognized that its plain language reading of the rule found support in federal case law. *Id.* at ¶ 51.

Tomsu essentially asks this Court to ignore the plain language of the Rule when he argues that "the district court still should have excluded Ressel given her importance as a key fact witness, and the other specifics of this case." Appellant's Principal Brief at 20. The plain language of the Rule does not carve out exceptions for "key fact witnesses" or other case "specifics." Again, *Faulconbridge* proves instructive. There, this Court explained that "Rule 615(2) is necessary to level the playing field." *Faulconbridge*, ¶ 52. Specifically, the Court noted that

> A party will often appoint as its representative the officer or employee most knowledgeable about the case. Thus, the second exception can give that crucial witness the opportunity to hear the other witnesses and tailor his testimony accordingly. Notwithstanding that risk, Rule 615(2) recognizes the exception in order to afford a party that is not a natural person a right comparable to the right the first exception affords to natural persons. This seems appropriate since criminal cases will always and civil cases will often match a party that is not a natural person against a party that is a natural person. Failure to equalize Rule 615 treatment of parties within the same case may not pose constitutional problems, but still smacks of unfairness.

Faulconbridge, ¶ 52, citing 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure, Evidence, § 6245, at 76 (1997). Thus, Ressel's status as a "key fact witness" not only fails to inform whether Rule 615(2) permits her sequestration, but in fact serves to level the playing field as between Tomsu and the University.

Tomsu next wrongly argues that the "district court erroneously exempted two (2) representatives – France and Ressel – from Tomsu's sequestration request." Appellant's Principal Brief at 22. Citing the Fourth Circuit case of *United States v. Farnham*, 791 F.2d 331 (4th Cir. 1986), Tomsu asserts that Rule 615(2) clearly contemplates exempting only a single representative from the sequestration request. Appellant's Principal Brief at 21. In *Farnham*, the trial court allowed two witnesses to remain in the courtroom under Rule 615(2), F.R.Evid. despite Farnham's sequestration request. *Farnham*, 791 F.2d at 334. The Fourth Circuit concluded that it was error not to sequester one of these witnesses, noting the "singular phrasing of the exception in 615(2)." *Id.*

Tomsu's argument is premised on his erroneous recasting of Lucy France, the University's general counsel, as both a witness and the University's designated representative. She served neither role. The University did not designate two representatives as Tomsu claims. It designated Ressel—and only Ressel. Trial Transcript, Day One, p. 7, l. 1 - p. 9, l 4. Ms. France was present in her capacity as general counsel. She was not listed as a witness and offered no testimony. Tomsu fails to explain how the District Court erred in failing to sequester a non-witness. Clearly, a "witness sequestration order" does not apply to non-witnesses such as Ms. France and does nothing to undermine the District Court's ruling with respect to Ressel.

The District Court correctly ruled that Rule 615(2) did not authorize Ressel's exclusion from the courtroom. Because the District Court ruled that Ressel could remain in the courtroom based on Rule 615(2), M.R.Evid., Tomsu's arguments against her presence in the courtroom based on Rule 615(3) prove irrelevant. As such, the University does not address them. This Court should affirm the District Court, obviating the need to address whether the District Court's error was harmless.

b. Tomsu fails to demonstrate prejudice from the University's designated representative's presence in the courtroom.

Tomsu presents no evidence of prejudice from Ressel's presence in the courtroom. "This Court will not reverse a decision of the trial court unless prejudice is shown, and such prejudice will not be presumed but must be affirmatively shown." *State v. Love*, 151 Mont. 190, 440 P.2d 275 (1968).

The only example Tomsu offers in an attempt to demonstrate prejudice (and presumably the one he finds most persuasive) fails to do so. He cites an exchange between his counsel and Ms. Ressel regarding employee complaints against her. Recall that Debbie Morlock refused to allow Mike Reid, Ressel's supervisor, to confront Ressel about her complaints. Order, ¶ 29. When asked if she wished she could have had the opportunity to address her staffs' concerns, Ressel testified that "I would actually say, in retrospect, [Reid] was bringing them to my attention

without actually mentioning it ...." Trial Transcript, Day Three, p. 277, ll. 1-14. From this, Tomsu claims that Ressel was able to "create the false appearance that the University properly supervised her conduct and timely intervened to address the myriad of employee complaints against her by Tomsu and others." Appellant's Principal Brief at 14.

Tomsu overreaches. Ressel's testimony provides merely that, in hindsight, she recognizes that her supervisor was trying to address staff concerns without violating the request that he not do so directly. In the context of his constructive discharge case—requiring a showing that working conditions at UM were so intolerable that voluntary termination was Tomsu's only reasonable alternative—Ressel's hindsight revelation says nothing about what was actually going on in the workplace at the time. Moreover, Tomsu's counsel impeached Ressel on her supposed inconsistent statements, drawing it to the court's attention contemporaneous with her testimony. Trial Transcript, Day 3, p. 277, l. 15-25, p. 278, ll. 1-25. This exchange fails to demonstrate prejudice, as does Tomsu's bald reference, without citation to the record, of other purported "instances" of prejudice. Appellant's Principal Brief at 38.

This Court should affirm the District Court's ruling that Rule 615(2) did not authorize Ressel's exclusion from the courtroom.

II. This Court should affirm the District Court's grant of summary judgment to the University on Tomsu's emotional distress claims.

Tomsu's claims for negligent and intentional infliction of emotional distress fail as a matter of law. The District Court correctly granted the University's motion for partial summary judgment on these claims for two standalone reasons. First, the Wrongful Discharge from Employment Act (WDEA or Act) expressly precludes them. Second, he failed to demonstrate actionably serious or severe emotional distress. For either or both reasons, this Court should affirm.

a. The Wrongful Discharge from Employment Act expressly precludes Tomsu's emotional distress claims.

The District Court correctly dismissed Tomsu's emotional distress claims as precluded by the WDEA. The WDEA "sets forth certain rights and remedies with respect to wrongful discharge ... [and] provides the exclusive remedy for a wrongful discharge from employment." Section 39-2-902, MCA. The Act expressly preempts all common law remedies, providing that "no claim for discharge may arise from tort or express or implied contract." Section 39-2-913, MCA. The WDEA further provides that "there is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages, except as provided for in [the WDEA]." Section 39-2-905, MCA.

This Court has held, and the parties here agree, that the WDEA does not bar all tort claims arising in the employment context. *Beasley v. Semitool, Inc.*, 258 Mont. 258, 261, 853 P.2d 84, 86 (1992); Appellant's Principal Brief at 29-30. Rather, the plain language of the statute precludes only those tort claims "for discharge." In other words, the WDEA will preclude only those tort claims that are caused by an asserted wrongful discharge. Section 39-2-913, MCA; *see also Basta v. Crago, Inc.*, 280 Mont. 408, 412, 930 P.2d 78, 80 (1996), *citing Beasley*, 258 Mont. at 261, 853 P.2d at 86. "The key to determining whether the tort claims are independent is to determine whether they are "inextricably intertwined" (same circumstances as the discharge) and are premised upon the termination." *Sorensen v. OMS Partners, Inc.*, 2000 Mont. Dist. LEXIS 2396, *5, *citing Kulm v. MSU*, 285 Mont. 328, 948 P.2d 243 (1997).

This Court has previously determined that the WDEA precludes emotional distress claims based on the same set of facts as a constructive discharge. In *Dagel v. Great Falls*, 250 Mont. 224, 819 P.2d 186 (1991), Dagel, like Tomsu, brought claims for constructive discharge and negligent and intentional infliction of emotional distress, among others. Dagel alleged, as does Tomsu, that harassing treatment by her supervisor during employment was causing her emotional problems, forcing her to resign. *Dagel,* 250 Mont. at 226-227, 819 P.2d at 188. The district court dismissed Dagel's emotional distress claims, determining that

they were precluded by the WDEA. *Dagel,* 250 Mont. 237, 819 P.2d at 194. This Court agreed that Dagel could not bring emotional distress claims alongside her constructive discharge claim under the WDEA (though, noted that some of the alleged acts may have occurred prior to its passage, and remanded to allow plaintiff the opportunity to amend her complaint). *Dagel,* 250 Mont. at 236-37, 819 P.2d at 194.

Later, in *Beasley v. Semitool*, 258 Mont. 258, 853 P.2d 84 (1993), this Court revisited its rationale from *Dagel.* Semitool argued the holding in *Dagel* required the Court to dismiss former employee Beasley's contract claims, brought alongside his wrongful discharge claim. This Court disagreed, distinguishing *Dagel* by concluding that "it is clear both the [emotional distress] and implied contract claim in *Dagel* are completely and inextricably intertwined with and based on Dagel's termination and discharge." *Beasley*, 258 Mont. at 263, 853 P.2d at 87.

To the extent Tomsu relies on *Beasley*, it is distinguishable. First, Beasley did not bring emotional distress claims at all, let alone ones tethered to and arising from the same acts and omissions as a constructive discharge claim. *Beasley*, 258 Mont. at 260, 853 P.2d at 84. Further, the analysis in *Beasley* turned on a liberal construction of Beasley's complaint, and this Court's determination that because Beasley averred separate damages for his contract claims and his wrongful discharge claim, he sufficiently indicated an intent to plead independent claims.

Beasley, 258 Mont. at 260, 853 P.2d at 84. Here, we have the benefit of discovery that overwhelmingly-and undisputedly—demonstrates Tomsu's claims are based on the same alleged acts and omissions, as will be discussed more fully below.

Despite Tomsu's attempt to distinguish the case, *Sorensen*, a district court decision from the Fourth Judicial District, is directly on point. There, plaintiff Sorensen, just like Tomsu, brought claims for constructive discharge, and intentional and negligent infliction of emotional distress. *Sorensen*, *2. She alleged that her employer degraded the staff, called them names, slammed doors, threw office items around, made derogatory comments about his patients and discussed his personal sex life. *Sorensen*, *3. Also like Tomsu, Sorensen alleged the same facts to support her claims for constructive discharge and her claims for intentional and negligent infliction of emotional distress. *Id.*

Sorensen's employer moved to dismiss Sorensen's emotional distress claims as preempted by the WDEA. *Id.*, *3. The district court noted that the basis for Sorensen's wrongful discharge claim was constructive discharge; namely, that the aforementioned facts created a working environment which any reasonable person would find intolerable. *Sorensen*, ** 7-8. The district court determined that Sorensen's complaint clearly alleged conduct in support of her emotional distress claim that was inextricably intertwined with her the claim for wrongful discharge

based on constructive discharge and accordingly dismissed the emotional distress claims. *Sorensen*, ** 6-7.

Tomsu wrongly claims that *Sorensen* is easily distinguished because Sorensen "conceded that her emotional distress claims and wrongful discharge claim were inextricably intertwined." Appellant's Principal Brief at 32. A reading of *Sorensen* finds no such concession. She did, however, allege that the same facts "resulted in her present claims for constructive discharge, intentional and negligent infliction of emotional distress, and negligent supervision and control." *Sorensen*, *2. If this constitutes a concession that claims are inextricably intertwined, then Tomsu has also conceded as much with respect to his claims.

Just as in *Dagel* and *Sorensen*, Tomsu undisputedly premises his claims for emotional distress on the same acts and omissions that support his claim for constructive discharge. This Court need look no further than Tomsu's Principal Brief to confirm. For instance, Tomsu's asserts that "[p]art of what compelled Tomsu to resign was the intentional and negligent infliction of emotional distress on him by Ressel." Appellant's Principal Brief at 17. He further claims that he "was forced to take time off work in early December 2015 due to the work environment perpetuated by Ressel and the resultant distress." *Id.* at 27.

Tomsu's Complaint alleges that the "hostile work environment at UM, its outrageous treatment of Mr. Tomsu, *and the resulting symptoms of emotional*

distress began during the time of his employment and prior to his resignation." First Amended Complaint (Doc. #3), ¶ 34 (emphasis added). Tomsu's claim letter to the State's Risk Management and Tort Defense Division further makes the point. There, in support of his request for $100,000 for emotional distress damages, Tomsu argues that the "very fact that [he] was compelled to seek medical treatment *as a result of being subject to a blatantly hostile work environment* is telling." *See* Ex. L, p. 9 to Defendant' Motion for Partial Summary Judgment on Counts II and III and Brief in Support (Doc. # 28) (emphasis added). Similarly, in discovery, when asked to provide "a detailed description of the 'resulting symptoms of emotional distress', including date of onset, alleged in Paragraph 34 of your First Amended Complaint", Tomsu identified the same facts and approximate date, October of 2015, that his claims for constructive discharge began. *See id.* at 13, comparing Ex. I (discovery responses), p. 9 *with* Ex. D, Deposition Transcript of Tony Tomsu, p. 148, ll. 16-25, p. 149, ll. 1-6 (each identifying exclusion from work activities beginning in October of 2015 as the basis for emotional distress and constructive discharge, respectively); *see also* Appellant's Principal Brief at 33.

Tomsu next incorrectly claims that Montana Second Judicial District Court case of *Mohan v. Montana Resources*, Cause No. DV-10-68 (Mont. 2nd Jud. Dist. Ct, 2010) (Appendix B to Appellant's Principal Brief) involved the "precise issue"

now before this Court and "is on all fours and highly persuasive." Appellant's Principal Brief at 31, 33. While both cases allege wrongful termination and negligent and intentional infliction of emotional distress, the similarities end there. First, *Mohan* was before the court on a motion to dismiss and based solely on the complaint. *Mohan*, p. 1. Here, as discussed above, we have ample evidence in the record beyond a counsel-crafted complaint to plainly demonstrate that Tomsu's causes of action are inextricably intertwined.

Second, and dispositive to the analysis, Mohan did *not* involve a claim of constructive discharge. Rather, Mohan was fired from his position, and alleged his termination was not for good cause and in violation of his employer's written personnel contract. *Mohan* at 2-3. Separate and apart from his purported wrongful firing, a singular act that occurred on December 11, 2009, Mohan alleged that before his firing, he had been subject to verbal abuse and wrongful, harassing conduct by his employer. *See* Ex. A, ¶ 16 to Answer Brief in Opposition to Defendant's Motion for Partial Summary Judgment on Counts II and III (Doc. # 25). Here, by contrast, the constructive discharge and emotional distress claims march lockstep, each based on the same events, making them inextricably intertwined and barring Tomsu's emotional distress claims. *Mohan* is not binding on this Court and is clearly not "on all fours" with the present matter.

Tomsu does not distinguish *Dagel* or engage in a meaningful analysis of whether his discharge and emotional distress claims are inextricably intertwined (based on the same circumstances). Instead, Tomsu attempts to reframe the relevant inquiry as whether his emotional distress claims arose "during employment." Appellant's Opening Brief at 33-35. Specifically, he asserts that because his claims for emotional distress arose during employment, they are distinct from his wrongful discharge, which he tethers to a single day—December 31, 2015—the day he resigned. This analysis entirely ignores that a claim for constructive discharge also arises "during employment."

The WDEA defines a constructive discharge as "the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative." Section 39-2-903(1), MCA. A constructive discharge, by its very definition, also occurs "during employment" and not on the date of resignation as Tomsu would have this Court believe. In the context of a constructive discharge claim, too narrowly focusing on the fact that these causes of action all arose "during employment" therefore cannot answer the question of whether they are inextricably intertwined and thus precluded by the WDEA. Clearly, they are, as *Dagel* and *Sorensen* plainly hold.

Tomsu concludes by faulting the District Court for "creat[ing] an impossible standard to meet for a constructively discharged employee to ever bring an emotional distress claim that is independently actionable." Appellant's Principal Brief at 36. Tomsu vents his frustration in the wrong forum. It is the legislature that has defined the contours of a wrongful discharge action. The District Court here—and this Court in *Dagel*—applied the plain language of the WDEA and its proscription against bringing additional tort claims caused by an asserted wrongful discharge. Section 39-2-913, MCA. Tomsu's grievance is for the legislature.

The District Court correctly determined that the WDEA precludes Tomsu's emotional distress claims because they are inextricably intertwined with his constructive discharge claim. This Court should therefore affirm the District Court's grant of summary judgment to the University on Counts II and III of Tomsu's First Amended Complaint.

b. Tomsu failed to demonstrate that he suffered emotional distress as a matter of law.

Even were this Court to somehow conclude that Tomsu's emotional distress claims are not inextricably intertwined with his constructive discharge claim, it should still affirm the District Court because Tomsu did not suffer serious or severe emotional distress as a matter of law.

An independent cause of action for infliction of emotional distress will arise where (1) serious or severe emotional distress to the plaintiff was (2) the reasonably foreseeable consequence of (3) the defendant's negligent or intentional act or omission. *Wages v. First Nat'l Ins. Co. of Am.*, 2003 MT 309, ¶ 11, 318 Mont. 232, 79 P.3d 1095, *citing Sacco v. High Country Indep. Press, Inc.*, 271 Mont. 209, 234, 896 P.2d 411, 426 (1995). The District Court correctly concluded that Tomsu's emotional distress claims fail under the first prong. Order on Summary Judgment at 51-52 (Appendix 1).

Under this prong, the purported emotional distress must be so serious that no ordinary person should be expected to endure it. *Sacco*, 271 Mont. at 230, 896 P.2d at 423. Intensity and duration of the distress are considered in determining its severity. *Id.* "Measuring this element requires a careful consideration of the circumstances under which the infliction occurs, and the party relationships involved, in order to determine when and where a reasonable person should or should not have to endure certain kinds of emotional distress." *Maloney v. Home & Inv. Ctr., Inc.*, 2000 MT 34, ¶ 63, 298 Mont. 213, 994 P.2d 1124. A district court has the duty to determine whether any proof of such severe emotional distress exists sufficient to raise a question of fact for the jury. *First Bank (N.A.)-Billings v. Clark*, 236 Mont. 195, 206, 771 P.2d 84, 91 (1988).

In *First Bank*, the Plaintiff claimed emotional distress because of a bank's failure to release him from his personal guaranty. 236 Mont. at 207, 771 P.2d at 92. Plaintiff claimed that he "felt bad, lost sleep, and became withdrawn." *Id.* The Court held that Plaintiff had not provided enough evidence to prove that his emotional distress was serious or severe, and that the district court had erred in submitting the issue to the jury. *Id.* In *Renville v. Fredrickson*, 2004 MT 324, 324 Mont. 86, 101 P.3d 773, plaintiff brought a claim for negligent infliction of emotional distress resulting from the death of her son in a car accident. Plaintiff screamed, cried and her body shook when she learned of her son's death. *Id.* at ¶ 6. She was forced to take additional anti-depressants and showed symptoms of depression. *Id.* This Court held that she had not suffered severe emotional distress "that no reasonable person could be expected to endure." *Id.* at ¶ 14.

Contrast these cases with *Czajkowski v. Meyers*, 2007 MT 292, 339 Mont. 503, 172 P.3d 94, where a husband and wife endured 4 years of verbal harassment over their land. Their neighbors "unrelentingly screamed vulgar epithets and made vulgar gestures at them as well as photographed them and blatantly watched them through binoculars." *Id.* at ¶ 9. This persistent harassment resulted in the wife suffering severe sleep loss, loss of appetite and weight, and emotional outbursts. *Id.* at ¶¶ 33-34. This Court determined that these prolonged symptoms showed a physical manifestation of distress which met the *Sacco* standard. *Id.* at ¶ 37.

Here, the District Court exercised its gatekeeper role and correctly determined that "there is no evidence in the record sufficient to raise a question of fact for the jury for [Tomsu's] claim of serious or severe emotional distress." Order on Summary Judgment at 51-52. The undisputed facts show that Tomsu did not suffer serious or severe emotional distress. Tomsu did not seek medical help or counseling for his symptoms, save one visit to a doctor for a chest cold where he self-reported his elevated blood pressure. His distress did not have the intensity or duration of the couple in *Czajkowski*. Order on Summary Judgment at 51-52; Trial Ex. 1; Order, ¶ G. The symptoms alleged by Tomsu mirror closely to the symptoms alleged by the plaintiff in *First Bank*, and do not rise to the standard set in *Sacco*.

"Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it." *Sacco*, 271 Mont. at 234, 896 P.2d at 426. Tomsu has failed to show that he has suffered serious or severe emotional distress which no reasonable person could be expected to endure such that the law should intervene.

Moreover, the alleged actions that give rise to Tomsu's emotional distress claims occur in the workplace and relate to his interactions with his supervisor

Dawn Ressel. *See, e.g.,* First Amended Complaint (Doc. # 3), ¶¶ 16, 33, 37. His supposed emotional distress stems from Ressel deciding not to invite him to meetings he felt he should have attended, telling him his title was a working title only (a fact undisputed by Tomsu), and assigning him a project he didn't think he should have to do. *Id.* Tomsu neither refutes that these circumstances form the basis for his claims nor sets forth any additional circumstances giving rise to his emotional distress. *See generally* Answer Brief in Opposition to Defendant's Motion for Partial Summary Judgment on Counts II and III (Doc. # 25). As the District Court correctly concluded, "the acts complained of by [Tomsu] are not inherently abusive." Order on Summary Judgment at 53.

Tomsu's references to Morlock and Wingard's knowledge of his emotional distress fails to persuade. Appellant's Principal Brief at 11, 28. Whether others are aware of purported emotional distress does not speak to its severity. And, Morlock testified she was aware of Tomsu's emotional distress merely because he told her about it and not because of any firsthand knowledge. *See* Ex. D to Answer Brief in Opposition to Defendant's Motion for Partial Summary Judgment on Counts II and III (Doc. # 25), Deposition of Debbie Morlock, p. 171, ll. 19-25, p. 172, ll. 1-24. Wingard testified simply that Tomsu was "completely disappointed." Doc. # 25, Deposition of Ed Wingard, p. 98, ll. 8-19. These witnesses do nothing to corroborate the severity of Tomsu's supposed emotional distress.

The District Court did not reach the second prong of the analysis, concluding instead that Tomsu did not suffer actionably serious or severe emotional distress. This Court should affirm the District Court in this regard. Should this Court disagree, Tomsu's emotional distress claim fails under the second prong—which requires emotional distress be a reasonably foreseeable consequence of defendant's actions. *Sacco*, *271* Mont. at 232, 896 P.2d at 425. Plaintiff's distress must be reasonable and justified under the circumstances, and no liability arises when plaintiff suffers exaggerated and unreasonable distress, unless it results from the plaintiff's peculiar susceptibility to distress which the defendant knew of. *Id.*, 271 Mont. at 233, 896 P.2d at 426. Like severity, foreseeability of harm must be determined by the court. *Wages,* ¶ 24.

Here, UM could not have foreseen Tomsu suffering emotional distress from the circumstances claimed. Tomsu claims that his exclusion from work assignments and meetings, confusion over his title, and being asked to undertake a project he found objectionable created a hostile work environment and caused his emotional distress. Being that events such as these occur regularly in almost every workplace, Tomsu's reaction to these innocuous events is unreasonable given the circumstances. *See* Order, ¶ G. To hold that actionable emotional distress can arise when an employee subjectively feels left out of a meeting, suffers short-lived

confusion over their title, or gets assigned a project they don't want to do would open the floodgates to emotional distress claims by unhappy employees.

"[T]here is no occasion for the law to intervene in every case where some one's feelings are hurt." *Maloney v. Home & Inv. Ctr., Inc.*, 2000 MT 34, ¶ 66, 298 Mont. 213, 994 P.2d 1124 (*citing Restatement (Second) of Torts,* § 46 cmt. d). The University could not have foreseen Tomsu's alleged distress because Tomsu's reaction to events described above are unreasonable given the circumstances. This Court should affirm the District Court. *See Mont. Solid Waste Contrs. v. Mont. Dep't of Pub. Serv. Regulation,* 2007 MT 154, ¶ 29, 338 Mont. 1, 161 P.3d 837 (recognizing that this Court will affirm a district court that reaches the right result even if for a different reason) (citation omitted).

Finally, evaluation of the third prong, requiring the emotional distress be based on the negligent or intentional acts and omissions of the defendant, only serves to highlight the inextricably intertwined nature of Tomsu's constructive discharge and emotional distress claims. Tomsu cites all the same acts and omissions in support of each. Each of these claims turns on reasonableness. The District Court concluded that Tomsu's perception of these workplace events was unreasonable. Order at ¶ G. If these acts and omissions prove insufficient to support a claim for constructive discharge, they also fail to support claims for emotional distress.

Tomsu did not suffer actionably serious or severe emotional distress. This Court should affirm the District Court's dismissal of Counts II and III of his First Amended Complaint on summary judgment.

CONCLUSION

This Court should affirm the District Court's correct ruling that Rule 615(2) did not authorize the exclusion of the University's designated representative. The rule does not speak to non-witnesses, making Ms. France's presence in the courtroom entirely irrelevant to the analysis.

This Court should also affirm the District Court's dismissal on summary judgment of Tomsu's emotional distress claims. The WDEA expressly precludes them. Moreover, he failed to demonstrate that his purported emotional distress was sufficiently serious or severe to support independent claims.

Respectfully submitted the 18th of August, 2020.

/s/ Courtney Cosgrove
Courtney Cosgrove
RISK MANAGEMENT & TORT DEFENSE
Attorney for the University of Montana

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Answer Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,909 words, excluding certificate of service and certificate of compliance.

/s/ *Courtney Cosgrove*
Courtney Cosgrove

CERTIFICATE OF SERVICE

I, Courtney Cosgrove, hereby certify that I have served true and accurate copies of the foregoing *Answer Brief of Appellee University of Montana* to the following on August 18, 2020:

J.R. Casillas
Matthew A. McKeon
DATSOPOULOS, MacDONALD & LIND
201 West Main, Suite 201
Missoula, MT 59802

/s/ *Courtney Cosgrove*
Courtney Cosgrove