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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, ADRIAN SCOTT DUANE, Plaintiff-Intervenor, vs. IXL Learning, Inc., Defendant.	Case No.: 17-cv-02979 **PROPOSED PLAINTIFF-INTERVENOR'S NOTICE OF MOTION TO INTERVENE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE** **Date: September 19, 2017** **Time: 1:30 p.m.** **Courtroom: 4-17th Floor** **Judge: The Honorable Vince Chhabria**

Please take notice that on September 19, 2017, at 1:30 p.m., in Courtroom 4, 17th Floor , 450 Golden Gate Avenue, San Francisco, California 94102, of the above-entitled Court, Adrian Scott Duane ("Intervenor") will move and does move this Court for leave to intervene in this action.

This motion, along with the Declaration of David Marek and Exhibits attached thereto, is made pursuant to Federal Rules of Civil Procedure 24(a) and (b), on the ground that the Plaintiff-Intervenor may intervene as of right because he is an "aggrieved person" under Title VII of the Civil Rights Act of 1964 ("Title VII") and under the Americans with Disabilities Act (the "ADA"), and therefore has the unconditional right to intervene because his motion was filed in a timely manner. Neither the Plaintiff nor Defendant opposes Plaintiff's right to intervene.

Defendant IXL Learning, Inc. ("Defenant" or "IXL"), however, does oppose Plaintiff's [Proposed] Complaint in Intervention (attached to the Declaraiton of David Marek ("Marek Decl.") as Exhibit A) to the extent that Plaintiff added (i) a claim for retaliation under the California Fair Employment and Housing

Act ("FEHA"), the California state corollary to the federal anti-retaliation provision of Title VII and the ADA, and (ii) allegations that Intervenor told his manager, David Keyes, that he was the victim of discrimination in an email and a subsequent meeting that took place days prior to the termination of his employment.

Intervenor is an "aggreieved person" because he filed a charge with the EEOC alleging the retaliation claims that form the basis of this action. This motion is timely because it is being made within two months of the Plaintiff's commencement of the action and before the Court has entered a scheduling order.

If allowed to intervene, Intervenor will assert his claims under Title VII, the ADA, and FEHA for retaliation. Intervenor's claims arise from the same set of facts that were alleged in the EEOC's underlying action.

The motion is based on this notice, the memorandum of points and authorities filed herewith, the Declaration of David Marek and Exhibits attached thereto, and all pleadings, papers, and records filed in this action.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

Itnervenor filed a charge with the EEOC alleging discrimination and retaliation under Title VII, the ADA, and other state and federal anti-discrimination and anti-retalition statutes (including FEHA). The action pending before this Court commenced by the EEOC is brought on behalf of Intervenor, who is the "aggrieved person." This motion has been brought in a timely manner, and neither the EEOC nor IXL oppose Intervenor's right to intervene. Defendant, however, does oppose certain aspects of the Intervenor's [Proposed] Complaint In Intervention.

1. Background

On March 17, 2015, Intervenor filed a charge with the EEOC, alleging that defendant IXL Learning, Inc. ("IXL") discriminated and retaliated against him in violation of various federal and state anti-discrimination and anti-retaliation statutes. See Marek Decl., Exhibit B.[1]

On April 22, 2016, the EEOC issued its "Determination," finding "there is reasonable cause to believe that [IXL] discriminated against [Intervenor] in retaliation for protesting against discriminatory conduct, in violation of the statutes." See Marek Decl., Exhibit C.

On January 6, 2017, Intervenor commenced an action in the Northern District of California arising from IXL's termination of his employment. Case No. 3:17-cv-00078 (referred to herein as the "Duane Action"). Marek Decl., Exhibit D. In the Duane Action, Intervenor alleged only two claims: (1) for violation of the Family Medical Leave Act ("FMLA"); and (2) wrongful termination in violation of public policy. Intervenor expressly noted in that Complaint that he intended to add claims under Title VII, the ADA, and FEHA when he was legally permitted to do so, but he could not at that time because the EEOC had not issued at right-to-sue letter. See Marek Decl., Exhibit D, FN1. Furthermore, Intervenor informed IXL's counsel that, while he felt compelled to assert these claims to avoid the statute of limitations running, he recommended that the parties agree to stay the action, pending the EEOC's decision on commencing a lawsuit or issuing a right-to-sue letter. See Marek Decl., Exhibit E. IXL rejected this recommendation.

On May 24, 2017, the EEOC filed a complaint agasint IXL, alleging violation of Title VII and the ADA. Defendant has not yet answered or otherwise moved, and the Court has not yet set a discovery schedule.

To promote judicial efficiency, after the EEOC commenced this action, which arises from the same set of facts as the Duane Action, Intervenor proposed that IXL and Intervenor agree to dismiss the Duane Action with prejudice, but agreed that IXL would not object to Intervenor intervening in this action.

While neither the EEOC nor IXL opposes the present motion to intervene, IXL opposes Intervenor's claim under FEHA and the additional allegations asserted by Intervernor that Intervenor complained of discrimination in email and subsequent meeting with his manager in the days leading up to

[1] In his EEOC Charge, Intervenor alleged that he complained of discrimination to his manager in email and in person days before the termination, in addition to the complaints of discrimination in his Glassdoor post. Marek Decl., Exhibit B, ¶¶ 66-70; 74; 77-81.

the termination, as well as in his Glassdoor post. (The EEOC alleged that the retaliatin arose from only the Glassdoor post, and the EEOC's Complaint was silent as to Intervenor's complaints of discimination to his manager.)

Intervenor has not previously asserted claims under FEHA, and surely has not dismissed such claims. Intervenor only dismissed his claims arising under the FMLA and tort claims for wrongful termination in violation of public policy, the only claims he had previously asserted. Further, he has asserted this claim in a timely manner. This Court has jurisdiction to hear the claim. The FEHA claim is nearly identical to the Title VII and the ADA claims, arising from the same set of facts and behavior as the claims alleged in the EEOC complaint. In addition, there is no basis to object to Intervenor's additional allegations that he complained about unlawful discrimination to his manager in addition to his complaint of unlawful discrimination on Glassdoor. These facts, which will certainly come out in the course of discovery, might be relevant to the claims and were properly pled.

2. Intervention

Parties may intervene in a lawsuit as a matter of right or with the permission of the Court. Fed. R. Civ. P. 24. Generally, the Ninth Circuit applies a four-part test in evaluating a motion for intervention as matter of right pursuant to Federal Rules of Civil Procedure 24(a), and an applicant must demonstrate (1) the application for intervention is timely; (2) the applicant possesses a "significantly protectable" interest in the subject matter of the action; (3) without intervention the action may impair or impede the appicant's ability to protect the interest; and (4) the interest is inadequately represented by the existing parties. *Southwest Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001). The burden is on the party seeking intervention to demonstrate that each of the elements is met before a court may grant the right to intervene. *League of United Latin. Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997); *see also NAACP v. New York*, 413 U.S. 345, 369 (1973) (all requirements must be met before an intervention of right is permitted).

The test is applied liberally in favor of the applicant seeking intervention. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995). A court's analysis "is guided primarily by practical considerations, not technical distinctions." *Southwest Ctr.*, 131 F.3d at 818 (internal quotation marks omitted). "Courts are to take all well-pleaded, nonclusory allegations in the motion to intervene, the

proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections. *Id.* at 819-20.

Under Fed. R. Civ. P. 24(b), a party may intervene with permission of the Court. Rule 24(b)(1)(B) maintains that "[o]n timely motion, the court may permit anyone to intervene who: has a claim or defense that shares with the main action a common question of law or fact."

3. Discussion and Analysis of Intervention as a Matter of Right

Intervenor seeks to assert claims under Title VII, the ADA, and FEHA for retaliation. Intervernor should be permitted to intervene as a matter of right because of his claims arising under Title VII, which provides that "persons aggrieved shall have the right to intervene in a civil action brought by the Commission …" 42 U.S.C. § 2000e-5(f)(1). This clause "grants the person aggrieved an unconditional right to intervene" if a motion is timely made. *EEOC v. Brotherhood of Painters, Decorators & Paperhangers of Am.*, 284 F.Supp. 1264, 1266-67 (D.S.D 1974) (clause restricting intervention to cases involving government agency or political subdivisions applies only to cases filed by the attorney general); *see also EEOC v. Guimarra Vineyards Corp.*, 2010 U.S. Dist. LEXIS 82917, 1t *9 (E.D.Cal. 2010) (persons aggrieved "have the unconditional right to intervene in this case if the motion was timely").

A. "Person Aggrieved"

"Under the provisions of 42 U.S.C. § 2000e-5(f)(1), an 'aggrieved person is defined as a person who has filed a charge with the EEOC.'" *EEOC v. GMRI, Inc.*, 221 F.R.D. 562, 563 n.1 (D.Kan. 2004), quoting *EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C.*, 273 F.Supp.2d 260, 263 (E.D.N.Y. 2003). Therefore, to have standing as "person aggrieved," Intervenor must show an injury and the "interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute." *Foust v. Transamerica Corp.*, 391 F.Supp. 312, 314 (N.D. Cal. 1975), citing *Data Processing Service v. Camp*, 397 U.S. 150, 152-53 (1970).

Here, Intervenor filed a charge with the EEOC.

B. Timeliness

The "threshold requirement" for intervention as a matter of right is that the motion to intervene be filed in a timely manner. United States v. Oregon, 913 F.2d 576, 588 (9th Cir. 1990). When a court finds "the motion to intervene was not timel, [it] need not reach any of the remaining elements of Rule 24." Wilson, 131 F.3d at 1302, quoting United States v. Washington, 86 F.3d 1499, 1503 (9th Cir. 1996). To determine whether a motion to intervene is timely, the court considers: (1) the stage of the proceedings at the time the motion is made; (2) prejudice to other parties; and (3) the reason for and length of any delay in moving to intervene. *Northwest Forest Resources Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996). Further, a court should be more lenient in considering these factors when intervention is sought as a matter of right compared to permissive intervention, because of the likelihood of serious harm. United States v. Oregon, 745 F.3d 550, 552 (9th Cir. 1984).

Here, Intervenor moved to intervene at an early stage of the proceedings. The motion comes less than two months after the EEOC filed its complaint, and before the Court has set a scheduling order. Further, Intervenor put IXL on notice of his intent to intervene on June 21, 2017. Moreover, there is no prejudice to either the EEOC or IXL, neither of whom oppose this motion.

C. Intervenor's FEHA Claim

Pursuant to F.R.C.P. Rule 24(b), Intervenor is pemitted to add a claim under FEHA. *See EEOC v. WirelessComm, Inc.*, Case No. 5:11-cv-04796 (EJD), 2012 WL 1711040 (N.D.Ca. May 15, 2012)[2] (holding that aggrieved party was permitted to intervne in EEOC's action and add claims under FEHA and add additional parties); *EEOC v. Central California Foundation For Health*, Case No. 1:10-cv-01492 (LJO)(JLT), 2011 WL 149831 (E.D.Ca. Jan. 18, 2011)[3] (holding that a group of individuals – several of whom had not even filed an EEOC Charge – to intervene in the EEOC's Title VII case commenced on their behalf and add claims under FEHA). In *WirelessComm*, the Court held that Intervenor's

[2] Intervenor notes for the Court that *WirelessComm* was not reported in F.Supp.2d(2012). Nevertheless, the decision is accessible online and is not designated as "NOT FOR CITATION" pursuant to Local Rle 3-4(e). Accordingly, this Court should consider this decision for its non-controversial holding. A copy of the case is attached as Exhibit F to Marek Decl.

[3] Intervenor notes for the Court that *Central California Foundation for Health* was not reported in F.Supp.2d(2011). Nevertheless, the decision is accessible online and is not designated as "NOT FOR CITATION" pursuant to Local Rle 3-4(e). Accordingly, this Court should consider this decision for its non-controversial holding. A copy of the case is attached as Exhibit F to Marek Decl.

"intervention to assert [FEHA] claims meets the Rule 24(b) standard for permissive intervention." *WirelessComm*, 2012 WL 1711040, at *2. Here, there is not basis to oppose Intervernor's request to add a FEHA claim.

D. Intervenor's Allegation That He Complained To Keyes Of Discrimination

Defendant objects to Intervenor's allegations that IXL's unlawful retaliation flowed from Intervenors's complaints of unlawful discrimination (i) in emails to, and in a meeting with, his manager, David Keyes, and/or (ii) on his Glassdoor post. While the EEOC only asserted that IXL retaliated against Intervenor because of the Glassdoor post, there is no basis for IXL's argument that Intervenor is prohibited from adding these additional allegations. In *WirelessComm*, the Court permitted Intervenor to add additional parties that the EEOC had not named **and** "a small amount of additional detail regarding their conduct." *Id.*

Here, where Intervenor added a small amount of additional detail, the [Proposed] Complaint in Intervention plainly "arise[s] out of the same behavior alleged in the EEOC's Complaint." *Id.* Regardless of the additional detail in the Proposed Complaint in Intervention, the claims asserted by the EEOC and the claims asserted by Intervenor revolve around IXL's basis for terminating Intervenor's employment, and the events that occurred during that time period.

E. Conclusion

Intervenor has establishes that he may intervene as a matter of right under Fed. R. Civ. P. 24(a). In addition, pursuant to either Fed. R. Civ. P. 24(a) or (b), Intevenor has properly added a claim under FEHA arising from the same set of eventst that resulted in the EEOC Action.

DATED: August 21, 2017

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/s/_____

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