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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. IXL LEARNING, INC., Defendant.	Case No.: 17-CV-02979-VC **Date:** **September 19, 2017** **Time:** **1:30 p.m.** **Courtroom:** **4-17th Floor** **Judge:** **Honorable Vince Chhabria**

DEFENDANT'S OPPOSITION TO PROPOSED
PLAINTIFF-INTERVENOR'S NOTICE OF MOTION TO INTERVENE

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IXL Learning, Inc. ("IXL") respectfully submits this Memorandum of Law in Opposition to Proposed Plaintiff-Intervenor's Motion to Intervene submitted by Proposed Plaintiff-Intervenor Adrian Scott Duane ("Intervenor").

I. INTRODUCTION

This lawsuit was filed by the Equal Employment Opportunity Commission (the "EEOC") and consists of one count of retaliation pursuant to Title VII and the ADA based on Intervenor allegedly engaging in legally protected employment activities by publicly posting his opposition on a website. DE 1, No. 38. The Intervenor now seeks to add three causes of action: (1) Violation of Title VII of the Civil Rights Act; (2) Violation of the Americans with Disabilities Act (the "ADA"); and (3) Violation of the Fair Employment and Housing Act ("FEHA") pursuant to Government Code 12940(h) and (m).

Intervenor's request to add these additional claims should be denied. First, because Intervenor and IXL stipulated to the dismissal with prejudice of the lawsuit brought by Intervenor against IXL, Intervenor is prohibited under res judicata from bringing claims he could have brought in that action. Second, if the Court decides that Intervenor's claims are not barred by res judicata, Intervenor still has yet to receive a right-to-sue letter from either the EEOC or the DFEH. Third, regardless of whether Intervenor has a right-to-sue letter, Intervenor cannot add claims that do not implicate legal and factual issues common with the EEOC's claims.

II. FACTS

A. Intervenor's Employment With IXL

IXL is a web-based educational software company headquartered in San Mateo, California. Intervenor started work with IXL in July 2013 as a product analyst.

In July 2014, Intervenor notified David Keyes ("Keyes"), his supervisor, that he would be undergoing surgery in November and would be absent from work for six to eight weeks to recover. Intervenor indicated that he would be having weekly pre-operative appointments, and Keyes agreed to permit Intervenor to work from home the days of those appointments. Intervenor's last day of work before his surgery was October 30, 2014.

On December 19, 2014, Intervenor e-mailed Keyes, indicating that he still planned to return to work on December 30 despite a complication that had arisen. Intervenor asked if Keyes would let him

work half days in the office and half days at home for the first few weeks. Keyes responded on December 22, stating that he would prefer that Intervenor be in the office when he comes back to work since Intervenor was more productive in the office in the past. Keyes asked if there was anything IXL could do to accommodate Intervenor working in the office upon his return. Keyes also told Intervenor that it would be completely fine for Intervenor to extend his leave to aid in his recovery as IXL provides unlimited paid sick leave as a benefit of employment.

On December 23, Intervenor responded by insisting that he be allowed to work from home 50% of the time. IXL accommodated Intervenor's request. After acknowledging his past lack of productivity when working remotely, Intervenor recommended that metrics be put in place to monitor his progress and productivity to IXL's satisfaction.

On December 30, Intervenor posted a review of IXL on Glassdoor.com[1]:

> 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 your rights when you work here, because they don't, and they don't care to

[1] IXL uses the Glassdoor.com platform to recruit employees.

> 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.

Intervenor also checked the following: "Doesn't recommend," Neutral Outlook," and "Disapproves of CEO."

On January 6, 2015, Keyes met with Intervenor in hopes of proactively resolving whatever was causing Intervenor to appear unhappy, and after hearing Intervenor's complaints, Keyes relayed them to IXL's CEO, Paul Mishkin. Mishkin subsequently scheduled a meeting with Intervenor for January 8 (two days after Keyes met with Intervenor).

IXL then discovered the negative review of IXL posted on Glassdoor.com and determined that Intervenor had likely posted the review. The Glassdoor.com post was provided to Mishkin after the meeting with Intervenor was scheduled. Mishkin decided to terminate Intervenor's employment because of this Glassdoor.com post and informed Intervenor of the termination at the previously scheduled meeting on January 8.

B. Procedural History

1. National Labor Relations Board Proceeding

The acting regional director of the National Labor Relations Board (the "NLRB" or the "Board") filed a complaint against IXL on July 29, 2015 in response to a Charge filed by Intervenor. In the NLRB Complaint, the NLRB alleged that IXL violated Section 8(a)(1) of the National Labor Relations Act (the "NLRA" or the "Act"). Specifically, the NLRB alleged that Intervenor engaged in concerted activities for the purposes of mutual aid and protection, by citing concerns of workplace discrimination in the posting on Glassdoor.com and that IXL discharged Intervenor to discourage employees from engaging in these or other concerted activities.

The case was tried before Administrative Law Judge Gerald M. Etchingham (the "ALJ"). On April 28, 2016, the ALJ issued a 37-page opinion in which he dismissed the complaint and held that IXL

did not engage in unfair labor practices within the meaning of Section 8(a)(1) of the Act. Menezes Decl., Ex. 1. The ALJ concluded that Intervenor's online reference to alleged discriminatory practices by IXL was "maliciously untrue" and made by him with "reckless disregard of whether it was true or false" as his real intention in his "angered state of mind was to hurt or damage" IXL's ability to recruit employees. Menezes Decl., Ex. 1, at 34. The ALJ found that Intervenor's post was "childish ridicule" in the nature of a personal attack on IXL and that Intervenor's Glassdoor.com posting was "so disloyal and recklessly disparaging" of IXL to lose protection under the Act. Menezes Decl., Ex. 1, at 35. On June 10, 2016, the NLRB adopted the findings and conclusions of the ALJ, and the NLRB Complaint was dismissed.

2. Equal Employment Opportunity Commission Proceeding

On March 17, 2015, Intervenor filed a charge of discrimination with the EEOC alleging violations of Title VII and the ADA. Intervenor alleged that IXL discriminated and retaliated against Intervenor on the basis of his sex and disability. The EEOC issued a letter of determination on or around April 22, 2016 stating that there was evidence that Intervenor was discharged for engaging in protected activity. At the same time, the EEOC determined that IXL did not deny Intervenor a reasonable accommodation and that IXL did not discriminate against or discharge Intervenor because he is transgender.

The EEOC has yet to issue a right-to-sue letter.

3. Lawsuit Filed by Intervenor

On January 6, 2017, Intervenor filed a complaint against IXL and IXL's CEO, Paul Mishkin, alleging retaliation in violation of the Family and Medical Leave Act against IXL and wrongful termination in violation of public policy against IXL and Mishkin (the "Intervenor Action"). DE 20-04. The complaint in the Intervenor Action noted that Intervenor intended to assert additional claims under Title I, the ADA, Title VII, FEHA, and the California Family Rights Act upon his receipt of his right-to-sue letter from the EEOC. DE 20-04, at 1. The court dismissed the claim against Mishkin on May 12, 2017.

Following the initiation of this lawsuit by the EEOC, IXL and Intervenor stipulated, pursuant to Federal Rule of Civil Procedure 41(a), to the dismissal of all claims pending in the Intervenor Action with prejudice. Intervenor's lawsuit against IXL was dismissed on June 27, 2017. Menezes Decl., Ex. 2.

III. DISCUSSION

A. Res Judicata Prevents Intervenor from Bringing Claims He Could Have Brought in the Intervenor Action

Intervenor has engaged IXL in litigation through administrative proceedings before the EEOC and the NLRB in which the EEOC, in part, and the NLRB found in favor of IXL. Intervenor then initiated the Intervenor Action against IXL. After the EEOC filed this suit against IXL, Intervenor sought IXL's stipulation to dismiss the Intervenor Action against IXL with prejudice. Intervenor now attempts to reopen and relitigate claims that he could have brought in the prior action that he agreed to dismiss with prejudice.

Pursuant to Federal Rule of Civil Procedure 41(a)(1), an action may be dismissed by filing a stipulation of dismissal signed by all parties who have appeared. A stipulated dismissal of an action with prejudice in a federal district court constitutes a final judgment on the merits. *Headwaters Inc. v. U.S. Forest Service*, 399 F. 3d 1047, 1052 (9th Cir. 2005); *see Stewart v. U.S. Bancorp*, 297 F. 3d 953, 956 (9th Cir. 2002) ("The phrase 'final judgment on the merits' is often used interchangeably with 'dismissal with prejudice.'"); Federal Rule of Civil Procedure 41(b) ("[A] dismissal under this subdivision (b) and any dismissal not under this rule – except one for lack of jurisdiction, improper venue, or failure to join a party under [Federal] Rule [of Civil Procedure] 19 – operates as an adjudication on the merits.").

Under the principles of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or ***could have been*** raised in that action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *see Intermedics, Inc. v. Ventritex, Inc.*, 775 F. Supp. 1258, 1262 (N.D. Cal. 1991) (Res judicata "will bar a subsequent suit on the same ground of recovery when (1) the parties are identical, (2) the prior judgment was rendered by a court of competent jurisdiction, (3) the judgment was a final judgment on the merits, and (4) both suits are based on the same cause of action.").

Res judicata can apply in cases where the plaintiff has not received a right-to-sue letter. For example, the Ninth Circuit held that it joins its "sister circuits in holding that Title VII claims are not exempt from the doctrine of res judicata where plaintiffs have neither sought a stay from the district court for the purpose of pursuing Title VII administrative remedies nor attempted to amend their complaint to include their Title VII claims." *Owens v. Kaiser Foundation Health Plan, Inc*., 244 F. 3d 708, 714-15 (9th Cir. 2001). In *Owens*, plaintiffs argued that res judicata could not apply because they were barred from bringing their Title VII claims in the previous action when they had not yet received their right-to-sue letters from the EEOC. *Id*. at 714. The Ninth Circuit held that the plaintiffs had "ample time" to secure their right-to-sue letters prior to filing their previous action, which had been dismissed with prejudice. *Id*. at 715. The Ninth Circuit further stated that, in the alternative, plaintiffs "could have sought a stay from the district court pending their administrative proceedings before the EEOC." *Id*. However, because plaintiffs failed to exercise either option, the Ninth Circuit concluded that plaintiffs' Title VII claims were barred by the doctrine of res judicata when plaintiffs' previous action had been dismissed with prejudice. *See also Davis v. Dallas Area Rapid Transit*, 383 F. 3d 309, 315 (5th Cir. 2004) ("Several other circuits have similarly held that Title VII claims were barred where plaintiffs failed to take measures to avoid preclusion under res judicata while they pursued the requisite Title VII remedies."). Courts have similarly held that claims under the ADA are not exempt from res judicata when a plaintiff fails to obtain a right-to-sue letter during the pendency of a previous litigation. *See Jang v. United Technologies Corp*., 206 F. 3d 1147 (11th Cir. 2000) (The Eleventh Circuit held that res judicata barred an employee from splitting his causes of action and bringing his ADA claim after his first suit was adjudicated on the merits when the ADA claim in the first suit was dismissed for lack of a right-to-sue letter. Although plaintiff argued he attempted to obtain a right-to-sue letter but that the EEOC failed to transmit the letter, the Eleventh Circuit noted that at least three other Circuits have rejected similar arguments and held that plaintiffs may not split causes of action by bringing a second suit with federal causes of action after receiving a right-to-sue letter.).

Here, Intervenor attempts to assert claims that he admittedly could have brought in the Intervenor Action. In his Complaint, Intervenor specifically stated that he intended to assert additional claims under Title I, the ADA, Title VII, FEHA, and the California Family Rights Act upon receipt of

his right-to-sue letter. DE 20-04. Despite acknowledging the requirement to obtain a right-to-sue letter, Intervenor has yet to obtain a right-to-sue letter even though, on or around July 2016, the EEOC informed IXL that conciliation efforts had been unsuccessful. Specifically, Intervenor could have requested a right-to-sue letter any time after the expiration of 180 days from the date of the filing of his charge with the EEOC, which was on or around March 10, 2015. 29 C.F.R. § 1601.28(a)(1); DE 20-02, at 2. Despite such knowledge, Intervenor then stipulated to the dismissal of the Intervenor Action with prejudice. Intervenor did not seek a stay in the Intervenor Action for the purpose of pursuing administrative remedies (including obtaining a right-to-sue letter) nor did he attempt to amend his complaint in the Intervenor Action to include his Title VII and ADA claims. Thus, just as in *Owens*, Intervenor's newly asserted claims are barred under the doctrine of res judicata.

Therefore, while IXL does not object to Intervenor intervening in this lawsuit pursuant to 42 U.S.C. 2000e-5(f)(1), Intervenor should not be allowed to bring claims that could have been brought in the Intervenor Action.

B. Intervenor Cannot Bring a Claim Under Title VII or FEHA When He Does Not Have a Right-to-Sue Letter From Either the EEOC or the DFEH

Even if Intervenor's claims are not barred by res judicata, Intervenor still cannot bring a claim when he has yet to receive a right-to-sue letter from either the EEOC or the DFEH.

Intervenor has not alleged or stated that he has received a right-to-sue letter from the EEOC or the DFEH. Under Title VII, a party must file a timely charge with the EEOC and receive a right-to-sue letter before filing any related court action. 42 U.S.C. § 2000e–5(f)(1); *see also Davenport v. Board of Trustees of State Center Community College Dist.*, 654 F. Supp. 2d 1073, 1087 (E.D. Cal. 2009). The "general requirement of a federal right-to-sue letter remains." *Surrell v. California Water Service Co*., 518 F.3d 1097, 1105 (9th Cir. 2008). "Courts typically look to the relative fault of the parties to determine whether the failure to obtain a right-to-sue letter should be excused." *Id.; see Pietras v. Board of Fire Com'rs of Farmingville Fire Dist*., 180 F.3d 468 (2nd Cir. 1999) ("Every circuit before us that has faced the question has held that a plaintiff's failure to obtain a notice-of-right-to-sue-letter is not a jurisdictional bar, but only a precondition to bringing a Title VII action that can be waived by the parties or the court.").

Here, Intervenor has not received a right-to-sue letter from the EEOC. Intervenor's prior complaint (now dismissed with prejudice) in the Intervenor Action stated that he intended to amend the complaint to assert additional claims under the ADA, Title VII, and FEHA "upon receipt of of [sic] right-to-sue letter from the EEOC." DE 20-04, at 1. Neither Intervenor's Motion to Intervene nor his Proposed Complaint in Intervention alleges that he ever requested or received this right-to-sue letter. DE 19; DE 20-01.

The right-to-sue letter will include authorization to bring a civil action under Title VII or the ADA. 29 C.F.R. § 1601.28(e). This is especially important when the EEOC has retained the right to sue and has sued on some, but not all, of the claims brought by Intervenor, and Intervenor's claims and basis for such claims contradict the basis of the claims brought by the EEOC. For example, the EEOC argues that IXL retaliated against Intervenor based solely on Intervenor's Glassdoor.com post; however, Intervenor alleges that he was also retaliated against based on complaints he made to his manager.

Similarly, Intervenor has not alleged that he received a right-to-sue letter from the DFEH. Under California Government Code § 12965(b), the DFEH is to issue, on Intervenor's request, a right-to-sue notice if a civil action is not brought by the DFEH within 150 days after the filing of Intervenor's complaint with the DFEH or if the DFEH determines earlier that no civil action will be brought. Government Code § 12965(b) provides a one-year time limit for filing a civil action from the date of the right-to-sue notice. "Obtaining a right-to-sue notice is a necessary predicate to the filing of an action under the California Fair Employment and Housing Act." *Westrec Marina Management, Inc. v. Arrowood Indem. Co.*, 78 Cal. Rptr. 3d 264, 268 (Cal. Ct. App. 2008) (citing *Romano v. Rockwell Internat., Inc.*, 14 Cal. 4th 479, 472 (Cal. 1996) ("Under FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the [DFEH] and must obtain from the [DFEH] a notice of right to sue in order to be entitled to file a civil action in court based on violations of FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under FEHA.")).

Thus, even if Intervenor's claims are not barred by res judicata, Intervenor still cannot assert a claim under Title VII or FEHA when he has failed to obtain a right-to-sue letter

C. Intervenor's FEHA Claim Does Not Share a Common Question of Law or Fact With the EEOC Claims.

Intervenor also cannot add a FEHA claim when such claim has neither a question of law nor a question of fact in common with the EEOC's claims.

Federal Rule of Civil Procedure 24(a)(1) provides for intervention as of right, meaning that a party, upon timely motion, may intervene when given an unconditional right to intervene by federal statute. Title VII provides an unconditional right to intervene in a lawsuit brought by the EEOC. 42 U.S.C. 2000e-5(f)(1); *see E.E.O.C. v. Occidental Life Ins. Co. of Cal.*, 535 F.2d 533, 542 (9th Cir. 1976).

However, because FEHA does not provide an unconditional right to intervene, Intervenor's FEHA claim must satisfy Federal Rule of Civil Procedure 24(b), which provides for permissive intervention. Federal Rule of Civil Procedure 24(b) allows a party to intervene when the party "has a claim or defense that shares with the main action a common question of law or fact." FRCP 24(b)(1)(B).

The Ninth Circuit has held that a court may grant permissive intervention "where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 19996) (internal citation omitted). However, even if an applicant satisfies the threshold requirements, "the district court has discretion to deny permissive intervention." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998); *see Orange v. Air Cal.*, 799 F.2d 535, 539 (9th Cir. 1986) ("Permissive intervention is committed to the broad discretion of the district court."). The Ninth Circuit has identified nonexclusive discretionary factors that a district court can consider when deciding whether to grant permissive intervention, including, but not limited to, the nature and extent of the intervenor's interest, his standing to raise relevant legal issues, the legal position he seeks to advance, its probable relation to the merits of the case, whether the intervenor's interests are adequately represented by other parties, and whether the party seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. *Spangler v. Pasadena City Board of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

Here, Intervenor's FEHA claim as stated in Government Code 12940(m) does not share a question of law or fact in common with the EEOC's action. Specifically, Intervenor alleges a willful violation of Government Code 12940(m), which makes it unlawful for an employer to fail to make a reasonable accommodation or to retaliate or otherwise discriminate against a person for requesting an accommodation. However, the EEOC's retaliation claims relate solely to the Glassdoor.com posting. Specifically, to establish a claim of retaliation, a party must prove that (1) the party engaged in a protected activity, (2) the plaintiff suffered an adverse employment action, and (3) there was a casuaink between the party's protected activity and the adverse employment action. *Poland v. Chertoff*, 494 F.3d 1174, 1179-80 (9th Cir. 2007). Thus, the EEOC's retaliation claims are founded solely on whether the Glassdoor.com posting constituted a protected activity. However, Intervenor's FEHA claim under Government Code 12940(m) pulls in additional questions of fact and law as it relates to Intervenor's disability and reasonable accommodations. This is beyond the scope of the EEOC's claims as the EEOC previously determined that IXL provided reasonable accommodation and did not discriminate against or discharge Intervenor because he is transgender.

The unpublished cases relied on by Intervenor are distinguishable. In *E.E.O.C. v. Wireless Comm, Inc.*, No. 5:11-CV-04798 EJD, 2012 WL 1711040 (N.D. Cal. May 15, 2012), the court held that the intervenor's state law claims all arose out of the sexual harassment experienced by the intervenor, and the defendant did not dispute that the ***same*** events that gave rise to the tort claims also gave rise to the Title VII claims. DE 20-06, at 3. Here, Intervenor's claim under Government Code 12940(m) arises under ***different events*** as those giving rise to the EEOC's claims. Specifically, the EEOC's claims rely solely on the Glassdoor.com posting, while Intervenor's claim under Government Code 12940(m) relies on events before the Glassdoor.com posting relating to Intervenor's alleged disability and reasonable accommodations (e.g., earlier meetings or communications between Intervenor and his supervisor).

The second unpublished case cited by Intervenor makes no mention of or reference to Federal Rule of Civil Procedure 24(b). *E.E.O.C. v. Central California Foundation for Health*, No. 1:10-CV-01492 LJO JLT, 2011 WL 149831 (E.D. Cal. Jan. 18, 2011); DE 20-06, at 6. Here, both Intervenor and IXL agree that the addition of state claims, such as FEHA, must meet the permissive intervention standard under Federal Rule of Civil Procedure 24(b). DE 19, at 6 ("Pursuant to F.R.C.P. Rule 24(b),

Intervenor is permitted to add a claim under FEHA."). Because this second case did not invoke or analyze Federal Rule of Civil Procedure 24(b), it is not applicable to Intervenor's motion. DE 20-06, at 6.

Intervenor should not be allowed to add a claim under Government Code 12940(m) when the claim does not have a question of law or a question of fact in common with the EEOC's claims.

IV. CONCLUSION

For the reasons stated herein, the Court should deny the addition of claims alleged in Proposed Plaintiff-Intervenor's Motion to Intervene.

Respectfully submitted,

Dated: September 5, 2017

YOUNG BASILE HANLON & MACFARLANE, P.C.

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STATE OF MICHIGAN, COUNTY OF OAKLAND
U.S. Equal Employment Opportunity Comm. v. IXL Learning, Inc.
Case No.: 3:17-CV-02979-VC

I am employed in the County of Oakland, State of Michigan; I am over the age of eighteen (18) and not a party to the within action; my business address is 3001 W. Big Beaver Road Suite 624, Troy, MI 48084. On September 5, 2017, I served the foregoing document(s) described as **Defendant's Opposition to Proposed Plaintiff-Intervenor's Motion to Intervene** on all interested parties to this action by delivering a copy thereof via electronic mail to each of said interested parties at the following address(es):

Ami Sanghvi Equal Employment Opportunity Commission 350 The Embarcadero, Suite 500 San Francisco, CA 94105 P: (415) 625-5640 F: (415) 625-5657 ami.sanghvi@eeoc.gov	Attorneys for Plaintiff US EEOC
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☐ **(BY MAIL)** I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our firm's office address in Troy, Michigan. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☒ **(BY ELECTRONIC FILING)** I caused such document to be delivered via electronic filing and service of court via Notice of Electronic Filing ("NEF").

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on September 5, 2017, at Troy, Michigan.

/s/ Jeffrey D. Wilson
Jeffrey D. Wilson

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. IXL LEARNING, INC., Defendant.	Case No.: 17-CV-02979-VC **DECLARATION OF NATASHA R. MENEZES IN SUPPORT OF DEFENDANT'S OPPOSITION TO PROPOSED PLAINTIFF-INTERVENOR'S MOTION TO INTERVENE** **Date:** **September 19, 2017** **Time:** **1:30 p.m.** **Courtroom:** **4-17th Floor** **Judge:** **Honorable Vince Chhabria**

I, NATASHA R. MENEZES, declare:

1. I am an associate attorney at the law firm of Young Basile Hanlon & MacFarlane, P.C., and counsel for the Defendant, IXL Learning, Inc. ("IXL Learning"). This declaration is in opposition to Proposed Plaintiff-Intervenor's Motion to Intervene filed on August 21, 2017. I have personal

knowledge of the matters set forth herein and, if called as a witness, I could and would testify competently thereto.

2. Attached hereto as Exhibit 1 is the NLRB Decision and Order entered by the Administrative Law Judge on April 28, 2016.

3. Also attached hereto as Exhibit 2 is the Order of Dismissal entered in the matter of Adrian Scott Duane v. IXL Learning, Inc. and Paul Mishkin, Case No. 3:17-cv-00078 [DE 51].

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 5th day of September, 2017 in Troy, Michigan.

/s/ Natasha R. Menezes
Natasha R. Menezes

Exhibit 1

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

IXL LEARNING, INC. and ADRIAN SCOTT DUANE	Case 20-CA-153625

ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

Dated, Washington, D.C., April 28, 2016.

By direction of the Board:

Gary Shinners

Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations and on size of paper, and that requests for extension of time must be served in accordance appearing on the pages attached hereto. **Note particularly the limitations on length of briefs with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1015 Half Street SE, Washington, DC 20570, on or before **May 26, 2016.**

NLRB ADR PROGRAM
FOR SETTLING UNFAIR LABOR PRACTICE CASES PENDING BEFORE THE BOARD

Since December 2005, the National Labor Relations Board's alternative dispute resolution (ADR) program has assisted parties in settling unfair labor practice cases pending before the Board. For parties who have chosen to participate in the ADR program, NLRB-assigned neutrals have assisted parties in reaching settlements in approximately 60% of the cases. The Board approved the parties' settlements in each of those cases.

Participation in the Board's ADR program is voluntary, and a party who enters into settlement discussions under the program may withdraw its participation at any time. The Board will provide the parties with an experienced neutral to facilitate confidential settlement discussions to explore resolution options that serve the parties' interests. Depending on the parties' preference, the settlement conferences will be held in person, telephonically, or by videoconference.

The Board established the ADR program in response to the success experienced by other federal agencies and the federal courts in settling contested cases through ADR, as well as the success of the NLRB's own settlement judge program at the trial level. In announcing the Board's decision to make the program permanent, the Chairman stated:

> ADR programs provide the parties with several benefits, including savings in time and money; greater control over the outcome of their cases, and more creative, flexible, and customized resolutions of their disputes. Settlement discussions conducted with the assistance of an ADR neutral may broaden resolution options, often by going beyond the legal issues in controversy, and may be particularly useful where traditional settlement negotiations are likely to be unsuccessful or have already been unsuccessful. Our experience with the pilot ADR program demonstrates that participation in the program provides the parties with a process for expeditiously resolving their disputes, which serves to effectuate the purposes of the Act.

Features of the Board's ADR program include:

- The parties may request assignment of an Agency administrative law judge to serve as the neutral. The program director, however, is also available to serve in that capacity. The judge who heard the underlying case will not be appointed.
- The Board will stay further processing of the unfair labor practice case for 30 days from the first meeting with the neutral or until the parties reach a settlement, whichever occurs first. Requests for extension of the stay beyond the 30 days will be granted only with the approval of and in the sole discretion of the neutral and the program director upon a showing that such an extension is supported by good cause. However, no case may be in the program for more than 60 days.

- The preferred method of conducting settlement conferences is to have the parties or their representatives attend in person, and therefore the neutral will make every reasonable effort to meet with the participants face-to-face at the parties' location. Settlement conferences by telephone or through videoconference may be held if the parties so desire.

- Parties may be represented by counsel at the conferences, but representation by counsel is not required. Each party must have in attendance, however, a representative who has the authority to bind the party to the terms of a settlement agreement.

- The parties may be asked to submit to the neutral a confidential pre-conference memo setting forth what is in dispute between the parties, prior settlement efforts, and anything else that the parties would like to bring to the neutral's attention. The memo will be treated as a confidential submission unless the party that prepared the memo authorizes release to the other parties.

- The neutral has no authority to impose a settlement.

- Discussions between the neutral and the participants will be confidential, and there will be no communication between the program and the Board on specific cases submitted to the ADR program, except for procedural information such as case name, number, and status.

- Nothing in the ADR program is intended to discourage or interfere with settlement negotiations that the parties wish to conduct outside the program.

- Deadlines for filing pleadings with the Board will be stayed effective the date that the case enters the ADR program. In the event the case is removed from the program, the time period for filing will begin running again from where it left off.

- Settlements reached are subject to approval in accordance with the Board's existing procedures for approving settlements.

- No party will be charged fees or expenses for using the program.

The Board invites parties who have unfair labor practice cases pending before the Board to consider participating in the ADR program. If you have questions about the program, or if your client would like to participate in the program, please contact the program director, Gary Shinners, at (202) 273-3737, or by email at gary.shinners@NLRB.gov.

NLRB Rules and Regulations
Procedures for Filing Documents

The following information is provided to help you file certain documents after an administrative law judge's decision has issued. The information provided below is not comprehensive. To fully read the Board's Rules and Regulations with respect to the filing of documents after a judge's decision has issued, please see Sections 102.46 through 102.48 and Sections 102.111 through 102.114 of the Board's Rules and Regulations. A complete copy of the Board's Rules and Regulations may be viewed at the NLRB's public website at www.nlrb.gov/reports-guidance/rules-regulations.

Exceptions to Judge's Decision and Briefs in Support of Judge's Decision - Section 102.46 (a) – Within 28 days from the date of the Order Transferring Proceeding to the Board, parties may file exceptions to the administrative law judge's decision, together with a brief in support of the exceptions. Any party may also, within the same time frame, file a brief in support of the judge's decision. Please note that the due date for exceptions is stated at the bottom of the Order Transferring Proceeding to the Board.

- **Example**: If the date of the Order Transferring Proceeding to the Board is October 1, then exceptions are due on October 29.
- **Extensions of Time**: Requests for an extension of time to file exceptions or briefs must be in writing and filed with the Office of the Executive Secretary at least three days prior to the due date for exceptions. In addition, a copy of the extension of time request must be timely served on all parties.

Oppositions to Exceptions - Section 102.46 (d)(1) – 14 days after the last due date for exceptions, any party opposing the exceptions may file an answering brief to the exceptions with the Office of the Executive Secretary.

- **Example**: If the last due date for exceptions is October 29, then the answering brief is due on November 12.
- Per Section 102.46 (d)(2), matters discussed in the answering brief are limited to what is raised in the exceptions and the brief in support of exceptions.
- **Extensions of Time**: Requests for an extension of time to file an answering brief must be made in writing and filed with the Office of the Executive Secretary at least three days prior to the due date for the answering brief. In addition, a copy of the extension of time request must be timely served on all parties.

Cross-Exceptions - Section 102.46 (e) – 14 days after the last due date for exceptions, any party that has not yet filed exceptions may file cross-exceptions and a supporting brief to any portion of the administrative law judge's decision.

- **Example**: If the last due date for exceptions is October 29, then cross-exceptions are due on November 12.
- **Extensions of Time**: Requests for an extension of time to file exceptions or briefs must be in writing and filed with the Office of the Executive Secretary at least three days prior to the due date for exceptions. In addition, a copy of the extension of time request must be timely served on all parties.

Answering Briefs to Cross-Exceptions - Section 102.46 (f)(1) – 14 days after the last due date for cross-exceptions, any party may file an answering brief to the cross-exceptions.

- **Example:** If the last due date for cross-exceptions is November 12, then the answering brief to the cross-exceptions is due on November 26.
- **Extensions of Time:** Requests for an extension of time to file an answering brief must be in writing and filed with the Office of the Executive Secretary at least three days prior to the due date for exceptions. In addition, a copy of the extension of time request must be timely served on all parties.

Reply Brief to Answering Brief - Section 102.46 (h) – 14 days after the last date on which an answering brief is due, any party may file a reply brief to the answering brief.

- **Example:** If the last due date for answering briefs is November 12, then the reply brief is due on November 26.
- The reply brief shall not exceed 10 pages. Requests for permission to exceed this page length will NOT be granted.
- **No extensions of time are permitted for reply briefs.**

Page Limits and Index Requirement - Section 102.46 (j) – Any brief filed pursuant to Section 102.46 must not be combined with any other brief. In addition, except for reply briefs, briefs filed under this section must not exceed 50 pages in length, unless permission to do so is obtained from the Board by motion. The details for this type of a motion are fully set forth in the Board's Rules and Regulations, Section 102.46 (j). Any brief that exceeds 20 pages in length must contain a subject index with page references and an alphabetical table of cases and other authorities cited.

Automatic Adoption of Judge's Decision in Absence of Exceptions - Section 102.48 – If no party files exceptions to the judges' decision, then the finding, conclusions, and recommendations contained in the judge's decision shall automatically become the decision and order of the Board, and all objections and exceptions shall be waived for all purposes.

Computation of Filing Period - Section 102.111 – In computing any period of time under the Board's Rules and Regulations, the day of the act (for example, issuance of the decision) is not to be counted. The last day on which the document is due is to be counted, *unless* that day is a Saturday, Sunday, or a legal holiday, in which case, the time period continues until the next Agency business day. **For instance**, if the due date for exceptions falls on a Monday that is a holiday (such as Labor Day), then the exceptions will be due the following Tuesday.

- In computing the period of time for filing a responsive document, the designated period begins to run on the date the preceding document was required to be received by the Agency, even if the document was filed prior to that date.

Filing Receipt Rules - Section 102.111 (b) –

- The filing of any document by hard-copy must be **received** before the official closing time of the *receiving office* on the last day of the time limit.
  Example: If a document is filed by hand delivery, the document must be received by the Office of the Executive Secretary prior to 5:00 p.m. ***Eastern time*** on the due date.
- The electronic filing of any document on the NLRB's website must be received before midnight for the time zone of the *receiving office* on the last day of the time limit.

Example: If electronically filing a document with the Office of the Executive Secretary in Washington, D.C., then that document must be filed prior to 11:59 p.m. ***Eastern time*** on the due date.

- Requests for extension of time that are filed within three days of the due date must be based on circumstances not reasonably foreseeable in advance.
- Documents may be hand-delivered to the Board.
- Documents postmarked on the day before (or earlier than) the due date are considered timely even if they are received by the Office of the Executive Secretary after the due date; documents which are postmarked on or after the due date are untimely.

Late Filings - Section 102.111 (c) – A party may file motions, exceptions, requests for review, briefs, and any responses after the due date **only upon good cause shown based on excusable neglect and when no undue prejudice would result.**

- A party that is attempting to file documents after the due date must file, in addition to the documents, a motion that states the reasons for requesting to file in an untimely manner.
- A party must also file an affidavit sworn to by individuals with personal knowledge of the facts relating to the late filing.

Service and Filing Dates - Section 102.112 – The date of service is the day on which the document is placed in the mail, or with a private delivery service, or is delivered in person. If the document is faxed, then the date of service is the date on which the transmission is received.

Service Requirements - Section 102.113 and 102.114 –

- Where the rules require service of documents on other parties, a copy of the documents must also be served on any attorney or other representative who is representing that party. **For example**, if Company ABC is represented by John Doe, an attorney, then John Doe must be served a copy of the documents.
    - ***Please note that exceptions, cross-exceptions, answering briefs, reply briefs, extensions of time, and/or any other motion, must be served on all parties in a case.***
- Service of documents by a party on other parties can be done either personally, by registered mail, certified mail, regular mail, electronic mail (if the document is filed electronically), or by private delivery service. Please note that ***service on all parties must be made in the same manner as the filing of the document***, or in a more expeditious manner.
- Failure to follow the procedures relating to timeliness in Section 102.114, may result in: 1) rejection of the document; or 2) withholding a ruling on the matter until service has been completed.
- Papers that are filed with the Board must be typewritten on 8.5 by 11-inch plain white paper; margins must be no less than one inch on each side; typeface must not be smaller than 12 characters per inch; document must be double-spaced. Documents that do not comply with these requirements may be rejected.
- The person or party serving the papers on other parties must submit a written statement of service. This statement must have the following information: 1) the names of the parties served; the date on which these parties were served; and 3) the method of service.

JD(SF)-21-16
San Mateo, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

IXL LEARNING, INC.

and **Case 20-CA-153625**

ADRIAN SCOTT DUANE, an Individual

Cecily Vix, Esq.,
for the General Counsel.
Jeffrey D. Wilson Esq.
(Young Basile Hanlon & MacFarlane, P.C.),
for the Respondent.
David Marek, Esq.(Liddle & Robinson),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in San Francisco, California, on November 5, 2015. Adrian Scott Duane, an individual (the Charging Party or Duane), filed the charge in Case 20-CA-153625 on June 3, 2015. The General Counsel issued the complaint on July 29, 2015, and amended it on October 16 and 22, 2015 (complaint), and the Respondent IXL Learning, Inc. (Respondent or Employer) answered the original complaint on August 12 and the amended complaint on October 27, 2015, generally denying the critical allegations of the complaint.

The complaint alleges the Respondent also violated Section 8(a)(1) of the National Labor Relations Act (Act) by terminating Duane's employment because he engaged in protected concerted activities citing concerns of workplace discrimination in a posting on Glassdoor.com. The complaint further alleges the Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad rule requiring employees to register their complaints about their working conditions with their supervisor before complaining to third parties. Finally, at hearing, the complaint was amended to add one further allegation that Respondent violated the Act under Section 8(a)(1) by discharging Duane to prevent future protected concerted activity.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation with an office and place of business in San Mateo, California, has been engaged in the creation and sale of online educational software services and related products since 1998. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (G C Exh. 1(f) and 1(n).)[2]

II. Statement of Facts

A. The Respondent's Background and Operations

Respondent is an educational technology company that provides online services in math and English for K-12 students to use to help develop and practice math and English skills. The company was founded in 1998 by its current Chief Executive Officer Paul Mishkin (Mishkin) and it is located in San Mateo, California, near the Silicon Valley where a number of other technology companies are located. (Tr. 241.) Respondent employs approximately 200 employees, the large majority who work at the San Mateo facility but some who are privileged to work remotely part or full time. (Tr. 200.)

Respondent maintains its own website that K–12 students can use. Respondent's product includes a math practice site where students enter Respondent's website and take practice math tests and Respondent records each student's answers and records all of the data and responses so that teachers and parents can see how well the students are doing. (Tr. 200 and 207.) Respondent's engineer and product analyst employees write code and a program that generates each of the practice exam questions or problems and the engineer needs a list of specifications from Respondent's management and the documents referred to as "specs" are written by

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[1] The transcript in this case is generally accurate, but I correct the transcript (Tr.) as follows: Tr. 36; l. 6, "Nina" should be "Nemo"; Tr. 53; l. 6, "unpermitted" should be "unlimited"; Tr. 61, l. 7, "as" should be "at"; Tr. 86; l. 13, "this gender" should be "cisgender"; Tr. 93; l. 22, "log" should be "long"; Tr. 97; l. 21, "mind" should be "mine"; Tr. 98; l. 8, "her supervisees has" should be "her employees that she supervises has"; Tr. 105, l. 20, "I" should be "in"; Tr. 106; l. 12, "ours" should be "hours"; Tr. 124; l. 13, "Meyers Two" should be "Meyers II"; Tr. 155; l. 21, "replying" should be relying"; Tr. 198; l. 15, "parxial" should be "*Parexel International*"; Tr. 210; l. 19, "That's" should be "What's"; Tr. 232; l. 12, "the productivity" should be "being less productive";Tr. 245; l. 14, "than" should be "that"; Tr. 247; ll. 11-12, "extremely in" should be "extremely important in"; Tr.251; l. 17, "at that" should be "to"; Tr. 255; l. 4, "fall" should be "all"; Tr. 279; l. 2, "easy on challenging work" should be "easy, unchallenging work".

[2] Abbreviations used in this decision are as follows: "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "Jt. Exh." for joint exhibit; "GC Br." for the General Counsel's brief and "R. Br." for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record. Charging Party counsel, while participating at hearing, did not submit a post-hearing brief.

Respondent's product analyst employees who basically say what each problem is going to be about, what the text in that problem is, how students answer it such as via multiple choice or written answer, etc. (Tr. 206-208.) The code is tested so that by the time of its release to the public by Respondent, the code has been tested and works smoothly without any problems. (Tr. 207.)

As part of its benefits package, Respondent offers its employees unlimited paid sick leave in 2014 and employees were only required to tell their manager they wanted to take a sick day and employees must bring in a doctor's note to explain missed sick days in excess of 3. (Tr. 206.)

B. Glassdoor.com Jobs and Recruiting Services

Since 2013, Respondent subscribes to a jobs and recruiting service from Glassdoor.com primarily for recruitment purposes and the site allows Respondent to recruit highly educated candidates and gives Respondent enhanced services on Glassdoor's website and allows it to put more essential information on the recruitment website. (Tr. 241, 261; Jt. Exh. 1; R. Exh. 9.) Mishkin opined that Glassdoor's main purpose is to help Respondent recruit qualified employees in the competitive technology environment that exists in Silicon Valley. (Tr. 262-263.) Respondent pays extra for an enhanced page on Glassdoor.com that says more about the company, what it is like working at Respondent and shows a video about Respondent and its products. (Tr. 280.) Current and former employees can post anonymous reviews about companies on Glassdoor.com.

Glassdoor's mission is to "help people find the jobs they love and help companies attract top talent." (R. Exh. 9 at 1.) The Glassdoor Essentials Package is touted by Glassdoor to allow Respondent to "Attract Top Talent With Bundled Job Advertising and Employer Branding." (Jt. Exh. 1; R. Exh. 9.) Respondent advertises open positions to prospective new employee candidates using Glassdoor and candidates also use Glassdoor to submit job applications and resumes in response to open positions at various companies including Respondent. One feature that Glassdoor offers to protect member anonymity is described by Glassdoor as:

> All contributions submitted to Glassdoor are anonymous to other community members, including employers. Glassdoor does not display your email address, Facebook profile, or any other personal information. All members of our community have the ability to submit a contribution without providing additional information that would allow others to identify you:
>
> - When submitting a company review, interview review, or benefit review to Glassdoor it is optional to provide your location and title.
> - You may also submit a salary review to Glassdoor without providing your employer name.
>
> Glassdoor will never post to your Facebook wall without your permission. We will never display your Facebook profile next to any of your submissions....

(R. Exh. 9 at 3.) Thus, there is no ability to comment on a Glassdoor posting the same as one can do on Facebook or Twitter and the nature of Glassdoor.com is not a social media site but rather it is a recruitment tool utilized by Respondent to recruit prospective employees and advertise itself

similar to what Yelp does for restaurants. (Tr. 116-117.) A reviewer of a Glassdoor posting can only post anonymously if the posting is helpful. There is no ability to affix a name to a Glassdoor posting saying whether one agrees or disagrees with the post and employees do not communicate with each other through public or private messages. Id.

C. The Charging Party's Work and Employment at Respondent in First Year

Duane began working at Respondent in July 2013 as a math team product analyst. Duane has his Ph.D. in mathematics and he opined that Respondent demands that its employees either have their masters or PhD. in math or English. (Tr. 25-26.)

Duane explained that his work for Respondent involved designing skills that Respondent could incorporate into its website products for students. Duane wrote specifications for those skills, he aligned those skills to the common core curriculum and he designed the Ipad application keyboard and he also reviewed skills and tested the resulting generators for the website. (Tr. 26, 208.)

Duane's math team had 2 managers, David Keyes (Keyes) being one of the two and Duane's direct supervisor/manager for the majority of Duane's employment at Respondent. (Tr. 28.) Keyes was the direct supervisor of Duane and 5 other employees in his role as program manager for math content at Respondent from January 2014 through early January 2015. (Tr. 200-01.) In 2014[3] and 2015, Keyes direct manager was Kate Mattison (Mattison), the director of products, and Mattison reported to Joe Kent, the director of engineering, and Kent reported to CEO Mishkin. (Tr. 201-202.)

Mishkin described Respondent's employees' ability to work remotely as a privilege subject to the discretion of Respondent's individual managers. (Tr. 202-203, 259.) Keyes described remote work basically broken down into 2 types: (1) that which is requested *sporadically* on a 1-day basis when employees have a sick child at home, a repair person appointment or appliance delivery scheduled, or an extended vacation by a day or two; and (2) a set *regular* remote work schedule on a part time or full time basis with remote work occurring daily or weekly at a set percentage of time preapproved by management. (Tr. 88-90, 226-228; GC Exh. 4 at 1-2.) Keyes opined that almost all Respondent's employees received approval for the sporadic type remote work but that the regular fixed schedule remote work was much less frequent and required a set plan for those who did not have productivity issues. (Tr. 222-224.) Duane admits that for his 25-30 days that he worked partially at home from January--October, 2014, there were no restrictions or reporting requirements tied to this remote work arrangement.

Keyes described one employee's, Mathew Bleeker's, remote schedule as being 100 percent at home. Bleeker turned down Respondent's first job offer because he could not move from Louisiana due to his wife's illness so Respondent revised its offer to Bleeker of 100 percent work at home which was later accepted in November or December 2014 by Bleeker before he started after Duane's employment at Respondent ended. Id. Another employee, Gina Bland, was allowed by Respondent to remotely work a 50/50 plan after her first 3 months in the office and she did well and works 100 percent at home as of November 2015. (Tr. 224.)

[3] All dates in 2014 unless otherwise indicated.

Duane further opined that he can perform all of his job functions remotely because all of his communications were done online via g-chat or email. (Tr. 46-47.) Keyes agreed that most of the job duties of a math product analyst can be done remotely with the only issue being the testing of all of the devices. (Tr. 203.)

Duane described his work at Respondent as being 80-90 percent individual and 10-20 percent collaborative. (Tr. 29.) Duane estimated that on his math team of 15 employees, approximately 5 of 15 or 33 percent were allowed to occasionally work remotely. (Tr. 25.) Non-management employees at Respondent, like Duane, work in cubicles at the San Mateo office while managers have their own private offices. (Tr. 27.) Duane estimates that the nearest manager office to his cubicle was approximately 15 feet away and 30-40 feet away from the next closest manager at Respondent. (Tr. 28, 203.) Karen Penner (Penner), Respondent's recruitment manager, occupied the office closest to where Duane worked while at Respondent. Id.

When he started at Respondent in July 2013, Duane reported to Mattison as his direct supervisor until she was promoted to director of products sometime after August 2013. Keyes was Duane's next direct supervisor who worked with Duane in this capacity until Duane's last day at work on January 8, 2015. (Tr. 26-27.) Keyes assigned Duane what skills he was to design and Keyes reviewed the specifications that Duane wrote for those skills. (Tr. 27.)

Duane had weekly one-on-one meetings with Keyes to check in on the kind of progress Duane was making on his work. (Tr. 107.) At least once or twice Keyes requested Duane to improve his accuracy and thoroughness of the work product that he was creating. Id.

Duane had a conversation with Mattison in August 2013 where he informed her about his disability advocate work with the Fair Education Act. (Tr. 66.) Duane also mentioned to Mattison that he had heard that Respondent planned to expand its product to create social studies skills and Duane told Mattison that he would like to work on such a new project if it came up. (Tr. 66-67.)

Employees at Respondent were allowed to work different hours with some working a 6-7 a.m. to 2-3 p.m. shift while others came in at 10-11 a.m. and worked until 7 or 8 p.m. (Tr. 28.) Employees are expected to work between 8-9 hours days with breaks and lunch with the option of staying or leaving the facility at lunch. Id. Employees were freely able to communicate to co-workers about work and personal matters during work hours and did so usually directly, via email, or g-chat instant messaging or texting. (Tr. 29; GC Exhs. 5 and 8.)

Duane received performance reviews on September 12 and November 12, 2013, which provided that Duane's work performance required improvement in areas such as organization, time management, promptness, and resourcefulness to increase productivity. (R. Exh. 2 at 2.)

D. The Charging Party's Isolated Alleged Protected, Concerted Activities Mostly Outside the Presence of Management

From time to time in the approximate 17 months that Duane worked at Respondent, he and one or two of his coworkers would discuss work concerns about Respondent most times during lunch outside the direct presence of management. This laundry list of isolated discussions touched upon concerns mostly at the start of Duane's employment about Respondent's unlimited sick leave policy, the common complaint of there being a lack of diversity at Respondent and in

the tech industry generally, the lack of supportive creativity in developing Respondent's product, and alleged micro-management of employees by Respondent's CEO Mishkin. Specifically, these isolated discussions are as follows:

1. Duane's Discussions in August 2013.

a. *New Skill* –

In August 2013, Duane and Keyes spoke when Keyes was still a product analyst like Duane and not yet a supervisor. Duane told Keyes that he had an idea for a new skill on Respondent's website in which students would learn how to make fractals by actually creating fractals. This conversation took place near their cubicles with Keyes, and two other product analyst employees. Keyes responded to Duane saying that he did not think that Respondent's CEO Mishkin would approve the new skill because it was too outside the norm that Respondent created and too different from the skills that were on the website at the time. (Tr. 38-39.)

b. *Lack of Diversity* –

Also during August 2013, Duane and co-worker Nemo Curiel (Curiel) had a conversation around lunchtime at Duane's cubicle and Curiel told Duane that he had noticed that there were only 2 Latino employees at Respondent including himself and only 2 or 3 African American employees. Duane responded to Curiel that Duane had noticed the same thing but Duane was not surprised by this because it is the tech industry and the tech industry workforce is not very diverse. (Tr. 33.) No manager was directly present. (Tr. 113.)

c. *Respondent's Sick Leave Policy* –

Again in August 2013, at the start of Duane's employment at Respondent, he and Curiel had another conversation at Duane's cubicle outside the direct presence of any Respondent supervisor or manager around lunchtime. (Tr. 113.) This conversation started with Duane commenting to Curiel that he was nervous because he had inconclusive blood test results and upon hearing this Curiel suggested to Duane that he take a sick day because Duane was nervous about this. Duane responded to Curiel by saying that Duane did not want to take a sick day and be perceived as being lazy and not putting enough time into his work at Respondent. (Tr. 29-30.)

2. Curiel's Sick Leave Conversation with Duane in January 2014

In January 2014, Duane had another conversation with Curiel regarding Respondent's sick leave policy. The conversation involved just the two co-workers outside their cubicles at lunchtime outside the direct presence of any supervisor or manager. Curiel told Duane that he had been called into the HR manager's office because he was using too many sick days. Duane responded by saying that if Respondent's policy is to allow unlimited sick day use then Curiel was within his rights to do that. Curiel responded to Duane by saying that he agreed with Duane but that Curiel would probably take fewer sick days. (Tr. 31-32.) No manager was directly present. (Tr. 113.)

3. Duane's Canceled Video Project Discussions with Curiel, Wu, and Morse in February and April 2014

In February 2014, Curiel, Duane and another product analyst co-worker, Jessica Morse (Morse), went to lunch at a restaurant off-site. At this time, Curiel and Morse told Duane that the video project they had been working on had been canceled. It was a video project to create short videos for 2nd and 3rd graders to learn math. Morse told Duane that she had moved from faraway to take this job at Respondent specifically to work on the video project. Morse told them that she was frustrated that it had been canceled and that she had wasted 3 months of work. Duane responded and said that he echoed her frustrations and that he would also be frustrated if it had happened to him. Curiel and Morse told Duane that they thought Mishkin and Mattison canceled the video project because Morse's direct supervisor had come up with the video idea in the first place. (Tr. 34-35.) No manager was directly present. (Tr. 113.)

Also in March or April 2014, math product analyst Nina Wu (Wu) and Duane were near cubicles when Wu told Duane that she had just started at Respondent and that, like Curiel and Morse above, she also had come to work on the video project that had been recently canceled. (Tr. 35-36, 169-170, 172-174.) Wu told Duane that the project had been canceled before she arrived at Respondent to start her job and that Respondent had not informed her before she arrived on her first day of work that the video project had been canceled. Id. Wu asked Duane if he had any knowledge about the project cancellation as to who canceled it and why it was canceled. Id. Duane responded that based on what he had heard from Curiel and Morse earlier, they believed that CEO Mishkin was responsible for cancelling the video project. (Tr. 36, 236.) Duane also told Wu that it seemed to him that Respondent did not really want to push the boundaries on creativity and that Respondent just wanted to keep its product quality the same as they had been done in the past and was not open to trying new things. Id. No manager was directly present. (Tr. 113.)

4. Duane's Expected Disability Leave Conversation with Wu in May 2014

In May 2014, Duane and Wu had a conversation at a cubicle outside the direct presence of management or outside of Respondent where Duane confided to Wu that he was getting ready to tell his supervisor Keyes that Duane planned to take 2 months off to have gender confirmation surgery. (Tr. 40-41, 175-176.) Duane also told Wu that he felt nervous about this because Duane did not plan to disclose that the surgery was related to his gender transition and Duane was worried that if Keyes later found out that Duane was a transgender that Keyes might not think that the surgery was medically necessary and that Keyes might even feel lied to because Duane had not disclosed that it was for Duane's gender transition. Id. Wu responded by saying that she thought Keyes would react nicely. (Tr. 41.) No manager was directly present. (Tr. 113.)

5. Duane's August 2013, September 2013, February 2014, and July 2014 Glassdoor Discussions with Curiel and/or Respondent's Management

In August 2013, Duane and Curiel discussed Glassdoor postings with manager Penner who told them that Glassdoor had received several negative reviews in the last few months and Respondent believed that they came from one former employee in the sales department. (Tr. 54.) Penner asked Duane and Curiel if they were willing to post positive reviews about Respondent

on Glassdoor. Id. Duane responded to Penner that he would probably be willing to post a review and Curiel told Penner he would think about it. Id.

Duane posted a positive review on Glassdoor in September 2013 about Respondent saying that so far he had had a good experience working at Respondent. (Tr. 54-55.) Duane and Curiel spoke more about postings on Glassdoor in September 2013 and Curiel told Duane that he had reviewed the negative reviews that Penner had mentioned in August but that Curiel had not noticed the same negative behavior mentioned in the negative reviews but Curiel told Duane that he was going to keep an eye out as these negative postings were definitely red flags to him. (Tr. 55.) Duane responded that this was reasonable to do but that he had not witnessed anything but good experiences but maybe people in other departments at Respondent experienced negative things. Id. No manager was directly present. (Tr. 113.)

On February 24, 2014, Prado emailed employees including Wu about Glassdoor reviews asking the employees to post comments about their work experience at Respondent so to help "paint a picture of what it's like to work at IXL – which will help us find the best talent …." (Tr. 178-180; GC Exh. 12.) Wu did not post anything on Glassdoor in response to Prado's email. (Tr. 185-186.) Wu described Glassdoor as being like Yelp but for employers and its primary use is for job seekers. (Tr. 186-187.)

In July 2014, Duane received another email from Prado about Glassdoor and the email encouraged employees to write positive reviews on Glassdoor. (Tr. 57.) At this same time Mishkin was inquiring into the process with Penner and Glassdoor whether there was any way that a negative review could be taken down from Glassdoor website. (Tr. 270; GC Exh. 14.)

6. Duane's January 2015 Conversation with Milin Re: New Skill for Kindergartners

In early January 2015, co-employee and senior product analyst Isadora Milin[4] (Milin) met with Duane and she showed him a new skill she was designing for kindergartners. (Tr. 39-40, 113, 204-205.) The new skill involved math and Milin told Duane that she thought the new skill would not be approved because it was beyond or different than Respondent's traditional skills. Id. Duane responded and told Milin that the new skill was a really good idea and that the Respondent should approve it for design and that it would be silly if Respondent did not pick it up and design it. Id. No manager was directly present. (Tr. 113.)

E. The Charging Party's Part-Time Work-At-Home Privilege in 2014

By July 2014, Wu was no longer employed at Respondent and Curiel left employment at Respondent by August 2014. (Tr. 36-37, 129, 167.)

In July or August 2014, Duane approached Keyes and advised him that he was going to need an extended medical disability leave absence because he was having surgery and would need approximately 2 months off later in the year. (Tr. 205.) Respondent had an unlimited paid sick leave policy, the terms of which provide that when an employee wants to take a sick day, they tell their manager that they want to take a sick day and they get a paid day off. (Tr. 296.)

[4] While Milin was formerly a supervisor at Respondent, by January 2015, she was no longer a supervisor or member of Respondent's management.

Their sick days are unlimited, and there are no criteria for what constitutes "sick" under the policy. Id.

Keyes approved Duane's plan for 2 months disability leave. Id. Duane never told Keyes that he was either a cisgender or a transgender. (Tr. 86.) Also at no time did Keyes ask Duane what his specific medical procedures were that were related to his disability leave in 2014. (Tr. 87.)

As part of his gender confirmation surgery plan, Duane sought pre-approval and Respondent and Duane entered into a regular remote work agreement to allow Duane to work from home one day per week so he could undergo electrolysis for 2 hours once a week. (Tr. 41.) As part of the pre-operation plan, Duane worked a half day or 4 hours one day per week at home and used sick leave for the other half day or 4 hours when undergoing the pre-surgery procedure one day per week. Keyes, however, opined that rather than just one day per week during this time period, Duane was allowed and actually worked 2 non-consecutive days a week--Tuesdays and Thursdays from home under the agreed remote work plan of 4 hours remote work at home and 4 hours sick leave for the 25-30 days that Duane attended pre-op electrolysis. (Tr. 208.) Since there are 17 weeks from July through October, I find that an average on both Keyes' and Duane's estimates equates to the admitted 25-30 days of partial sick leave use by Duane. (Tr. 88-90.)

Duane worked his usual schedule at Respondent the remaining 4 days per week for the months of July through October when this regular remote privilege agreement was in effect. (Tr. 46.) Keyes approved this regular remote privilege plan for Duane.

On October 3, Duane sent an email styled "Gone for Nov & Dec" to his coworkers at Respondent with a copy to Prada and Keyes announcing that he was having "major surgery" that would put him out of work from November 1 through December 30 and that they should send any questions related to work items for their team in advance so that he can respond by the last week of October. The email further referred to Duane's desire to keep the details of his gender transition surgery private and provided that while Duane was aware that some co-workers might be concerned or curious about his surgery, "this is a matter I'm only discussing in detail with close friends and family … [s]o I'd prefer not to field questions from coworkers about it … [and t]hanks in advance for respecting that." (Tr. 41, 43; GC Exh. 3.)

During the 4-month period that Duane worked from home 4 hours per day, Keyes noted that Duane's productivity was down for these months compared to when Duane had been working in the office before July. (Tr. 211-212; GC Ex. 4 at 1-2.) Keyes talked to Duane about his decreased productivity during this time period and Duane explained that he was so tired from the pre-operation appointments that Duane could not manage to work afterwards during the last half of the day. (Tr. 211.). As a result, sometime during this pre-op period, Keyes and Duane came up with a revised regular remote work plan where Duane would take half sick days on the Tuesdays and/or Thursdays he had appointments so that he could focus on his appointments and work in the morning for a half day prior to the appointments. (Tr. 212.) Duane admits that during this time period when he worked remotely due to his pre-op electrolysis procedures, he had productivity issues causing him to be less productive with his work assignments as noted by Keyes. (Tr. 94.)

As part of his gender confirmation surgery plan, Duane took disability leave for two months - the entire months of November and December 2014--before returning to work on December 30 after surgery. (Tr. 50.) Duane communicated with Keyes while on disability leave. (Tr. 43.)

Duane estimates that from July through October 2014, he was allowed to work at home 25-30 total days for medical or health reasons without restrictions and he was satisfied with Respondent's accommodation for his short-term disability at all times up until the time he sought a new and different regular remote work agreement from Respondent in late December 2014. (Tr. 87-90.) Also prior to December 22, 2014, Duane admits that Keyes was very flexible with Duane's need for working remote or taking time off because of sporadic medical issues. (Tr. 87-88, 96.) Until late December 2014, Duane further admits that he did not have any issue, concerns, or complaints with his use of sick leave or Respondent accommodating Duane's need to work remotely. (Tr. 95.) During his employment at Respondent, Duane was approved for every single instance when he requested a remote work day or any time off, including partial days, leaving work early or coming in late. (Tr. 95-96.)

F. The Charging Party's Return to Work at Respondent in December 2014 and Continued Part-Time Work-At Home Privilege

In mid-December 2014, Duane started to look for a new job with a different employer than Respondent. (Tr. 134.)

Prior to returning to work on December 30, Duane corresponded to Keyes via email after they both attended Respondent's Christmas party.

On Friday, December 19, Duane emailed Keyes and updated Keyes on Duane's post-surgery condition and to work out a new remote work privilege plan for Duane's return to work on December 30. (Tr. 46-47; GC Exh. 4 at 3.) Duane wrote to Keyes that things were going very well in terms of Duane's healing from his surgery but that he had developed a nonserious condition known as a fistula the day after the Christmas party which Duane believed would "make it challenging to be out of the house for long periods of time until it fully heals" which Duane's doctor opined would be quickly. Id. Due to this new medical condition, Duane further wrote:

> 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 [Duane]

Id.

On the following Monday, December 22, Keyes responded to Duane's request for an increased regular remote work agreement with Respondent and wrote:

> … 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 [Keyes]

(Tr. 46-47; GC Exh. 4 at 2-3.) Keyes commented that because of Duane's lack of productivity in July-October 2014 during Duane's pre-op procedures, Keyes was concerned about Duane's productivity if Duane came back part time again as he was proposing, half days in the office, half days at home for 5 days a week. (Tr. 212-213.)

On December 23, at approximately 10:30 a.m., Duane had a text message conversation with coworker Morse after receiving Keyes' December 22 response referenced above.

Duane starts out saying to Morse: "David [Keyes] is breaking employment law it turns out." (GC Exh. 5 at 1.) Morse responds: "oh yeah? How are you my dear I miss you greatly." Id. Duane responds: "Yep. Lawyer says the case is textbook." Id. Morse next says: "he has to let you work remote ½ days." Id. Duane next says: "Yes he does, as long as I can perform all essential job junctions which of course I can." Id. Morse then says: "yeah totally. I wonder if that was him [Keyes]. Or acting on someone else's behalf." (GC Exh. 5 at 2.) Duane responds: "I am so done with IXL [Respondent] as soon as possible." Id. Morse responds: "yeah how is the job hunt going?" Id. Duane replies: "I wondered too." Id. Morse next says: "I just met w/ a girl at Remind." Id. Duane responds: "Oh nice." Id. Morse concludes by texting: "and I finally applied to IDEO." Id.

Duane responded with his counter-proposal to Keyes later on Tuesday afternoon, December 23, and wrote:

> … 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 [Respondent] 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 am also CCing Marciela [Prada], 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 [Duane]

(GC Exh. 4 at 2.)

At this time with his December 23 counter-proposal email, Duane meant by use of the term "collaboratively" that he was looking to discuss with Keyes a way to come to an accommodation that Duane felt he needed upon returning to work on December 30. (Tr. 99.) Also, by his December 23 email, Duane was volunteering to provide medical documentation from his doctor to Keyes in support of the accommodation he sought. (Tr. 101-102.) In addition, Duane proposed that there be metrics in place and monitoring of progress in response to the productivity issues that Keyes raised in his earlier email. (Tr. 102.)

Keyes forwarded Duane's December 23 email to Prado and Ockenberg and Keyes eventually discussed it with Mishkin too on December 24. (Tr. 224, 226.) Keyes says that this email from Duane was the first notification to Mishkin on December 24 that "anything was happening" and that Duane had complained of discrimination or what he believed was unfair treatment with respect to his 50 percent remote work accommodation request. (Tr. 226-227, 243.)

Mishkin wanted to know from Keyes the background as Mishkin had just been drawn into the situation about Duane's current regular remote leave request, Duane's earlier 2-month leave and his pending return to work. (Tr. 232-233.) Keyes informed Mishkin that Duane had gone out on leave for an operation and he is now coming back and he requested to work half time at home 4 hours a day, and Keyes' initial response was that Keyes preferred that Duane be in the office because of Duane's lower productivity from the preop appointments. Id. Keyes also gave Mishkin information about Duane's agreed part time remote work for 2 half days during his pre-op appointments and then Keyes told Mishkin that while he preferred that Duane be accommodated for work in the office, Keyes said in response to Duane's email of December 23 that he would write a response to Duane's email for Mishkin to review. Id. Keyes admitted to Mishkin that he planned to accept Duane's offer to work remotely for 50 percent at home beginning on December 30, 2014. Id.

On Wednesday December 24, after consulting with Mishkin and getting his approval, Keyes replied to Duane's counter-proposal and accepts it explaining:

> Thanks for the response. We are definitely on the same page here as far as goals are concerned – that is, having you achieve a complete recovery while also being able to fully contribute to the team when you return. To start, I would like to clarify a couple of things from our previous emails. When you worked remotely the days of your pre-op appointments, I noticed that productivity was down. This is why we tried having you work half days and take half sick days. It is also why I said I preferred that you return to work in the office full time if we could accommodate you appropriately. You are definitely correct that the IXL development team does allow employees to work remotely in a variety of situations (sick children, waiting for

> repair people, sick, extending vacations, etc…). This is allowed by manager discretion based on the employee's ability to work well in these types of situations. Also, these sorts of working remotely requests are sporadic in nature (a day here, a day there), and are different than working remotely part time every day. These more regular requests are not always granted. Based on your doctor's recommendation, it sounds like reasonable accommodation in your case is to set up a part time remote working situation. It would be great if you could provide written documentation for this – and we can move forward with this plan. I'm happy to come up with performance goals and a progress monitoring plan for you as well. Having your office time be in the morning sounds great to me – thanks for that suggestion! I'm looking forward to having you back and think that the 30th still works. We can talk about specifics of our plan then. Thanks, David

(Tr. 102, 226-228; GC Exh. 4 at 1-2.)

Later on December 24, just before midnight, Duane further responds to Keyes' last email and writes:

> I can understand your concerns, given the brief situation with remote work while trying to balance my pre-op appointments. At that time I was trying my best to contribute, while undergoing lengthy appointments that were physically and mentally exhausting. I did not always keep up, despite my best efforts. In retrospect, I should have requested a reasonable accommodation for my medical situation from the beginning, rather than attempting to keep up with work on those days. I do believe that this situation is very different. What I need is the opportunity to rest my physical body from the kind of everyday movement that most people take for granted – I am not attempting to attend appointments during that time as I was previously. If you feel like I'm not keeping up with work with this accommodation, please tell me directly. I'm happy to reevaluate if necessary. My doctor is not in his office at this time, but he and his staff will get a written statement to you as soon as possible. The 30th still works for me. I'll see you then. Best, Scott [Duane]

(GC Exh. 4 at 1.)

The next day, Keyes finishes this email correspondence by writing:

> This all sounds good. I've set up a meeting for us on the 30th from 10-11 am. Let me know if you'd prefer a different time. I can get you caught up on what's going on the past couple of months and we can go over a game plan for your part time remote situation. Thanks, David

(GC Exh. 4 at 1.)

Duane incorrectly views the December email chain above (GC Exh. 4), as evidence that Keyes and Respondent denied Duane's initial request for disability accommodation in writing. (Tr. 90-93.) However, Duane also admits that after this email exchange from December 19-25, 2014, until he saw the remote work plan on December 30, 2014, Duane was satisfied with Respondent's accommodation for Duane to work remotely while preparing for and returning from surgery. (Tr. 106.)

G. The December 30, 2014 Meeting Between Charging Party and Keyes and Charging Party's Negative Posting on Glassdoor.com

On December 30 as planned, Duane returned to Respondent and he met with Keyes in Keyes office. (Tr. 50.) Keyes wanted to inform Duane of personnel changes at Respondent and changes in the math team since he was out and what projects that Keyes had going. (Tr. 50-51.)

Keyes informed Duane that one new product analyst had been hired, Mr. Bleeker, and that he would be working full-time remotely from Louisiana because his wife had recently had a serious medical diagnosis so he needed to take care of her. (Tr. 50.) Keyes next informed Duane that another product analyst, Gina Bland (Bland), would be working 50 percent remotely from Washington DC on alternating months so that she could be with her husband. (Tr. 50-51.)

Keyes also presented Duane with the regular Working Remotely Plan that Keyes drafted based on Duane's suggested schedule and that there be measurable metrics and which provided that Duane work 50 percent remotely - Mondays from 6:30 to 10:30 a.m. at home and 12 p.m. to 4 p.m. at his office at Respondent and Tuesdays through Fridays 7 a.m. to 11 a.m. at Respondent and 12 to 4 p.m. at home. (Tr. 213; GC Exh. 6.) The plan also required that Duane check in with Keyes twice a week in person and twice a week by email. (Tr. 51.) Despite the clear language in the plan, Duane testified that the terms included his coming to the Office every day at 8 a.m. and staying until noon and then working from home the rest of the day from 1 p.m.-5 p.m. (Tr. 51.)

Duane did not voice any complaints about the regular 50 percent remote work plan that Keyes presented on December 30 which was exactly what Duane had requested earlier in the late December email chain referenced above. (Tr. 212-213.)

At the December 30 meeting with Keyes or soon thereafter, Duane became upset. (Tr. 106.) Duane explains that it was a combination of 2 things-(1) Duane felt that the hours in his regular remote work plan were more restrictive than they needed to be given the type of work being done; and (2) Duane's being informed by Keyes that 2 colleagues also had regular remote work plans--one of whom was a brand new hire who received a much more flexible 100 percent remote work plan working remotely from another state which Duane believed was unfair. Id. Duane did not mention any prior discussions with other Respondent employees during the December 30 meeting with Keyes.

As stated above, detail that Duane was unaware of included: Mathew Bleeker's regular remote schedule was 100 percent at home as Bleeker turned down Respondent's first job offer because he could not move from Louisiana due to his wife's illness so Respondent revised its offer and offered 100 percent work at home which was later accepted in November or December 2014 by Bleeker before he started after Duane's employment at Respondent ended. (Tr. 222-224.) Another employee, Gina Bland, was allowed by Respondent to regularly work remotely a 50/50 plan after her first 3 months had been 100 percent in the office and she did well. (Tr. 224.) No evidence was presented showing that Duane ever viewed or inquired about the specific remote work restrictions placed on Bleeker or Bland. (Tr. 88.) Duane's view in late December 2014, that his regular remote work plan that he received on December 30, 2014, was more restrictive than other Respondent employees is also based his view that employees with children were allowed *sporadic* remote work in contrast to what Duane received from July through October 2014 when he was less productive. (Tr. 88-90.)

After meeting with Keyes the morning of December 30, Duane met with Morse in Respondent's parking lot on his way home and Duane told Morse about the meeting with Keyes and how they went over the regular 50 percent remote work plan for Duane. (Tr. 52-53.) Duane complained to Morse that he felt that his remote work plan was more restrictive than other people's remote plans. Id.

Morse responded to Duane by citing a study about sick leave that said that companies that allow unlimited sick leave to employees actually end up with employees using less sick leave than companies with limited sick leave. (Tr. 53.) Duane responded to Morse by telling her that the study results make sense because there was definitely a culture of guilt around taking sick leave at Respondent. Id.

At approximately 10:36 p.m. on December 30, Duane and former Respondent employee Wu have an email exchange where Duane complains about Respondent and tells Wu he has started applying to other employers, he's eagerly looking forward to the next step, and he is committed to moving on from Respondent, he's much less secretive about his trans status and that if Mind is still hiring mathematicians, he was going to apply. (R. Exh. 4.) Duane also mischaracterized Keyes requesting a doctor's note when, in fact, Duane volunteered to provide one for his regular 50 percent remote leave plan counterproposal. (Tr. 134-142; GC Exh. 4 at 1-2; R Exh. 4.)

Also late on December 30, Duane makes an anonymous posting to Glassdoor.com entitled "Micromanaged and problematic." (GC Exh. 7.) Duane admits that he did not state anywhere in the posting that he was speaking on behalf of other Respondent employees as it next alerts prospective recruits that it is from an anonymous current employee who doesn't recommend [working at Respondent to job seekers], gives Respondent a neutral outlook and mentions the CEO under the title of the post as quick reference points. Id. The posting next specifically provides:

> I have been working at [Respondent] IXL Learning full-time (More than 3 years)[5]
>
> 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 it 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

[5] This statement is untrue. Duane did not work for Respondent for 3 years as of December 30. Tr. 123. He worked approximately less than 1.5 years.

> 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.
>
> Helpful (14)

(Tr. 125; GC Exh. 7.) While Duane admitted that he knew that his December 30 Glassdoor.com posting was going to be reaching potential or prospective new recruits to let them know of what he felt was a bait and switch or a misleading campaign to recruit employees (Tr. 116117), he also alleges that he made the posting because he was concerned about some of the treatment that he and other employees had received in the workplace and Duane also thought it was important to share those concerns with other employees. (Tr. 57.) I find this statement not credible that Duane was concerned or even considered other current coworkers at Respondent when he made this statement as none of his formerly-mentioned coworkers, Wu or Curiel, remained employed at Respondent after August 2014 and Morse and Duane were interviewing and intended to leave Respondent's employment as of December 30. Duane also alleges that his posting implies that the complaints listed in the posting are both for Duane and other Respondent employees. (Tr. 124-125.) I find this statement highly speculative and again not credible as the posting came from Duane as an anonymous individual and does not imply any type of group message. The evidence shows that by December 30, Duane is the only employee at Respondent with the individual concerns listed in the December 30 posting. Duane also admits that he was upset on December 30, 2014, when he made his December 30 Glassdoor posting. (Tr. 106.)

Duane worked remotely part time the first week of January 2015 and Keyes noticed that Duane seemed visibly upset and non-communicative during this time period. (Tr. 213-214.) As a result of Duane being visibly frustrated or upset during this time period, Keyes set up a meeting with Duane for January 6, 2015, because Duane's conduct was pretty unusual. (Tr. 214.)

H. The January 6, 2015 Meeting Between Charging Party and Keyes and Charging Party's Text Description of the Meeting Afterwards to Morse

On January 6, 2015, Duane and Keyes met in Keyes office and Keyes asked Duane if everything was all right because Duane did not appear to be happy at the office. Duane believed that the meeting revolved around his disability accommodation. (Tr. 60.)

Keyes opened the morning meeting by telling Duane that Keyes had noticed that Duane had been upset since he came to work on December 30 and Keyes asked whether there was

anything Keyes could do to help Duane. (Tr. 215.) Duane responded to Keyes by telling him that he was unhappy with some of his work assignments, Duane felt that his ideas were not really listened to, and that there was a lot of creative work to be done in the workplace. (Tr. 61.)

Duane also told Keyes that he was not just upset about the initial denied accommodation flip-flop by Respondent. (Tr. 61-62.) Duane also mentioned that he was upset about Prado's training of Duane on the second or third day of work in July 2013 when Prado skipped over the disability training saying to the trainee employees including Duane simply that: "You're all healthy, you don't need this [disability training]. Id. Duane says that in July 2013, he knew that he would probably have to take disability leave during his employment at Respondent and he really needed the skipped training information. Id.

Duane also told Keyes that Brad Marshall (Marshall), Respondent's former HR manager, had initially given Duane incorrect information about the amount of time that Duane could take on disability and that had, for a while, changed Duane's plans for surgery. (Tr. 62.)

Duane also says he mentioned to Keyes being upset because Prado had asked Duane an inappropriate question about Duane's arm, which ended up being the donor site for his surgery and that this was just another example in a long line of inappropriate things that had happened around disability in the workplace. Id.

Finally, Duane also responded by telling Keyes that he was very upset at how Respondent handled Duane's return from disability leave, the ADA compliance and Respondent's disability accommodation to Duane and Duane told Keyes that he knew for a fact that Respondent had discriminated against him. (Tr. 61, 215-216.) Duane repeated to Keyes that Keyes had denied him something that Duane was legally entitled to receive, the disability accommodation, and by initially denying Duane that disability leave accommodation, Duane felt uncomfortable in the workplace. (Tr. 63.)

Keyes responded by defending his acceptance of Duane's regular 50 percent remote work plan proposal, getting emotional, his voice wavering a little bit, and telling Duane that he was really sorry they had to have the conversation, that Keyes was upset that Duane was unhappy and that it was not Keyes' intention to make Duane feel upset in any way. Keyes tried to explain to Duane that Keyes was trying to work with Duane on Duane's returning to work in late December at Respondent and Keyes again asked Duane if Respondent could accommodate Duane in the office. (Tr. 215.) Keyes did not think he had discriminated against Duane and was upset that Duane thought that Keyes had discriminated against him with the regular 50 percent remote work plan and believed from Duane's reaction that Keyes' statements to Duane were somehow inadequate so Keyes told Duane that Keyes would bring the issue up with upper management, Ockenberg, and Mishkin. Id. Duane did not speak about any other Respondent employees at this meeting. (Tr. 216.)

Duane responded to Keyes by admitting that his decreased productivity when undergoing pre-op procedures was different than his current condition and regular 50 percent remote work plan accommodation as Duane just needed to rest at home under the current regular 50 percent remote work plan which was working well for Duane at the time. (Tr. 63-64.) Keyes responded by telling Duane that he had noticed that Duane had been doing a really great job and that Duane

had complied with the terms of the regular 50 percent remote work plan accommodation and met all of his goals so far. (Tr. 64.)

Duane believed that Keyes was sincere when he got emotional at their meeting. (Tr. 126-127.) At his January 6, 2015 meeting with Keyes, Duane did not mention discussions with other Respondent employees prior to the meeting. (Tr. 216.) Also, Duane admitted to Keyes that Duane only assumed that other employees with remote work plans at Respondent did not have to check in regularly with their managers as he did because their remote work was sporadic while Keyes believably explained that this was not true. (Tr. 88, 221-223.)

Immediately after the meeting, Keyes emailed Prado and Ockenberg and met with them and Mishkin soon thereafter to discuss Duane's discrimination claim. (Tr. 217.) Keyes recommended that Duane speak to Mishkin about the claim and see if it can be resolved. Id. Mishkin responded to Keyes and told him he could meet with Duane later that same week. Id.

After meeting with Keyes and later that same morning of January 6, 2015, Duane and Morse had the following text exchange initiated by Duane describing his earlier meeting with Keyes:

Duane (CP): OMG [Oh my god], I just made David [Keyes] almost cry.

Morse (M): What?! Why. I'll be at work at 9:15.

CP: He called me in and said you don't seem happy & I said well IXL [Respondent] hasn't treated me well around my disability. And then I just kept talking. Jenna says I'm self-righteous.

M: Oh wow.

CP: She is right & now David [Keyes] knows.

M: Oy well do u feel better or worse

CP: Better

M: I want to hear about it more. But not in office.

CP: Ya

M: Over a drank. [sic.]

CP: Yes

M: What were his parting words.

CP: Said he's going to escalate it to Ockenberg[6] on my behalf. Wants me to know that he will try to earn my trust back & that he's my advocate. Omg he was so upset.

M: Oh man.

[6] In January 2015, Lenore Ockenberg was Respondent's head of operations according to Duane at hearing. Tr. 63.

CP: It's hard being a straight cisgender able bodied white guy sometimes.

M: Scott [Duane]! Omg hah.

CP: So many marginalized people you don't understand.

M: Be mic [siq.] Nice Hahahahaha

CP: Yeah yeah

M: Ur so cold lol [laugh out loud].

CP: You're right. I am.

M: Escalate what to Lenore though. Isn't he the issue sort of?

CP: I brought up everything, Marciela [Prado] asking inappropriate questions, skipping the disability part of training, his handling of the accommodations, Brad [____] giving me wrong info. It's a systems problem. Sometimes my mouth won't close.

M: Someone needs to tell it like it is. You should be a disability advocate.

CP: Yes, I shall just make everyone feel terrible & they will cave. Maybe I'll meet up w/ you guys….

(Tr. 63; GC Exh. 8.) Duane opined that he exaggerated Keyes crying at their meeting and that he was sarcastic when he said to Morse that it was hard for Keyes to be a straight cisgender able bodied white guy sometimes. (Tr. 126-127.)

Also on January 6, 2015, around noon in the parking lot at Respondent's facility, Duane and Morse spoke in person and Duane reiterated what happened earlier in his meeting with Keyes. Morse said she was glad someone was speaking up and telling them what they needed to know although Morse herself had had a better experience with Respondent's sick leave use when she earlier experienced a neck injury. (Tr. 73-74, 97.) Duane believed that Morse had a different supervisor than Duane and that Morse's supervisor was more willing to accommodate her. (Tr. 97.)

On January 7, 2015, early in the morning, Mishkin emailed Duane and told him that Keyes had told Mishkin that Duane had "voiced a complaint about discrimination" and that Mishkin would like to meet with Duane Thursday [January 8] at 11 a.m. to discuss this. (Tr. 245; GC Exh. 10; R. Exh 6.) Mishkin also wrote to Duane that "[d]iscrimination of any type, including disability discrimination is unacceptable to Mishkin and to Respondent and Mishkin needs to understand what has been occurring so that he can take action immediately to correct it. Id. At this point in time, Mishkin had not made any decision about Duane's continued employment. (Tr. 245.)

Also on January 7, Duane accepted Mishkin's meeting invite at 8:06 a.m. and wrote; "That sounds good. Looking forward to speaking with you." (R. Exh. 6.)

On January 7, 2015, in late morning, Keyes first learned of Duane's Glasdoor.com posting from December 30. (Tr. 218.) Prado sent Keyes, Ockenberg, and Mishkin an email on

January 7 with the December 30 posting saying "Hi everyone, I hate to assume who this is from … but please read this review from Glassdoor for yourselves." (Tr. 218-219; R. Exh. 8.)

After first seeing the December 30 Glassdoor posting on January 7, 2015, Keyes was asked if he thought Duane had written the December 30 Glassdoor posting and Keyes said he believed the December 30 posting came from Duane. (Tr. 225.) Mishkin also first learned of Duane's December 30 post on Glassdoor after Prado sent an email with the post to him later on January 7. (Tr. 245-246.)

Upon reading Duane's December 30 post, Mishkin believed it amounted to defamation and he decided that the post was unacceptable and that Duane would have to be terminated as a result of the recklessness of untrue statements in the December 30 posting to Glassdoor because Mishkin also opined that Duane's posting was an "outrageous" form of "defamation" because it was posted in a public forum on Glassdoor, which Mishkin believed was an "extremely important [tool] in recruiting candidates" in a tight job market. (Tr. 246-248, 272.) Mishkin also believed that Duane's December 30 Glassdoor posting was "blatantly untrue" and "also … the way it was written and the place it was posted were specifically designed to hurt the Company [Respondent]" because it would be seen by prospective recruits. (Tr. 272-273.) Keyes also opined that Duane was terminated because of his December 30 Glassdoor posting. (Tr. 225.)

I. The January 8, 2015 Meeting Between Charging Party and Respondent's CEO and the Resulting Discharge of Charging Party

On January 8, 2015, Duane met with Mishkin at 11 a.m. in Mishkin's office. (Tr. 220.) Mishkin asked Duane how things were with Keyes now and Mishkin told Duane that Mishkin understood that Duane had some issues related to discrimination that he wanted to discuss that he raised with Keyes on January 6, 2015. (Tr. 76, 248.)

Duane said that things were fine with Keyes now and Duane repeated to Mishkin what he had told Keyes about it being about Duane thinking that Keyes initially rejected Duane's request for a regular 50 percent remote work plan last December and how this position by Keyes was "illegal." (Tr. 76-77, 248, 273.) Duane admitted to Mishkin that he had productivity issues in the past when working remotely. (Tr. 256.) Duane repeated Prado's skipping over disability training on Duane's second or third day of work in July 2013. Id.

Duane then added one more complaint about when in December 2013 Penner told Duane that one of Respondent's employees that she supervises, Bridget, had Lupus and needed kidney surgery and decided to add onto that a plastic surgery procedure. (Tr. 76, 98, 249.) Penner told Duane that she reluctantly granted the sick leave request which led Duane to believe that Respondent's unlimited sick leave policy probably was not unlimited. (Tr. 98.)

Mishkin responds to Duane's complaints by telling Duane that he would talk to Prado and Penner about Duane's complaints and Mishkin said that HR is a difficult specialty and that there is really no way to be an expert in Human Relations. (Tr. 77, 148, 250, 273.)

Mishkin next asked Duane if there were any other complaints other than those he raised with Keyes and the new one about Penner. Duane also told Mishkin that it was not legal what Keyes had done--or what Respondent had done with regard to Duane's disability accommodation request and that it was not really a gray area with regard to HR. Id. Instead, Duane told Mishkin,

HR is very cut and dry, in Duane's situation, in particular. Id. At no time during his January 8, 2015 meeting with Mishkin did Duane mention any earlier discussions with other Respondent employees that led to the December 30 posting or his meeting that day with Mishkin. (Tr. 152.) Instead, all of the issues raised by Duane with Mishkin on January 8, 2015, were Duane's individual concerns and specific to his medical leave and disability issues.

After Duane listed all his complaints to Mishkin, Mishkin pulled out a printout of Duane's December 30 Glassdoor posting and said to Duane: "Now I want to talk about something else." (Tr. 77-78, 250-251, 273; GC Exh. 7.) Mishkin continued by saying "I know what this is and I want to talk about it." Id.

Duane responded by asking Mishkin why they were discussing the Glassdoor posting when Duane had come in to discuss discrimination in the workplace. Id. Mishkin responded to Duane saying that they had already addressed Duane's complaints about discrimination and now they were going to talk about the Glassdoor posting. Id.

Duane told Mishkin that anonymity exists online for a reason and Duane did not think that it was fair that Mishkin was asking him about the posting. (Tr. 251.) Mishkin responded by telling Duane that: "You posted this online in a very public place. I have a right to ask you about it." Id.

Mishkin told Duane that Mishkin was bothered by Duane's posting because what Duane insinuates in the posting completely goes against Mishkin's values and the values that Mishkin worked so hard to cultivate at Respondent. Id. Mishkin next read the paragraph in the posting that begins: "There are no politics if you fit in." Id.

Duane immediately responded to Mishkin by saying he wrote the posting because he was upset when he wrote it. (Tr. 122, 251.)

Mishkin continued to quote the posting and said to Duane that "you know, what you're saying here [in your posting] is if you're not, if you work for IXL and you're not white or Asian, if you are not a straight or a mainstream gay, if you don't like sports, if you don't have kids, that you'll be discriminated against. That's the claim you are making." (Tr. 252.)

Duane responds by telling Mishkin that when he looks around Respondent those are the kind of people that he sees and as a result, Duane told Mishkin that he has a hard time connecting with people. Id.

Mishkin next asked Duane whether he is talking about discrimination or about friendships? (Tr. 150, 252.)

Duane replies saying that "those things blend together." Id.

Duane next apologized to Mishkin for making the December 30 Glassdoor posting and repeated that he was mad or upset when he made the posting and Duane asked Mishkin if Mishkin wanted Duane to take the posting down. (Tr. 79-80, 252-253.)

Mishkin responded to Duane by saying that he would like that if the posting came down but "it's already out there in the public." (Tr. 253.)

The two next discussed the part of the posting saying that the CEO is really involved in every product and Duane accused Mishkin of canceling the video project. Mishkin told Duane that the video project was Mishkin's original idea and that it was canceled by Mishkin because "it wasn't an effort that made sense for us [Respondent] as a company." (Tr. 148-149, 253-254.)

Mishkin returned to the posting alleging different treatment based on ethnicity, sexual preference, or having children and Mishkin asked Duane if Duane has any evidence of Respondent's alleged different treatment. (Tr. 254.) Duane responded by telling Mishkin that "as a queer person," Duane doesn't feel that he fits in and Duane also told Mishkin that he sees employees with kids being able to work from home sporadically. Id.

Duane next repeated his claim about Keyes denying Duane's initial request for a regular 50 percent remote work plan on December 22 and saying that this was illegal and Duane also acknowledged that there were productivity issues with him working at home in the summer of 2014 and Duane admitted that he had not been productive working at home in the past. (Tr. 255.) Mishkin then asked Duane if he thought that Keyes had a right to ask Duane about being less productive working at home in the past and whether that should be factored into a future remote work agreement. Id. Duane's response to this question was simply "Yes, but that [Keyes initial hesitation in granting Duane's request for 50% work at home in December 2014] was still illegal." Id.

Mishkin asked Duane whether he had brought up any of his concerns with Keyes and Duane said "Well, I might have mentioned something a couple of days ago." (Tr. 255.) Duane next told Mishkin that Duane had planned to mention something and that he had been struggling a lot with health issues and low energy and Mishkin asked Duane how he came up with the energy to make the December 30 Glassdoor posting and not find the energy to talk to your manager? (Tr. 255-256.)

Mishkin and Duane opined that Respondent does not have a rule or policy requiring employees to talk to management about work problems before disclosing them to third parties. (Tr. 146-147, 256.) Mishkin, however, thought it was inappropriate that Duane did not speak to a supervisor about his complaints about Respondent before going to Glassdoor with his posting on December 30 and Mishkin believed it was common decency for Respondent's employees to go to their supervisors first to air their complaints or concerns. (Tr. 274, 281-282.) Mishkin credibly denied that Duane's termination resulted in any way from his not airing his complaints or concerns first with supervisors before posting on Glassdoor. Id.

Mishkin concluded the meeting by telling Duane that he was sorry for whatever Duane was going through health wise and Mishkin thanked Duane for sharing his concerns and complaints. Id. Mishkin repeated to Duane that Mishkin would talk to Penner and Prada about Duane's concerns. Id.

Mishkin went on to terminate Duane's employment at Respondent and saying that what Duane did in his December 30 posting on Glassdoor was unacceptable, it showed extremely poor judgment and poor ethical values. (Tr.80, 256-257.) Mishkin also told Duane that Mishkin could not trust Duane, Mishkin could not imagine ever trusting Duane, or ever being able to work with Duane and Mishkin believes that Duane was understanding the gist of their conversation when

Duane got up and told Mishkin that "You'll be hearing from my lawyer," and just stormed out of Mishkin's office. (Tr. 256-257.)

III. ANALYSIS

A. Credibility Legal Standards

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 13–14 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions--indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 14. To the extent that I have made them, my credibility findings are set forth above in the findings of fact for this decision.

As stated above, while Duane admitted that he knew that his December 30 Glassdoor.com posting was going to reach potential or prospective recruits to let them know that he felt that Respondent had a bait and switch or a misleading campaign to recruit employees (Tr. 116-117), Duane further makes the unbelievable statement that he also made the posting because he was concerned about some of the treatment that he and other employees had received in the workplace and Duane also thought it was important to share those concerns with other employees. (Tr. 57.) I find this testimony non-credible as it was apparent at hearing that until Respondent reasonably hesitated in granting Duane his regular 50 percent remote work privilege proposal, Duane was very satisfied with the extensive leave and remote work accommodation that Respondent had awarded to him with no reservations. With one foot out the door as of mid-December 2014 when Duane started looking for a new job and had applied to work at other employers, Duane admits he was upset and I find that he threw a tantrum on December 30 with his personal gripe comprised of his unsupported and mistaken belief that Respondent had discriminated against him somehow by accepting the regular 50 percent remote work privilege that Duane himself put forth. Duane confuses Respondent's *sporadic* remote work plan that has no restrictions and is regularly granted to employees with a more formal *regular* remote work privilege that has built in restrictions to monitor productivity and is granted based on merit at the discretion of Respondent's supervisors.

Duane's credibility was further weakened when he misrepresented the length of his employment at Respondent in the December 30 Glassdoor.com posting as he more than doubled his actual employment time with Respondent and said he worked at Respondent for 3 years or 36 months rather than just 17 months. Also, Duane was not believable when he told Wu that Respondent had rejected a disability accommodation proposal and was requiring Duane to obtain a doctor's note before considering the regular 50 percent remote work privilege plan. I find these statements untrue and I further find that Duane volunteered the regular 50 percent remote work privilege plan and to provide the doctor's note and to comply with specific metrics to gauge

productivity. (GC Exh. 4 at 2-3.) Also I find that Duane was unreasonable in his belief that Respondent had discriminated against him by awarding the 50 percent remote work privilege that Duane had requested that came with metrics or restrictions to gauge work productivity especially given Duane's admitted prior history of being less productive working remotely.

Duane was also not believable when he stated that he thinks his posting *implies* that the complaints listed in the posting are both for Duane *and other Respondent employees*. (Tr. 124-125.) While it is true that the posting could have been seen by Duane's coworkers, it is apparent here that a negative posting, like Duane's, was intended for prospective employees and not Duane's coworkers as all prior discussions by Duane and his coworkers about negative comments posted to Glassdoor.com were specifically aimed at protecting Respondent's ability to recruit and find the best talent. (Tr. 54-57, 178-187.) I reject this testimony as I find that the December 30 Glassdoor.com posting was intended by Duane as his individual gripe posted to hurt Respondent's ability to recruit prospective employees. I further find that the posting was Duane's reckless and impetuous reaction to Respondent's reasonable hesitation to immediately accepting Duane's regular 50 percent remote work privilege Duane proposed due to Duane's earlier productivity problems. Duane admits that he was upset on December 30, 2014, when he made his December 30 Glassdoor.com posting. (Tr. 106.) He also admits that prior to December 30, he was satisfied with Respondent's flexibility and his use of Respondent's paid sick leave and disability leave benefits. I find that Duane's erroneous belief that Respondent's remote work privilege was applied to him in a discriminatory way was what set him off to make his December 30 posting and there is no evidence that any other employee was similarly situated or even shared Duane's belief that Respondent's remote work privilege was discriminatory.

The posting amounts to childish ridicule of Respondent without there being an ongoing labor dispute present. Duane did not mention discussions with other Respondent employees during the December 30 meeting with Keyes or his January 6 or 8 meetings with Keyes or Mishkin. As stated above, I further find this statement untrue that Duane was concerned or even considered other coworkers at Respondent when he posted on December 30 as none of his formerly-mentioned coworkers, Wu or Curiel, remained employed at Respondent after August 2014 and Morse and Duane were both interviewing at other employers and intended to leave Respondent's employment as of December 30. Duane's posting also does not imply that the complaints listed in the posting are for other Respondent employees because this statement is highly speculative and again not credible as the posting came from Duane as an anonymous individual with his single gripe about Respondent's remote work privilege and does not imply any type of group message. The evidence shows that by December 30, Duane is the only employee at Respondent with the individual concerns listed in the December 30 posting.

I also reject any statement by Duane that his friend Morse was solicited by him to assist him with his complaint of Respondent's alleged remote work privilege discrimination and that she joined his cause when she allegedly told him on January 6, 2015, after Duane's anonymous December 30 Glassdoor.com posting, that "she was glad that someone was speaking up and, you know, telling them [Respondent] what they needed to know." (Tr. 74.) This January 6, 2015 parking lot conversation took place without management hearing the conversation and, more importantly, *after* the anonymous December 30 Glassdoor.com posting. Moreover, Morse was not called as a witness to testify at hearing and there is no evidence that she was unavailable to

testify or was ever part of any group of employees that received a regular remote work privilege at Respondent. Finally, there is no evidence that Morse was part of any group of employees who shared Duane's concern that Respondent's remote work plan was discriminatory. Moreover, like Duane, Morse had had a good experience with Respondent's sick leave use when she earlier experienced a neck injury. (Tr. 73-74, 97.)

Keyes was the most believable of all witnesses and testified in a non-hesitant confident manner about Duane's employment at Respondent and the events leading up to Duane's termination on January 8, 2015. I conclude that Keyes related the facts accurately, logically, and to the best of his ability to do so. Keyes provided generally specific and detailed testimony.

Mishkin was also a credible witness who answered questions directly without coaching in a naturally conversant fashion and believably testified about the same events leading to Duane's termination and the high risk of detrimental effect that Duane's December 30 posting would have to Respondent's business and its continued ability to recruit prospective employees.

For these reasons, I credit Keyes' and Mishkin's testimony over Duane's where there is a conflict.

B. Duane's December 30 Glassdoor.com posting was not a protected, concerted activity

Complaint paragraph 6(a) alleges that about December 30, 2014, Duane engaged in concerted activities for the purposes of mutual aid and protection, by citing concerns of workplace discrimination in a posting on Glassdoor.com, a job website that allows employees to post reviews of their employer and make suggestions for improvement. [7]

In general, the test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce protected activities. Id.; *Station Casinos, LLC*, 358 NLRB No. 153, slip op. at 18–19 (2012); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000). Apart from a few narrow exceptions, an employer's subjective motivation for its conduct or statements is irrelevant to the question of whether those actions violate Section 8(a)(1) of the Act. See *Station Casinos, LLC*, supra.

Thus, the initial inquiry to be made in this case is whether Duane engaged in protected concerted activity when he posted concerns of workplace discrimination on the Glassdoor.com website on December 30, 2014.

"To be protected under Section 7 of the Act, employee conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection.'" *Fresh & Easy Neighborhood*

[7] Duane's specific charge in this case was limited to the following: "I believe that IXL Learning terminated my employment in retaliation for engaging in protected concerted activity. I posted my concerns about the terms and conditions of my employment in an anonymous review to Glassdoor.com after discussing these concerns with another IXL employee who was herself concerned about the company's discriminatory practices. IXL terminated my employment on January 8, 2015, on the basis of this review." GC Exh. 1(a).

Market, 361 NLRB No. 12, slip op. at 3 (2014). For the reasons set forth below, I find Duane's individual complaints criticizing management were not concerted or protected.

1. *The December 30 Glassdoor.com posting is not concerted activity.*

The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887. An individual employee's complaint is concerted if it is a "logical outgrowth of the concerns of the group." *Every Woman's Place*, 282 NLRB 413 (1986); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 3 10 NLRB 831 (1993), enfd., 53 F.3d 261 (9th Cir. 1995).

The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. See, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). The Board has found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612 (1980). An employee's activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp.*, 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987), enfd. 853 F.2d 966 (1st Cir. 1988). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action. See *United Association of Journeymen & Apprentices of the Pipefitting Industry of the United States and Canada, Local Union 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984); *National Specialties Installations*, 344 NLRB 191, 196 (2005).

The Board held that whether an employee's activity is concerted depends on the manner in which the employee's actions may be linked to those of her coworkers. *Fresh & Easy Neighborhood Market*, supra at 3. The Supreme Court has observed that "[t]here is no indication that Congress intended to limit [Section 7] protections to situation in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems*, 465 U.S. at 835. Concertedness is analyzed under an objective standard. *Fresh & Easy Neighborhood* Market, supra at 4. Employees act in a concerted fashion for a variety of reasons, some altruistic and some selfish. Id. citing *Circle K Corp.,* 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). Solicited employees do not have to share an interest in the matter raised by the soliciting employee for the activity to be concerted. Id. at 6, citing *Mushroom Transportation,* 330 F.2d 683, 685 (3d Cir. 1964), *Circle K Corp.,* 305 NLRB at 933; *Whittaker Corp.,* 289 NLRB 933, 934 (1988); and *El Gran Combo,* 284 NLRB 1115, 1117 (1987).

In this case, I find no evidence that on December 30, 2014, when Duane posted his personal gripes on Glassdoor.com., he was engaged in concerted or group action or acting in any way on behalf of any fellow coworker at that time with similar discrimination claims. I further find that the posting is Duane's own purely personal complaint that is mistakenly based on Duane's unreasonable belief that he was wronged by Respondent when Respondent accepted Duane's own 50 percent regular remote work plan. The discrimination charge and complaint allegations are limited to Duane's alleged remote work plan discrimination allegation and any expansion or added rationale for Duane's December 30 posting are not credible. Furthermore, Duane's complaint about the alleged discriminatory remote work privilege award was an individual one. He sought a 50 percent remote work privilege only for himself. His requests were predicated not on a collective-bargaining agreement but on the negotiations he commenced in mid-December 2014 which resulted in Respondent accepting all of Duane's 50 percent remote work privilege terms. Duane's endeavors were commenced without prior support by fellow workers and no evidence was introduced to show that any other employee shared Duane's complaint about being awarded a discriminatory remote work privilege by Respondent. See *Tampa Tribune*, 346 NLRB 369, 371-372 (2006) (Employee who raised a personal gripe complaint about favoritism was speaking only for himself and there was no evidence that his coworkers even shared his belief that favoritism existed so no protected concerted activity); see also *National Wax Co.*, 251 NLRB 1064, 1064-1065 (1980) (Same).

Duane's friend, Morse, did not testify or confirm what was alleged in his charge that Duane felt his 50 percent regular remote work plan was more restrictive than other employees' regular remote work plans. (Tr. 53.) As stated above, I reject Duane's testimony that his December 30 posting was made by him for other Respondent employees as it is unsupported by a preponderance of the evidence. Also, Duane testified that Morse responds not that she too was also "concerned about the company's discriminatory practices" with its remote work plan privilege as alleged in Duane's charge but rather Morse simply cited a study about sick leave that purportedly said that companies that allow employees to take unlimited sick leave actually end up having employees taking less sick leave. I find that at no time did Morse complain to Duane about similar discriminatory practices, nor did Duane ever seek to initiate, enlist, solicit, ask for help, request any assistance, or induce group action either from Morse or others either leading to his December 30 Glassdoor.com posting or in the posting itself. Instead, Duane's reference to alleged discriminatory practices by Respondent related only to his personal mistaken belief that Respondent had wronged him by the way it accepted his 50 percent remote work privilege proposal.

The Board in *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3-4, held that an employee who approached her coworkers with a concern implicating the terms and conditions of their employment, *and solicited or sought their help in pursuing it*, was acting in a concerted nature. (Emphasis added.) Here, as stated above, Duane did not approach Morse or any of his coworkers with his discrimination concern or solicit or seek their help before he angrily posted his criticisms of Respondent on Glassdoor.com on December 30, 2014.

Moreover, Duane's December 30 Glassdoor.com posting alone is distinguishable from *Triple Play Sports*, 361 NLRB No. 31, slip op. at 4 (2104), where the Board affirmed an administrative law judge who found that a social media website known as Facebook discussion

amongst 4 employees was *concerted* activity because it involved four current employees and was "part of an ongoing sequence" of discussions that began in the workplace about the Respondent's calculation of employees' tax withholding. Noting that the employees, in their Facebook conversation, discussed issues they intended to raise at an upcoming staff meeting as well as possible avenues for complaints to government entities, the judge also found that the participants were seeking to initiate, induce, or prepare for group action. As a result, the judge concluded that the Facebook discussion was concerted under the standard set forth in *Meyers Industries*, 281 NLRB 882, 887 (1986).

Here, Duane's posting on Glassdoor.com was not a social media posting like Facebook or Twitter. Instead, Glassdoor.com is a website used by Respondent and prospective employees as a key recruiting tool to recruit prospective employees. Other than a single anonymous "helpful" mark without any ability for discussion, the anonymous December 30 posting was Duane's final personal salvo against Respondent on his way to a new employer. I further find that Duane posted his anonymous exit message to the general public and used Glassdoor.com as his attempt to harm Respondent's recruiting efforts. The posting was not part of any ongoing sequence of discussions between Duane and his fellow coworkers as the two coworkers he complained with most earlier in 2013 and early 2014 about subjects entirely separate from any complaint involving Respondent's discriminatory regular remote work privilege, Curiel and Wu, had already left the company well before December 30.[8] More importantly, there is no evidence put forth that anyone other than Duane shared his individual concern that Respondent's remote work privilege was being awarded in a discriminatory way.

I do not find that Duane engaged in concerted activity when he posted his anonymous December 30, 2014 Glassdoor.com to voice his concerns of workplace discrimination as alleged in paragraph 6(a) of the complaint. The credited evidence does not show that any of Duane's conversations were concerted or directed to his coworkers. In each conversation leading up to his posting, Duane spoke of only his own issues with Keyes and Mishkin and did not mention any sort of concerted discussion with a coworker, group action or concern. At hearing, Duane failed to credibly show that his issues about Respondent's remote work privilege extended to any other coworker beyond his own mistaken belief that that he had been mistreated or discriminated against in any way by Respondent. Duane failed to list any other employee's like-minded concerns of discrimination at his meeting with Keyes or Mishkin or in the December 30 Glassdoor.com posting. In addition, even when Duane complained to Keyes and Mishkin, he did so in pursuit of his personal interest regarding how he was being treated by Keyes in the 50 percent remote work privilege and not how he and others were being treated. Duane never credibly claimed to act or intend to act on behalf of any other employee and he did not seek to initiate, induce, or prepare for group action when he met with Keyes or Mishkin. Based on the foregoing, I find the General Counsel has failed to adduce evidence sufficient to establish that Duane's December 30 Glassdoor.com posting was concerted.

I also find that no evidence was presented which proves that before their meeting on January 6, 2015, Keyes and Respondent had knowledge of the details of Duane's medical

[8] The General Counsel makes note of Duane's coworker Morse's January 6, 2015 comment to Duane that "someone needs to tell it like it is." I find that this is not evidence that the December 30 posting is a concerted action as the comment is made, unknown to management, *after* the personal posting was made by Duane in a fit of anger .

procedures in 2014 or that Respondent was aware that Duane was a transgender or disability activist. Duane admits through his texts and emails with coworkers and former coworkers that his surgery was a private matter and even Morse, a close friend and confidante to Duane, was unaware that Duane was a disability advocate as of January 2015. (See GC Exhs. 3 and 8.) I once again find and reject that the evidence of the results of an internet search in November 2015 using the Google search engine should disclose to Respondent or make it apparent that Duane was such an activist as of December 2014 and I find this evidence too speculative and inadmissible.

In addition, there is no evidence that other employees shared Duane's concerns about Respondent's alleged discriminatory awarding of its remote work privileges or alleged shoddy human relations department work. While it appears that Morse empathized with Duane, there is no evidence that Morse also shared a remote work privilege with Respondent or that Duane and Morse sought to act as a group to challenge Respondent's regular remote work privileges or allegedly shoddy human relations department work. Moreover, after Duane's December 30 posting, Morse stated that she was satisfied with how her supervisor handled her own sick leave use. Also there was no evidence put forth by the General Counsel that any conversation that Duane had with any coworker leading up to his December 30 Glassdoor.com posting was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of Respondent's employees. See *Mushroom Transportation*, supra at 685 (Conversation between 2 employees constitutes concerted activity only if "at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees.).

I further find that even when concerns, unknown to management,[9] were voiced in 2013 or early 2014 by or in Duane's presence before Wu and Curiel left Respondent's employment, nothing was done to take further group action beyond these isolated events such as the filing of grievances, there were no work stoppages or strikes, and no petition was circulated. Duane never credibly claimed to act or intend to act on behalf of any other employees and he did not seek to initiate, induce, or prepare for group action when he made his December 30 Glassdoor.com posting or met with Keyes or Mishkin.

In addition, I find that there is no connection between Duane's December 30 posting/his resulting termination and any of Duane's alleged protected concerted discussions with coworkers in 2013, 2104, and January 2015. First of all, as referenced above, most of the discussions occurred outside the direct presence of management and the General Counsel has not satisfied her burden of proving by a preponderance of evidence that Keyes, Mishkin, or any of Respondent's managers knew of these isolated and attenuated discussions between Duane and his coworkers. More importantly, Duane's December 30 Glassdoor.com posting admittedly was generated by him as his angry reaction to Respondent's award to him of his requested remote work privilege which is unrelated to Duane's discussions with coworkers in 2013, 2014, and 2015 on entirely different subjects and not Respondent's remote work privilege.

[9] I reject the General Counsel's argument that these "discussions were likely overheard by [Penner] her" because her office was located approximately 10-15 feet from a group of cubicles. GC Br. at 2. I find this argument speculative and unsupported by the evidence especially when most of the conversations occurred during the lunch hour or outside Respondent's premises.

Once again, Duane admitted that before his December 30 meeting with Keyes, he was satisfied with his use of Respondent's earlier partial remote work privilege and his sick leave and disability leave benefits that Duane had used 25-30 days of partial sick leave and 2 full months of disability leave in 2014. Duane's only real gripe as of December 30 was his false belief that Respondent had discriminated against him when awarding him the 50 percent remote work privilege he had requested.

Furthermore, by December 30, Morse and Duane were actively seeking to leave Respondent and there is no evidence that there were any other coworkers who would share or benefit from Duane's posting. I find that Duane intended his December 30 Glassdoor.com posting to direct prospective employees to ignore Respondent's recruiting attempts and go elsewhere for employment. This also shows that Duane's posting was intended to harm Respondent's ability to recruit new employees and not benefit coworkers. Hence, Duane's mere griping or "concerns" with Respondent were purely personal in nature and not concerted activity undertaken for mutual aid or protection.

The General Counsel argues in her closing brief that I should follow the holdings in *Caval Tool Division, Chromalloy Gas Turbine Corp.*, 331 NLRB No. 101 (2000), and *Whittaker Corp.*, 289 NLRB No. 116 (1988), and find that Duane's December 30 Glassdoor.com posting is a concerted activity. (GC Br. at 17.)[10] In *Caval Tool, Inc.*, for example, an outburst by one questioning employee was considered concerted activity when the employee interrupted a group meeting between employees and management by voicing her disgruntlement with the company's newly announced coffee break policy. *Caval Tool, Inc.*, supra at 863. Similarly, in *Whitaker Corp.*, an employee's spontaneous remarks at a group meeting of employees gathered to hear the company's president announce that the employees' anticipated wage increases would not be forthcoming was held to be concerted activity as his statements implicitly elicited support from his fellow employees against the announced change. *Whitaker Corp.*, supra at 934. The facts in these cases are distinguishable, however. Here, Duane's December 30 posting was generated by him anonymously into a public forum as his angry individual response to Respondent's personal award to him of the 50 percent remote work privilege he had requested that was specific to Duane and did not involve an announced change in a common employee benefit affecting all employees at a group meeting. Moreover, the December 30 posting was intended by Duane to harm Respondent's continuing ability to recruit prospective employees and not to initiate or induce any group action. Unlike social media posting, Duane's anonymous December 30 posting did not initiate any group discussion. I further find that this anonymous December 30 posting

[10] The General Counsel also cites to the case *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853 (1952), enfd. 206 F.2d 325 (9th Cir. 1953) and argues that Duane's December 30 Glassdoor.com posting was Duane's preliminary step to acting in concert and therefor the posting is a concerted activity. GC Br. at 15. The facts in *Salt River Valley* are distinguishable from the facts in this case as *Salt River Valley* involved an employee Sturdivant found to be acting in a preliminary step to acting in concert when he circulated a petition among his coworker employees, otherwise known at the time as "zanjeros," designating himself as agent to take any action necessary to collect back wages allegedly owed the employees by the employer. Here, Duane's anonymous Glassdoor.com posting was not a similar preliminary step to acting in concert as his act of anonymous posting was made in anger as a childish ridicule of Respondent to hurt Respondent's ability to recruit on Duane's way out of the company and represents his individual action complaining anonymously that his remote work privilege was awarded to him in a discriminatory manner without any fellow coworker employees sharing this same complaint.

having garnished 15 anonymous "helpful" marks does not equate to the potential for group discussion nor does it solicit or initiate coworker assistance or group action and it is not concerted activity. .

The General Counsel also argues that Duane's anonymous December 30 posting is also protected under the Board's doctrine of "inherently concerted" activity and she cites to cases where the Board has held that employee communications about wages, work schedules, and job security are inherently concerted. See GC Brief at 17-19 and cases listed therein. The facts in these cases are distinguishable from the facts in this case, however, because they involved actual discussions amongst coworkers about wages, work schedules and job security. Here, Duane's explanation for his December 30 posting is that he was upset about Respondent's award to him of his 50% remote work privilege which I find is not an inherently concerted activity as it is not an employer benefit affecting all employees. Rather, remote work is a privilege awarded to employees who earn it through metrics that reflect stable or increased productivity. Also, Duane's anonymous one-way posting did not allow for any further discussion from anyone in response to the anonymous posting the same as a social media posting allows on Facebook, Twitter, or Instagram. Moreover, as stated above, by December 30, Duane and Morse intended to leave their employment at Respondent and there is no evidence that the posting was a discussion amongst Duane and his coworkers intended to induce group action to make it "inherently concerted." Instead, Duane intended his impulsive one-way posting to hurt Respondent's ability to recruit new employees on his way out to a new job.[11]

2. The December 30 posting is unprotected under the Act.

Even assuming arguendo that Duane engaged in concerted activity, I find his December 30 Glassdoor.com posting was not protected. To be protected under the Act, the activity must relate to Section 7 rights. ["S]ome concerted activity bears a less immediate relationship to employees' interests as employees than other such activity," and "at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567–568 (1978). Simply put, it is difficult to see how Duane's complaints were aimed at improving "the interests of employees qua employees." See *G & W Electric Specialty Co.*, 154 NLRB 1136, 1137 (1965).

The concept of "mutual aid or protection" focuses on the goal of the concerted activity; whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Fresh & Easy Neighborhood Market*, supra at 4-5 citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Employee motive is not relevant to whether the activity is engaged in for mutual aid or protection. *Fresh & Easy Neighborhood Market*, supra at 6. The analysis focuses on whether there is a link between employee activity and matters concerning the workplace or employees' interests as employees. Id. Although personal vindication may be among the soliciting employee's goals, that does not mean that the soliciting employee failed to embrace the larger purpose of drawing management's

[11] The same effect would be reached in the analogous situation where an employee hires a skywriting company to fly across the Silicon Valley over the lunch hour or during rush hour traffic with a similar anonymous one-way message disparaging an employer that was posted by Duane on December 30.

attention to an issue for the benefit of all of his or her fellow employees. *St. Rose Dominican Hospitals*, 360 NLRB No. 126, slip op. at 4 (2014).

Furthermore, employee discussions that do not include representatives of their employer are protected. The Board has made clear that employee discussions with coworkers are indispensable initial steps along the way to possible group action and are protected regardless of whether the employees have raised their concerns with management or talked about working together to address those concerns. *Hispanics United of Buffalo*, 359 NLRB 368, 370 (2012), citing *Relco Locomotives*, 358 NLRB 298, 315 (2012), affd. and incorporated by reference at 361 NLRB No. 96 (2014). Protection is not denied because employees have not authorized another employee to act as their spokesperson. *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984).

Here, some of the complaints beyond Duane's specific charge in this case are unprotected and largely concern Duane's impression that Respondent's product, online math tests, could be produced in a more creative way but for CEO Mishkin's hand's on "micromanagement." The Board has held that employee activity aimed at bringing about a change in management hierarchy is normally unprotected because it lies outside the sphere of legitimate employee interest. See *NLRB v. Oakes Machine Corp.*, 897 F.2d 84 (2d Cir. 1990).

These complaints of how Respondent's "product" is created are not thereby converted into a working condition. "In general, 'employee efforts to affect the ultimate direction and managerial policies of the business are beyond the scope' of Section 7." *Riverbay Corp.*, 341 NLRB 255, 257 (2004) (quoting *Lutheran Soc. Serv. of Minnesota*, 250 NLRB 35, 41 (1980)). The quality of the "product" is among these managerial prerogatives that are "not encompassed by the 'mutual aid or protection' clause." *Lutheran Soc. Serv. of Minnesota*, supra at 42.

Factory workers, too, may manifest a strong interest in the goods they produce, but the nature of those goods is not a condition of employment . . ." *Waters of Orchard Park*, 341 NLRB 642, 645–646 (2004). I find Duane's complaints criticizing management's decision to cancel a video project or micromanaging its employees were not protected activities. Duane failed to show how his concerns about the cancellation of a video project or Respondent founder and CEO Mishkin's alleged micromanagement would benefit his fellow employees. Moreover, as discussed below, criticisms about management's decision to cancel a project are not criticisms about working conditions, but are instead criticisms of Respondent's product.

Other than attenuated common complaints against management and Respondent's policies, Duane did not have any significant concerns with Keyes or Respondent until his return to work on December 30, 2014, when Duane began using the 50 percent remote work privilege that he first proposed to Respondent earlier that month. Duane's impulsive posting to Glassdoor.com the night of December 30 was the direct result of his mistaken judgment that Respondent was discriminating against him by requiring him to enter into a regular remote privilege agreement. I find that there was no evidence presented to show that Respondent discriminated against Duane or any employee in its remote work privilege program and that Respondent was justified and acted reasonably based on Duane's past decreased productivity

working remotely when Respondent presented Duane with the 50 percent remote work privilege that Duane had requested.

Here, Duane's remote work privilege gripe/discrimination claim and resulting anonymous posting to Glassdoor.com are individual in nature as only Duane is complaining about Respondent's remote work privilege being applied improperly and only Duane's individual interests were being advanced by his discrimination complaint posting and not those of his coworkers. Duane never solicited Morse's help or any coworker's assistance in complaining about alleged remote work privilege discrimination. Unless Duane's coworkers were solicited by Duane to assist him in complaining to management about alleged remote plan privilege discrimination, I find that Duane was not acting for the purpose of mutual aid or protection with his December 30 Glassdoor.com posting. See *Fresh & Easy Neighborhood Market*, supra at 6-8 (Board finds that employee's solicitation of her coworker colleagues' assistance in complaining to the employer about a harassment incident was for the purpose of mutual aid or protection).

Consequently, I find that Duane, as a disgruntled employee with one foot out the door who was actively seeking new employment, made his anonymous December 30 Glassdoor.com posting specifically to harm Respondent's business and its ability to recruit prospective employees and not as a concerted protected activity. Based on the foregoing, I find the General Counsel failed to establish that Duane engaged in activity protected by Section 7 through his December 30 Glassdoor.com posting.

In addition, the Board has long recognized that an employer has a legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation from defamation and reckless disparagement. Section 7 rights are balanced against these interests, if and when they are implicated. In striking that balance, the Board applies these principles in accordance with the Supreme Court's decisions in *Jefferson Standard,* 346 U.S. 464 (1953) and *Linn v. Plant Guards Local 114,* 383 U.S. 53 (1966).

In *Jefferson Standard*, the Court upheld the discharge of employees who publicly attacked the quality of their employer's product and its business practices without relating their criticisms to a labor controversy. The Court found that the employees' conduct amounted to disloyal disparagement of their employer and, as a result, fell outside the Act's protection. 346 U.S. at 475–477. In *Linn*, the Court limited the availability of State-law remedies for defamation in the course of a union organizing campaign "to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." 383 U.S. at 64–65. The Court indicated that the meaning of "malice," for these purposes, was that the statement was uttered "with knowledge of its falsity, or with reckless disregard of whether it was true or false." Id. at 61.

Applying these precedents, the Board has held that "employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing labor dispute between the employees and the employers and the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection."

MasTec Advanced Technologies, 357 NLRB 103, , 107 (2011) (quoting *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000)).

Turning to the facts of this case, I find that Duane's allegation in his December 30 Glassdoor.com posting to the general public that Respondent discriminated against him when it awarded him the same 50 percent remote work privilege that he had earlier requested was maliciously untrue and made by him with reckless disregard of whether it was true or false as his real intention in his angered state of mind was to hurt or damage Respondent's ability to recruit prospective employees who used Glassdoor.com to arrange interviews and seek employment.

The first prong of the *Jefferson Standard* test is not at issue here. There was no ongoing labor dispute at Respondent on December 30 when Duane posted his individual untrue complaints of discrimination because at that time only Duane's personal complaint existed sparked as only his angry response to the 50 percent% remote work privilege award. No other employees were involved at that time with the same unreasonable complaint concerning Respondent's remote work privilege. Duane himself admitted he had no issues or complaints with Respondent's paid sick leave policy or disability leave program before December 30 as Duane had been granted all of the paid sick leave and disability leave he requested before December 30, 2014. (Tr. 87-96.) Thus, I find that there was no ongoing labor dispute at the time of Duane's December 30 Glassdoor.com posting.

As to the second prong of the test, I further find that Duane's angry childish posting was "so disloyal and reckless as to lose the Act's protection" under *Jefferson Standard* and its progeny. See *MasTec*, 357 NLRB 103, at 107. The posting disparaged Respondent by recklessly stating that most of Respondent's "management has no idea what the word 'discrimination' means, nor do they seem to think it matters." (GC Exh. 7.) Statements are maliciously untrue and unprotected, "if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity." *Mastec*, supra at 107 (citations omitted). The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue. Id. (internal quotation marks and citations omitted).

Duane's discrimination comments are maliciously untrue as Duane made them with reckless disregard for their truth or falsity. My examination of Duane's December 30 Glassdoor.com posting shows that it exceeded the standard of the Supreme Court, which holds that even the most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth. *Linn*, supra at 63. Under the standard set forth in *Linn* and its progeny, the Respondent has the burden to establish that the comments were maliciously untrue. *Springfield Library & Museum,* 238 NLRB 1673, 1673 (1979). The Respondent has met this burden.

Here, with one foot out the door, I find that Duane's angry posting on the Glassdoor.com recruiting website was intended by him to hurt Respondent's ability to compete and recruit new employees and contained reckless untruths that Respondent discriminated against its employees. As stated above, Duane unreasonably became angry thinking he had been discriminated against by Respondent when Respondent did no such thing. Respondent simply accepted Duane's 50 percent remote work privilege proposal when it awarded him the privilege of working remotely. Duane mischaracterized the events leading up to the written December 30 remote work privilege

plan when he told Wu that Respondent required Duane to obtain a doctor's note before considering a remote work plan and that Respondent required that specific metrics to gauge productivity be in place. Both of these suggestions came from Duane who volunteered to provide these before the work plan was finalized. In addition, Duane falsely told to Wu that Respondent rejected his 50 percent remote work plan proposal as Respondent through Keyes simply and reasonably hesitated in accepting Duane's 50 percent remote work proposal due to Duane's prior low productivity working remotely in the summer of 2014. Respondent then accepted Duane's 50 percent remote work proposal in its entirety with no changes. With this background, I further find that Duane's angry discrimination complaint in his December 30 Glassdoor.com posting was recklessly untrue and not protected by the Act. Accordingly, I find that Duane's December 30 Glassdoor.com posting lost protection under *Linn*.

I further find that Duane's discrimination complaint was so disloyal or recklessly disparaging as to lose the protection of the Act.

> In summary, the disloyalty standard is at base a question of whether the employees' efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances. Product disparagement unconnected to a labor dispute, breach of important confidences, and threats of violence are clearly unreasonable ways to pursue a labor dispute. On the other hand, suggestions that a company's treatment of its employees may have an effect upon the quality of the company's products, or may even affect the company's own viability are not likely to be unreasonable, particularly in cases when the addressees of the information are made aware of the fact that a labor dispute is in progress. Childish ridicule may be unreasonable, while heated rhetoric may be quite proper under the circumstances. Each situation must be examined on its own facts, but with an understanding that the law does favor a robust exchange of viewpoints. The mere fact that economic pressure may be brought to bear on one side or the other is not determinative, even if some economic harm actually is suffered. The proper focus must be the manner by which that harm is brought about.

Sierra Publishing Company v. NLRB, 889 F.2d 210, 220 (9th Cir. 1989).

Here, under the totality of facts, I find that Duane's angry and impulsive discrimination complaint is better characterized as childish ridicule in the nature of a personal attack on Respondent's ability to recruit new employees than as related to a legitimate labor dispute or ongoing grievances from a group of employees. As such, I further find that Duane's December 30 posting was so disloyal and recklessly disparaging of Respondent as to lose protection under the Act. See also *Jefferson Standard*, supra at 472 (NLRA doesn't protect "calculated devastating attacks upon an employer's reputation and products.") Hence, Duane's December 30 Glassdoor posting was not protected by the Act, and his discharge was lawful. The Respondent's action terminating his employment did not violate Section 8(a)(1) of the Act.

C. The Respondent did not violate Section 8(a)(1) by terminating Duane for posting on Glassdoor.com before bringing a complaint to management and therefore Respondent maintained and overbroad rule.

The General Counsel amended her complaint paragraphs 6(b) and 6(e) in this action on October 22, 2015, to add a further allegation that Duane was terminated for violating an unlawful rule prohibiting employees from bringing workplace complaints to third parties without first raising them with their supervisor. The General Counsel therefore argues that Respondent maintains an overbroad rule that unlawfully interferes with the statutory right of employees to communicate their employment-related complaints to persons and entities other than the employer (including a union or the Board) and cites the case *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990), in support of her argument. In addition, the General Counsel argues that even if the rule is unwritten, it remains unlawful as verbally promulgated rules also violate the Act. *Hyundai America Shipping Agency*, 357 NLRB 681, 695 (2011), review granted in part and decision reversed in part, *Hyundai Am. Shipping Agency, Inc. v. NLRB,* 2015 WL 6875278 at 3, (D.C. Cir., No. 11-1351, 11/6/15)("[M]erely encouraging and not requiring employees to take actions potentially implicating their Section 7 rights doesn't amount to an employer's attempt to 'interfere with, restrain, or coerce' them in violation of Section 8(a)(1).").

The General Counsel argues in her brief that "Duane's testimony about the words Mishkin used implied it was a requirement that employees must first go to management with their complaints." (GC Br. At 8.) I reject this argument as being unsupported by the evidence as I have found, as stated above, that Mishkin and Duane both agreed that Respondent does not have such a rule or policy requiring employees to talk to management about work problems before disclosing them to third parties. (Tr. 146-147, 256.) In addition, I further find that Mishkin credibly denied that Duane's termination resulted in any way from his not airing his complaints or concerns first with supervisors before posting on Glassdoor.com. (Tr. 274, 281-282.)

I find that the General Counsel has failed to prove either the existence of an unlawful policy or the unlawful termination of Duane for violating any unlawful Respondent rule or policy.

D. There is no evidence that Respondent's termination of Duane was a "preemptive strike" to suppress future protected concerted activity.

The General Counsel amended her complaint in this action at hearing to add a further allegation that Respondent fired Duane to suppress protected concerted activity by other employees and cites *Parexel International, LLC.*, 356 NLRB 516, 519 fn. 9 (2011), in support of her argument. In *Paraxel*, an employee was terminated because the employer did not want her to discuss wages and discrimination with other employees. An employer violates the Act when it acts to prevent future protected activity. *Parexel International, LLC.*, 356 NLRB 516, 519 fn. 9 (2011). "After all, the suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity." Id.

I further find that the General Counsel has failed to prove her "preemptive strike" theory in this case as there is no evidence that Mishkin considered any chance that Duane would later

attempt to engage in future protected concerted activity with other employees especially when no such discussions ever came up in Duane's meetings with Keyes on January 6 or Mishkin on January 8, 2015. As a result, I further find that no evidence was provided that Mishkin's decision to discharge Duane on January 8 was motivated in any way by a desire to preempt future Section 7 activity. Instead, as stated above, Mishkin discharged Duane for his disparaging December 30 posting at a time when Duane was readying to resign from Respondent after being satisfied with Respondent's flexibility in granting him 25-30 days of sporadic remote work and 2 months of disability leave and Duane was terminated because he made his angry, impulsive, and false claim of discrimination against Respondent in his December 30 Glassdoor.com posting intended by Duane to harm Respondent's reputation and dissuade prospective employee recruits from coming to Respondent for employment.

I therefore find that the General Counsel failed to prove that Respondent discharged Duane for unlawful reasons, and Respondent did not violate Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, as alleged in the complaint.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended[12]

ORDER

The complaint is dismissed.

Dated: Washington D.C. April 28, 2016

Gerald M. Etchingham,
Administrative Law Judge

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Exhibit 2

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ADRIAN SCOTT DUANE, Plaintiff, v. IXL LEARNING, INC. and PAUL MISHKIN, Defendants.	Case No.: 3:17-cv-00078-WHA **STIPULATION FOR DISMISSAL WITH PREJUDICE**

To the Honorable William H. Alsup, United States District Judge:

Defendants IXL Learning, Inc. ("IXL") and Paul Mishkin ("Mishkin") (collectively, the "Defendants") and Plaintiff Adrian Scott Duane ("Plaintiff"), by and through their undersigned counsel, hereby agree and stipulate pursuant to Fed. R. Civ. P. 41(a) to the dismissal of all claims pending in this action by Plaintiff against Defendants with prejudice, waiving all rights of appeal. The parties agree not to pursue any costs or attorneys' fees incurred during the course of this action.

IT IS SO STIPULATED.

DATED: June 22, 2017

/s/ David Marek (with permission)
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PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: June 27, 2017

United States District Judge