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11 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

12 KYLE SAMPLE

13 Plaintiff,

14 v.

15 LEE ENTERPRISES, an Iowa
16 Corporation, THE MISSOULIAN,
17 owned by Lee Enterprises, KATHY
18 BEST, in her official capacity of
19 Editor-in-Chief of the Missoulian,
20 BOB MESEROLL, in his official
21 capacity of Sport's Editor at the
22 Missoulian.

23 Defendants.

24 Cause No. **DV-17-158**

25 Department No. **4**

26 Judge **Karen Townsend**

27 **AMENDED COMPLAINT AND
28 DEMAND FOR JURY TRIAL**

Plaintiff Kyle Sample, by and through his counsel of record, Matthew B. Lowy and C. Olivia Erickson, of Lowy Law, P.L.L.C. for his Amended Complaint against Defendants, states and alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff is Kyle Sample, and is represented by Lowy Law, PLLC. Mr. Sample is, and at all times relevant hereto was, a resident of Missoula County, Montana.

- 1 2. Defendant is Lee Enterprises, a corporation residing in Iowa, voluntarily
2 doing business in the State of Montana.
- 3 3. Defendant is The Missoulian, a corporation owned by Lee Enterprises, doing
4 business in the State of Montana.
- 5 4. Defendant is Kathy Best, Editor in Chief of the Missoulian newspaper.
- 6 5. Defendant is Bob Meseroll, Editor of the Sports section of the Missoulian
7 newspaper.
- 8 6. The events that form the basis of this complaint occurred in Missoula
9 County, Montana.
- 10 7. This Court has jurisdiction over the parties, and the matters alleged herein,
11 and the Fourth Judicial District Court in Missoula County is the proper place
12 of venue for this case to proceed.
13

GENERAL ALLEGATIONS

- 14 1. Kyle Sample is a Missoula native, who wanted to be a sports writer since
15 age 13. He became a sports editor of his high school paper, and upon
16 graduation, matriculated to the University of Montana's journalism program.
17 During college, he became the editor of a weekly insert that previewed the
18 Grizzlies' football games. Kyle, since his first interest as a child, had wanted
19 to follow a more old-school type of journalism, chasing down leads without
20 frills or fads. The inevitable push towards digital media had taken firm hold
21 by this time, causing him to struggle with reconciling his career aspirations
22 with the reality of the changing and often discomfiting journalism world.
23 Despite his reservations, Kyle continued as a student at UM, taking time off
24 after semesters to work to pay for school.
25
- 26 2. November 2012, during one of these breaks — despite his lack of real
27 experience or a full degree — Kyle was offered a part-time job at the
28 Bozeman Daily Chronicle. After months of driving to and from Bozeman

1 every weekend, the Chronicle offered him a temporary full-time job covering
2 Montana State University football. He then successfully worked his way into
3 a permanent position with the Chronicle.

- 4 3. September 2014, Kyle was offered a job as a sports reporter at the Helena
5 Independent Record, affording better pay and more artistic freedom. He
6 moved into this position, but heard of a job opening at the Missoulian a
7 month or two later and jumped at the opportunity. He thus landed a full-time
8 job on his favorite paper only two years after a shaky start as a weekend
9 student freelancer. In Kyle's own words, he was "beyond excited" to know
10 that his friends and family would read his work every day, in the same sports
11 section for which he had fought his sisters growing up. He states that it "was
12 probably the most thrilling moment of [his] short journalism career."
13
- 14 4. January 27, 2015 Kyle arrived at the Missoulian offices to start this new
15 career chapter. During his orientation, Bob Meseroll, the Missoulian's
16 longtime sports editor, specifically commented on Bob's history of seeing his
17 reporting staff get along, and his hope that this would continue to hold true
18 with Kyle as a new addition to the department. With this in mind, Kyle set
19 out eager to be a solid team player with excellent work product. He thought
20 this would be an easy task, having maintained outstanding working
21 relationships with all of his former colleagues and supervisors, many of
22 which turned into lasting personal friendships.
- 23 5. As Kyle jumped in with this mindset, the situation immediately took a strange
24 turn. The first night in the office, he learned some important recruiting
25 information about a potential player. Kyle had been hired to cover recruiting,
26 this was squarely within his job duties. He wrote a blog post about it, but did
27 not yet have the credentials to log into the Missoulian's Griz Blog, so AJ
28 Mazzolini, the paper's Griz football beat writer, told Kyle to email him the

1 story and AJ would post it. Initially this seemed like a friendly gesture, but AJ
2 posted it under his own account, with no reference to the writer. In essence,
3 it made it appear that AJ had reported and written the story instead of Kyle.
4 This was a very questionable ethical line that AJ crossed.

- 5 6. This type of underhanded and ethically questionable behavior continued. A
6 few days later, Bob, AJ, and Kyle met to discuss upcoming projects. Among
7 other suggestions, Kyle had an idea to investigate undecided recruits. He
8 told AJ that he was going to contact UM's recruiting coordinator for more
9 information, which he did. Once back at the office to transcribe the interview,
10 AJ confronted Kyle and demanded to know why he had approached the
11 recruiting coordinator. AJ claimed that as the football beat reporter, he
12 should have the only contact with the coaches. Among other confrontational
13 statements, he ordered Kyle to "stay in [his] own lane;" however, as the only
14 reporter covering recruiting, it seemed to Kyle that talking to the recruiting
15 coordinator was staying in his "own lane."
16
- 17 7. Although he was confused and a little upset, Kyle elected to stay quiet about
18 this interaction in the interest of maintaining team cohesion. Later that day,
19 after their editor Bob had returned, AJ announced that he was going to write
20 the story about UM's future recruiting plans. Needless to say, this upset Kyle
21 even further. Despite the fact that he had conceived and pitched the story,
22 his "teammate" was going to directly steal the concept, after criticizing Kyle
23 for investigating it. Even worse, Bob let it happen, without a word that it was
24 Kyle's idea and should be his to report. Again, though, despite this betrayal,
25 Kyle said nothing, trying still to be a cooperative team player.
- 26 8. This behavior served to highlight some questionable interactions that Kyle
27 had with Bob even before he started at the Missoulian. During his interview,
28 he shared some little-known information he had acquired about UM, hoping

1 to showcase his potential as a good hire. By the time he had returned to
2 Helena, Bob had used the information to write a story without naming Kyle
3 as a source.

4 9. Furthermore, Bob did not communicate with Kyle in a timely manner about
5 his hiring decision, despite some of Kyle's contacts reporting that a decision
6 had been made. When Kyle inquired about it, Bob responded that they had
7 not made a decision and if he was questioning their hiring methods, then
8 maybe the Missoulian was not the right place for him. Kyle soon learned
9 that this was typical of Bob's defensive reactions about questioning his
10 routine.

11 10. Despite all of this behavior, Kyle still earnestly wanted to contribute to the
12 team. Bob's constant refrain was "teamwork" — despite his own lack of
13 adherence to the concept — and Kyle worked hard to live up to it. In the
14 years preceding the job at the Missoulian, Kyle had gone out of his way to
15 cultivate numerous contacts for his reporting. In addition to covering his own
16 beats, he consistently and frequently fed information to the other sports
17 reporters to help them act as a functioning sports section and not a clump of
18 reporters unable to develop meaningful sources. He accomplished this
19 largely by drawing on his contact network. In fact, it seemed that his
20 colleagues never showed initiative or ability to find the information
21 themselves, making his contributions essential.

22
23 11. Over time, this began to feel burdensome, especially since Bob and AJ were
24 routinely demanding and ungrateful, and Kyle decided to suggest to Bob that
25 he replace AJ with Kyle on the Griz football beat. This was a reasonable
26 suggestion, since Kyle had far more contacts and sources pertinent to this
27 beat than AJ did; in fact, many of the football staff disliked AJ and rejected
28 communication with him at all. Bob refused to even consider this, and told

1 Kyle that he will not take away beats he has already assigned, even though
2 he had assigned the Lady Griz beat to Kyle when he was offered the job,
3 and then taken it away his first day in the office.

4 12. Kyle had decided to go to Bob with this suggestion rather than anyone else
5 in the chain of command at the suggestion of a reporter in another section.
6 She had gone to management with some concerns about an unrelated
7 interaction with another staff member, and found that she was brushed off by
8 her superiors. Because of her experience, when Bob was unreceptive, Kyle
9 did not feel any confidence in seeking support from other management
10 personnel.

11 13. At this point, Kyle began to feel real friction developing between himself and
12 Bob and AJ, often escalating to an environment of actual harassment.
13 These two men had a very close relationship, and they seemed completely
14 united in their hostility towards Kyle, who by this point was feeling confused,
15 ostracized, and disrespected.

16 14. Mid July, 2015, Kyle reached out to a Griz football player for a recruiting
17 story he was working on, and AJ aggressively confronted him. He
18 demanded to know why Kyle had not told him about it, and Kyle responded
19 that he had no obligation to share his projects with AJ, who was not his
20 superior. Neither AJ nor Bill Speltz, the section's other full-time reporter,
21 ever communicated with Kyle about their stories. That night, Bob questioned
22 Kyle about his encounter with AJ, who had apparently gone straight to their
23 editor with a distorted version of what happened. He had made it look like
24 Kyle was trying to gather information outside of his beat, which was patently
25 untrue, and rather than hearing both sides and making a fair determination,
26 Bob automatically took AJ's side. He said that Kyle was treating AJ unfairly
27 and that from then on, he would have to communicate the details of his work
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1 with the other reporters. This seemed deeply unreasonable to Kyle, as their
2 beats did not cross so there was no impact on anyone else's work. Bob
3 never imposed this arbitrary and non-standard obligation on anyone else.

4 15. August 7, 2015, AJ was drafting a story about future football scheduling,
5 which included information about what money Montana would receive from
6 Washington. Kyle received an email from a contact at Oregon detailing the
7 money that they would be paying Montana and reported it on Twitter, which
8 AJ commented on. A mere hour or two later, AJ's story had been updated to
9 reflect these numbers, but yet again, he had not attributed any credit to Kyle
10 for the information. Kyle asked him about it, and in a less-than-friendly text
11 message exchange, he insisted that he had found the numbers elsewhere.
12 This seemed unlikely, considering the timeline of AJ's revisions, and
13 considering his apparent pattern of plagiarism. Predictably, AJ went straight
14 to Bob with his version of the interaction.

15 16. August 10, 2015 Bob sent Kyle an email accusing him of harassing AJ. He
16 chastised him for speaking to AJ about the apparent plagiarism, told him to
17 "check [his] ego at the door . . . and become a team player," and threatened
18 him with probation and dismissal for any future indiscretions. He also told
19 Kyle to stop "sniping at AJ and undermining his work." He did acknowledge
20 Kyle's "considerable energies and talents," which indicates that he respected
21 his professional abilities, and that his hostility towards Kyle was personal.
22 This indication is reinforced by the fact that later down the road during Kyle's
23 time with the paper, AJ considered taking another job, and at the time, Bob
24 stated that he would move Kyle into AJ's position if AJ left.

25 17. Kyle responded respectfully with his own assertions of his side of the story.
26 He pointed out the discrepancies between Bob's treatment of him versus AJ,
27 and AJ's failures to reciprocate in kind when Kyle provided him with
28

1 information. He also refuted Bob's accusation that he had not "checked his
2 ego at the door," by stating that he had covered almost every sport the
3 Missoulian writes about and volunteered extra time to make the section
4 better. He pointed out that he had often adjusted his schedule to be available
5 when the department was short handed, without a complaint. He referred to
6 Bob's early remarks about previous staff getting along, and stated that he
7 had gone above and beyond to maintain harmony, including keeping silent
8 about AJ treating him unfairly many times over. He also stated that if there
9 was proof that AJ had not plagiarized his information, Kyle was wrong and
10 sorry for it. He stated that he viewed AJ's behavior as "a breach of ethics
11 that [he, Kyle,] strongly believe[s] in and that [their] profession should try to
12 uphold," and that he "never did this to undermine anybody, or cause any
13 trouble," but rather "because [he] sincerely believed what had happened was
14 wrong."

15
16 18. In response to this lengthy and thoughtful email, Bob sent back a one
17 paragraph response in which he "disagree[d] with just about everything" Kyle
18 had stated, and telling him that he would "tread lightly if I were you because
19 if AJ decided to pursue a complaint of 'hostile work environment,' it would be
20 an open and shut case." He gave unenthusiastic lip service to wanting Kyle
21 "to be a part of this team," but followed it up with a demand for "rapid
22 improvement." At no point did he respond to or address any of Kyle's
23 concerns.

24 19. After having his supervisor ignore his concerns and refuse to consider his
25 side of the story, Kyle felt there was nothing left to do. He had no support or
26 defense system at the Missoulian, with his supposed teammates assembled
27 against him. If something went wrong, there was no one who would speak
28 up for him, so he withdrew, kept to himself, and kept his mouth shut. He

1 spent a good portion of his remaining days at the Missoulian with his
2 headphones in, and stopped speaking to AJ unless spoken to. Adding to the
3 mixed messages and his confusion, soon thereafter Bob told him to join AJ
4 on a series of web videos about Griz football, despite Bob ordering Kyle to
5 ignore the Griz since it was not his beat.

6 20. Amid such a hostile work environment, Kyle tried to just keep gathering
7 information and cultivating sources, which is what any good reporter aims
8 for. This took him out of the office frequently, talking to people and chasing
9 leads. In his mind, news does not happen at a desk. And these absences
10 from the office had no adverse effect on his work product or volume.

11 21. December 3, 2015, while gathering information for two planned stories, he
12 received a text message from Bob asking if Kyle still worked at the
13 Missoulian. He responded that he was doing research for a Griz basketball
14 story. Bob ordered him to ignore anything that was not high school sports,
15 and threatened to replace him on the basketball beat with their part-time
16 reporter.

17 22. This was a breaking point for them. At a meeting later that night, Kyle clearly
18 communicated his frustrations to Bob, who predictably refuted all of them
19 without a second thought. Kyle stated that he was considering filing a
20 grievance, and Bob then handed Kyle a reprimand letter the next day. It
21 stated that he had to be in the office more than he was; backed into a corner,
22 he reluctantly signed it.

23 23. For several months, tensions simmered. Kyle had no way to know what
24 would be viewed as a misstep and land him in trouble, so he kept his head
25 down and doggedly pursued his work. Bob broke his ankle during the
26 summer, leaving the others to pick up the slack. While AJ and Bill each took
27 at least a week of vacation during this time, Kyle took no more than a day or
28

1 two, and consistently volunteered to cover the section's design shifts, on top
2 of his already mounting workload. On top of all this, he planned out twelve
3 additional stories for a fresh perspective, and had to email out 112
4 questionnaires to area athletic directors to gather information for certain
5 sports.

6 24. Then Bob emailed and asked him to cover the schedules for the sports in the
7 area, which were actually Bob's responsibility. When Kyle explained his
8 workload and requested some help, Bob insinuated that Kyle could not
9 handle the upcoming season and had not been working hard enough in his
10 absence, despite the fact that he had been working more than thirty hours of
11 overtime, covering for the others, and planning new approaches, all on top of
12 producing his normal volume of work. But again, Bob gave this no
13 acknowledgement or consideration.

14 25. Shortly after Bob returned, Kyle began work on his last story for the
15 Missoulian, about an Arlee high-school athlete, Carly Hergett. During his
16 interviews, Carly herself, her mother, and a former teacher made disclosures
17 that her father had been abusive to the family before her mother left with the
18 children.

19 26. September 14, Kyle finished the story, which included the information about
20 the alleged abuse, and emailed it to Bob and one of the Missoulian's copy
21 editors for proofing. Later that night he submitted the final product. It was
22 published online that night, and in print the day after.

23 27. Bob job, as editor and direct supervisor, was tracking and monitoring Kyle's
24 projects, along with Bill's and AJ's, and reviewing their stories before they
25 went to print. He asked one time in passing about Kyle's story, and never
26 asked to review any information about it, nor about the basis of the story.
27
28

1 And based on the fallout described below, it seems sure that he never
2 bothered to read it the night that Kyle sent it to him before it was published.

3 28. September 15, Bob contacted Kyle by text message in the morning about
4 the story, after having seen it published. He asked if there were any police
5 records to confirm the abuse, and when Kyle said that he did not know, Bob
6 stated that there could be “trouble” over it. Kathy Best, the newest editor-in-
7 chief, then called Kyle and inquired where and how he had obtained his
8 information, which he explained. She asked if there was any way he could
9 corroborate the allegations of abuse, and over the next few days he
10 attempted to do so. There had been a letter the girl wrote for a class
11 assignment that mentioned the abuse, but neither she nor her teacher had a
12 copy of it any longer. More meaningfully, he spoke with a sheriff in Granite
13 County — where the family had first moved after leaving the father — who
14 remembered them. This sheriff stated that he was a friend of the girl’s uncle,
15 and the family had looked to him for protection, indicating to him that they
16 were in fear of the father.

17
18 29. At this point, Kyle had a week-long vacation that had been priorly approved,
19 so he was not in the office for the next seven days.

20 30. September 22, 2016 Kyle was called into a meeting with Kathy and Bob,
21 where they discussed the same things as the week before. Kathy asked
22 Bob if he had discussed the project with Kyle, and he responded that they
23 had a brief interaction about how the interviews had gone. The meeting
24 ended with Kathy informing Kyle that she was uncertain whether he could
25 continue working at the paper.

26 31. September 23, 2016 Kyle was again called into the office, and knew he had
27 been fired when his key card did not work. He met with Kathy, and she told
28 him that he had severely erred, and had placed the paper at great risk of a

1 lawsuit. She had spoken with Carly's paternal grandfather, who denied
2 everything, and Kathy was going to apologize to the father. She claimed she
3 no longer trusted him as reporter, and said the fact that he failed to bring the
4 story to anyone for help showed that he was not a "team player," which is the
5 exact phrasing Bob used when he accused him of "harassing" AJ. It seemed
6 not to matter that none of the sports reporters took their stories to each other
7 for help, which is a reasonable practice since Bob, as their editor, was
8 supposedly proofing and editing their stories.

9 32. Despite the paper's apparent hysteria about a potential lawsuit, there is no
10 evidence that they ever printed a retraction or apology. Also, it was slated to
11 run in the Billings Gazette, which is owned by the same parent company,
12 Lee Enterprises. It was pulled before publication; a sports copy editor at the
13 Gazette read it and recognized that it could be problematic. Yet somehow,
14 neither the copy editors at the Missoulian, nor Bob, Kyle's actual editor,
15 managed to do the same. Furthermore, Lee Enterprises, via the Gazette,
16 had published an article in 2012 about Carly's mother, in which she stated
17 that her husband, Carly's father, was abusive. (See Attached Exhibit 1) Yet
18 this story is still online, accessible by anyone who searches for Carly's last
19 name.
20

21 33. All of this happened with nary a word or move by the Missoulian to attempt
22 to handle the supposed transgression through a disciplinary process, nor to
23 consider that perhaps some or all of the blame lay elsewhere. There was no
24 acknowledgment or consideration of Kyle's spotless record in his past
25 employment, nor of his exceptional work ethic and otherwise exemplary work
26 product for the Missoulian. Bob had several times admitted respect for
27 Kyle's abilities and talents, as indicated by his August email and by
28 considering Kyle for AJ's position, leaving no room for an argument that he

1 was terminated for lack of capability. Kyle had insufficient time to argue his
2 case before he was summarily terminated — by an editor-in-chief who barely
3 knew him, and an editor who plainly disliked him. Since, his position has
4 been filled by a new full-time reporter, nixing any suggestion that the
5 termination was due in any part to a need to cut staff.

6 34. This treatment stands in stark contrast to the philosophy put forth in the
7 Missoulian’s Employee Handbook. (See Attached Exhibit 2) In relevant
8 part, it provides:

- 9 • Goals are to “work to provide an atmosphere that encourages
10 communication through all levels,” and “to vigorously defend and protect the
11 constitutional rights of free speech, free press and free
12 assembly.” (Attached, pg 6)
- 13 • Human resource policy “objective is to build a climate of trust and openness
14 in which the concepts of professional management are understood and
15 practiced. . . . All employees should be encouraged to participate in
16 decisions that affect their area of responsibility. All employees should have
17 the opportunity to develop to the maximum of their potential consistent with
18 our needs.” (Attached, pg 7)
- 19 • A claim to conduct periodic “climate surveys” to determine employees’
20 perceptions on how well the Missoulian is doing. (pg 7)
- 21 • That “[t]he Missoulian has an open-door policy. If there is a situation or
22 condition at the newspaper that is a problem to you, please feel free to ask
23 for information, advice or help in resolving it. Most concerns can be cleared
24 up between you and your manager; however, we have an established
25 procedure that we believe will help you handle concerns.” This is outlined
26 as going to the immediate manager to discuss the issue and offer
27 suggestions for resolution. If there is no satisfactory resolution, then go to
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1 the department manager “without any fear of recrimination.” And if it is still
2 not resolved, direction to make an appointment with the publisher or HR
3 manager. (pg 7-8)

- 4 • That the Missoulian is a union-free organization, due to a “desire to have
5 people in our company deal with each other on a direct, individual basis
6 without the intervention of outsiders. We have policies and practices to help
7 resolve problems and to provide individual opportunity. We recognize that
8 this policy places a responsibility on every management person to maintain
9 good employee relations and look for ways to make them better. . . . Only all
10 of us working together as a team can make this a healthy organization.” (pg
11 8)
- 12 • That the Missoulian “is committed to a work environment in which all
13 individuals are treated with respect and dignity. Each individual has the right
14 to work in an atmosphere that promotes equal employment opportunities
15 and prohibits discriminatory practices, including harassment. Therefore, we
16 expect that all relationships among persons in the workplace will be
17 business-like and free of bias, prejudice, and harassment. . . . These
18 policies apply to all employees, managers or customers. . . . The Missoulian
19 prohibits retaliation against any individual who reports discrimination or
20 harassment or participates in an investigation of such reports.” (pg 14-15)

21
22 35. In addition to the numerous counts of ill-treatment to which staff at the
23 Missoulian subjected Kyle, he also had reason to object to the paper’s
24 policies regarding overtime work and pay. He regularly worked well over the
25 40 hour workweek expected by law, but rarely was actually paid for this time.
26 During 2015 and 2016 he worked over 400 hours of unpaid overtime.
27 Management was fully aware of this, as early on during his employment with
28 the paper, Bob told him that there was concern with the amount of hours he

1 was reporting, so he needed to keep an eye on them. And yet the amount of
2 work he was expected to cover and produce would not allow for him to
3 maintain only 40 hours of work a week. Kyle has stated that this is common
4 practice at many newspapers, born out of both pressure to produce a certain
5 amount of coverage, and a lingering hope that it will lead to a position with a
6 decent wage.

7 36. After his termination, Kyle applied for unemployment benefits. The
8 Missoulian was given an opportunity to provide specific information
9 regarding his separation, but failed to do so. Based on the information
10 available, the Montana Department of Labor and Industry concluded that his
11 discharge was not for misconduct under Mont. Code Ann. § § 39-51-201(19)
12 and 39-51-2303. (Attached Exhibit 3)

13 **APPLICABLE LAW TO ALL COUNTS**

- 14
- 15 1. According to the Montana Supreme Court, the doctrine of *respondeat*
16 *superior* is when “the consequences of one person's actions may be
17 attributed to another person.” Denke v. Shoemaker, 2008 MT 418 ¶¶ 73, 347
18 Mont. 322, 198 P.3d 284. This will be imposed upon an employer when an
19 employee is acting “within the scope of his or her duties to the employer,”
20 which is usually a question of fact, but becomes a question of law for the
21 court when “only one legal inference may reasonably be drawn from the
22 facts.” Denke at ¶ 74.
 - 23 2. In this case, this means that Lee Enterprises and the Missoulian as the
24 employers of the other defendants, Kathy Best and Bob Meseroll, are liable
25 for any actions taken by those two individuals in the scope of their
26 employment. For the purposes of this case, all claims laid against Kathy Best
27 and Bob Meseroll are for actions taken within the scope of their employment.

28 **COUNTS ONE & TWO— WRONGFUL DISCHARGE**

- 1 1. Kyle Sample repeats and incorporates by reference each and every
2 statement and allegation contained in all preceding paragraphs as though
3 fully set forth in this section.
- 4 2. In Montana, the Wrongful Discharge from Employment Act (WDEA) is the
5 sole remedy for a wrongful discharge.
- 6 3. “Montana has chosen to protect the rights of a worker to challenge the
7 validity of an employer’s decision to terminate his or her employment. While
8 Montana law still provides that, absent provisions to the contrary,
9 employment is ‘at will,’ under the Wrongful Discharge From Employment Act,
10 an employer in most cases must have good cause to fire an employee.”
11 Jarvenpaa v. Glacier Elec. Co-op., Inc., 271 Mont. 477, 480, 898 P.2d 690
12 (1995).
- 13 4. The WDEA defines “discharge” as “termination of employment, including
14 resignation, elimination of the job, layoff for lack of work, failure to recall or
15 rehire, and any other cutback in the number of employees for a legitimate
16 business reason.” Mont. Code Ann. § 39-2-903(2). A “legitimate business
17 reason” is a reason “that is neither false, whimsical, arbitrary or capricious,
18 and it must have some logical relationship to the needs of the business.”
19 Andrews v. Plum Creek Mfg., LP., 2001 MT 94, ¶ 18, 305 Mont. 194, 27 P.3d
20 426.
- 21 5. A discharge is wrongful under the WDEA if “it was not for good cause and
22 the employee had completed the employer’s probationary period of
23 employment; or the employer violated the express provisions of its own
24 written personnel policy.” Mont. Code Ann. § 39-2-904(1)(b)&(c). “Good
25 cause” is defined as “reasonable job-related grounds for dismissal based on
26 a failure to satisfactorily perform job duties, disruption of the employer’s
27
28

1 operation, or other legitimate business reasons.” Mont. Code Ann. §
2 39-2-903(5).

- 3 6. In determining good cause, courts balance an employer’s right to employ
4 who they want, with an employee’s legitimate interest in maintaining secure
5 employment. Buck v. Billings Montana Chevrolet, Inc., 248 Mont. 276, 811 P.
6 2d 537 (1991). “The balance should favor an employee who presents
7 evidence, and not mere speculation or denial, upon which a jury could
8 determine that the reasons given for his termination were false, arbitrary or
9 capricious, and unrelated to the needs of the business.” Johnson v. Costco
10 Wholesale, 2007 MT 43, ¶ 23, 152 P.3d 727.
- 11 7. Note that the Missoulian’s Employee Handbook states they are an at-will
12 employer that may terminate with or without notice, any time, and at the
13 option of the Missoulian. (Exhibit 2, pg 9) This is in violation of the WDEA.
14 This is not legally enforceable.

15
16 (a) Count One — Lack of Good Cause

- 17 1. Kyle Sample repeats and incorporates by reference each and every
18 statement and allegation contained in all preceding paragraphs as though
19 fully set forth in this section.
- 20 2. In Andrews, an employee sued her former employer for wrongful discharge
21 under the WDEA. The District Court granted the employer’s motion for
22 summary judgement. The Montana Supreme Court reversed.
- 23 3. In Andrews, five years into her employment, the employer conducted an
24 audit that revealed bookkeeping discrepancies resulting in significant
25 amounts of missing cash, cash and checks that did not match invoices,
26 deposit slips that did not match, and a failure to notify supervisors cash was
27 missing. Although no impropriety was suspected, this resulted in the
28 employee, plaintiff-Andrews, being placed on investigative suspension and

1 then transferred to a different, inferior job due to “poor performance of her
2 duties.” She quit rather than take the inferior job and sued for wrongful
3 discharge. Over the course of her employment she had less than two weeks
4 of training, received no job evaluations other than a discussion regarding
5 timeliness, and her job performance was described as adequate by her
6 supervisor.

- 7 4. The employee asserted that any inadequacy she had in performing her job
8 duties was due to the employer’s failure to train, define procedures,
9 appropriately supervise, and evaluate her in her job. Restated: no employer
10 has good cause to discharge for failure to perform job duties when no
11 training was provided, no evaluations conducted, and / or failure to abide by
12 procedures when no procedures existed. There was also evidence the
13 plaintiff’s conduct was “the usual” among her fellow employees.
- 14 5. On appeal, the Montana Supreme Court stated that there was sufficient
15 evidence presented by the employee to create a question of fact, and a jury
16 must be allowed to decide whether good cause existed, since district courts
17 may not adjudicate questions of fact on summary judgment motions.
- 18 6. The employer responded that the missing cash and other discrepancies
19 were enough to constitute good cause. It also asserted the mere failure to
20 satisfactorily perform job duties was enough good cause, regardless of who
21 was at fault for that failure, so it did not matter if the inadequacies were the
22 employer’s fault. Finally the employers asserted the terminated employee
23 needed to provide evidence she satisfactorily performed her duties.
- 24 7. “Good cause” is a “reasonable job-related grounds for dismissal based on a
25 failure to satisfactorily perform job duties, disruption of the employer’s
26 operation, or other legitimate business reasons.” Mont. Code Ann. §
27 39-2-903(5).
28

- 1 8. In this case, Kyle was terminated. This discharge was not for “good cause”
2 within the meaning of Mont. Code Ann. § 39-2-903(5).
- 3 9. Kyle’s actions at the Missoulian did not rise to the level of “reasonable job-
4 related grounds for dismissal” within the meaning of Mont. Code Ann. §
5 39-2-903(5).
- 6 10. Kyle did not fail to satisfactorily perform job duties. Mont. Code Ann. §
7 39-2-903(5). Kyle was an exemplary employee. Kyle’s work product was
8 generally regarded as excellent, he went above and beyond to help out other
9 reporters in his section by feeding them information outside the scope of his
10 beat. He bent over backwards to try and preserve harmony with his
11 supervisor and coworkers, even in the face of harassment and abuse.
- 12 11. Defendants stated to Kyle his termination was a consequence of his last
13 story — it had the potential to be a problem. This ignores Defendant Bob’s
14 job duties as Kyle’s editor, Defendant Best’s job duties to supervise
15 Defendant Bob, and Defendant Missoulian as a business, to instill
16 safeguards by proofing publications in advance of publication. Humans
17 make mistakes at times — if we remove all the humans, we will only be left
18 with mechanical error — and part of the reason a chain of command exists in
19 business operations is to help catch and correct human error(s).
- 20 21 12. Kyle did not err. But, assuming *arguendo* he was not correct, a one-time
22 error such as this — especially with so much fault resting on the editors’
23 shoulders — should not cost an otherwise faultless employee his job. At
24 most, it should have been handled with an internal disciplinary process for
25 Kyle and for Defendant Bob; Kyle’s termination is akin to using a sledge
26 hammer when a scalpel would have sufficed and the absence of any
27 consequence to Defendant Bob illustrates a corporate decision to place all
28 blame on Kyle as a patsy. If Montana employees may be terminated for a

1 small number of mistakes far apart in time, Montana citizens will never know
2 any job security.

3 13. Kyle did nothing to disrupt the employer's operation within the meaning of
4 Mont. Code Ann. § 39-2-903(5). Kyle was a "team player." Kyle made every
5 effort to maintain harmony with Bob and AJ; nonetheless, they united against
6 Kyle and nothing he said or did was ever able to change that. Furthermore,
7 Defendant Bob expressed on more than one occasion that he held Kyle's
8 journalistic work to be outstanding. If he was dissatisfied with Kyle's
9 professional work, he would not have told Kyle that he was going to promote
10 him to AJ's position even though AJ had not yet committed to leaving the
11 Missoulian.

12 14. Claims against Kyle for his final story also did not disrupt the employer's
13 operation. As described above, although including the specific information
14 about the abuse Carly Hergett stated was perpetrated by her father may
15 have been a mistake, it was a first-time mistake that never should have
16 made it through the screening process. Terminating Kyle was, and still is,
17 scapegoating and involution of Montana law.

18 15. There are no other legitimate business reasons supporting good cause for
19 Kyle's termination. Mont. Code Ann. § 39-2-903(5). "Legitimate business
20 reasons" are reasons that are "neither false, whimsical, arbitrary or
21 capricious" and they must have "some logical relationship to the needs of the
22 business." Andrews, ¶ 18. Any ascertainable reasons for discharging Kyle
23 are not legitimate business reasons.

24 16. Kyle's case is analogous to Andrews, *supra*. The Missoulian failed to
25 provide continuing training or education pertinent to his job, failed to define
26 procedures, and did not appropriately supervise and evaluate Kyle; just as in
27 Andrews, the Missoulian cannot have good cause to discharge for failure to
28

1 perform job duties when no training was provided, no evaluations conducted,
2 and / or there was no failure to abide by procedures when no procedures
3 existed. The Andrews court reversed summary judgment for termination
4 based upon five years of misplacing cash and other vital information; here,
5 Kyle has been terminated for submitting a story to his editor for publication
6 that included abuse allegations substantiated by two witnesses, two
7 collateral sources, and was previously published by Lee Enterprises through
8 the Billings Gazette as truth. Kyle is not at fault for the copy editor or
9 Defendant Bob's failure to edit the story upon submission. Just as five years
10 of alleged misconduct was not sufficient for dismissal in Andrews, the
11 Missoulian is liable for wrongful termination and must be awarded
12 compensatory damages.

13
14 17. Kyle's dismissal was not for good cause. His termination by Defendants was
15 wrongful and in violation of the WDEA and Montana law.

16 (b) Count Two — Violation of Personnel Policy

- 17 1. Kyle Sample repeats and incorporates by reference each and every
18 statement and allegation contained in all preceding paragraphs as though
19 fully set forth in this section.
- 20 2. A discharge is also wrongful under the WDEA if "...the employer violated the
21 express provisions of its own written personnel policy." Mont. Code Ann. §§
22 39-2-904(1)(b) and (c).
- 23 3. In this case, Defendants have violated the express terms of their own
24 personnel policy.
- 25 4. According to the Missoulian's Employee Handbook, they seek to foster an
26 environment of teamwork, individual growth, trust, and working together to
27 resolve problems. Exhibit 2, page 6-8 and 14). The Missoulian promises to
28 hold management accountable for harassment and retaliation, and to

1 understand and uphold the concepts of professional management. Exhibit 2,
2 page 8.

3 5. Time and again, Defendants violated these provisions in their treatment of
4 Kyle:

- 5 • There was no effort made by Kyle's manager, Defendant Bob, to foster
6 trust or problem solving.
- 7 • Defendant Bob gave lip service to the concept of teamwork, while
8 simultaneously siding with AJ at every turn, adding to the abuse being
9 heaped upon Kyle by his coworker, AJ.
- 10 • Defendant Bob ignored every concern Kyle brought to him, and harassed
11 him for his attempts to work things out with AJ.
- 12 • Defendant Bob retaliated against Kyle by throwing a reprimand letter at
13 him the very day after Kyle stated that he was considering filing a
14 grievance against Defendant Bob.
- 15 • The Missoulian and Defendant Kathy Best failed to conform to their
16 personnel policy by failing to monitor and hold Defendant Bob accountable
17 as a manager.
- 18 • The Missoulian failed to direct Defendant Bob's conduct to conform to the
19 Corporation's own personnel manual, resulting in Defendant Bob's
20 mistreatment of Kyle and Defendant Bob's failure to provide his reporters
21 with sufficient oversight.
- 22 • Defendant Bob did not sufficiently complete his principle assigned job
23 duty, editing, and put his subordinates at great risk of personal and
24 professional harm by failing to provide them with feedback, proofing, or
25 guidance. (This is precisely what occurred here when Kyle's story was
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27
28

1 submitted for publication, not proofed by Defendant Bob, and Kyle wound
2 up fired.)

- 3 6. Based upon the foregoing enumerated failures by Defendants, Defendants
4 violated the express terms of their personnel policy. Kyle's termination was
5 wrongful under the WDEA and Montana Law.

6 **COUNT THREE — NEGLIGENT SUPERVISION OF EMPLOYEES**

- 7 1. Kyle Sample repeats and incorporates by reference each and every
8 statement and allegation contained in all preceding paragraphs as though
9 fully set forth in this section.
- 10 2. Defendants should be liable for negligent supervision of employees.
- 11 3. Although the Montana Supreme Court has referenced the torts of negligent
12 hiring, retention, and supervision, it has yet to explicitly discuss them in
13 depth. See Saucier ex rel. Mallory v. McDonald's Restaurants of Mont., Inc.,
14 2008 MT 63, 179 P.3d 481 (Court declined ruling on the tort claim because it
15 was a sexual harassment case, placing it under the MHRA); Bruner v.
16 Yellowstone County, 272 Mont. 261, 900 P.2d 901 (1995); Hoffman v. Austin,
17 2006 MT 289, 147 P.3d 177 (overruled on other grounds); Pablo v. Moore,
18 2000 MT 48, 995 P.2d 460. See also Peschel v. City of Missoula, 664
19 F.Supp.2d 1149 (D. Mont. 2009).
- 20 4. In Bruner — a case that was focused on whether the sole remedy for sexual
21 harassment was found in the MHRA — Justice Leaphart, in his dissent,
22 stated that he would explicitly recognize the separate tort of negligent
23 retention in Montana. “When, during the course of employment, the
24 employer becomes aware or should have become aware of problems with
25 an employee that indicated his [or her] unfitness, and the employer fails to
26 take further action such as investigating, discharge, or reassignment.” 272
27 Mont. at 269. (quoting Yunker v. Honeywell, 496 N.W.2d 419, 423 (quoting
28

1 Garcia v. Duffy, 492 So.2d 435, 438-39 (Fla.Dist.Ct.App. 1986))). He
2 furthermore stated that “[i]n Vollmer v. Bramlette (1984), 594 F.Supp. 243,
3 the Federal District Court for the District of Montana concluded that an
4 employer has a duty to protect his or her employees from foreseeable
5 employee-caused harms. That court concluded that in the negligent hiring
6 context, “the question of foreseeability, such as which would give rise to a
7 duty of the employer, is a question of fact not properly disposed of by
8 summary judgment.” Vollmer, 594 F.Supp. at 248. The basis of responsibility
9 under the doctrine of negligent hiring is the master’s own negligence in hiring
10 or retaining in his employ an incompetent servant whom the master knows or
11 by the exercise of reasonable care should have known was incompetent or
12 unfit and thereby creating an unreasonable risk of harm to others. Estate of
13 Arrington v. Fields (Tex.Civ.App.1979), 578 S.W.2d 173, 178.” Bruner, at
14 269-270.

- 15 5. In this case, Defendant Bob Meseroll has demonstrated poor supervisory
16 skills resulting in a stressful and hostile work environment. He consistently
17 sided with AJ, his friend and “prodigy,” without hearing Kyle’s side of the
18 story; bullied and degraded Kyle; ignored Kyle’s concerns; and leveled
19 untrue and unsubstantiated accusations at Kyle. Defendant Bob also
20 consistently failed to perform his job as an editor by reviewing Kyle’s work,
21 placing Kyle and the other reporters at risk of making mistakes that could
22 cost them personally and professionally. As a supervisor, Defendant Bob
23 requires sufficient training to supervise subordinates. He also requires his
24 own supervisor to oversee his work. Defendant Bob did not demonstrate the
25 necessary skills to be a competent supervisor. Defendant Bob’s negligent
26 supervision permitted Kyle to be subjected to unreasonable stress, hostile
27 work environment, and negligently failed to execute his job duty of editing
28

1 Kyle's stories prior to publication. Defendant Bob's negligence caused Kyle
2 anxiety and humiliation of having a story published with information that
3 landed Kyle in trouble, which Defendant Bob should have caught; but for
4 Defendant Bob's negligent supervision, Kyle would not have been harmed.
5 Defendants are liable for negligent supervision and retention of employees.

- 6 6. Further, the Missoulian is negligent in its supervision of Kyle Sample and the
7 other reporters. As a front-line reporter, Kyle reasonably expected the
8 network of editors and copy editors to supervise and support him. As an
9 hourly-wage employee, Kyle also had a reasonable and legal expectation to
10 be compensated for all work performed beyond 40 hours each week. All
11 Defendants were responsible to provide Kyle and the other reporters with a
12 fair, respectful, and harassment-free environment. Defendants failed to meet
13 any of these reasonable expectations, and thus should be liable on this
14 additional theory for negligent supervision and retention of employees.
- 15 7. The Missoulian became aware or should have become aware of problems
16 with Kyle's supervisors that indicated an unfitness, and the Missoulian failed
17 to take further action such as investigating, discharge, or reassignment. The
18 Missoulian has a duty to protect its employees from foreseeable employee-
19 caused harms. The Missoulian's own negligence in hiring or retaining
20 deficient employees whom The Missoulian knows or by the exercise of
21 reasonable care should have known was incompetent or unfit created an
22 unreasonable risk of harm to Kyle. Defendant should be held liable for its
23 negligent supervision.
24

25 **COUNT FOUR — BREACH OF OBLIGATION OF GOOD FAITH AND FAIR**
26 **DEALING**

1. Kyle Sample repeats and incorporates by reference each and every statement and allegation contained in all preceding paragraphs as though fully set forth in this section.
2. “Every contract, regardless of type, contains an implied covenant of good faith and fair dealing.” Story v. City of Bozeman, 242 Mont. 436, 450, 791 P.2d 767 (Mont., 1990). “In essence, the covenant is a mutual promise implied in every contract that the parties will deal with each other in good faith, and not attempt to deprive the other party of the benefits of the contract through dishonesty or abuse of discretion in performance.’ Beaverhead Bar Supply v. Harrington, 247 Mont. 117, 124, 805 P.2d 560, 564 (1991) citing Story, 242 Mont. at 450, 791 P.2d at 775; *citing* Restatement (Second) of Contracts § 205 cmt. a (1981) (‘Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party....’)” Phelps v. Framton, 2007 MT 263, ¶ 29, 339 Mont. 330, 170 P.3d 474 (Mont., 2007).
3. The Wrongful Discharge from Employment Act is “the exclusive remedy for a wrongful discharge from employment,” which means that “no claim for discharge may arise from tort or express or implied contract.” Mont. Code Ann. §§ 39-2-902 and -913. The Montana Supreme Court has held that this bars all claims for wrongful discharge based on common law tort or express contract. Kneeland v. Luzenac America, Inc., 1998 MT 136, ¶ 27, 289 Mont. 201, 961 P.2d 725. Furthermore, Mont. Code Ann. § 39-2-905(3), states: “There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering [or] emotional distress....” Hence, the WDEA disallows tort and contract claims arising from the discharge, but does not bar claims arising within the circumstances of employment separate and

1 independent from the discharge. Beasley v. Semitool, Inc., 258 Mont. 258, at
2 262, 853 P.2d 84 (1993).

- 3 4. As held in Story v. City of Bozeman, 242 Mont. 436, 791 P.2d 767 (1990), a
4 breach of the underlying contract is not a prerequisite to a breach of the
5 implied covenant of good faith and fair dealing.
- 6 5. In this case, there was an employment contract between Defendants and
7 Kyle, and Defendants did not abide by the obligation of good faith and fair
8 dealing in the underlying implied contract. Defendants did not deal with Kyle
9 in good faith. Defendant Bob treated Kyle with incredibly unreasonable
10 hostility and disrespect, depriving him “of the benefits of the contract through
11 dishonesty or abuse of discretion in performance.” Beaverhead Bar Supply,
12 247 Mont. at 124. The benefits of the implied covenant of good faith and fair
13 dealing includes being treated fairly and consistently, and having any
14 concerns or issues addressed in an even-handed way. Defendants deprived
15 Kyle of these benefits through the dishonest behavior between AJ and
16 Defendant Bob towards Kyle and through Defendant Bob's abuse of
17 discretion in performance as Kyle's supervisor.
- 18 6. Kyle had a “justified expectation” Defendants would treat him fairly and
19 consistently; because they did not, Defendants breached their obligations of
20 good faith and fair dealing. Phelps, ¶ 29.

21
22 **COUNT FIVE — NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

- 23 1. Kyle Sample repeats and incorporates by reference each and every
24 statement and allegation contained in all preceding paragraphs as though
25 fully set forth in this section.
- 26 2. Defendants negligently inflicted emotional distress on Kyle Sample during
27 his employment period by creating a severely distressing work culture
28 beyond what a reasonable person would be expected to endure.

- 1 3. “A cause of action for negligent infliction of emotional distress will arise under
2 circumstances where serious or severe emotional distress to the plaintiff was
3 the reasonably foreseeable consequence of the defendant’s negligent act or
4 omission.” Sacco v. High Country Independent Press, Inc., 271 Mont. 209,
5 232, 896 P.2d 411 (1995). It is only for the court to decide whether severe or
6 serious emotional distress could be found from the evidence, and for the jury
7 to decide whether in fact it has existed. Id., 271 Mont. at 233, 896 P.2d at
8 425. The finder of fact, whether judge or jury, is “best situated to determine
9 whether and to what extent the defendant’s conduct caused emotional
10 distress, by referring to their own experience.” Id. Evidence of physical injury
11 is not necessary to support a claim of emotional distress. Id.
- 12 4. The Montana Supreme Court has adopted the Restatement (Second) of
13 Tort’s definition of “severe or serious” emotional distress: “Emotional
14 distress...includes all highly unpleasant mental reactions.... It is only where it
15 is extreme that the liability arises.... The law intervenes only where the
16 distress inflicted is so severe that no reasonable [person] could be expected
17 to endure it. The intensity and the duration of the distress are factors to be
18 considered in determining its severity.” Id. 271 Mont. at 234, 896 P.2d at 425.
- 19 5. The Wrongful Discharge from Employment Act is “the exclusive remedy for a
20 wrongful discharge from employment,” meaning “no claim for discharge may
21 arise from tort or express or implied contract.” Mont. Code Ann. §§ 39-2-902
22 and -913. The Montana Supreme Court has held that this bars all claims for
23 wrongful discharge based on common law tort or express contract. Kneeland
24 v. Luzenac America, Inc., 1998 MT 136, ¶ 27, 289 Mont. 201, 961 P.2d 725.
25 Furthermore, Mont. Code Ann. § 39-2-905(3), states: “There is no right under
26 any legal theory to damages for wrongful discharge under this part for pain
27 and suffering [or] emotional distress....” Hence, the WDEA disallows tort and
28

1 contract claims arising from the discharge; notwithstanding, this does not bar
2 claims arising within the circumstances of employment separate and
3 independent from the discharge. Beasley v. Semitool, Inc., 258 Mont. 258, at
4 262, 853 P.2d 84 (1993).

- 5 6. In McGinnis v. City of East Helena, 2002 MT 254, 63 P.3d 512, an employee
6 sued his employer for infliction of emotional distress (negligent and
7 intentional), wrongful discharge, and additional counts. The district court
8 granted summary judgment in favor of the defendant employer and the
9 Montana Supreme Court affirmed.
- 10 7. In McGinnis, the plaintiff described acts of harassment by his supervisor,
11 including insults about his weight, intelligence, and a threat of demotion.
12 These incidents occurred sporadically over a two-year period. The McGinnis
13 Court made a finding these threats were “idle, one-time events.” The Court
14 stated the “relationship between the parties is an important consideration,”
15 and highlighted that the beginning of the relationship between these parties
16 was friendly, the “needling” was initially friendly and humorous, and it was a
17 year or more before things began to deteriorate. The Court held this did not
18 rise to the required level of “serious and severe” emotional distress and
19 affirmed the trial court. McGinnis, ¶ 28-29.
- 20 8. In this case, Kyle’s emotional injuries are factually distinguishable from
21 McGinnis, supra. Kyle suffered negligent infliction of emotional distress due
22 to Defendant Bob’s and AJ’s negligently hostile and abusive treatment during
23 his employment with them, and the negligent failure of Defendant Kathy Best
24 and the Missoulian to prevent such treatment. Sacco, 271 Mont. at 232.
25 Independent of Defendant’s wrongful termination, AJ and Defendant Bob’s
26 behavior made for unbearable working conditions for the almost two years
27 that Kyle worked for the Missoulian. AJ and Defendant Bob engaged in
28

1 behavior that any reasonable person would find to constitute “serious
2 emotional distress.” *Id.* 271 Mont. at 234. A reasonable person would be
3 “unable to endure” being harassed, plagiarized, disrespected, and
4 undermined, and then upon presentation of those issues to their supervisor,
5 see them brushed aside and summarily denied for almost two years. *Id.* To
6 reach a point where an employee feels trapped and marginalized for no
7 reason at all is unconscionable. That type of behavior — denying every
8 grievance and slowly making someone doubt their feelings and often their
9 sanity — is sheer abuse and would result in a constructive discharge if it had
10 continued. This is especially egregious when Defendant Bob indicated more
11 than once that he did not doubt Kyle’s professional abilities; Defendant Bob
12 had a personal vendetta against Kyle.

13 9. The negligently distressing behavior set forth in the recitation of facts in this
14 pleading firmly establish Defendant’s conduct is distinguishable from
15 McGinnis. In McGinnis, the conduct of the employer, although inconsiderate,
16 was sporadic and only became hostile in the few incidents during the last
17 year or so of employment. It was not consistently ongoing, nor were the
18 isolated incidents enough to constitute “serious or severe” distress. In the
19 case *sub judice*, there is a two-year period of abuse and mistreatment,
20 relieved only when Kyle was traveling for work and away from Defendant
21 Bob. Even the plagiarism began the day of Kyle’s interview with the
22 Missoulian when no attribution was made to his investigation that revealed
23 the Montana Grizzlies new head football coach.

24
25 10. Kyle routinely put in more than 40-hours of work each week. In spite of being
26 an hourly wage employee, he was only paid for working more than 40-hours
27 twice during his tenure at the Missoulian. Defendants showed their
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1 appreciation by demeaning, de-constructively criticizing, and plagiarizing
2 Kyle's journalism.

3 11. Even when traveling outside the office, Defendant Bob managed to find ways
4 to unjustly criticize Kyle. It is one thing to have a supervisor who is
5 insensitive and makes jokes at the expense of an employee. Although
6 distasteful, alone it is not enough to make an employee's mental suffering
7 rise to the required level. Defendant Bob's behavior, detailed many times in
8 this complaint, made Kyle's entire experience at the Missoulian "severely
9 distressing," far beyond what a "reasonable person would be expected to
10 endure." Sacco 271 Mont. at 234. This, coupled with the knowledge
11 management routinely sided with supervisors, made Kyle feel utterly alone,
12 isolated from any allies, and eventually made him start questioning his own
13 judgment and emotions.

14 12. Defendants are liable for negligent infliction of emotional distress.

15 **COUNT SIX — INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

- 16
- 17 1. Kyle Sample repeats and incorporates by reference each and every
18 statement and allegation contained in all preceding paragraphs as though
19 fully set forth in this section.
 - 20 2. Defendants intentionally inflicted emotional distress on Kyle Sample during
21 his employment period by **creating a severely distressing work culture**
22 **beyond what a reasonable person would be expected to endure.**
 - 23 3. "[A]n independent cause of action for intentional infliction of emotional
24 distress will arise under circumstances where serious or severe emotional
25 distress to the plaintiff was the reasonably foreseeable consequence of the
26 defendant's intentional act or omission." Sacco v. High Country Independent
27 Press, Inc., 271 Mont. 209, 237, 896 P.2d 422 (1995). The Court applies the
28 same requirement as in the preceding count that the emotional distress be

1 serious or severe, defined in the same way that those terms are defined for
2 negligent infliction of emotional distress. Id.

- 3 4. It is only for the court to decide whether severe or serious emotional distress
4 could be found from the evidence, and for the jury to decide whether in fact it
5 has existed. Id., 271 Mont. at 233, 896 P.2d at 425. The finder of fact,
6 whether judge or jury, is “best situated to determine whether and to what
7 extent the defendant’s conduct caused emotional distress, by referring to
8 their own experience.” Id. Evidence of physical injury is not necessary to
9 support a claim of emotional distress. Id.
- 10 5. The Montana Supreme Court has held “that an award of punitive damages is
11 the proper method of addressing the culpability and intentional nature of the
12 defendant’s conduct in an intentional infliction of emotional distress case.” Id.
13 See also Miller v. Watkins, 200 Mont. 455, 468, 653 P.2d 126, 132 (1982)
14 (“Punitive or exemplary damages are allowed where the defendant has been
15 guilty of oppression, fraud, or malice, actual or presumed, for the sake of
16 example and by way of punishing the defendant. Exemplary damages shall
17 be used when the defendant clearly shows that he is deserving of such
18 special treatment and punishment.”)
- 19 6. “The difference between the negligent and intentional versions of the cause
20 of action lies, not in the elements of the tort, but in the nature and culpability
21 of the defendant’s conduct.” Sacco, 271 Mont. at 238. This means, when
22 arguing *intentional* infliction of emotional distress, “the plaintiff may request
23 relief in the form of punitive damages, per § 27-1-220, MCA, [statute allowing
24 for punitive damages in certain types of situations] to address the culpability
25 of the defendant's conduct.” Id. 271 Mont. at 239.
- 26 7. In this case, the same analysis applies as in negligent infliction of emotional
27 distress: Kyle suffered intentional infliction of emotional distress due to
28

1 Defendant Bob’s and AJ’s intentional hostility and abusive treatment during
2 his employment. Sacco, 271 Mont. at 232. Kyle’s discharge aside, AJ and
3 Defendant Bob’s behavior made for unbearable working conditions for the
4 almost two years Kyle worked for the Missoulian. AJ and Defendant Bob
5 intentionally engaged in behavior that any reasonable person would find to
6 constitute “serious emotional distress.” Id. 271 Mont. at 234. A reasonable
7 person would be “unable to endure” being harassed, plagiarized,
8 disrespected, and undermined, and then upon presentation of those issues to
9 their supervisor, see them brushed aside and summarily denied for almost
10 two years. Id. To reach a point where an employee feels trapped and
11 marginalized is unconscionable. That type of behavior — denying every
12 grievance and slowly making someone doubt their feelings and often their
13 sanity — is abusive and would have resulted in a constructive discharge if it
14 had continued. This is especially egregious when Defendant Bob indicated
15 more than once that he did not doubt Kyle’s professional abilities; it was a
16 personal vendetta against him.

- 17 8. This case is distinguishable from McGinnis as stated above.
- 18 9. The culpability of Defendant’s conduct elevates the negligent infliction of
19 emotional distress alleged above to an intentional infliction of emotional
20 distress.
- 21 10. Defendants are liable for intentional infliction of emotional distress.

22 **COUNT SEVEN — ACTUAL MALICE**

- 23 1. Kyle Sample repeats and incorporates by reference each and every
24 statement and allegation contained in all preceding paragraphs as though
25 fully set forth in this section.
- 26 2. Defendants are guilty of actual malice towards Kyle.

1 3. “A defendant is guilty of actual malice if the defendant has knowledge of facts
2 or intentionally disregards facts that create a high probability of injury to the
3 plaintiff and:

4 “a) deliberately proceeds to act in conscious or intentional disregard of the
5 high probability of injury to the plaintiff; or

6 “b) deliberately proceeds to act with indifference to the high probability of
7 injury to the plaintiff.”

8 Mont. Code Ann. § 27-1-221(2).

9 4. The Montana Supreme Court has considered claims under Section 27-1-221
10 in various employment actions. See Harrell v. Farmers Educational Co-op
11 Union of America, Montana Div., 2013 MT 367, 314 P.3d 920; Beaver v.
12 Montana Dept. of Natural Resources and Conservation, 2003 MT 287, 78 P.
13 3d 857; and Gates v. Life of Montana Ins. Co., 205 Mont. 304, 668 P.2d 213,
14 (1983).

15 5. “[R]easonable punitive damages may be awarded when the defendant has
16 been found guilty of...actual malice. Mont. Code Ann. § 27-1-221(1).

17 6. In this case, Defendants are guilty of actual malice towards Kyle. Defendant
18 Bob knew the fact that his behavior towards Kyle created a high probability of
19 injury to him and deliberately proceeded to act with at least indifference to
20 and seemingly with conscious disregard of the high probability of injury to
21 Kyle. Mont. Code Ann. § 27-1-221(2). Any manager with Bob’s years of
22 experience knows that treating an employee with hostility and aggression
23 creates a high probability of injury to that employee.

24 7. Defendant Bob also intentionally disregarded facts that created a high
25 probability of injury to Kyle and deliberately proceeded to act with at least
26 indifference to and seemingly with conscious disregard of the high probability
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1 of injury to Kyle. Mont. Code Ann. § 27-1-221(2). He intentionally
2 disregarded:

- 3 • Kyle’s complaints about AJ’s abusive behavior,
- 4 • Kyle’s concerns about AJ’s unethical plagiarizing, and
- 5 • Kyle’s concerns with how Defendant Bob himself was treating Kyle.

- 6 8. Malice indicates a deep emotional component, which is present in a case
7 such as this — outrageous treatment based on undeserved hostility and
8 enmity.
- 9 9. Furthermore, as editors, Defendant Bob and Defendant Kathy knew the fact
10 that reporters can include information in their stories, inadvertently or
11 otherwise, that would incur a high probability of injury to their professional
12 career and reputation. Mont. Code Ann. § 27-1-221(2)(a). They also could
13 easily submit a story that was written with too much haste, or too little sleep,
14 or too little preparation, which could also bring a high probability of injury.
15 Mont. Code Ann. § 27-1-221(2)(a). Defendant Bob and Defendant Kathy also
16 knew that it is the job of the editor in charge of any such reporters to proof
17 and monitor their stories, and it is the job of the editor in chief to monitor and
18 supervise the editors under her. Failing to perform these requirements put all
19 their reporters at high probability of injury, as set forth above. Mont. Code
20 Ann. § 27-1-221(2)(a).
- 21 10. Defendant Kathy, Defendant Bob, and Defendant Missoulian Corporation
22 deliberately proceeded with knowledge of these facts and failed to do their
23 jobs; this failure was with conscious disregard of and / or with indifference to
24 the high probability of injury to Kyle as one of their reporter employees.
- 25 11. Defendants are guilty of actual malice.

26
27 **COUNT EIGHT — HOSTILE WORK ENVIRONMENT**
28

- 1 1. Kyle Sample repeats and incorporates by reference each and every statement
2 and allegation contained in all preceding paragraphs as though fully set forth
3 in this section.
- 4 2. For almost two years, Defendants subjected Kyle to unwelcome conduct of a
5 harassing and abusive nature.
- 6 3. Kyle’s workplace was permeated with harassing and abusive intimidation that
7 was sufficiently severe or pervasive to alter the conditions of his employment
8 and create an abusive working environment.
- 9 4. As a consequence of Defendants’ conduct, Kyle suffered damages, both
10 general and special.
- 11 5. Defendants are liable to Kyle for the hostile work environment they created.

12 **COUNT NINE — WAGE AND HOUR CLAIM**

- 13 1. Kyle Sample repeats and incorporates by reference each and every statement
14 and allegation contained in all preceding paragraphs as though fully set forth
15 in this section.
- 16 2. Montana’s Wages and Wage Protection Act, Mont. Cod Ann. § 39-3-201, *et*
17 *seq.*, requires that an employer pay its employees “the wages earned by the
18 employee....” Mont. Code Ann. § 39-3-204(1). This extends to the admonition
19 that “An employer may not employ any employee for a workweek longer than
20 40 hours unless the employee receives compensation for employment in
21 excess of 40 hours in a workweek at a rate of not less than 1 1/2 times the
22 hourly wage rate at which the employee is employed.” Mont. Code Ann. §
23 39-3-405(1).
- 24 3. An employer who fails to pay its employee for earned overtime may be subject
25 to penalties of up to 110% of the unpaid overtime under Mont. Admin. R.
26 24.16.7561.
27
28

1 4. In this case, Kyle worked many hours of overtime during his time with the
2 Missoulian and was unpaid for most of them. During 2015 and 2016 he
3 worked over 400 hours of unpaid overtime. The last time when Defendants
4 failed to pay Kyle for overtime was during his last month on staff at the
5 Missoulian.

6 **COUNT TEN — JOINT AND SEVERAL LIABILITY**

- 7 1. Kyle Sample repeats and incorporates by reference each and every statement
8 and allegation contained in all preceding paragraphs as though fully set forth
9 in this section.
- 10 2. In Trux, L.P. v. Mine and Mill Hydraulics, Inc., 2003 MT 20, 63 P.3d 1142, Trux
11 sued for breach of contract, fraud, and unjust enrichment; Trux alleged joint
12 and several liability. The trial court granted summary judgment to Mine and
13 Mill; the Montana Supreme Court reversed. The Trux Court voiced no issue
14 nor objection to the application of joint and several liability to the plaintiff's tort
15 and contract action.
- 16 3. The Montana Supreme Court has adopted the theory of joint liability: "For
17 harm resulting to a third person from the tortious conduct of another, one is
18 subject to liability if he (a) does a tortious act in concert with the other or
19 pursuant to a common design with him, or (b) knows that the other's conduct
20 constitutes a breach of duty and gives substantial assistance or
21 encouragement to the other so to conduct himself, or (c) gives substantial
22 assistance to the other in accomplishing a tortious result and his own conduct,
23 separately considered, constitutes a breach of duty to the third person."
24 Newman v. Lichfield, 2012 MT 47, ¶ 40, 272 P.3d 625 citing Restatement of
25 Torts § 876.
- 26
27
28

1 4. As the owner of the Missoulian, which is itself an independent company, Lee
2 Enterprises and the Missoulian are jointly and severally liable for all claims
3 presented against any of them hereunder.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff Kyle Sample move this Court to grant judgment as
6 follows:

7 1. Damages, including compensatory, punitive, general, and special
8 damages, as determined by the Court to be just and necessary under the
9 circumstances.

10 2. Award all fees incurred litigating this matter, including but not limited to
11 court costs, attorney's fees, and attorney's costs;

12 5. Any such other relief the Court deems just and proper.

13 RESPECTFULLY submitted this 20th day of March, 2017.

14
15
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23 *Attorney for Plaintiff*

24 **DEMAND FOR JURY TRIAL**

25 Plaintiff Kyle Sample demands a trial by jury of all triable issues as a right
26 by jury, pursuant to Mont. Rule of Civ. Pro. 15.

27 RESPECTFULLY submitted this 20th day of March, 2017.

28 C. Olivia Erickson
Lowy Law PLLC
Attorney for Plaintiff