

1 DAVID MAREK, SBN  
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4 Palo Alto, California 94301  
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6 917-721-5042

7 Attorney for Plaintiff-Intervenor

8 UNITED STATES DISTRICT COURT  
9  
10 NORTHERN DISTRICT OF CALIFORNIA

11 U.S. EQUAL EMPLOYMENT OPPORTUNITY  
12 COMMISSION,

13 Plaintiff,

14 ADRIAN SCOTT DUANE,

15 Plaintiff-Intervenor,

16 vs.

17 IXL Learning, Inc.,

18 Defendant.

Case No.: 17-cv-02979

**DECLARATION OF DAVID MAREK IN  
SUPPORT OF DUANE’S MOTION TO  
INTERVENE**

**Date:**

**Time:**

**Courtroom: 4-17<sup>th</sup> Floor**

**Judge: The Honorable Vince Chhabria**

19 I, David Marek, declare:

20 1. I am the sole proprietor of The Marek Law Firm, Inc., and counsel for Intervenor and  
21 aggrieved party, Adrian Scott Duane. This declaration is in support of Duane’s Motion to Intervene  
22 in this action. I have personal knowledge of the matters set forth herein and, if called as a witness, I  
23 could and would testify competently thereto.

24 2. Attached hereto as “Exhibit A” is the [Proposed] Complaint in Intervention.

25 3. A true and correct copy of Duane’s EEOC Charge filed on March 17, 2015 is  
26 attached hereto as “Exhibit B.”

27 4. A true and correct copy of the EEOC’s Determination dated April 22, 2016 is  
28 attached as “Exhibit C.”

5. A true and correct copy of the Complaint filed in *Adrian Scott Duane v. IXL*

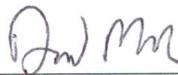
1 *Learning, Inc. and Paul Mishkin*, 17-cv-00078 dated January 6, 2017 (referred to as the “Duane  
2 Action”) is attached as “Exhibit D.”

3 6. A true and correct copy of the email exchange between IXL’s counsel and me  
4 whereby I requested staying the Duane Action until the claims pending before the EEOC – including  
5 the Title VII, ADA, and FEHA claims – were able to be asserted dated April 5 and 7, 2017 is  
6 attached as “Exhibit E.”

7  
8 7. In addition, in Duane’s opposition to Defendant’s Motion to Dismiss filed in the  
9 Duane Action, Duane reiterated his proposal that the parties stay the pending action until the EEOC  
10 has either brought suit or issued its right-to-sue letter.

11 8. True and correct copies of *EEOC v. WirelessComm, Inc.*, No. 5:11-cv-04796 (EJD),  
12 2012 WL 1711040 (N.D.Ca., May 15, 2012) and *EEOC v. Central California Foundation For*  
13 *Health*, No. 1:10-cv-01491(LJO)(JLT), 2011 WL 149831 (E.D. Ca., Jan 18, 2011) are attached as  
14 “Exhibit F.”

15  
16 I declare under penalty of perjury under the laws of the United States of America that the  
17 foregoing is true and correct. Executed on this 17<sup>th</sup> day of August 2017 in Palo Alto, California.

18  
19  
20   
David Marek

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11 U.S. EQUAL EMPLOYMENT OPPORTUNITY  
12 COMMISSION,

13 Plaintiff,

14 ADRIAN SCOTT DUANE,

15 Plaintiff-Intervenor,

16 vs.

17 IXL Learning, Inc.,

18 Defendant.

Case No.: 17-cv-02979

**[PROPOSED] COMPLAINT IN  
INTERVENTION**

Civil Rights – Employment Discrimination

**DEMAND FOR A JURY TRIAL**

**NATURE OF THE ACTION**

19 Plaintiff-Intervenor, Adrian Scott Duane, intervenes in this action commenced by the U.S.  
20 Equal Employment Opportunity Commission (“EEOC”). The EEOC asserted claims pursuant to  
21 Title VII of the Civil Rights Act of 1964 (“Title VII”), Title V of the Americans with Disabilities  
22 Act (the “ADA”), and Title I of the Civil Rights Act of 1991 (“Title I”) that Defendant IXL  
23 Learning, Inc. (“IXL”) discriminated and retaliated against its former employee, Duane, by  
24 terminating his employment for engaging in protected opposition activity. Duane hereby asserts  
25 claims against IXL arising from the same conduct under Title VII, the ADA, and the California Fair  
26 Employment and Housing Act (“FEHA”).

**JURISDICTION AND VENUE**

27  
28 1. This Court has jurisdiction pursuant to 28 U.S.C. §§1331 and 1367. Section 1367 provides

1 that, “Such supplemental jurisdiction shall include claims that involve joinder or intervention of  
2 additional parties.”

3 2. Venue is proper in the United States District Court for the Northern District of California  
4 because the employment practices occurred in Defendant’s headquarters in San Mateo, California.

5 **PARTIES**

6 3. Plaintiff Equal Employment Opportunity Commission (EEOC) is the federal agency charged  
7 with the administration, interpretation, and enforcement of Title VII and Title I of the ADA.  
8

9 4. Plaintiff-Intervenor, Adrian Scott Duane, is a transgender man with an undergraduate degree  
10 from in Mathematics from Carleton College, and a Ph.D. in Mathematics from the University of  
11 California, San Diego. He resides in Oakland, California.

12 5. At all relevant times, Defendant IXL Learning, Inc. (IXL) has been headquartered in San  
13 Mateo, California and has had another office in North Carolina.

14 **ADMINISTRATIVE PROCEDURES**

15 6. Duane has exhausted all of his administrative remedies required to bring his claims under  
16 Title VII, ADA, and FEHA.  
17

18 7. On or about March 17, 2015, Duane filed a timely charge of discrimination with the EEOC  
19 alleging that IXL discriminated against him in violation of the retaliation provisions of Title VII, the  
20 ADA, and FEHA.

21 8. On April 22, 2016, the EEOC issued a Letter of Determination finding reasonable cause to  
22 believe that IXL violated the retaliation provisions of Title VII and the ADA.  
23

24 9. On July 28, 2016, the EEOC issued a Notice of Failure of Conciliation.

25 10. All conditions precedent to the initiation of this lawsuit have been fulfilled.

26 **FACTUAL ALLEGATIONS**

27 11. Duane, a transgender man, began working for IXL as a Product Analyst in July 2013.  
28

1 12. During his employment, Duane discussed with coworkers his impressions about the culture  
2 at IXL being unwelcoming to employees who are not White or Asian American, who are not able-  
3 bodied, and who do not fit into neat categories of gender identity, orientation, and expression.

4 13. Throughout his employment, employees probed Duane with inappropriate questions about  
5 his gender identity and orientation. On at least one occasion, after seeing scars on Duane's chest, an  
6 employee asked another co-worker if Duane used to be a girl. Similarly, upon learning that Duane  
7 was in a relationship with a woman, a co-worker asked Duane if it was his first time dating a  
8 woman.  
9

10 14. IXL provided employees with unlimited sick leave as a benefit of employment.

11 15. In July 2014 Duane notified his supervisor, David Keyes, about the need for approximately  
12 6-8 weeks of leave for a surgery in November.

13 16. In September 2014, IXL approved Duane's disability leave and processed the necessary  
14 paperwork for California State Disability Insurance benefits.  
15

16 17. On October 3, 2014 Duane emailed his team members that he would begin a two month  
17 leave of absence in November for a surgery and that he wished to keep the details private.

18 18. On at least one other prior occasion that Duane knew of, IXL had disclosed confidential  
19 health information about an IXL employee.

20 19. For approximately six weeks prior to his leave, IXL permitted Duane to work remotely so he  
21 could attend weekly pre-operation appointments.  
22

23 20. Duane started approximately eight weeks of approved short-term disability leave on October  
24 30, 2014 in order to undergo and recover from gender confirmation surgery.

25 21. At the conclusion of his leave, Duane developed post-operative complications, which  
26 required rest in order to effectuate a full recovery, and made it challenging to be out of his home for  
27 long periods of time.  
28

1 22. Duane requested a 50% remote work arrangement for his first few weeks back at work in  
2 order to accommodate his recovery. Duane's manager resisted providing the accommodation and  
3 instead suggested that Duane take additional leave until he was able to return.

4 23. Duane informed IXL via email that he had consulted with an employment attorney who  
5 advised that remote work requests because of a medical condition qualified as a reasonable  
6 accommodation under the Americans with Disabilities Act.

7 24. Keyes immediately forwarded Duane's December 23, 2014 email to Maricela Prado and  
8 Lenore Ockerberg, IXL human resources representatives. On or around December 23, 2014,  
9 Duane's December 23, 2014 email was also forwarded to Paul Mishkin, IXL's CEO, and then  
10 shortly after forwarding this email Keyes discussed Duane's allegations with Mishkin.

11 25. On December 29, 2014, Duane provided a note from his surgeon supporting his reasonable  
12 accommodation request. The surgeon advised that Duane work remotely for at least four more  
13 weeks for postoperative healing. This note was on the letterhead of Brownstein & Crane Surgical  
14 Services and included the website [www.brownsteincrane.com](http://www.brownsteincrane.com). Brownstein & Crane's websites  
15 immediately identifies itself as "Gender Surgery in San Francisco." The entire website announces  
16 the medical practice's specialty of providing transgender surgeries.  
17

18 26. After Duane's self-advocacy, IXL relented and allowed Duane to work from home 50% of  
19 the time.  
20

21 27. IXL presented Duane with a detailed remote work plan upon Duane's return to work on  
22 December 30, 2014. That day Duane learned that at least two other employees were permitted to  
23 work remotely between 50% and 100% of the time and were not subject to such a detailed remote  
24 work arrangement. Duane understood that these employees were cisgender, heterosexual, and non-  
25 disabled.  
26

27 28. That evening Duane posted a message on Glassdoor.com, a jobs recruiting and ratings  
28

1 website, which stated, in relevant part: “There are no politics if you fit in. If you don’t –that is, if  
2 you’re not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who  
3 really likes softball – then you’re likely to find yourself on the outside. Treatment in the workplace,  
4 in terms of who gets flexible hours, interesting projects, praise, promotions, and a big yearly raise, is  
5 different and seems to run right along these characteristics.” Duane also posted “[m]ost  
6 management do not know what the word ‘discrimination’ means, nor do they seem to think it  
7 matters.”  
8

9 29. During Duane’s employment at IXL, IXL encouraged employees to use Glassdoor – a  
10 service that IXL paid for and closely monitored – as a means to communicate with employees,  
11 potential employees, and management. For instance, by email dated February 24, 2014, Prado  
12 instructed IXL employees, including Duane, to “take a moment to login to Glassdoor.com and post  
13 some comments about your work experience.” At IXL events, CEO Mishkin had also orally  
14 instructed IXL employees to do the same.  
15

16 30. As a result of IXL’s direct encouragement to do so, Duane had posted a comment about IXL  
17 in the past, and he was aware that the Company reviewed the site.

18 31. On January 6, 2015, Duane directly reported, in a meeting with Keyes, his concerns about  
19 experiencing discrimination in the workplace. Keyes promised to alert the CEO about Duane’s  
20 complaints.  
21

22 32. On January 7, 2015, CEO Mishkin emailed Duane to set up a meeting for January 8, 2015  
23 to discuss his discrimination complaints.

24 33. Also on or about January 7, 2015, HR Manager Maricelo Prado allegedly discovered  
25 Duane’s Glassdoor.com posting and forwarded it to CEO Mishkin. Although the posting was  
26 anonymous, IXL suspected that Duane had written it.

27 34. On January 8, 2015, Duane met with CEO Mishkin and outlined the concerns he had about  
28

1 discrimination.

2 35. During the meeting, CEO Mishkin confronted Duane about the Glassdoor.com post. After  
3 confirming that Duane had written the post, CEO Mishkin terminated Duane's employment.

4 36. Mishkin had decided to terminate Duane's employment before the January 8 meeting. When  
5 the meeting ended, and Duane returned to his work station, he became aware that IXL had packed  
6 and removed his belongings while he was in the January 8 meeting with Mishkin.

7 37. IXL claims that the reason for terminating Duane was his December 30, 2014 post on  
8 Glassdoor.com  
9

10 **FIRST CAUSE OF ACTION**  
11 **(Violation of Title VII)**

12 38. Duane repeats and realleges the allegations contained herein.

13 39. Duane was an employee under Title VII, 42 U.S.C. § 2000(e)(f).

14 40. IXL has at all relevant times engaged in industry affecting commerce within the meaning of  
15 Section 701(h) of Title VII, 42 U.S.C. § 2000(e)(h).

16 41. IXL has employed well over 15 people for at least 20 calendar weeks in the current or  
17 proceeding year, and is therefore an employer under 42 U.S.C. § 2000(e)(b).

18 42. As alleged herein, IXL retaliated against Duane in violation of Title VII by terminating his  
19 employment for engaging in legally protected employment activities by opposing IXL's  
20 discrimination when he reported this discrimination to his manager and when he posted on  
21 Glassdoor.  
22

23 43. As a direct and proximate result of IXL's violation of Title VII, Duane suffered actual  
24 damage, including not limited to losses in compensation and benefits, humiliation, emotional  
25 distress, and loss of enjoyment of life.  
26

27 44. IXL's unlawful actions were intentional, willful, malicious, and/or done with reckless  
28 disregard for Duane's rights.

1 45. Duane also seeks an award of punitive damages for IXL’s malicious and reckless conduct, as  
2 described herein, in amounts to be determined at trial.

3 **SECOND CAUSE OF ACTION**  
4 **(Violation of ADA)**

5 46. Duane repeats and realleges the allegations contained herein.

6 47. Duane is an employee under the ADA, 42 U.S.C. § 12111(4).

7 48. IXL is an employer under the ADA, 42 U.S.C. §§ 12111(5) and (7).

8 49. As alleged herein, Duane requested an accommodation under the ADA. After IXL initially  
9 refused Duane’s request for an accommodation, Duane opposed IXL’s employment practice by  
10 engaging in legally protected employment activities, including by publicly posting his opposition to  
11 IXL’s practices on Glassdoor.

12 50. As alleged herein, IXL violated the ADA by terminating Duane’s employment for engaging  
13 in legally protected employment activities by opposing IXL’s discrimination and failure to  
14 accommodate when he complained about IXL’s conduct to his manager and when he posted on  
15 Glassdoor.

16 51. As a direct and proximate result of IXL’s violation of the ADA, Duane suffered actual  
17 damage, including not limited to losses in compensation and benefits, humiliation, emotional  
18 distress, and loss of enjoyment of life.

19 52. IXL’s unlawful actions were intentional, willful, malicious, and/or done with reckless  
20 disregard for Duane’s rights.

21 53. Duane also seeks an award of punitive damages for IXL’s malicious and reckless conduct, as  
22 described herein, in amounts to be determined at trial.

23 **THRID CAUSE OF ACTION**  
24 **(Violation of FEHA Gov. Code § 12940(h) and (m))**

25 54. Duane repeats and realleges the allegations contained herein.  
26  
27  
28

1 55. Government Code § 12940(h) provides that it is unlawful to retaliate against a person  
2 “because the person has opposed any practice forbidden under [Government Code §§ 12900 through  
3 12966] ...”

4 56. Duane is a “person” under Gov. Code § 12925(d).

5 57. IXL is an “employer” under Gov. code § 12926(d).

6 58. As alleged herein, IXL violated FEHA by terminating Duane’s employment for opposing  
7 IXL’s employment practices forbidden under FEHA, including his opposition to IXL’s  
8 discriminatory employment practices and his opposition to IXL’s failure to accommodate. Duane  
9 opposed these practices by engaging in legally protected employment activities, including  
10 complaining to his manager in email and in a meeting, and publicly posting his opposition on  
11 Glassdoor.  
12

13 59. IXL’s conduct described herein constitutes a willful violation Gov. Code § 12940(h) and (m).

14 60. As a proximate result of IXL’s violation of the FEHA, Duane has suffered substantial losses,  
15 including lost back pay with prejudgment interest, in amounts to be determined at trial, and other  
16 affirmative relief necessary to eradicate the effects of IXL’s unlawful employment practices,  
17 including attorneys’ fees and costs.  
18

19 61. Duane also seeks an award of compensation for past and future nonpecuniary losses resulting  
20 from the unlawful retaliation complained of herein, including emotional pain, suffering,  
21 inconvenience, loss of enjoyment of life, and humiliation.  
22

23 62. Duane also seeks an award of punitive damages for IXL’s malicious and reckless conduct, as  
24 described herein, in amounts to be determined at trial.  
25  
26  
27  
28

**PRAYER FOR RELIEF**

Wherefore, Duane respectfully requests that this Court:

- A. Order IXL to make Duane whole, by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices.
- B. Order IXL to make Duane whole, by providing compensation for past and future nonpecuniary losses resulting from the unlawful retaliation complained of herein, including emotion pain, suffering, inconvenience, loss of enjoyment of life, and humiliation.
- C. Order IXL to pay Duane punitive damages for its malicious and reckless conduct, as described herein, in amounts to be determined at trial.
- D. Grant such further relief as the Court deems necessary and proper in the public interest.
- E. Award Duane his attorneys' fees and the costs of this action.

**DEMAND FOR A JURY TRIAL**

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff requests a jury trial on all questions of fact raised by its complaint.

Dated: August 17, 2017

THE MAREK LAW FIRM, INC.

By:           /s/ David Marek          

David Marek

228 Hamilton Avenue

Palo Alto, California 94301

(917) 721-5042

[david@marekfirm.com](mailto:david@marekfirm.com)

Attorney for Intervenor-Plaintiff

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SHERRY M. SHORE  
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ROBERT L. ADLER  
LAKEISHA M.A. CATON  
ERIN E. LYNCH  
KRISTA E. BOLLES  
CAITLIN D. BROWN  
CARA B. CHOMSKI  
ATOOSA N. ESMALI\*

March 17, 2015

\*AWAITING ADMISSION

**BY HAND**

United State Equal Employment  
Opportunity Commission  
New York District Office  
33 White Hall Street  
New York, New York 10006

Re: A. Scott Duane v. IXL Learning

Dear Sir or Madam:

We represent the Complainant, A. Scott Duane, in the above-referenced matter. I enclose for filing an original plus five copies of Mr. Duane's Charge of Discrimination.

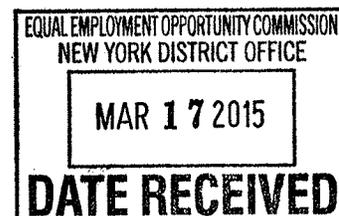
Thank you for your attention to this matter.

Very truly yours,



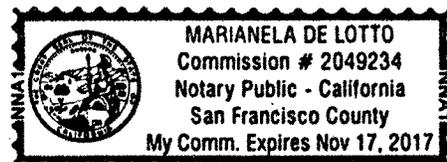
Cara B. Chomski

*Enclosures*



EEOC Form 5 (5/01)

<p align="center"><b>CHARGE OF DISCRIMINATION</b></p> <p><small>This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.</small></p>	<p>Charge Presented to: Agency(ies) Charge No(s):</p> <p><input type="checkbox"/> FEPA <input checked="" type="checkbox"/> EEOC</p>						
<p><b>CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING</b> and EEOC <i>State or local Agency, if any</i></p>							
<p>Name (indicate Mr. Ms. Mrs.) <b>Mr. Adrian Scott Duane</b></p>	<p>12/13/1984</p>						
<p>Street Address City, State and ZIP Code <b>2303 Park Blvd, Apt. 5 Oakland, CA 94606</b></p>							
<p><small>Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)</small></p>							
<p>Name <b>IXL Learning</b></p>	<p>No. Employees, Members <b>50+</b></p>						
<p>Phone No. (Include Area Code) <b>650-372-4040</b></p>							
<p>Street Address City, State and ZIP Code <b>777 Mariners Island Boulevard San Mateo, CA 94404</b></p>							
<p>Name</p>	<p>No. Employees, Members</p>						
<p>Phone No. (Include Area Code)</p>							
<p>Street Address City, State and ZIP Code</p>							
<p>DISCRIMINATION BASED ON (Check appropriate box(es).)</p> <p><input type="checkbox"/> RACE <input type="checkbox"/> COLOR <input checked="" type="checkbox"/> SEX <input type="checkbox"/> RELIGION <input type="checkbox"/> NATIONAL ORIGIN</p> <p><input checked="" type="checkbox"/> RETALIATION <input type="checkbox"/> AGE <input checked="" type="checkbox"/> DISABILITY <input type="checkbox"/> OTHER (Specify below)</p>							
<p>DATE(S) DISCRIMINATION TOOK PLACE</p> <table style="width:100%; border: none;"> <tr> <td style="text-align: center;">Earliest</td> <td style="text-align: center;">Latest</td> </tr> <tr> <td style="text-align: center;"><b>7/10/2013</b></td> <td style="text-align: center;"><b>1/8/2015</b></td> </tr> <tr> <td colspan="2" style="text-align: center;"><input type="checkbox"/> CONTINUING ACTION</td> </tr> </table>		Earliest	Latest	<b>7/10/2013</b>	<b>1/8/2015</b>	<input type="checkbox"/> CONTINUING ACTION	
Earliest	Latest						
<b>7/10/2013</b>	<b>1/8/2015</b>						
<input type="checkbox"/> CONTINUING ACTION							
<p>THE PARTICULARS ARE (If additional paper is needed, attached extra sheet(s)):</p> <p style="text-align: center;">Please see the attached EEOC Charge of Discrimination.</p>							
<p>I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.</p>	<p>NOTARY – When necessary for State and Local Agency Requirements</p> <p align="center"><i>M. S. Lotto</i></p>						
<p>I declare under penalty of perjury that the above is true and correct.</p> <p align="center"><i>March 10, 2015</i> Date</p> <p align="center"><i>[Signature]</i> Charging Party Signature</p>	<p>I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.</p> <p>SIGNATURE OF COMPLAINANT</p> <p align="center"><i>[Signature]</i></p> <p>SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year) <i>March 10, 2015</i></p>						



### CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Contra Costa

On 3-10-2015 before me, Marianela De Lotto, Notary Public  
Date Here Insert Name and Title of the Officer

personally appeared Adrian Scott Campe Luane  
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.  
Signature [Handwritten Signature]  
Signature of Notary Public



Place Notary Seal Above

#### OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

#### Description of Attached Document

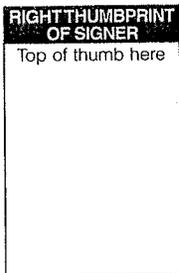
Title or Type of Document: \_\_\_\_\_

Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

#### Capacity(ies) Claimed by Signer(s)

- Signer's Name: \_\_\_\_\_
- Individual
  - Corporate Officer — Title(s): \_\_\_\_\_
  - Partner —  Limited  General
  - Attorney in Fact
  - Trustee
  - Guardian or Conservator
  - Other: \_\_\_\_\_



Signer Is Representing: \_\_\_\_\_

- Signer's Name: \_\_\_\_\_
- Individual
  - Corporate Officer — Title(s): \_\_\_\_\_
  - Partner —  Limited  General
  - Attorney in Fact
  - Trustee
  - Guardian or Conservator
  - Other: \_\_\_\_\_



Signer Is Representing: \_\_\_\_\_

**CHARGE OF DISCRIMINATION**

*A. Scott Duane v. IXL Learning*

**Introduction**

1. I am a 30-year-old transgender man. At all times relevant to this action, I was disabled due to complications from phalloplasty on November 3, 2014, a surgery related to my transition. I believe that IXL Learning (“IXL”) discriminated against me on the basis of my sex, gender identity, gender expression, disability, perceived disability, request for reasonable accommodation, and decision to take protected medical leave, and retaliated against me for complaining of this discrimination by terminating my employment.

2. I was employed by IXL from July 10, 2013 until it terminated my employment on January 8, 2015.

3. IXL is a web-based educational software company with its headquarters at 777 Mariners Island Boulevard, Suite 600, in San Mateo, California. IXL employs roughly 200 employees; although most work out of its San Mateo office, many employees work remotely from locations throughout the United States.

4. At IXL, I worked as a Product Analyst as part of the Product Development team in its San Mateo headquarters. Among other tasks, I wrote and reviewed design specifications for the IXL website and aligned IXL skills to state educational standards, including the Common Core. I also designed customized iPad and Android tablet keyboards and graphing components for our mobile apps. The IXL content team considered me the “expert” on our products for mobile platforms.

5. Throughout my employment with IXL, I was qualified for my position and performed my duties in a professional and competent manner. I earned excellent performance

reviews, received multiple awards for my work, and was considered an expert by my team for my contributions to all aspects of our mobile platforms.

6. IXL knew that I am transgender and discriminated against me after I had surgery in November 2014 and attempted to return to work after taking approximately two months of FMLA/CFRA leave. IXL refused to allow me to take sick leave prior to my surgery and misinformed me of the company's policies regarding paid disability leave. The company also refused to grant me reasonable accommodations for my disability during my recovery from surgery, even though I repeatedly requested this accommodation, offered to provide documentation from my physician, and specifically requested an accommodation that the company routinely grants to non-disabled, heterosexual, and cisgender employees for personal and professional reasons.

7. On December 30, 2014, the same day that I returned to work after my FMLA/CFRA leave, I posted an anonymous review on Glassdoor.com complaining that the company discriminates against minority or non-conforming employees in work assignments, promotions, raises, and flexible hours. At least two other IXL employees who are currently employed with the company have posted negative reviews of IXL on Glassdoor.com, and to my knowledge neither have been investigated, reprimanded, or terminated.

8. On January 6, 2015, I met with my supervisor to complain that I felt that the company had discriminated against me by failing to work with me to develop a reasonable accommodation for my disability. IXL terminated my employment on January 8, 2015, ostensibly on the basis of my Glassdoor.com review.

9. IXL terminated my employment two days after I complained of disability discrimination and within two weeks of my return from FMLA/CFRA leave and requests for

reasonable accommodation. IXL knew that I was disabled due to a complication of gender confirmation surgery.

**A. I Was Qualified For My Position At IXL And Was Recognized By My Team, Supervisor, And CEO For My Outstanding Performance.**

10. I joined IXL in July 2013 after receiving my Ph.D. in mathematics in June 2013 from the University of California, San Diego, with a G.P.A. of 3.93. I excelled at IXL and was recognized for my outstanding performance. I was qualified for my position and performed my duties in a professional and competent manner throughout my employment with the company.

11. IXL gave me three performance reviews over the course of my employment with the Company. I received my first review on September 12, 2013, after 60 days of employment at IXL, from Kate Mattison. Ms. Mattison supervised me between July 10, 2013, and December 31, 2013. Ms. Mattison rated all aspects of my performance between a 3 and 4 on a 1-5 scale, denoting performance that “consistently meets” or was “consistently above” expectations. In this review, Ms. Mattison noted that “Scott has a very positive attitude and great enthusiasm. He is willing to tackle any project and volunteers to take on new responsibilities.”

12. I received my second performance review from Ms. Mattison after 90 days of employment with IXL on November 6, 2013. In this review, Ms. Mattison also ranked my performance between a 3 and 4, indicating that my performance consistently met or was above IXL’s expectations.

13. I received my third performance review in or around January 2014 from David Keyes, who supervised me from January 1, 2014, until IXL terminated my employment on January 8, 2015. Mr. Keyes rated all aspects of my performance at a 4 or 5, and noted that I had improved in all areas that Ms. Mattison had outlined opportunities for growth. Mr. Keyes also praised my work handling mobile device platforms, and for becoming a leader in mobile testing. As a result

of this review, Mr. Keyes assigned me the project of designing our mobile icons for precalculus so that I could engage in additional creative roles within the Company.

14. I received my second performance review in or around January 2014 from David Keyes, who supervised me from January 1, 2014, until IXL terminated my employment on January 8, 2015. Mr. Keyes rated all aspects of my performance at a 4 or 5, and noted that I had improved in all areas that Ms. Mattison had outlined opportunities for growth. Mr. Keyes also praised my work handling mobile device platforms, and for becoming a leader in mobile testing. As a result of this review, Mr. Keyes assigned me the project of designing our mobile icons for precalculus so that I could engage in additional creative roles within the company.

15. IXL awarded me two “team trophy” awards for my work. Mr. Keyes awarded me a “team trophy” for designing icons for the precalculus grade, which appear on IXL’s iPad app. Mr. Keyes awarded me a second “team trophy” for my design of an innovative mobile keyboard, which was well-received by our mobile software engineers.

16. IXL’s CEO, Paul Mishkin, also recognized my excellent work for the company. IXL develops “skills,” which are learning modules addressing very specific topics. Skills typically take the form of progressively difficult series of questions in a given subject area. In August 2014, Mr. Mishkin stated that he was impressed by my work designing precalculus skills in sinusoidal graphing, matching polynomial functions and graphs, writing series in sigma notation, and finding recursive formulae for sequences. Mr. Keyes made these statements praising my work orally during a meeting that included myself, Mr. Keyes, and Ms. Mattison.

17. On or around September 2014, Ms. Mattison sent an email to myself and Mr. Keyes praising the skills that I designed for the August 2014 product release.

18. Throughout my employment, IXL's Sales team used skill sets that I designed to market our product to potential customers at conferences and other industry events. The sinusoidal graphing skill that I developed was particularly popular among math teachers and school principals.

**B. IXL Knew That I Am Transgender.**

19. Although I never formally came out to IXL as a transgender person, this information is readily available online. I am involved in transgender activism, and have been for some time. Several weeks after I began work at IXL, a project that I had worked on as a graduate student in San Diego garnered significant media attention. As a result, I became a fairly significant name in the transgender advocacy community. I also write for The Advocate, one of the preeminent publications for the Lesbian, Gay, Bisexual, and Transgender ("LGBT") community.

20. A simple Google search of "Adrian Scott Duane" reveals that I am transgender; indeed, my byline on the Advocate states "Dr. ADRIAN SCOTT DUANE is a math nerd, an activist, and a transsexual man. He currently designs math learning software in the Bay Area."

21. On July 12, 2013, IXL hosted a "new employee" activity which involved an urban scavenger hunt in San Francisco. One "challenge" in the scavenger hunt involved having a female team member draw the Golden Gate Bridge on a male team member's chest using lipstick. I volunteered to be drawn on. Karen Penner, IXL's Head of Recruiting, drew on my chest. My chest has obvious scarring from a bilateral mastectomy, known as "top surgery," which I had several years before as part of my transition. Another team member took a picture of Ms. Penner drawing on my chest, which the company used on a slide show later that day and saved to the "fun" folder in IXL's shared drive.

22. During my employment with IXL, I disclosed my transgender status to four employees. I first disclosed my status in August 2013 to an employee whom I regard as a personal friend. We frequently discussed my transgender status on the office's instant messenger program.

23. On or around August 2013, a project I had worked on in San Diego called "Visible Bodies" received press coverage in The Advocate and the Huffington Post, with my name attached to the project. I sent these articles to the employee who knew that I was transgender.

24. On or around September 2013, I went to lunch with Maricela Prado (a Human Resources employee, who was later promoted to lead Human Resources in October 2014), Ms. Penner, and another employee. Ms. Prado asked me if I like to date men or women, and I responded that gender is not the most important factor for me. However, I noted that I mostly date men.

25. On or around September 2013, Michael Pi, (a member of IXL's Sales team) and I attended a recruiting conference at Santa Clara University, standing together at a table for approximately three hours. During this time, Mr. Pi asked me a number of questions about being gay, and mentioned a transgender student he taught when he worked as a high school teacher several years before. Even though this student was male-to-female transgender, Mr. Pi referred to the student as a "he." I corrected Mr. Pi as to the appropriate gender pronoun for this student, and offered advice as to how to handle gender difference in the classroom. When Mr. Pi asked why I knew so much about transgender youth, I told him that I had worked with LGBT teens at Hillcrest Youth Center in San Diego while studying for my Ph.D.

26. In November 2013, I attended a private party in San Francisco hosted by Chaz Bono, a well-known transgender advocate. I mentioned that I attended this party to Ms. Penner

the following Monday. Ms. Penner asked, 'Isn't she Sonny and Cher's kid?' I corrected Ms. Penner, stating that Mr. Bono is a "he."

27. A friend of mine tagged me on Facebook as having attended Mr. Bono's event. At the time, I was Facebook friends with Mr. Pi. I believe that Mr. Pi saw this posting.

28. Also in December 2013, I was engaged in the process of editing an anthology titled "Letters For My Siblings," in collaboration with another transgender author. This book is a collection of narratives by non-binary and genderqueer authors. I mentioned that I was editing this book to Tatum Radcliffe, an administrative assistant in Human Resources who works closely with Ms. Prado and Ms. Penner. I also mentioned the subject matter of the book. Ms. Radcliffe asked me how I had become engaged in this work, and I told her that I had a good friend who is genderqueer.

29. In or around January 2014, Gary Yee, an information technology employee, saw me in the on-site gym locker room and asked about the scars on my chest. I told Mr. Yee that I had surgery, but did not specify further. Mr. Yee continued to ask me questions, asking why I had surgery. I attempted to evade his line of questioning by stating that I had surgery to correct a growth which needed to be removed.

30. Although, to my knowledge, only Mr. Pi and Mr. Yee asked directly about my transgender status and physical appearance, many other male employees of IXL saw me in the gym locker room. These employees included Jeffrey Peterson, an employee in the Sales department who attended the same high school with me before my transition, and Mark Ritterhoff, a senior software developer who requested to become my Facebook friend and expressed confusion when I declined his request.

31. I had a preliminary surgical procedure in February 2014 with Dr. Curtis Crane, a physician in San Francisco who focuses on gender confirmation surgery. A simple Google search of Dr. Crane reveals that he and his practice work almost exclusively with the transgender community.

32. I was out of the office for one week following my February surgery. When I returned to work, I was unable to speak properly due to side effects from medications and was limping slightly. At least one IXL employee (I believe Ms. Penner) asked me why I was unable to speak and for details regarding my surgery. I stated that I was missing a mucous membrane somewhere on my body, so my surgeon had taken some from my mouth to compensate.

33. In or around March 2014, Mr. Peterson began working at IXL in its Sales department. During a casual conversation at the office, Mr. Peterson and I realized that we had attended the same high school in Edina, Minnesota. Mr. Peterson stated that he did not remember me, I told Mr. Peterson that I did remember him, but stated that I was not surprised that he did not remember me because I had not been around much in high school. I added this disclaimer because I was concerned that Mr. Peterson could look me up in an old high school year book, which showed me before my transition.

34. Also in or around March 2014, I went out in a large group of colleagues and friends including Ms. Prado, Ms. Penner, Mr. Pi, and Ms. Radcliffe for karaoke. I brought a friend with me, who is also a transgender man but frequently reads as more female or gender ambiguous than I do.

35. Between March and June, 2014, I was engaged in organizing work for Transgress Press, a publishing company that exclusively publishes transgender titles. We planned to publish the book Manning Up: Transsexual Men on Finding Brotherhood, Family, and Themselves in late

May, 2014. I had written a piece for this book and was helping to organize the release party in San Francisco. I mentioned to Ms. Penner and another employee that I had written a piece for an anthology by and for men titled Manning Up, though I did not tell them that it focused on transgender men, and did not tell them the subtitle.

36. During this time, I made a video trailer for the book, and sent this link to three employees whom I regard as personal friends, and to whom I had disclosed my transgender status.

37. Two of my work friends to whom I had disclosed that I am transgender attended the release party for Manning Up. Another colleague whom I did not know and who did not, to my knowledge, know of my transgender status also expressed interest in attending. My two work friends told the third coworker that she could not attend the party, though I do not know what reason they gave her.

38. In July 2014, I began dating my partner, Jenna. I mentioned my new relationship to several colleagues, including Jeremy Murphy, with whom I shared a cubicle. I never disclosed my status to Mr. Murphy. Mr. Murphy asked whether this was my first time dating a woman, and I responded that it was not.

39. On or around April or May of 2014, Mr. Pi specifically asked another coworker about the scars on my chest, and asked, "Did Scott used to be a girl?" This coworker relayed that conversation to me, and stated that she attempted to deflect the question without answering affirmatively or negatively. This incident indicated to me that my gender was the subject of discussion by at least some of my professional colleagues; what's more, this incident indicated to me that IXL fostered an environment that accepted such discussion and did nothing to discourage workplace incidents hostile to queer and transgender employees.

40. Mr. Pi added me on Facebook shortly after I joined the company, and I accepted his request. I avoided discussing that I am transgender on my Facebook feed, but posted articles about trans-related topics. I later removed Mr. Pi from my Facebook friends list after he asked another employee whether I am transgender. I was concerned that Mr. Pi might inadvertently “out” me as transgender during a conversation with another employee. Mr. Pi actively socializes with many of my colleagues at IXL in different departments, and seemed unaware of the damage that being outed as transgender can do to an employee’s career and personal life. Like many employees at IXL, I believe that Mr. Pi received no training as to how to respect other employees’ privacy in the workplace with respect to gender identity, gender orientation, and gender expression.

41. On December 11, 2014, Jenna and I attended IXL’s Christmas party. We did not stay very long, as I was still in the process of recovering from surgery. Jenna met many of my colleagues, including Ms. Prado, Mr. Murphy, Mr. Keyes, and Ms. Penner. I introduced Jenna to my colleagues as my partner.

42. I believe that bringing Jenna to the IXL Christmas party raised questions regarding my gender expression and identity among my colleagues. Jenna has short hair and frequently wears “men’s” clothing, and others frequently read her gender presentation as that of a stereotypically gay woman. I am often perceived as a gay man, and when we appear together, others often question our sexual orientations and our gender identities and expressions because we do not fit into neat categories. For these reasons, bringing Jenna to my office Christmas party may have indicated to my coworkers that I am transgender or that my gender expression and identity fall outside of the accepted gender binary.

43. I believe that IXL's formal policies and workplace environment fostered a culture of discrimination against employees who do not conform to accepted gender roles, identities, and expression. In addition to the conduct directed towards me, IXL's formal content restrictions for our software reinforced stereotypical gender roles. When I began working for the Company in July 2013, I noticed that IXL's content restrictions for mathematics word problems included a provision that stated, to the best of my recollection, "Activities in word problems should be gender appropriate. For example, a problem like, 'Tim went shopping for skirts' should never appear." I found these gender stereotype-reinforcing restrictions hostile to employees whose gender identity and expression may not conform to the "gender appropriate" behaviors that IXL required that our site's content reinforce. I verbally discussed my concerns with three other employees.

**C. IXL Did Not Object To My Flexible Schedule Before I Became Disabled.**

44. During my January 2014 performance review and before I became disabled, I asked Mr. Keyes about my work schedule. I am involved in community organizing work, and would occasionally work irregular hours—for example, by coming in at 7:00am and working until 3:30pm, or beginning work at 11:00am and working until 7:30pm. I brought up this issue during my performance review because I wanted to ensure that keeping an irregular schedule was not a problem for Mr. Keyes or for the company. Mr. Keyes told me that my irregular hours were "absolutely fine," because I always got my work done and made sure not to miss any meetings.

**D. IXL Improperly Disclosed Employees' Private Medical Information.**

45. I was very concerned that IXL Human Resources did not respect the privacy of employees' medical information throughout my time with the company.

46. In or around January 2014, Ms. Penner informed me that her subordinate—whom she identified by name—had lupus, and that this employee was on leave for 6 weeks to have kidney

surgery related to her lupus. Ms. Penner told me that this employee was also having liposuction. I told Ms. Penner that she should not have told me about this employee's medical condition. Ms. Penner replied that it was "fine" to tell me because the employee was engaged in lupus-related advocacy.

47. Following this encounter, I became concerned that IXL's Human Resources Department would not respect my own personal and medical privacy before, during, and after my gender confirmation surgery. Indeed, Ms. Penner and Ms. Prado asked me invasive questions in front of other employees during the lead-in to my surgery. As the Human Resources representative, Ms. Prado had full access to the medical records that I submitted to the company in connection with my CFRA/FMLA leave of absence.

**E. IXL Discriminated Against Me On The Basis Of My Gender And Disability.**

48. I received no training from IXL's Human Resources Department regarding the company's disability policies and procedures. During my orientation on or around July 10, 2013, Ms. Prado came to the "Disability" section of the training and purposefully skipped over it, stating to me and my colleagues at the training session that we were a "bunch of young, healthy guys and didn't need it."

49. I knew that I would need to know the company's disability policies in the future because I planned to have surgery related to my status as a transgender person, but I did not say anything because I felt uncomfortable asking for this information in front of a room of new colleagues.

50. When I first joined IXL, I spoke with another IXL employee, Nemo Curiel, regarding the company's sick leave policy. Mr. Curiel was once called into Human Resources for taking "too many" sick days, though the company's sick leave policy technically provides for

unlimited sick time with the approval of a manager. Mr. Curiel is Mexican-American; he remarked that he was one of only two Latino employees at IXL, and that IXL's workforce is almost entirely White or Asian American. We agreed that the culture at IXL is generally unwelcoming to employees who are not White or Asian American, who are not able-bodied, and who do not fit into neat categories of gender identity, orientation, and expression.

51. In February 2014, I had a preliminary surgical procedure in preparation for my later phalloplasty. IXL allowed me to take one week of sick leave for this procedure.

52. In July 2014, I informed my supervisor, Mr. Keyes, that I needed to have another surgery, which was scheduled to take place on November 3, 2014. I also told Mr. Keyes that I would need to be out for between six and eight weeks to recover after the surgery. Finally, I told Mr. Keyes that I would need to have weekly pre-operative appointments to prepare for my surgery.

53. I did not tell Mr. Keyes the type of surgery that I prepared to undergo, nor did I inform him that I am transgender. Mr. Keyes told me that I could work remotely on the days that I had pre-operative medical appointments.

54. After speaking with Mr. Keyes in July 2014, I spoke with IXL's then-Human Resources manager, Brad Marshall, about my upcoming surgery. I asked Mr. Marshall about my options for disability leave and pay. Mr. Marshall informed me that I could take three months of medical leave under the California Medical Rights Act. Mr. Marshall also told me that I could only be paid for six weeks of disability—which I later found out was incorrect, as I was in fact eligible to receive up to 52 weeks of paid disability.

55. Mr. Marshall also told me that I would have to cash out all of my vacation days before I could begin to take disability leave, and that I could not take paid sick days for the week between my last day of work and the beginning of my State Disability Insurance ("SDI") pay.

56. IXL terminated Mr. Marshall in September 2014, one day before he and I were scheduled to discuss my upcoming surgery. The company promoted Ms. Prado to take over Human Resources. Ms. Prado is a close friend of Ms. Penner.

57. I was concerned that Ms. Prado would not respect my medical privacy. In my experience, both Ms. Prado and Ms. Penner inappropriately disclosed employees' personnel issues to members of IXL whom they regarded as friends. On or around June 2014, my colleague and friend Mr. Curiel decided to leave the company. Mr. Curiel put his two week notice in to Ms. Prado, and specifically asked Ms. Prado not to disclose that he was leaving the company to other employees. Later that same day, I received an instant message from Ms. Penner asking what I knew about Mr. Curiel's decision to leave the company. I had not heard that Mr. Curiel was leaving the company before that time.

58. At the time that I needed to disclose my upcoming gender confirmation surgery to IXL, I was concerned that Ms. Prado would not respect my medical privacy due to her reputation within the company and lack of discretion regarding Mr. Curiel. Before meeting with Ms. Prado, I spoke with Mr. Keyes about my concerns. I told Mr. Keyes that I was concerned with keeping my upcoming medical leave private, and that I wanted to ensure that Ms. Prado did not disclose my medical information to other employees. Mr. Keyes told me that I should make clear to Ms. Prado that I wanted my medical information to remain strictly confidential during our meeting. I emailed Ms. Prado that same day stating that my medical information should remain private.

59. During a meeting with Ms. Prado, Mr. Keyes, and myself several days after the company terminated Mr. Marshall, I entered the room wearing a protective sleeve over my right arm, which would be used as graft tissue during my upcoming surgery. Ms. Prado asked me, in

front of my supervisor, “What’s that on your arm? What happened?” I told Ms. Prado that I would address this during our meeting.

60. During the September 2014 meeting, I told Ms. Prado that I would need hand therapy after my operation. She replied by asking me why the surgeon needed to use my right arm, and whether they could use my left arm instead.

61. At this same meeting, Ms. Prado told me that I would need to cash out my vacation days before I could take leave time, and stated that I was not allowed to use sick leave during the absence from work due to my surgery.

62. During the September 2014 meeting, Mr. Keyes told me that he would be flexible when I returned from surgery, and stated that if I needed to work remotely or part-time, that he would work with me to accommodate my needs.

63. Several days after the September 2014 meeting, Ms. Penner asked me what the “thing” on my arm was. She continued asking invasive questions when I attempted to avoid giving specific answers as to the nature of my surgery. Ms. Prado witnessed this conversation and did not intervene.

64. After I returned to my desk following this conversation, Ms. Prado sent me a Gchat message apologizing for Ms. Penner’s behavior. Ms. Prado told me that Ms. Penner did not know about my upcoming surgery. I did not respond to Ms. Prado’s messages.

65. My last day at work before my surgery was October 30, 2014.

**F. IXL Refused To Reasonably Accommodate My Disability.**

66. On Friday, December 19, I emailed Mr. Keyes to update him as to my recovery. I told Mr. Keyes that I had suffered a surgical complication that made it challenging for me to be out of the house for extended periods of time. I told Mr. Keyes that I still planned to return to

work on December 30, but asked Mr. Keyes whether I would be able to work half days in the office and half days at home as an accommodation for this surgical complication.

67. Mr. Keyes replied to my email requesting a modified schedule on Monday, December 22. Mr. Keyes stated that “I would prefer that you be in the office for your hours when you come back since you are more productive here.” Mr. Keyes asked whether there was anything that the company could do to “accommodate your situation so that you can work in the office.”

68. Being physically present in the office did not affect my ability to perform the essential functions of my job in any manner. As a Product Analyst, I could perform all of the functions of my job anywhere that I could log into the IXL system—essentially, any location with a secure internet connection. IXL routinely allowed other employees to work remotely even full time in order to accommodate personal and family obligations. My supervisor, Mr. Keyes, informed me that the company had hired at least one employee with the understanding that this employee would work remotely 100% of the time.

69. I replied to Mr. Keyes on December 30, 2014, and copied Ms. Prado. In this email, I stated that remote work qualifies as a “reasonable accommodation,” and noted that the company routinely granted this accommodation to IXL employees taking care of children, out of the office for illnesses, or even to extend vacations. I offered to provide written documentation from my physician regarding my disability, and noted that my physician had suggested that I work remotely as much as possible, especially after the complication. I also stated that I would be happy to work with Mr. Keyes to resolve any concerns he may have had regarding my productivity, including developing “metrics that we can put in place so that you can monitor my progress to your satisfaction” or a “weekly productivity review.” I have attached the email exchange from Mr. Keyes between December 19 and December 30, 2014, as Exhibit A to this Charge.

70. My request to work in the office for half days and work from home during the other half was a reasonable accommodation for my disability and would not have burdened the company in any way. In addition, Mr. Keyes refused to engage in an interactive process with me—or indeed any discussion—regarding how IXL could accommodate my disability in a manner that would not create an undue hardship on the organization. I submitted a note from my physician to IXL on December 29, 2014, explaining that my requested accommodation for a modified work-from-home schedule was medically necessary. That note is attached as Exhibit B to this Charge.

71. During my email and in-person discussions with Mr. Keyes between December 22 and December 30, 2014, I discussed the difficulties that I was having in securing reasonable accommodations with a colleague and personal friend to whom I had disclosed my transgender status. This employee was concerned by the company's unwillingness to offer me a modified work schedule after I suffered complications from surgery for personal reasons.

72. This employee and I discussed how IXL's policy of allowing "unlimited" sick leave at the discretion of the employee's manager actually meant that employees took far fewer sick days than they would under policies that provide for a set number of sick days. We discussed this policy in the context of a study indicating that "unlimited" sick policies negatively affected employees' willingness to take sick days in part because they feared retaliation, and noted that we believed that this was occurring at IXL.

73. This employee asked that I not name her in this Charge, because she is concerned that IXL may retaliate against her for any participation in this proceeding.

74. I returned to IXL on December 30, 2014. I met with Mr. Keyes that day. During that meeting, Mr. Keyes told me that another employee's wife had received concerning medical test results, and that as a result that other employee would be working 100% remotely to care for

her. Mr. Keyes also told me of another IXL employee who was on a 50% remote-work schedule because her husband lived in the District of Columbia.

75. After discussing the accommodations granted to these other IXL employees—both of whom were non-disabled, cisgender, and heterosexual—Mr. Keyes reviewed my own very strict accommodations, which required that I be in the office at fixed hours every day and report to him twice per week via email, and another two times per week in person. My schedule upon returning from medical leave was very strict by the standards of other employees at IXL, nearly all of whom work flexible hours and from home, with few checkups or restrictions. My “Scott Duane Working Remotely Plan” is attached as Exhibit C to this Charge.

**G. IXL Terminated My Employment After I Complained That The Company Unlawfully Discriminated Against Me And Other Non-Conforming Employees.**

76. After my disappointing meeting with Mr. Keyes on December 30, I posted an anonymous review of the company on Glassdoor.com, stating in relevant part that:

There are no politics if you fit in. If you don't—that is, if you're not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball—then you're likely to find yourself on the outside. Treatment in the workplace, in terms of who gets flexible hours, interesting projects, praise, promotions, and a big yearly raise, is different and seems to run right along these characteristics.

There is essentially no HR knowledge or staff at this company. Know your rights when you work here, because they don't, and they don't care to learn. Most management has no idea what the word “discrimination” means, nor do they seem to think it matters.

The full text of this review is attached to this Charge as Exhibit D.

77. On January 6, 2015, Mr. Keyes asked to speak with me in his office. In this one-on-one meeting, Mr. Keyes stated that I seemed unhappy since returning from medical leave. I told Mr. Keyes that I was not feeling challenged in the work that the company had assigned to me since I returned from my medical leave, and that I was not happy with how the company had

handled my disability leave. I explained to Mr. Keyes all of the grievances discussed in this Charge, with the exception of my conversations with Ms. Penner. I did not bring up my concerns about my medical privacy that had arisen after my encounters with Ms. Penner because I was concerned that I would suffer retaliation.

78. During the January 6, 2015, meeting, I noted to Mr. Keyes that I had been working hard and meeting all of the goals outlined in our correspondence on December 30, 2014, attached to this Charge as Exhibit B. Mr. Keyes agreed that I had met all of the goals we had discussed and stated that he noticed and appreciated my work ethic and productivity.

79. After I outlined my grievances to Mr. Keyes, Mr. Keyes seemed receptive, and stated that he would escalate my concerns to Lenore Ockerberg, Ms. Prado's supervisor in the Human Resources Department. Mr. Keyes stated that he would keep me informed as to the progress of the escalation of my concerns. Mr. Keyes also apologized profusely for having discriminated against me.

80. To the best of my recollection, Mr. Keyes told me, "I'm really sorry that you felt discriminated against" and that "I didn't mean to discriminate against you." He continued that, "I can totally understand why you would feel this way," and stated that he wanted to earn my trust back and be my advocate. He stated that he was my advocate as my manager. Mr. Keyes seemed emotional and sincere, and I believe that he acted in good faith when escalating my concerns to the company's upper management. I do not believe that Mr. Keyes was or is aware that I am transgender.

81. On January 7, 2015, the day after my meeting with Mr. Keyes, I received an email from Mr. Mishkin, the CEO of IXL. Mr. Mishkin's email to me stated that he had heard that I had complaints regarding disability discrimination, and that he wanted to discuss these complaints with

me. Mr. Mishkin told me that IXL took discrimination very seriously. A copy of Mr. Mishkin's email is attached to this Charge as Exhibit E.

82. I met with Mr. Mishkin under the guise of discussing my concerns that IXL had discriminated against me on the basis of my disability on January 8, 2015. During this meeting, Mr. Mishkin and I discussed my concerns regarding disability discrimination for approximately ten minutes. I told Mr. Mishkin all of my grievances, and informed him that Mr. Keyes and Ms. Prado had acted illegally after I returned from medical leave by refusing to grant me medically necessary accommodations that they routinely granted to other, heterosexual, cisgender, and non-disabled employees for personal and professional reasons. Mr. Mishkin seemed unconcerned.

83. After a brief discussion of my disability concerns, Mr. Mishkin presented me with the December 30, 2014 review that I had posted anonymously on Glassdoor.com. Exhibit D. Mr. Mishkin said to me, "I think you know what this is."

84. I asked Mr. Mishkin why we were discussing the Glassdoor.com review, because he had asked me to meet with him to discuss my complaints of disability discrimination. Mr. Mishkin continued to press me on the Glassdoor.com review, asking whether I had written the review. I stated to Mr. Mishkin that I had written that review, and that I had written it at a time when I was angry and frustrated by the way that the company had handled my return from surgery and disability due to surgical complications.

85. Mr. Mishkin appeared angry and upset about the instances of discrimination that my Glassdoor.com review identified, and demanded evidence behind the statements that I had posted. Mr. Mishkin specifically asked me what I meant by "mainstream gay" and what exactly it was about me, personally, that I felt that IXL had discriminated against me regarding.

86. As our CEO, I believe that Mr. Mishkin had access to my medical records and the disability paperwork that I had submitted to Human Resources regarding my gender confirmation surgery.

87. I replied to Mr. Mishkin's questions by stating, roughly, "I'm queer, and I stick out." Mr. Mishkin asked me whether I felt that there was a culture of discrimination at IXL, and I replied, "Yes, I do."

88. In response, Mr. Mishkin demanded why I had not addressed the concerns regarding "micromanagement" that I raised in my Glassdoor.com review before posting my concerns to a public site. I told Mr. Mishkin that at the time that I wrote the review, I had been focused on my surgery, and had addressed these concerns with Mr. Keyes two days before during our January 6, 2015 one-on-one meeting. Mr. Mishkin stated that it "wasn't right" for me to discuss these concerns on an anonymous public forum when I had not raised them directly with my manager. In response, I offered to take the post down.

89. Mr. Mishkin stated that I had not spoken with my manager soon enough, told me that the post showed "poor judgment and ethics," and stated that he "no longer felt comfortable working with" me.

90. After I left Mr. Mishkin's office, I found that IXL employees had cleaned out my desk and that Human Resources had prepared the paperwork associated with my discharge from the company. It was apparent that Mr. Mishkin had intended to terminate me before our meeting had started, and that IXL personnel had cleaned out my desk while I was engaged in the meeting with Mr. Mishkin.

91. I believe that Mr. Mishkin never intended to engage in a constructive dialogue with me regarding the company's failure to accommodate my disability, and instead terminated my

employment on the apparent basis of a Glassdoor.com review that I had posted nearly two weeks before—two days after Mr. Keyes had elevated my disability discrimination complaints to IXL’s upper management.

### **Conclusion**

92. I believe that IXL discriminated against me because of my sex, gender identity, gender expression, disability, request for reasonable accommodation, and decision to take protected medical leave, and retaliated against me for complaining of this discrimination.

93. As a result, I have suffered stress, anguish, humiliation, emotional distress, and loss of compensation, and I request an award of back pay, front pay in lieu of reinstatement, lost benefits, compensatory and punitive damages, liquidated damages, attorneys’ fees and costs, and an order directing IXL to cease and desist from its discriminatory and retaliatory practices and directing any other injunctive relief, together with such further and additional relief that the Department of Fair Employment and Housing (“DFEH”) or Equal Employment Opportunity Commission (“EEOC”) deems just and proper.

94. I provide the foregoing information to assert my rights under Title I of the Americans with Disabilities Act of 1990 (“ADA”), the Americans with Disabilities Act Amendments Act of 2008 (“ADAA”), Title VII of the Civil Rights Act of 1964 (“Title VII”), the Family and Medical Leave Act (“FMLA”), Section 8 of the National Labor Relations Act (“NLRA”), the California Fair Employment and Housing Act (“FEHA”), and the California Family Rights Act (“CFRA”), and to invoke the jurisdiction of the DFEH and the EEOC to investigate this Charge of Discrimination and proceed in accordance with their statutory mandates and procedural regulations, and to satisfy all procedural prerequisites to the commencement of a civil action.

95. Nothing in this Charge is intended to constitute a waiver of any right to seek judicial relief under state or local law with respect to the conduct complained of hereinafter.

96. I will advise the EEOC of any change in my address and telephone number, and I will cooperate in the proper processing of, and investigation into, this Charge. Please direct all communications and inquiries regarding this matter to David M. Marek and Cara B. Chomski, Esq., of Liddle & Robinson, L.L.P., 800 Third Avenue, New York, New York 10022, (212) 687-8500.

# EXHIBIT A

----- Forwarded message -----

From: **Scott Duane** <[sduane@ixl.com](mailto:sduane@ixl.com)>  
Date: Tue, Dec 23, 2014 at 9:11 PM  
Subject: Fwd: Return update  
To: Adrian Duane <[adrian.duane@gmail.com](mailto:adrian.duane@gmail.com)>

----- Forwarded message -----

From: **Scott Duane** <[sduane@ixl.com](mailto:sduane@ixl.com)>  
Date: Tue, Dec 23, 2014 at 3:39 PM  
Subject: Re: Return update  
To: David Keyes <[dkeyes@ixl.com](mailto:dkeyes@ixl.com)>  
Cc: Maricela Prado <[mprado@ixl.com](mailto:mprado@ixl.com)>

Hi David,

So before I start I want to let you know that I'm writing with the intent of finding a solution with you collaboratively -- there's a chance some of this email could be read as combative or hostile, and that is not the tone I'm intending at all.

I went ahead and spoke with an employment attorney to check in about what is meant by "reasonable accommodation", and she said with certainty that remote work qualifies here -- after all, IXL employees frequently work remotely to take care of children, to wait for repair people, because they're sick, or even just to extend vacations. This situation shouldn't (and legally can't) be treated any differently -- that is, under the Americans with Disabilities Act, IXL has to provide me with this accommodation. The attorney I spoke with also provided several online resources to me about the federal law which I am happy to pass onto you so that you can see some examples of how the ADA is implemented. I'm also CCing Maricela, who I believe is still filling in as the HR manager and should be familiar with the protections provided by the ADA.

My doctor is happy to provide written documentation, and actually suggested as much remote time as possible so that things heal quickly, particularly the complication that has arisen.

I completely understand your concerns about remote work and productivity, and I also understand that your primary responsibility is to make sure the math team meets all of its goals. But the bottom line is, I want to return to work, and I am certain I can perform the essential functions of my job while working remotely 50%. I'd like to find a solution under which I return on the 30th with this accommodation, or something very close to it. I suggest that we find some metrics that we can put in place so that you can monitor my progress to your satisfaction. I'd also suggest making all office time in the morning, so that you're sure to always have a chance to catch me in person to let me know what you'd like prioritized, etc. If there's anything else you'd like to include, such as a weekly productivity review, I'm happy to do that as well.

Best,

Scott

On Mon, Dec 22, 2014 at 3:47 PM, David Keyes <[dkeyes@ixl.com](mailto:dkeyes@ixl.com)> wrote:

Hi Scott,

It was great to see you as well! Glad to hear your recovery is going pretty smoothly.

As far as the plan goes for returning to work, I would prefer that you be in the office for your hours when you come back since you are more productive here.

Is there anything we can do to accommodate your situation so that you can work in the office? If you would need to extend your leave to aid in your recovery, that would be totally fine as well. Just let me know!

Thanks,  
David

On Fri, Dec 19, 2014 at 12:53 PM, Scott Duane <[sduane@ixl.com](mailto:sduane@ixl.com)> wrote:

Hi David,

Great to see you briefly at the Christmas party. I wanted to give you a quick update on how things are going and begin to finalize my plan for returning to work.

As you probably have heard, things have been going very well in terms of healing, for the most part. Unfortunately, the day after the party, a complication called a fistula appeared. This is not very serious, but will make it challenging to be out of the house for long periods of time until it fully heals. My doctor believes I should heal from this quickly, but it may affect how soon I can return.

For now, I am still planning on returning Dec 30, but I'm wondering if you'd be open to me working half days in the office and half days at home for the first few weeks. This would make the transition much easier for me, I think.

Let me know what you think. Looking forward to being back at it. Have a good holiday,

Scott

# EXHIBIT B

**BROWNSTEIN & CRANE SURGICAL SERVICES**

---

**CURTIS CRANE, M.D.**  
575 Sir Francis Drake Blvd, Ste 1  
Greenbrae, CA 94904  
Office: 415.625.3230  
Fax: 415.625.3233  
E-mail: [Curtis@brownsteincrane.co](mailto:Curtis@brownsteincrane.co)  
Site: [www.brownsteincrane.com](http://www.brownsteincrane.com)

Monday, December 29, 2014

Re: Scott Duane  
D.O.B.: 12/13/1984

To Whom It May Concern:

Please be advised that Scott Duane has been under my care following surgery on November 3, 2014. Due to delayed postoperative healing, it is advised that the patient be allowed to work remotely starting at his return to work on December 26, 2014 for at least 4 more weeks to allow for extended recovery time. These restrictions should be in place through January 25, 2015.

Should you have any questions please contact our office.

Sincerely,



Curtis Crane, M.D.

# EXHIBIT C

## Scott Duane Working Remotely Plan

### Working schedule (exact hours up for discussion, but consistency is required)

- Monday:
  - o Home: 6:30 am – 10:30 am
  - o Office: 12 pm – 4 pm
  - o The Math PA meeting is now 1 – 2 pm, and I'd like you to be in the office for this
- Tuesday – Friday:
  - o Office: 7 am – 11 am
  - o Home: 12 pm – 4 pm
- Two 1-1's a week, one on Tuesday and one on Friday

### Weekly work plan

Send me an email on Friday afternoon with a detailed and prioritized breakdown of what you'll be working on the following week categorized by tasks for Monday, goals for the week, and maintenance tasks. Include the relevant Fogbugz scheduled item cases tracking these tasks.

Here is an example (tasks are listed in order of priority):

#### Tasks for Monday

- 1) Revisions of K-VENN-12 and PC-STAT-91 back to reviewer
- 2) Complete PC-FUN-3 first draft (with 1-3 example scenarios)
- 3) Complete standard alignment review (Fogbugz case # and link)

#### Goals for the week

- 1) Hand off K-VENN-12 and PC-STAT-91
- 2) Push PC-FUN-3 into second round review
- 3) Complete first round testing of A-80UP and G-22
- 4) Complete a first draft of PC-STAT-71
- 5) Iterate on mobile keyboard design project. Talk to Xing, talk to Andy. Submit latest revision to David for review.

#### Maintenance tasks

- Review Isidora's specs on schedule (same day if revision received in the morning, same or next day if revision received in the afternoon)
- Complete phone interviews and job test reviews, and submit evaluations to Jobvite within 1-3 days of the interview or receiving the job test

### General goals

Write 1-2 new spec drafts a week. Flip reviews, revisions of specs within 1-2 days after receiving them. Stay on top of Fogbugz tasks, with both the "Math Content" milestone and the upcoming release milestone.

Meet goals set in Friday email consistently and with good quality. Aim to reduce time specs need in first and second round review. Currently it has been 10+ rounds, and it should be more like 5-7.

If goals are not being met, other accommodations will need to be considered, such as going back on disability leave or being in the office more.

# EXHIBIT D

Dec 30, 2014



Current Employee - Anonymous Employee

## "Micromanaged and problematic"

I have been working at IXL Learning full-time (more than 3 years)

### Pros

Easy, unchallenging work, good medical benefits, free drinks. Hours are not too crazy. The people are generally well-meaning and nice.

The company isn't going anywhere right now. They play to the traditional classroom, which is good for profits. You won't have to worry about the company going under (but don't expect the profits to pass onto you, either).

### Cons

Don't expect a challenge working here. This company sets the bar extremely high for who they hire, and then gives their smart, talented employees boring, menial work to fill the day. The CEO is overly involved in every product, every decision, every everything.

There are no politics if you fit in. If you don't -- that is, if you're not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball -- then you're likely to find yourself on the outside. Treatment in the workplace, in terms of who gets flexible hours, interesting projects, praise, promotions, and a big yearly raise, is different and seems to run right along these characteristics.

There is essentially no HR knowledge or staff at this company. Know what

The company isn't going anywhere right now. They play to the traditional classroom, which is good for profits. You won't have to worry about the company going under (but don't expect the profits to pass onto you, either).

### Cons

Don't expect a challenge working here. This company sets the bar extremely high for who they hire, and then gives their smart, talented employees boring, menial work to fill the day. The CEO is overly involved in every product, every decision, every everything.

There are no politics if you fit in. If you don't -- that is, if you're not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball -- then you're likely to find yourself on the outside. Treatment in the workplace, in terms of who gets flexible hours, interesting projects, praise, promotions, and a big yearly raise, is different and seems to run right along these characteristics.

There is essentially no HR knowledge or staff at this company. Know your rights when you work here, because they don't, and they don't care to learn. Most management has no idea what the word "discrimination" means, nor do they seem to think it matters.

### Advice to Management

Choose one: listen to the ideas of a group of smart, talented employees, or micromanage a group of mediocre employees. Don't pull the bait and switch on employees who can do way better.

Build a culture that encourages respect for people of all walks of life.

Doesn't Recommend     Neutral Outlook     Disapproves of CEO

Helpful

Add Employer Response



# EXHIBIT E

●●●● T-Mobile LTE 12:00 PM



< Inbox (9717)



From: Paul Mishkin >

Hide

To: Scott Duane >

**Meet Thursday**

January 7, 2015 at 4:27 AM

Inbox – sduane@ixl.com

Hi Scott,

David told me that you voiced a complaint about discrimination. I'd like to meet with you Thursday at 11 to discuss this. Please let me know if you'd prefer a different time.

Discrimination of any type, including disability discrimination, is unacceptable to me and to IXL, and I need to understand what has been



◀ Inbox (9717)



INBOX - square@ixl.com

Hi Scott,

David told me that you voiced a complaint about discrimination. I'd like to meet with you Thursday at 11 to discuss this. Please let me know if you'd prefer a different time.

Discrimination of any type, including disability discrimination, is unacceptable to me and to IXL, and I need to understand what has been occurring so that I can take action immediately to correct it.

Thanks,  
Paul



*Rec. 5/12/15*



**U.S. Equal Employment Opportunity Commission  
New York District Office**

33 Whitehall Street  
5th Floor  
New York, NY 10004  
(212) 336-3620  
TDD: 1-800-669-6820  
Fax: (212) 336-3625  
1-800-669-4000

Respondent: IXL LEARNING, INC.  
EEOC Charge No.: 520-2015-02025  
FEPA Charge No.:

May 4, 2015

Adrian S. Duane  
2303 Park Blvd, Apt. 5  
Oakland, CA 94606

Dear Mr. Duane:

This is to acknowledge receipt of the above-numbered charge of employment discrimination against the above-named respondent. Please use the "EEOC Charge No." listed above whenever you call us about this charge. The information provided indicates that the charge is subject to:

- Title VII of the Civil Rights Act of 1964 (Title VII)
- The Age Discrimination in Employment Act (ADEA)
- The Americans with Disabilities Act (ADA)
- The Equal Pay Act (EPA)
- The Genetic Information Nondiscrimination Act (GINA)

You need do nothing further at this time. We will contact you when we need more information or assistance. A copy of the charge or notice of the charge will be sent to the respondent within 10 days of our receipt of the charge as required by our procedures.

Please be aware that we will send a copy of the charge to New York State Division Of Human Rights Federal Contract Unit One Fordham Plaza, 4 Fl. Bronx, NY 10458 as required by our procedures. If the charge is processed by that agency, it may require the charge to be signed before a notary public or an agency official. Then the agency will investigate and resolve the charge under their statute. If this occurs, section 1601.76 of EEOC's regulations entitles you to ask us to perform a Substantial Weight Review of the agency's final finding. To obtain this review, a written request must be made to this office within 15 days of receipt of the agency's final finding in the case. Otherwise, we will generally adopt the agency's finding as EEOC's.

While your charge is pending, please notify us of any change in your address, or where you can be reached if you have any prolonged absence from home. Your cooperation in this matter is essential.

Sincerely,

---

Hernan Morales  
Supervisory Investigator  
(212) 336-3782

Office Hours: Monday – Friday, 8:30 a.m. - 5:00 p.m.  
www.eeoc.gov

Enclosure(s)

cc: Cara B. Chomski  
LIDDLE & ROBINSON, LLP  
800 Third Avenue  
New York, NY 10022



1 during which he had phalloplasty surgery as part of his gender confirmation. When IXL refused  
2 to accommodate his post-surgery medical needs, Duane posted on Glassdoor.com that IXL  
3 discriminated against him and others and disclosed other information about the working conditions  
4 at IXL, and he also informed his direct manager that IXL discriminated against him. Within days  
5 of Duane's assertion of his protected rights and having recently learned that Duane's medical leave  
6 was for gender confirmation surgery, IXL's CEO Paul Mishkin terminated Duane's employment  
7 because he asserted his protected rights.

### 8 JURISDICTION

9  
10 2. This Court has jurisdiction over this action under 28 U.S.C. § 1331. The amount  
11 in controversy exceeds \$75,000.

12 3. The Court has personal jurisdiction over the Defendant under California Code of  
13 Civil Procedure § 410.10 and because the Defendant's actions in this state give rise to the claims  
14 at issue herein.

### 15 VENUE

16 4. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) and (2), as both parties  
17 reside in this District and a substantial part of the events giving rise to the claims occurred in this  
18 District.

### 19 PARTIES

20  
21 5. Plaintiff Duane is a transgender man who resides in Oakland, California. He  
22 obtained his undergraduate degree in Mathematics from Carleton College in 2007, and his Ph.D.  
23 in Mathematics in June 2013 from the University of California, San Diego. He was employed by  
24 Defendant IXL in its San Mateo, California headquarters as a Product Analyst from July 10, 2013  
25 until it unlawfully terminated his employment on January 8, 2015.



1           10. Duane received his second performance review from Mattison after 90 days of  
2 employment with IXL on November 6, 2013. In this review, Mattison also ranked Duane's  
3 performance between a 3 and 4, indicating that his performance consistently met or was above  
4 IXL's expectations.

5           11. Duane received his third performance review in or around January 2014 from David  
6 Keyes, who supervised him from January 1, 2014, until IXL terminated his employment on  
7 January 8, 2015. Keyes rated all aspects of Duane's performance at a 4 or 5, and noted that Duane  
8 had improved in all areas that Mattison had outlined opportunities for growth. Keyes also praised  
9 Duane's work handling mobile device platforms, and for becoming a leader in mobile testing. As  
10 a result of this review, Keyes assigned Duane the project of designing IXL's mobile icons for  
11 precalculus so that Duane could engage in additional creative roles within the Company.  
12

13           12. IXL awarded Duane two "team trophy" awards for his work. Keyes awarded  
14 Duane a "team trophy" for designing icons for the precalculus grade, which appear on IXL's iPad  
15 app. Keyes awarded Duane a second "team trophy" for his design of an innovative mobile  
16 keyboard, which was well-received by IXL's mobile software engineers.

17           13. IXL's CEO, Mishkin, also recognized Duane's excellent work for the Company.  
18 In August 2014, Mishkin stated that he was impressed by Duane's work designing precalculus  
19 skills in sinusoidal graphing, matching polynomial functions and graphs, writing series in sigma  
20 notation, and finding recursive formulae for sequences.

21           14. On or around September 2014, Mattison sent an email to Duane and Keyes praising  
22 the skills that Duane designed for the August 2014 product release.  
23

24           15. Throughout his employment, IXL's Sales team used skill sets that Duane designed  
25 to market the Company's product to potential customers at conferences and other industry events.  
26

1 The sinusoidal graphing skill that Duane developed was particularly popular among math teachers  
2 and school principals.

3 **B. IXL Did Not Object To Duane’s Flexible Schedule Before He Became Disabled.**

4 16. During his January 2014 performance review and before Duane became disabled,  
5 Duane asked Keyes about his work schedule. Duane is involved in community organizing work,  
6 and would occasionally work irregular hours—for example, by coming in at 7:00 a.m. and working  
7 until 3:30 p.m., or beginning work at 11:00 a.m. and working until 7:30 p.m. Duane brought up  
8 this issue during his performance review because Duane wanted to ensure that keeping an irregular  
9 schedule was not a problem for Keyes or for the Company. Keyes told Duane that his irregular  
10 hours were “absolutely fine,” because Duane always got his work done and made sure not to miss  
11 any meetings.  
12

13 **C. In 2014, Duane Took Medical Leave To Have Phalloplasty Surgery.**

14 17. In July 2014, Duane informed his supervisor, Keyes, that he needed to have surgery,  
15 which was scheduled to take place on November 3, 2014. Duane also told Keyes that Duane would  
16 need to be out for between six and eight weeks to recover after the surgery. Finally, Duane told  
17 Keyes that he would need to have weekly pre-operative appointments to prepare for his surgery.

18 18. Keyes told Duane that he could work remotely on the days that he had pre-operative  
19 medical appointments.

20 19. After speaking with Keyes in July 2014, Duane spoke with IXL’s then-Human  
21 Resources manager, Brad Marshall, about his upcoming surgery. Duane asked Marshall about his  
22 options for disability leave and pay. Marshall informed Duane that he could take three months of  
23 medical leave under the California Medical Rights Act. Marshall also told Duane that he could  
24  
25  
26

1 only be paid for six weeks of disability—which Duane later found out was incorrect, as Duane was  
2 in fact eligible to receive up to 52 weeks of paid disability.

3 20. Marshall also told Duane that he would have to cash out all of his vacation days  
4 before he could begin to take disability leave, and that Duane could not take paid sick days for the  
5 week between his last day of work and the beginning of his State Disability Insurance (“SDI”)  
6 pay.

7 21. IXL terminated Marshall in September 2014, one day before he and Duane were  
8 scheduled to discuss Duane’s upcoming phalloplasty surgery. The Company promoted Maricela  
9 Prado to take over Human Resources. Prado is a close friend of Penner.  
10

11 22. Duane was concerned that Prado would not respect his medical privacy. In his  
12 experience, both Prado and Penner inappropriately disclosed employees’ personnel issues to  
13 members of IXL who they regarded as friends.

14 23. At the time that Duane needed to disclose his upcoming gender confirmation  
15 surgery to IXL, Duane was concerned that Prado would not respect his medical privacy.

16 24. Before meeting with Prado, Duane spoke with Keyes about his concerns. Duane  
17 told Keyes that he was concerned with keeping his upcoming medical leave private, and that he  
18 wanted to ensure that Prado did not disclose his medical information to other employees. Keyes  
19 told Duane that he should make clear to Prado that he wanted his medical information to remain  
20 strictly confidential during their meeting. Duane emailed Prado that same day stating that his  
21 medical information should remain private.  
22

23 25. Duane’s last day at work before his surgery was October 30, 2014.

24 **D. IXL Refused To Reasonably Accommodate Duane’s Disability.**  
25  
26

1           26.     On or about December 11, 2014, Duane attended the IXL holiday party with his  
2 girlfriend. Based on the reaction of his colleagues, it was apparent that his colleagues were  
3 surprised Duane, who most people believed to be a cisgender gay man, had a partner perceived to  
4 be a lesbian woman. This caused IXL employees to question his sexuality and gender identity.  
5 Because Duane has published articles on being transgender, a Google search of Plaintiff would  
6 have revealed his transgender status.

7           27.     On Friday, December 19, Duane emailed Keyes to update Keyes as to his recovery.  
8 Duane told Keyes that he had suffered a surgical complication that made it challenging for him to  
9 be out of the house for extended periods of time. Duane told Keyes that he still planned to return  
10 to work on December 30, but asked Keyes whether he would be able to work half days in the office  
11 and half days at home as an accommodation for this surgical complication.

12           28.     Keyes replied to Duane’s email requesting a modified schedule on Monday,  
13 December 22. Keyes stated that “I would prefer that you be in the office for your hours when you  
14 come back since you are more productive here.” Keyes asked whether there was anything that  
15 the Company could do to “accommodate your situation so that you can work in the office.”  
16

17           29.     Being physically present in the office did not affect Duane’s ability to perform the  
18 essential functions of his job in any manner. As a Product Analyst, Duane could perform all of  
19 the functions of his job anywhere that he could log into the IXL system—essentially, any location  
20 with a secure internet connection.

21           30.     IXL routinely allowed other employees to work remotely even full time in order to  
22 accommodate personal and family obligations. At one point, Duane’s supervisor, Keyes, informed  
23 Duane that the Company had hired at least one employee with job tasks substantially similar to  
24 Duane’s with the understanding that the employee would work remotely 100% of the time.  
25  
26

1 31. Duane replied to Keyes' email on December 23, 2014. In this email, Duane made  
2 clear that he believed IXL's failure and refusal to offer him a "reasonable accommodation"  
3 constituted illegal workplace discrimination and retaliation. Duane also offered to provide written  
4 documentation from his physician regarding his disability, and noted that his physician had  
5 suggested that Duane work remotely as much as possible, especially after the complication.

6 32. In this email, Duane requested to work in the office for half days and work from  
7 home during the other half, which was a reasonable accommodation for his disability and would  
8 not have burdened the Company in any way.

9 33. Keyes immediately forwarded Duane's December 23, 2014 email to Maricela  
10 Prado and Lenore Ockerberg, IXL human resources representatives. At this time, Duane's  
11 December 23, 2014 email was also forwarded to Mishkin, and Keyes discussed Duane's  
12 allegations with Mishkin.

13 34. Duane submitted a note from his physician to IXL on December 29, 2014,  
14 explaining that his requested accommodation for a modified work-from-home schedule was  
15 medically necessary. This note was on the letterhead of Brownstein & Crane Surgical Services  
16 and included the website [www.brownsteincrane.com](http://www.brownsteincrane.com). Brownstein & Crane's website  
17 immediately identifies itself as "Gender Surgery in San Francisco." The entire website announces  
18 the medical practice's specialty of providing transgender surgeries.  
19

20 35. If IXL did not know before receipt of the note from Duane's doctor that he was  
21 transgender, surely IXL knew at that time. In addition, IXL would have learned that all of the  
22 work time Duane had missed in 2014 was due to his gender reassignment surgery.

23 36. Duane returned to IXL on December 30, 2014. Duane met with Keyes that day.  
24 During that meeting, Keyes told Duane that another employee would be working 100% remotely  
25  
26

1 to care for his sick wife. Keyes also told Duane of another IXL employee who was on a 50%  
2 remote-work schedule because her husband lived in the District of Columbia.

3 37. After discussing the accommodations granted to these other IXL employees—both of  
4 whom were non-disabled, cisgender, and heterosexual—Keyes reviewed Duane’s own very strict  
5 accommodations, which required that Duane be in the office at fixed hours every day and report  
6 to Keyes twice per week via email, and another two times per week in person. Duane’s schedule  
7 upon returning from medical leave was very strict by the standards of other employees at IXL,  
8 nearly all of whom work flexible hours and from home, with few checkups or restrictions.

9  
10 **E. IXL Terminated Duane’s Employment After Duane Complained That IXL  
Unlawfully Discriminated Against Him And Other Non-Conforming Employees.**

11 38. After his disappointing meeting with Keyes on December 30, Duane posted an  
12 anonymous review of the Company on Glassdoor.com, stating in relevant part that:

13 The company isn’t going anywhere right now. They play to the  
14 traditional classroom, which is good for profits. You won’t have to  
15 worry about the company going under (but don’t expect the profits  
to pass onto you, either).

16 Don’t expect a challenge working here. This company sets the bar  
17 extremely high for who they hire, and then gives their smart, talented  
18 employees boring, menial work to fill the day. The CEO is overly  
involved in every product, every decision, every everything.

19 There are no politics if you fit in. If you don’t—that is, if you’re not  
20 a family-oriented white or Asian straight or mainstream gay person  
21 with 1.7 kids who really likes softball—then you’re likely to find  
22 yourself on the outside. Treatment in the workplace, in terms of  
who gets flexible hours, interesting projects, praise, promotions, and  
a big yearly raise, is different and seems to run right along these  
characteristics.

23 There is essentially no HR knowledge or staff at this company.  
24 Know your rights when you work here, because they don’t, and they  
25 don’t care to learn. Most management has no idea what the word  
“discrimination” means, nor do they seem to think it matters.

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39. During Duane’s employment at IXL, IXL encouraged employees to use Glassdoor – a service that IXL paid for and closely monitored – as a means to communicate with employees, potential employees, and management. For instance, by email dated February 24, 2014, Prado instructed IXL employees, including Duane, to “take a moment to login to Glassdoor.com and post some comments about your work experience.” At IXL events, Mishkin had also orally instructed IXL employees to do the same.

40. As a result of IXL’s direct encouragement to do so, Duane had posted a comment about IXL in the past, and he was aware that many of his colleagues reviewed IXL’s Glassdoor site and posted their opinions of IXL on this site.

41. On January 6, 2015, Keyes asked to speak with Duane in Keyes’ office. In this one-on-one meeting, Keyes stated that Duane seemed unhappy since returning from medical leave. Duane told Keyes that he believed IXL had “discriminated” against him in connection with his return from surgery.

42. During the January 6, 2015, meeting, Duane noted to Keyes that he had been working hard and meeting all of the goals outlined in their December 30, 2014 correspondence. Keyes agreed that Duane had met all of the goals they had discussed and stated that he noticed and appreciated Duane’s work ethic and productivity.

43. After Duane outlined his grievances to Keyes, Keyes appeared receptive, and stated that he would escalate his concerns to Lenore Ockerberg, Prado’s supervisor in the Human Resources Department. Keyes stated that he would keep Duane informed as to the progress of the escalation of his concerns. Keyes also apologized profusely for having discriminated against Duane.

1           44.     Keyes told Duane, “I’m really sorry that you felt discriminated against” and that “I  
2 didn’t mean to discriminate against you.” He continued that, “I can totally understand why you  
3 would feel this way.”

4           45.     Keyes escalated Duane’s allegations of discrimination to human resources and IXL  
5 senior management, including Mishkin. Among other things, Keyes and Mishkin had a phone call  
6 after the January 6, 2015 meeting during which Keyes informed Mishkin that Duane believed he  
7 was the victim of unlawful employment discrimination. Keyes also informed human resources of  
8 Duane’s allegations.

9           46.     Although Glassdoor posts are anonymous, IXL human resources, who found  
10 Duane’s December 30 Glassdoor post, believed Duane had published this post because the  
11 complaints closely resembled the allegations of discrimination that Duane had made to Keyes on  
12 January 6. Human resources informed Mishkin, among others, that they believed Duane had  
13 authored the December 30 Glassdoor post.

14           47.     On January 7, 2015 at 4:27 a.m., the day after his meeting with Keyes, Duane  
15 received an email from Mishkin, the CEO of IXL. Mishkin’s email to Duane stated that Mishkin  
16 had heard that Duane had complaints regarding discrimination, and that Duane wanted to discuss  
17 these complaints with Mishkin. Mishkin set up to meet with Duane on January 8, 2015 at 11:00  
18 a.m.

19           48.     On January 7, 2015, Duane sent Keyes an email with a series of links to websites  
20 that provide information on the Americans With Disability Act, as a follow up to the allegations  
21 of discrimination that Duane had made at their meeting on January 6.  
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1           49.     Prior to his meeting with Duane on January 8, 2015, Mishkin decided to terminate  
2 Duane's employment and even had security pack and remove Duane's personal effects from his  
3 work area.

4           50.     Duane met with Mishkin on January 8, 2015, under the guise of discussing Duane's  
5 concerns that IXL had discriminated against him on the basis of his disability. During this meeting,  
6 Mishkin and Duane discussed Duane's concerns regarding discrimination for approximately ten  
7 minutes. Duane told Mishkin all of his grievances, and informed Mishkin that Keyes and Prado  
8 had acted illegally after Duane returned from medical leave by refusing to grant him medically-  
9 necessary accommodations that they routinely granted to other, heterosexual, cisgender, and non-  
10 disabled employees for personal and professional reasons.

11           51.     After a brief discussion of his disability concerns, Mishkin presented Duane with  
12 the December 30, 2014 review that Duane had posted anonymously on Glassdoor.com. Mishkin  
13 said to Duane, "I think you know what this is."

14           52.     Mishkin appeared angry and upset about the instances of discrimination that  
15 Duane's Glassdoor post identified, and demanded evidence behind the statements that Duane had  
16 posted. Mishkin specifically asked Duane what he meant by "mainstream gay."

17           53.     As IXL's CEO, Mishkin had access to Duane's medical records and the disability  
18 paperwork that Duane had submitted to Human Resources regarding his gender confirmation  
19 surgery. In addition, Mishkin was aware that Duane, who had been perceived as a gay, attended  
20 the Company's holiday party with a female date and that Duane had submitted a letter from his  
21 doctor who performed gender confirmation surgery.  
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1 54. Duane replied to Mishkin’s questions by stating, roughly, “I’m queer, and I stick  
2 out.” Mishkin asked Duane whether he felt that there was a culture of discrimination at IXL, and  
3 Duane replied, “Yes, I do.”

4 55. According to Defendants, IXL and Mishkin terminated Duane’s employment  
5 allegedly because of his Glassdoor post which included allegations of discrimination and the  
6 disclosure of other working conditions at IXL.

7 56. Other IXL employees had posted negative comments about IXL on Glassdoor and  
8 had not been terminated.

9 57. After Duane left Mishkin’s office, Duane found that IXL employees had cleaned  
10 out his desk and that Human Resources had prepared the paperwork associated with his discharge  
11 from the Company. It was apparent that Mishkin had intended to terminate him before their  
12 meeting had started.

13  
14 **F. The EEOC Issued A Reasonable Cause Finding That IXL Retaliated Against Duane.**

15 58. On March 17, 2015, Duane filed a Charge of Discrimination and Retaliation with  
16 the Equal Employment Opportunity Commission (“EEOC”) asserting that IXL discriminated and  
17 retaliated against Duane on the basis of his gender and disability. In his Charge, Duane asserted  
18 his rights under Title I of the Americans with Disabilities Act of 1990, the Americans with  
19 Disabilities Act Amendments Act of 2008, Title VII of the Civil Rights Act of 1964, the California  
20 Fair Employment and Housing Act, and California Family Right Act, and invoked the jurisdiction  
21 of both the DFEH and the EEOC to investigate the Charge.

22  
23 59. On April 22, 2016, the EEOC, after conducting its investigation into Duane’s  
24 allegations, issued its Determination, finding that “there is reasonable cause to believe that the  
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1 Respondent discriminated against [Duane] in retaliation for protesting against discriminatory  
2 conduct, in violation of the statutes.”

3 60. The EEOC has not yet issued a right-to-sue letter.

4 **FIRST CAUSE OF ACTION**  
5 **(Retaliation in Violation of the Family and Medical Leave Act)**

6 110. Duane repeats and realleges the allegations contained in paragraphs 1 through 109  
7 as if fully set forth herein.

8 111. Duane is a citizen of the United States and was an “eligible employee” of Defendant  
9 IXL within the meaning of 29 U.S.C. § 2611(2)(A) at all times relevant to this action. At the time  
10 that Duane requested to take FMLA leave, he had worked for IXL for at least 12 months and had  
11 performed at least 1,250 hours of service with IXL for the previous 12-month period.

12 112. IXL is an “employer” within the meaning of 29 U.S.C. § 2611(4)(A) at all times  
13 relevant to this action, and employed more than 50 people within 75 miles of the worksite where  
14 Duane was employed.

15 113. Duane timely requested medical leave from IXL permitted under the Family and  
16 Medical Leave Act.

17 114. IXL treated Duane adversely because he took the leave he was entitled to under the  
18 FMLA.

19 115. IXL retaliated against Duane because he took an FMLA leave of absence, by,  
20 among other things, terminating his employment less than two weeks after returning from FMLA  
21 leave.

22 116. IXL willfully violated the FMLA.

1 117. As a proximate result of IXL’s retaliation against Duane on the basis of his exercise  
2 of rights under the FMLA, Duane has suffered substantial losses, including lost back pay.

3 118. As a result of IXL’s unlawful conduct, it is also liable for liquidated damages,  
4 interest, and attorneys’ fees and costs.

5  
6 **SECOND CAUSE OF ACTION**  
**(Wrongful Termination In Violation Of Public Policy Against IXL and Mishkin)**

7 119. Duane repeats and realleges the allegations contained in paragraphs 1 through 118  
8 as if fully set forth herein.

9 120. At all times relevant to this action, the public policy of the State of California, as  
10 codified, expressed, and mandated in California Government Code §§12900 *et seq.* is to prohibit  
11 employers from discriminating and retaliating against an individual on the basis of sex, gender  
12 identity, gender expression, disability, and decision to take protected medical leave. This public  
13 policy of the State of California is designed to protect all employees and to promote the welfare  
14 and well-being of the community at large.

15 121. In addition, California Labor Code § 232.5(a) prohibits an employer from  
16 “require[ing], as a condition of employment, that an employee refrain from disclosing information  
17 about the employer’s working conditions.” Section 232.5(c) prohibits an employer from  
18 terminating, or otherwise disciplining, an employee “who discloses information about the  
19 employer’s working conditions.”  
20

21 122. Accordingly, the actions of IXL and Mishkin in terminating Duane’s employment  
22 on the grounds alleged and described herein (namely, because of his Glassdoor.com post and  
23 subsequent complaints to his manager about IXL’s discrimination, retaliation, and working  
24 conditions) were wrongful and in contravention of the express public policy of the State of  
25  
26

1 California, to wit, the policy set forth in the California Fair Housing and Employment Act and the  
2 laws and regulations promulgated thereunder and/or Labor Code §§ 232.5(a) and (c).

3 123. As a proximate result of IXL's and Mishkin's actions described herein, Duane has  
4 suffered actual, consequential, and incidental financial losses, including without limitation loss of  
5 salary and benefits, and the intangible loss of employment-related opportunities in his field and  
6 damage to his professional reputation, all in an amount to be determined at trial.

7 124. Duane claims such amounts as damages pursuant to Civil Code §§ 3287 and 3288  
8 and/or any other provisions of law providing for prejudgment interest.

9 125. As a proximate result of IXL's and Mishkin's wrongful acts together and  
10 separately, Duane has suffered and continues to suffer emotional distress, humiliation, mental  
11 anguish and embarrassment, as well as the manifestation of physical symptoms. Duane is  
12 informed and believes and thereupon alleges that he will continue to experience such physical and  
13 emotional suffering for a period of time in the future not presently ascertainable, all in an amount  
14 to be determined at trial.

15 126. The acts taken toward Duane were carried out by IXL's officers, directors, and  
16 managing agents acting in a willful, malicious, egregious, deliberate manner and in conscious  
17 disregard for Duane's rights and safety, justifying an award of punitive damages in a sum  
18 appropriate to punish Defendants and deter others in IXL's industry from engaging in similar  
19 conduct.  
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1 WHEREFORE, while reserving the right to seek additional damages as available, Duane demands  
2 judgment against Defendants as follows:

3 A. On the First Claim against IXL, back pay, front pay, and employment benefits,  
4 liquidated damages, interest, and attorneys' fees and costs, plus an order enjoining IXL from  
5 engaging in the wrongful practices alleged herein, all in the maximum extent allowable by law;

6 B. On the Second Claim against IXL and Mishkin, back pay, front pay, and  
7 employment benefits, interest, and attorneys' fees and costs, as well as compensatory damages  
8 including those resulting from Duane's emotional distress and mental anguish in an amount to be  
9 determined at trial;

10 C. All such other and further relief as this Court deems just and proper.

11 Dated: January 6, 2017

12  
13  
14 THE MAREK LAW FIRM, INC.

15 By: /s/ David Marek  
16 David Marek  
17 228 Hamilton Avenue  
18 Palo Alto, California 94301  
19 (917) 721-5042  
20 david@marekfirm.com  
21  
22  
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25  
26



David Marek &lt;david@marekfirm.com&gt;

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**RE: Duane v. IXL**

1 message

**Natasha Menezes** <menezes@youngbasile.com>

Fri, Apr 7, 2017 at 4:53 PM

To: David Marek &lt;david@marekfirm.com&gt;, "Jeffrey D. Wilson" &lt;wilson@youngbasile.com&gt;, "R. Randy Wertz" &lt;rrwertz@itkc.com&gt;

Cc: Hind Samona &lt;samona@youngbasile.com&gt;

David,

We will discuss the issue you raised below and get back to you next week.

Thanks and enjoy your weekend,

Natasha

**From:** David Marek [mailto:david@marekfirm.com]**Sent:** Wednesday, April 5, 2017 2:13 PM**To:** Natasha Menezes <menezes@youngbasile.com>; Jeffrey D. Wilson <wilson@youngbasile.com>; R. Randy Wertz <rrwertz@itkc.com>**Subject:** Duane v. IXL

All:

I am writing to address an issue I raised earlier (and again yesterday), and that is whether the pending action, which was filed to preserve the statute of limitations on certain claims not pending before the EEOC, should be stayed until the claims currently pending before the EEOC can be asserted. Having reviewed your motion and the law, I believe a stay is appropriate and in the interest of both parties and the Court at this time, and therefore I ask you to reconsider your earlier decision.

In comparable, albeit not identical, situations Courts - which have "inherent power to manage their own dockets and stay proceedings" - have considered the following factors in deciding whether a stay is appropriate: "the convenience of the court and the efficient use of judicial resources;" "the interests of the parties;" "the interests of the public;" whether the case is in its early stages; "whether discovery is complete and whether a trial date has been set;" "whether a stay will simplify the issues in question and trail of the case;" and "whether a stay would unduly prejudice or present a clear tactical disadvantage to the nonmoving party." See *Telemac Corp. v. Teledigital, Inc.*, 450 F.Supp.2d 1107, 1111 (N.D.Ca 2006); *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1989).

I believe all of the factors weigh in favor of a stay in this instance. Surely, it would be more efficient for the Court to hear all of the issues at one time, rather than hearing this case only to have another case with claims arising from the same or similar facts. This case is at the earliest stage; no discovery has been done. Moreover, I do not see how your client would be prejudiced or disadvantaged tactically. You would not be giving up any of your rights to make motions or defenses. And whether we stay this case or not, the controversy will not be fully litigated until we assert the claims presently before the EEOC. In fact, this request seems to benefit your client.

On yesterday's call, Natasha explained that Defendants do not want the stay because the timing of the EEOC's decision is uncertain. While this is true, I do not agree this prejudices your client. Whether these claims are stayed or not, the timing of the EEOC's decision remains uncertain, and until the claims pending before the EEOC can move forward the case cannot be fully resolved (unless the parties reached a private settlement).

In any event, please let me know if you have changed your position on this issue.

Thanks.

--

David Marek

The Marek Law Firm

917-721-5042

California New York Florida

# **EXHIBIT F**

U.S. E.E.O.C. v. WirelessComm Inc., Not Reported in F.Supp.2d (2012)

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U.S. E.E.O.C. v. WirelessComm Inc., Not Reported in F.Supp.2d (2012)

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2012 WL 1711040  
Only the Westlaw citation is currently available.  
United States District Court,  
N.D. California,  
Northern Division.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

**WIRELESSCOMM INC.**, Defendant.

No. 5:11-CV-04796 EJD.

May 15, 2012.

**Attorneys and Law Firms**

Marcia L. Mitchell, U.S. Equal Employment Opportunity Comm'n, San Francisco, CA, for Plaintiff.

William Robert Tamayo, U.S. EEOC, San Francisco, CA, Kassra Powell Nassiri, Michael Patrick Dillingham, San Francisco, CA, for Defendant.

**ORDER GRANTING MOTION TO INTERVENE**

EDWARD J. DAVILA, District Judge.

\*1 Pending before the court is Deisy Mora's ("Mora") motion to intervene. Plaintiff U.S. Equal Employment Opportunity Commission ("EEOC") does not oppose this motion. Defendant **WirelessComm Inc.** ("WirelessComm") does not oppose Mora's right to intervene. WirelessComm, however, opposes Mora's motion on the grounds that the Proposed Complaint in Intervention expands the scope of the EEOC action to include two new defendants and four new causes of action. For the reasons discussed below, the motion is GRANTED.

**I. BACKGROUND**

On or about March 18, 2008, Mora filed charges with the California Department of Fair Employment and Housing ("DFEH") alleging sexual discrimination and harassment. *See* Proposed Compl. in Intervention ¶ 13, Docket No. 11-3. On March 19, 2008, the DFEH issued Mora a right-to-sue notice, closed its case, and deferred its investigation to the EEOC. *See id.* On March

25, 2008, these same charges were filed with the EEOC. *See id.* On February 23, 2010, the EEOC issued a letter finding reasonable cause that Mora was subjected to a hostile work environment and discriminated based on her sex, and that WirelessCom was aware of the harassment and failed to correct or prevent the harassment. *See id.* ¶ 14. On September 28, 2011, the EEOC concluded its investigation and filed the instant action alleging unlawful employment practices by WirelessComm in violation of 42 U.S.C. §§ 2000e-2(a)(1) (“Title VII”). *See id.* ¶ 15.

On December 2, 2011, Mora filed this Motion to Intervene as Plaintiff in the EEOC’s action to assert Title VII claims as well as state law claims for (1) sexual harassment, Cal. Gov.Code § 12940(k); (2) failure to prevent sexual harassment, Cal. Gov.Code § 12940(k); (3) intentional infliction of emotional distress; and (4) negligent infliction of emotional distress. *See id.* Mora also seeks to add two individual defendants, Lahouari Aribi (“Aribi”) and Karim Hadid (“Hadid”). *See id.*

## II. LEGAL STANDARDS

Mora move to intervene in the federal claims pursuant to Fed.R.Civ.P. 24(a), which allows intervention upon timely application “when a statute of the United States confers an unconditional right to intervene.” 42 U.S.C. § 2000e-5(f)(1) states in relevant part that “the person or persons aggrieved shall have the right to intervene in a civil action brought by the [EEOC] ....” 42 U.S.C. § 2000e-5(f)(1).

The motion to intervene to assert state law claims, on the other hand, is governed by Fed.R.Civ.P. 24(b), permitting intervention when “an applicant’s claim or defense and the main action have a question of law or fact in common.”

## III. DISCUSSION

### A. Intervention in the Title VII Claim

Title VII of the Civil Rights Act gives the applicants an unconditional right to intervene in a federal law suit brought against defendant by the EEOC. 42 U.S.C. § 2000e-5(f)(1) (“The person or person aggrieved shall have the right to intervene in a civil action brought by the Commission ....”); *see also E.E.O.C. v. Occidental Life Ins. Co. of Cal.*, 535 F.2d 533, 542 (9th Cir.1976). Fed.R.Civ.P. 24(a) allows intervention upon timely application “when a statute of the United States confers an unconditional right to intervene.” The Motion to Intervene was filed roughly two months after the EEOC filed its suit, before discovery in the case commenced. The motion is not untimely. Accordingly, Mora’s Motion to Intervene in the federal law claims is GRANTED.

\*2 Upon concluding that Mora is a proper party to this suit, the court must consider whether she should be allowed to file her Proposed Complaint in Intervention to add new state causes of action and new Defendants.

### B. Mora’s State Law Claims and New Defendants

Here, Mora’s state-law employment discrimination and emotional distress claims have a question of fact in common with the EEOC’s federal claims against WirelessComm because all the claims arise out of sexual harassment experienced at WirelessComm. WirelessComm argues that the state law claims include additional elements not required in a Title VII claim but does not dispute that the same events that give rise to the tort claims also give rise to the Title VII claims. Thus, Mora’s intervention to assert these state law claims meets the Rule 24(b) standard for permissive intervention. The court therefore concludes that Mora may assert her state law claims.

Additionally, Mora seeks to assert claims against Hadid, the owner of WirelessComm, and Aribi, Mora’s supervisor at WirelessComm. *See* Complaint in Intervention ¶ 2. Fed.R.Civ.P. 20 permits joinder of a defendant when the right to relief arises out of the same transaction or occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action. Fed.R.Civ.P. 20(a). The Complaint filed by the EEOC includes allegations about the behavior of WirelessComm’s Store Manager, including inappropriate comments and text messages, and Owner, including requesting pictures of Mora and other female employees and inviting Mora to vacation with him. *See* Compl. ¶ 8. Mora’s Proposed Complaint in Intervention names these individuals and adds a small amount of additional detail regarding their conduct. WirelessComm argues that Aribi should not be joined because he is not alleged to have witnessed or performed most of the acts identified in the Complaint. WirelessComm, however, does not argue that the allegations regarding Aribi’s conduct fail to state a claim against him. Additionally, WirelessComm does not dispute that the allegations regarding Aribi and Hadid’s actions in the Complaint in Intervention arise out of the same behavior alleged in the EEOC’s Complaint. Based on Mora’s Complaint in Intervention, the same questions of whether Aribi and Hadid actually acted in the manner alleged by Mora will be at issue under both the Title VII and state law claims. The court therefore concludes that Mora may join Aribi and Hadid as Defendants.

### C. Statute of Limitations

Finally, WirelessComm argues that the statute of limitations has run on each of the emotional distress claims, the claims would be subject to an immediate motion to dismiss, and the court therefore should decline to exercise its supplemental jurisdiction over these claims because they are futile. In California, intentional and negligent infliction of emotional distress claims have a two-year statute of limitations. Cal.Code Civ. Proc. § 335.1; Miller v. Bank of America, Nat. Ass'n, No. 3:11-cv-02588-MMA (BGS), 2012 WL 871321, at \*8 (S.D.Cal. Mar. 14, 2012). Mora's allegations regarding her emotional distress claims are based on conduct occurring before her constructive termination in October 2007. See Proposed Compl. in Intervention ¶ 17. Mora's emotional distress claims therefore are time barred unless the statute of limitations was tolled.

\*3 "As with the limitations period itself, we borrow our rules for equitable tolling of the period from the forum state, California." Cervantes v. City of San Diego, 5 F.3d 1273, 1275 (9th Cir.1993). Under California law, a plaintiff is entitled to equitable tolling as he pursues a remedy in another forum, when his actions establish (1) timely notice to the defendants in filing the first claim; (2) lack of prejudice to the defendants in gathering evidence for the second claim; and (3) good faith and reasonable conduct in filing the second claim. Id. at 1275. California's equitable tolling test is a fact-intensive one, which calls for a practical inquiry that ordinarily requires the court to consider matters outside the pleadings. Id. at 1276. For that reason, California's equitable tolling test "is more appropriately applied at the summary judgment or trial stage of litigation." Id.

Although dismissal has been upheld in some cases where it is evident from the face of the complaint that plaintiff could not prevail on the equitable tolling issue, ordinarily equitable tolling is not properly resolved at the pleading stage. Id. at 1276; Compare Arnold v. United States, 816 F.2d 1306, 1312-13 (9th Cir.1987) (upholding dismissal and finding that statute of limitations was not tolled by employee's filing of her Title VII claim because the wrong underlying the Title VII claim was distinct from that underlying the state-law tort claims, including intentional infliction of emotional distress) with Cervantes, 5 F.3d at 1276 (reversing district court's dismissal of the action as time-barred, noting that the district court had not employed the three-part test, and finding that the wrong underlying plaintiff's state-law claims and his federal § 1983 claim were not distinct because both involve his unlawful termination); see also Mathieu v. Nonell Corp., 115 Cal.App.4th 1174, 1189, 10 Cal.Rptr.3d 52 (2004) (upholding summary adjudication and finding the statute of limitations for plaintiff's wrongful termination claim was not tolled while she pursued her FEHA claim because she is not disadvantaged by having to file the wrongful termination claim before receiving a right-to-sue letter from the DFEH); Kang v. U. Lim America, Inc., 296 F.3d 810, 819-20 (9th Cir.2002) (reversing summary judgment and finding that a genuine issue of fact existed as to whether plaintiff's pursuit of his Title VII claim tolled the statute of limitations on his state-law claim for wrongful termination).

Here, WirelessComm fails to mention the three-factor fact-intensive standard for equitable tolling. Instead, WirelessComm merely asserts that the statutes of limitations on these causes of action are not subject to equitable tolling without further argument. WirelessComm has failed to demonstrate that the Complaint in Intervention does not adequately allege facts showing the *potential* applicability of the equitable tolling doctrine. See Cervantes, 5 F.3d at 1277. Thus, WirelessComm has failed to show that allowing Mora to intervene to assert her emotional distress claims would be futile and that a compelling reason exists for the court to decline supplemental jurisdiction over those claims.

## IV. CONCLUSION

\*4 Mora's Motion to Intervene is GRANTED. Mora shall file her Complaint in Intervention no later than May 30, 2012. The parties shall appear for a case management conference on June 15, 2012. The parties shall file a case management statement no later than June 5, 2012.

### All Citations

Not Reported in F.Supp.2d, 2012 WL 1711040

U.S. E.E.O.C. v. WirelessComm Inc., Not Reported in F.Supp.2d (2012)

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U.S. E.E.O.C. v. Central California Foundation for Health, Not Reported in F.Supp.2d...

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2011 WL 149831  
Only the Westlaw citation is currently available.  
United States District Court,  
E.D. California.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,  
v.  
CENTRAL CALIFORNIA FOUNDATION FOR HEALTH, d/b/a Delano Regional Medical Center; and Delano  
Heath Associates, Inc., Defendants.

No. 1:10-cv-01492 LJO JLT.

Jan. 18, 2011.

**Attorneys and Law Firms**

Peter F. Laura, Amrita Mallik, Govt., Anna Y. Park, U.S. Equal Employment Opportunity Commission, Los Angeles, CA, Rumduol Vuong, Govt., U.S. Equal Employment Opportunity Commission, Fresno, CA, for Plaintiff.

Robert D. Harding, Clifford & Brown, Bakersfield, CA, for Defendants.

ORDER GRANTING MOTION FOR LEAVE TO INTERVENE

JENNIFER L. THURSTON, United States Magistrate Judge.

\*1 The matter now before the court is a motion to intervene filed on December 7, 2010. (Doc. 10). Intervenor<sup>s</sup> seek to intervene as plaintiffs in the action filed by the Equal Employment Opportunity Commission ("EEOC") against Central California Foundation for Health, doing business as Delano Regional Medical Center, and Delano Health Associates, Inc., (collectively, "Defendants").

The Court has reviewed Intervenor<sup>s</sup>' motion and supporting documents, and determined that the matter is suitable for decision without oral argument pursuant to Local Rule 230(g). For the reasons discussed below, the motion to intervene is **GRANTED**.

***I. Background***

On August 18, 2010, the EEOC filed a complaint against Defendants, alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII") and unlawful employment practices. (Doc. 1 at 4). Defendants filed their answer on September 15, 2010. (Doc. 5). Within its Scheduling Order, the Court set a deadline for complaints in intervention to be filed by July 29, 2011.

(Doc. 9 at 1).

Intervenors filed the present motion on December 7, 2010. (Doc. 10). The EEOC filed a statement of non-opposition to the present motion on December 7, 2010. (Doc. 11). In addition, Defendants filed a statement of non-opposition on January 10, 2011. (Doc. 13).

## II. 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 Rule 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 applicant’s ability to protect that 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, 93 S.Ct. 2591, 37 L.Ed.2d 648 (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, nonconclusory 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.

## III. Discussion and Analysis

\*2 Intervenors seek to assert claims under Title VII and state claims for discrimination and harassment under California’s Fair Employment and Housing Act, Cal. Gov’t Code §§ 12940 et. seq. (Doc. 10 at 3). Intervenors argue they should be permitted to intervene as a matter of right because of their claim 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, at \*9 (E.D.Cal. Aug. 13, 2010) (persons aggrieved “have the unconditional right to intervene in this case if their motion was timely”).

### A. “Persons 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 “persons aggrieved,” Intervenors 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, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

Individuals who did not file charges with the EEOC may retain a right to intervene under the “single filing” or “piggybacking” rule, which permits a person who has not filed a complaint to “piggyback” onto an EEOC complaint filed by a similarly situated individual. See e.g., Guimarra Vineyards Corp., 2010 U.S. Dist. LEXIS 82917, at \*12, citing Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1110 (10th Cir.2001); see also Calloway Partners Nat’l Health Plans, 986 F.2d 466, 450 (11th Cir.1993) (claims must “arise out of similar discriminatory treatment in the same time frame”). The essence of the single filing rule is that it is “wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC.” *Id.* Thus, the rule allows other suitable plaintiffs to seek the relief of a Title VII action, though they have not filed a charge with the EEOC. *Id.*, citing Foster v. Ruhrpumpen, 365 F.3d 1191, 1197 (10th Cir.2004); EEOC v. Cal. Psychiatric Transitions, 644 F.Supp.2d 1249 (E.D.Cal.2009).

Here, twenty-three of the individuals seeking to intervene have filed charges with the EEOC and are name as charging parties in the EEOC’s complaint. (Doc. 10 at 6). The remaining twenty-nine individuals seek to apply the “single filing rule.” *Id.* at 6–7. According to Intervenors, “All Plaintiff–Intervenors are Filipino Americans who worked for Defendants. Their claims of discrimination under federal and state law all arise out of the same discriminatory treatment, the same English only policy, and the same enforcement efforts by Defendants targeted at Filipino American employees.” *Id.* at 7. Therefore, individuals who did not file a claim with the EEOC were similarly situated to the employees who did so, and all have a right to intervention.

*B. Timeliness*

\*3 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 timely, [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 the length of any delay in moving to intervene. *Northwest Forest Resource 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).

In this case, Intervenors moved to intervene at an early stage in the proceedings. As Intervenors succinctly stated, “This motion comes less than four months after the EEOC filed its complaint, within one week of the initial scheduling conference, and well before the July 2011 deadline set by the Court for filing complaints in intervention.” (Doc. 10 at 5). Moreover, there is no prejudice to either the EEOC or Defendants, who filed statements of non-opposition to the motion to intervene. (Docs.11, 13). Given these facts, the motion to intervene has been brought in a timely manner.

*V. Conclusion and Order*

Intervenors have established that they may intervene as a matter of right under Fed.R.Civ.P. 24(a). Many filed claims with the EEOC, and those who did not are similarly situated and thus may apply the “single filing rule,” as discussed above. Therefore, as “aggrieved persons” under Title VII, Intervenors have the unconditional right to intervene because their motion was filed in a timely manner. Accordingly, IT IS HEREBY ORDERED that the motion for leave to intervene is **GRANTED**.

IT IS SO ORDERED.

**All Citations**

Not Reported in F.Supp.2d, 2011 WL 149831

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**Footnotes**

- 1 “Intervenors” include: Douglas Abdon, David Agbayani, Manuela Aninion, Pacita Agustin, Melchor Apostol, Angelita Baligad, Nena Ballesteros, Ferdinand Baraceres, Charito Bilog, Maria Busto, Belen Cabbab, Michelle Cabbab, Fely Cacal, Normi Cacal, Erlinda Camotuya, Esther Casabar, Nora Casimiro, Elnora Cayme, Gina Correa, Armeliza Dela Cruz, Ester Delos Santos, Hilda Ducusin, Aida Estrella, Florentina Failano, Eduardo Frial, Consolacion Galafte, Jovena Gallegos, Luz Gallegos, Tomasa Gumallaai, Melinda Intoc, Calixto Lamug, Wilma Lamug, Anielyn Manalastas, Rome Manalastas, Maribelle Manankil, Sol Manaois, Elizabeth Matias, Cristina Nelmida, Nelson Nisperos, Venus Pagsuberon, Priscilla Penalosa, Jose Pira, Federico Quiniones, Nannette Quino, Teresita Rafanan, Melanie Refuerzo, Marilou Riola, Maria Teresa Solano, Necita Tabajonda, Myrna Torres, Elena Villamor, and Romeo Villamor. (Doc. 10).

Marek, David 8/17/2017  
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