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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, ADRIAN SCOTT DUANE, Plaintiff-Intervenor, vs. IXL Learning, Inc., Defendant.	Case No.: 17-cv-02979 **Date: September 19, 2017** **Time: 1:30 p.m.** **Courtroom: 4-17th Floor** **Judge: The Honorable Vince Chhabria**

REPLY IN FURTHER SUPPORT OF MOTION TO INTERVENE

Intervenor-Plaintiff Adrian Scott Duane ("Duane") submits this reply (the "Reply") in further support of his motion to intervene (the "Motion") and in response to the opposition (the "Opposition") submitted by Defendant IXL Learning, Inc. ("IXL").

PRELIMINARY STATEMENT

Duane filed this Motion pursuant to his statutory right to intervene in the EEOC's action commenced on his behalf (the "EEOC Action"). The EEOC asserted claims for violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), Title V of the Americans with Disabilities Act (the "ADA"), and Title I of the Civil Rights Act of 1991 in connection with its termination of Duane's employment. IXL does not object to Duane's intervening in the EEOC Action.

The dispute before this Court is quite narrow. The EEOC Action contains claims for violation of Title VII and the ADA, both claims arising from allegations that IXL terminated Duane's employment in retaliation for issues he raised in a Glassdoor.com post (the "Glassdoor Post"). Duane seeks to intervene in these two claims, as he is permitted by statute to do, and add a claim under the California Fair Employment and Housing Act ("FEHA"), which is the state corollary to Title VII and the ADA. In addition, whereas the EEOC asserted that IXL retaliated against Duane because of the Glassdoor Post, Duane asserted that IXL retaliated against him because of the Glassdoor Post and/or complaints of discrimination Duane made to his manager at the same time as the Glassdoor Post. IXL's objects to the Motion to the extent that it seeks to (i) add a claim under FEHA (the "Additional Claim"), and (ii) add an allegation to the EEOC's Title VII and ADA claims that IXL's retaliation might flow from Duane's assertion of his protected rights to his manager in addition to the Glassdoor Post (the "Additional Allegation").

The law, however, is clear that Duane is entitled to an unconditional right to intervene in the EEOC Claim pursuant to 42 U.S.C. § 2000e-5(f)(1) and Fed. R. Civ. P. 24(a). Further, pursuant to Fed. R. Civ. P. 24(b) Duane may intervene with permission of the Court provided that the additional claims "share[]

with the main action a common question of law or fact." Case law makes clear that adding a FEHA claim to the EEOC's federal claims constitutes a permissive intervention, as does adding additional allegations.

IXL's arguments are misguided. First, IXL argues that the doctrine of res judicata prevents Duane from adding his Additional Claim and Additional Allegation. IXL's argument arises from a complaint Duane commenced against IXL before the EEOC had issued a right-to-sue notice or commenced its own action against IXL (referred to as the "Duane Action"). In the Duane Action (see Exhibit B to the Declaration of David Marek ("Marek Decl.") submitted with the Motion), Duane asserted claims under the Family Medical Leave Act and a wrongful termination claim for violation of public policy. In that Complaint (at FN1), Duane notified IXL and the Court that he intended to amend the Complaint to add claims under Title VII, the ADA, and FEHA "upon receipt of his right-to-sue letter from the EEOC."

In addition, after the Complaint was filed, on April 5, 2017, Duane requested in writing (after multiple requests by phone) that IXL agree to stay the Duane Action "until the claims currently pending before the EEOC can be asserted." See Marek Decl., Exh. E. In this correspondence, Duane informed IXL he filed the Duane Action when he did to "preserve the statute of limitations on certain claims not pending before the EEOC." *Id.* IXL refused Duane's request to stay the Duane Action because they preferred to move forward at that time, even if it meant additional litigation. Duane also communicated this request to the Court as part of his Opposition to IXL's Motion to Dismiss, which was ultimately denied. In that briefing to the Court, Duane notified the Court that he requested IXL "agree to stay the pending action until the EEOC has either brought suit or issued a right-to-sue letter[, but] Defendant did not agree to this proposal." See Declaration of David Marek in Further Support of the Motion ("Declaration of Marek"), Exhibit A. At the oral argument on this Motion before Judge William H. Alsup on May 11, 2017, the Court made clear that it would not stay the action pending the EEOC's actions, analogizing the case in its Court to a football game, and instructing the parties that the Court would continue to move the ball down the field. Declaration of Marek, ¶ 4. Further, after the EEOC filed its

Complaint, and before Duane and IXL agreed to dismiss the Duane Action for the sake of convenience and judicial economy, Duane expressly notified IXL that he would intervene in the EEOC Action and IXL expressly agreed that it would not object to him doing so, even if the parties agreed to dismiss the Duane Action. Declaration of Marek, Exh B. The point being, here, Duane's actions were transparent and at all times designed to promote efficiency, unlike the cases cited by IXL which are examples of plaintiffs who tried to get additional bites at the apple by adding Title VII claims years after their cases had already been dismissed on the merits.

Second, IXL argues that Duane cannot add the Additional Claim and the Additional Allegation because he does not have a right-to-sue letter. Duane does not need a need a right-to-sue letter to intervene in the EEOC's Title VII and ADA claims. In addition, because of the EEOC and DFEH Worksharing Agreement, Duane does not need a right-to-sue letter to assert his FEHA claim where the EEOC has filed a lawsuit asserting Title VII and ADA claims. Notably, IXL cannot cite to a single case holding that Duane must have a right-to-sue letter where the EEOC has commenced an action on his behalf. In the alternative, Duane requests permission from the Court to obtain a right-to-sue letter.

Third, IXL argues that Duane cannot add the Additional Claim because it does not share a common question of law or fact with the EEOC's Title VII and ADA claims. Pursuant to Fed. R. Civ. P. Rule 24(b), however, Duane is permitted to add additional factual allegations, as well as additional claims. Here, the FEHA claim tracks the Title VII and ADA claim, and surely shares a common question of law and fact.

DISCUSSION

1. Duane's Title VII And FEHA Claims Are Not Barred By Res Judicata.

"Under 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. … As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of

multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

In certain instances, courts have held that res judicata may bar a claim under Title VII even where plaintiff was unable to assert the Title VII claim because the EEOC had not issued a right-to-sue letter. See *Owens v. Kaiser Foundation Health Plan, Inc.*, 224 F.3d 708, 714-15 (9th Cir. 2001) (holding res judicata barred plaintiffs whose suit filed in state court in 1995 was dismissed for failure to prosecute from asserting claims under Title VII in 1998, where the plaintiff did not seek a stay of their claims pending receipt of a right-to-sue letter). The *Owens* Court makes clear that res judicata does not apply where the plaintiff has sought to stay the matter pending the issuance of the right-to-sue letter. *Id.* ("they could have sought a stay"). See also *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 40-41 (2nd Cir. 1992) (Title VII claim not exempt from res judicata where plaintiff made no effort to in prior action to seek a stay from the district court or amend her complaint to include Title VII claim). Here, the record is clear that Duane sought to stay the Duane Action pending receipt of the right-to-sue letter, but neither IXL nor the District Court agreed to do so. In such an instance, IXL cannot claim it is in the position of defendants in cases such as *Owens*, who argued that they should be relieved of the cost and vexation of multiple lawsuits. IXL refused to stay the matter when Duane requested such relief specifically to avoid additional costs and multiple litigation.

In addition, Duane and IXL only agreed to dismiss the Duane Action, and allow Duane to intervene in the EEOC Action, after the EEOC had already commenced this case. Accordingly, unlike the defendants in cases like *Owens*, IXL knew that even after the Duane Action was dismissed it would have to defend against Duane's Title VII and ADA claims (which had already been filed before the Duane Action was dismissed) and the Additional Claim is identical to those federal claims.

Moreover, res judicata is meant to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on

adjudication." Here, IXL is trying to use res judicata to negate these objectives. Duane offered to stay the Duane Action pending receipt of the right-to-sue letter for the state purpose of relieving both parties of vexatious litigation and to conserve judicial resources, and IXL refused to do so. When Duane proposed this to the Court, the Court also refused to stay the matter. In addition, Duane and IXL agreed to dismiss the Duane Action after the EEOC Action was filed to promote judicial efficiency. Both parties knew, and IXL expressly agreed, that Duane had the right to intervene, and would do so. Further, the EEOC had already filed Duane's Title VII and ADA claims before the Duane Action was dismissed.

2. Duane May Assert His Claims At This Time Without A Right-To-Sue Letter Because The EEOC Asserted These Same Claims On Duane's Behalf, Or, In The Alternative, Duane Will Obtain A Right-To-Sue Letter From The DFEH.

Pursuant to 42 U.S.C. § 2000e-5(f)(1), an aggrieved party has the unconditional right to intervene in the EEOC's lawsuit without a right-to-sue letter. Accordingly, here, Duane has the right to intervene in the EEOC Action, thereby asserting claims under Title VII and the ADA, even without the issuance of a right-to-sue letter. Notably, IXL cites to no authority to the contrary, while the right to intervene is unconditional.

Furthermore, IXL appears to argue that Duane cannot assert the Additional Allegation with respect to the Title VII and ADA claim because he does not have a right-to-sue letter directly addressing that one factual allegation. IXL's argument that the right-to-sue letter "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" overlooks that the EEOC asserted claims under Title VII and the ADA. That he added an additional allegation does not alter the claim – namely, that IXL's termination of Duane's employment constituted unlawful retaliation for Duane's engaging in protected activity. Where Duane does not need a right-to-sue letter to intervene (as is the case here), he cannot possibly need a right-to-sue letter addressing one additional allegation.

Of note, during the course of the litigation, discovery will reveal that Duane asserted his protected rights in discussions with his manager at the time of the Glassdoor Post and again the day before his termination. If discovery establishes that IXL retaliated for these acts, as opposed to or in addition to the Glassdoor Post, the EEOC Claim can be amended. If not, then the addition of this allegation in the Intervenor Complaint will not impact the outcome of the litigaino. Accorindingly, IXL's argument is moot.

In addition, Duane does not need a right-to-sue letter to bring his FEHA claim. By filing his Charge with the EEOC, Duane simultanesously filed with the State Employment Department "pursuant to a worksharing agreement[1] between the two entities." *Surrell v. California Water Service Co.*, 518 F.3d 1097, 1104 (2008). Similarly, here, Duane should not need a right-to-sue letter to assert his FEHA claim where he filed a Charge with the EEOC, who ultimately filed suit on his behalf. IXL cites to no authority that an aggrieved party who filed an EEOC Charge needs a right-to-sue letter to add his or her FEHA claim when the aggrieved party has a right to intervene.

Furthermore, in this circumstance, the Court can "excuse" Duane's failure to get a right-to-sue letter. *Id.*, at 1105 ("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."). "[C]ourts have also concluded that once a plaintiff is *entitled* to receive a right-to-sue letter …, it makes no difference whether the plaintiff actually obtained it." *Id.* Here, the factual record makes clear that Duane does not have a right-to-sue letter only because the EEOC was continuing to pursue his matter and had even issued a Determination on April 22, 2016 that IXL had engaged in unlawful retatliaion. See *Woods*, 972 F.2d at 40-41 ("Congress viewed the

[1] In California, the EEOC and DFEH entered into a Worksharing Agreement. See Fiscal Year 1996 Worksharing Agreement Between California Department of Fair Employment and Housing and U.S. Equal Employment Opportunity Commission. Authorization of such agreements is found in 42 USC §§2000e-4(g)(1), 2000e-8(b), and 29 CFR §1601.13(c). The subject Worksharing Agreement applies to Title VII, ADA, ADEA, and Equal Pay Act of 1963 (29 USC §206) claims that overlap with FEHA claims. See Worksharing Agreement §I(A). Under this agreement, the EEOC and DFEH are each the agent of the other for purposes of receiving charges, and a claimant may "cross-file" charges, whereby a filing with one agency is forwarded to and considered filed with the other. Worksharing Agreement, §II; see EEOC Compliance Manual (CCH) §§5.2-5.3; 29 CFR §1601.13(a)(3)-(4), (b). Thus, a filing with one agency generally can constitute a filing with the other.

prospect of full administrative review as an integral part of Title VII."). Indeed, under the administrative scheme set up by Title VII (and FEHA), the filing of the administrative claim will trigger the investigatory and conciliatory procedures of the appropriate administrative body, with the hope that unlawful employment practices can be resolved and eliminated informally, and possibly without the need for judicial intervention, providing a more economical and less formal means of resolving the dispute. See *Sanchez v Standard Brands, Inc.*, 431 F2d 455, 466 (5th Cir 1970); *Martin v Lockheed Missiles & Space Co.*, 29 CA4th 1718, 1728, 35 CR2d 181 (1994); *Rojo v Kliger*, 52 C3d 65, 83, 276 CR 130 (1990).

Here, Duane has acted consistently with the statute's intent to use the administrative review process. Duane is now entitled to a right-to-sue letter for his FEHA claim, if one is needed, and therefore "it makes no difference whether the plaintiff actually obtained it."xxx

In the alternative, Duane can get a right-to-sue letter from the EEOC, if this Court determines it is necessary. In that instance, Duane requests the right to re-file his Intervenor Complaint after he has the right-to-sue letter.

3. Duane's Additional Claim And Additional Allegation Share A Common Question Of Law Or Fact With The EEOC Claims.

California courts have routinely held that an aggrieved party may add a claim under FEHA when intervening in an EEOC Action. See *E.E.O.C. v. WirelessComm, Inc.*, 2012 WL 1711040 (N.D.Ca. 2012); *E.E.O.C. v. Central California Foundation for Health*, 2011 WL 149831 (E.D.Ca. 2011); Marek Decl., Exh. F. IXL's cannot distinguish these cases. In both *Wireless* and *Central California*, the court permitted the aggrieved party on whose behalf the EEOC commenced an action to add a claim under FEHA.

Pursuant to Fed. R. Civ. P. Rule 24(b), a party may intervene with permissive if the claim shares a common question of law or fact with the main claim. Here, Duane's FEHA claim is essentially identical to the EEOC's Title VII and ADA claims. Both claim that IXL terminated Duane in retaliation for his

complaints about illegal discrimination and failure to accommodate. Legally and factually, these claims share common questions.

By way of comparison, an individual will be permitted to intervene in an EEOC lawsuit even when he had not filed a Charge provided that the "exhausted claims and non-exhausted claims arise out of the same circumstances." *E.E.O.C. v. Giumarra Vineyards Corp.*, 2010 WL 3220387, *4 (E.D.Ca. 2010) (a copy of this case is attached to the Declaration of David Marek. In such situations, the Court, in determining whether the claims "arise out of the same circumstances," looks at whether the claims are "nearly identical … in terms of temporal proximity and subject matter." *Id.* Here, all of Duane's claims arise out of the same circumstances. In all instances, the issue is whether IXL's termination constituted unlawful retaliation for his assertion of his protected rights.

IXL argues that the "Intervenor's claims and the basis for such claims contradict the basis of the claims brought by the EEOC." Opposition, p. 8. The alleged "contradiction" referred to by IXL is that while the EEOC asserted that IXL retaliated exclusively because Duane complained about discrimination in his Glassdoor post, Duane asserted that the retaliation stems from the Glassdoor post and possibly the additional complaints Duane made to his manager at the same time as his Glassdoor post (and which allowed IXL to determine that Duane was the author of his anonymous Glassdoor post). This is not a contradiction.

Moreover, Duane's FEHA claim is identical to his Title VII and ADA claims, and surely shares a question of fact and law with the EEOC's claims. All of the claims stem from IXL's termination of Duane's employment.

4. Conclusion

Duane should be permitted to file the Intervenor Complaint. In the alternative, he requests permission from the Court to seek a righ-to-sue letter, if that is required, and then permission to re-file his Intervenor Complaint.

DATED: September 12, 2017

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/s/

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

I, David Marek, declare:

1. I am the sole proprietor of The Marek Law Firm, Inc., and counsel for Intervenor and aggrieved party, Adrian Scott Duane. This declaration is in further support of Duane's Motion to Intervene in this action. 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 A" is Duane's Opposition to IXL's Motion to Dismiss filed in *Duane v. IXL Learning, Inc.*, 17-cv-00078-WHA, dated April 21, 2017.

3. On May 11, 2017, counsel for Duane and IXL appeared in the Northern District of California before Judge William H. Alsup for an oral argument on IXL's Motion to Dismiss the complaint. At this oral argument, I addressed the issue that Duane intended to add claims under Title VII, the ADA, and FEHA upon receipt of a right-to-sue letter, and referred to footnote 1 of the

Opposition (Exhibit A attached hereto) which notified the Court that Duane had requested (orally and in writing) that IXL agree to stay that action pending receipt of a right-to-sue letter or EEOC suit, and that IXL had denied this request.

4. At that oral argument, Judge Alsup indicated that he would not allow the parties to wait on the EEOC's decision. He analogized the suit before His Honor to a football game, and stated that he was going to get the ball across goal line.

5. After the EEOC filed this action on May 24, 2017, Duane and IXL agreed to dismiss the Duane Action to promote judicial efficiency. Before Duane and IXL agreed to the dismissal, however, Duane notified IXL he would intervene in the EEOC's action, and IXL's counsel agreed in writing, he did not "have any objection to Duane intervening in the EEOC case." A true and correct copy of the email exchange is attached as "Exhibit B."

6. A true and correct copies of *EEOC v. Giumarra Vineyards Corp., 2010 WL 3220387 (E.D.Ca. Aug. 13, 2010)* is attached as "Exhibit C."

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 12th day of September 2017 in Palo Alto, California.

/s/_____
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ADRIAN SCOTT DUANE, Plaintiff, -against- IXL LEARNING, INC. and PAUL MISHKIN, Defendants.		**Case No. 3:17-cv-00078-WHA** **Date:** **May 11, 2017** **Time:** **8:00 a.m.** **Courtroom:** **8, 19th Floor** **Judge:** **Hon. William Alsup**

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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TABLE OF AUTHORITIES

Statutes

Federal Court Cases

Adrian Scott Duane ("Plaintiff") respectfully submits this Memorandum of Law in Opposition to Defendants' Motion to Dismiss Plaintiff's Amended Complaint (the "Motion") submitted by Defendants IXL Learning, Inc. ("IXL") and Paul Mishkin ("Mishkin") (collectively "Defendants").

I. INTRODUCTION

Plaintiff has alleged two causes of action against Defendants, and has indicated his intent to add several additional causes of action arising from the same facts if the EEOC chooses not to pursue this case. First Amended Complaint ("FAC"), FN 1.[1] All of Plaintiff's claims arise from the termination of his employment, which occurred on January 8, 2015, eight days after Plaintiff returned from a protected leave of absence during which he had phalloplasty surgery as part of his gender confirmation. FAC, ¶ 1. In connection with Plaintiff's return to work, Defendants refused to accommodate Plaintiff in a manner consistent with accommodations provided to other employees and even to Plaintiff before he took leave under other circumstances. FAC, ¶¶ 68-71. Accordingly, Plaintiff complained both to his manager and through a Glassdoor.com post that IXL discriminated against him. FAC, ¶¶ 40-46. Two days after Plaintiff complained to his manager, and one day after Defendants allegedly became aware of the Glassdoor.com post, Defendants terminated his employment. FAC, ¶ 57. After investigating Plaintiff's allegations, the EEOC issued a Determination, finding that "there is reasonable cause to believe that the

[1] In the FAC, at footnote 1, Plaintiff indicated his intent to "amend this First Amended Complaint to assert additional claims under the Title I of the Americans with Disabilities Act of 1990 ("Title I"), the Americans with Disabilities Act Amendments Act of 2008 ("ADA Amendments"), Title VII of the Civil Rights Act of 1964 ("Title VII"), the California Fair Employment and Housing Act (the "FEHA"), and the California Family Rights Act (the "CFRA") upon receipt of his right-to-sue letter from the EEOC." Of note, Plaintiff has informed Defendants' counsel that, because of these claims, Plaintiff would agree to stay the pending action until the EEOC has either brought suit or issued its right-to-sue letter. Defendants did not agree to this proposal.

Respondent discriminated against [Duane] in retaliation for protesting against discriminatory conduct, in violation of the statutes." FAC, ¶ 61.

These facts give rise to Plaintiff's two pending claims. Plaintiff's First Cause of Action against IXL alleges violation of the Family Medical Leave Act ("FMLA"), 29 U.S.C. 2615(a)(1). Plaintiff's Second Cause of Action against both IXL and Mishkin alleges wrongful termination in violation of the public policy. The underlying public policies forming the basis of this claim are Defendants' violations of the ADA, Title VII, FEGA, CRFA, and California Labor Code § 232.5(a).

Although the facts as pled set forth straightforward claims – and the EEOC has already determined that there is reasonable cause to believe IXL engaged in illegal retaliation when it terminated Plaintiff's employment – Defendants nevertheless ask this Court to dismiss Plaintiff's two pending claims at the pleadings stage.

Defendants claim falsely that "Plaintiff has not alleged any facts indicating Defendants considered Plaintiff's FMLA leave as a negative factor in their termination decision." Motion, p. 13. The law is clear, however, that the temporal connection alone between the leave and the adverse act is sufficient to plead this cause of action. Here, Defendants terminated Plaintiff's employment eight days after he returned from leave. Moreover, Plaintiff pled that Defendants began treating him worse almost as soon as he returned. Surely, this satisfies the minimal pleading requirement.

Defendants also claim that the National Labor Relations Act ("NLRA") preempts Plaintiff's state law wrongful termination claim. Motion, p. 6. Plaintiff's wrongful termination claim arises from Defendant's alleged breach of a variety of state and federal statutes that have no connection whatsoever to the NLRA. Indeed, the NLRA does not –

and has never been found to – preempt workplace discrimination and retaliation claims. Plaintiff's discrimination and retaliation claims were expressly excluded from the NLRB proceeding.

For the reasons set forth hereinafter, Plaintiff respectfully requests that the Court deny Defendants' motion in its entirety.

II. FACTS

The facts of this matter have been carefully set down in the FAC.

The most important facts for this motion are as follows:

1. Plaintiff was an employee of IXL from June 2013 through January 8, 2015, on which date Defendants terminated his employment without any objective basis. FAC, ¶¶ 5, 8, 57.

2. Plaintiff took a protected medical leave of absence from his IXL employment from October 30, 2014 through December 30, 2014 during which he had phalloplasty surgery as part of his gender confirmation. FAC, ¶¶ 1, 67.

3. Prior to his FMLA leave, Defendants did not object to Plaintiff working part time from home, which was consistent with Defendants' treatment of other employees. FAC, ¶ 16. When Plaintiff returned from his FMLA leave, Defendants objected to his working part time from home, even though he required this accommodation because of post-surgical complications. Further, Defendants informed Plaintiff for the first time that IXL had an issue with his performance when he had previously been permitted to work outside the office. FAC, ¶¶ 27, 28.

4. When Defendants began treating Plaintiff worse than they had treated him before his leave and worse than his colleagues, Plaintiff complained on Glassdoor.com – a

website used by Defendants – and to his manager that IXL discriminated against him on the basis of his gender identity, gender expression, disability, and decision to take leave. FAC, ¶¶ 77, 79.

5. The day after Plaintiff complained to his manager – and eight days after the Glassdoor.com post – Defendants terminated his employment without any legitimate basis. FAC, ¶¶ 1, 57.

6. On March 17, 2015, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that IXL discriminated and retaliated against him in violation of the ADA, Title VII, FEHA, and CFRA when it terminated his employment because (i) it learned he was transgender; (ii) he took a protected leave of absence, and had gender reassignment surgery during his leave; and (iii) he complained on Glassdoor and to his manager that IXL discriminated against him in violation of these statutes. FAC, ¶ 60. On April 22, 2016, the EEOC issued a Determination, finding that "there is reasonable cause to believe that the Respondent discriminated against [Duane] in retaliation for protesting against discriminatory conduct, in violation of the statutes." FAC, ¶ 61.

7. On July 29, 2015, the National Labor Relations Board ("NLRB") filed the complaint (the "NLRB Complaint") on behalf of Plaintiff against IXL alleging that IXL terminated Plaintiff because he "engaged in concerted activities for the purposes of mutual aid and protection." Defendants' Motion for Judicial Notice, Exhibit A.[2] The NLRB held

[2] Plaintiff does not object to Defendants' Motion for Judicial Notice of the NLRB Complaint and the NLRB Decision. However, Plaintiff hereby requests that this Court also take judicial notice of selected portions of the transcript from the NLRB hearing. Such transcript is attached as Exhibit A to the Declaration of David Marek.

a hearing on November 5, 2015, during which hearing the parties were not permitted to address the claims pending before the EEOC. Declaration of David Marek, Exhibit A. The NLRB Administrative Law Judge ("ALJ") issued a decision (the "NLRB Decision") on April 28, 2016 finding that Plaintiff failed to demonstrate that he engaged in "concerted, protected activity." Defendants' Motion for Judicial Notice, Exhibit B.

III. DISCUSSION

A. Legal Standard On Motion To Dismiss

A complaint will survive a motion to dismiss under Rule 12(b)(6) when it contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 663, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). When considering a Rule 12(b)(6) motion, the court must "accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff." *Resnick v. Hayes,* 213 F.3d 443, 447 (9th Cir.2000). Plaintiffs must allege "plausible grounds to infer" that their claims rise "above the speculative level." *Twombly,* 550 U.S. at 555–56. "Determining whether a complaint states a plausible claim for relief" is a "context-specific" task, requiring "the reviewing court to draw on its judicial experience and common sense." *Iqbal,* 556 U.S. at 679.

Plaintiff's detailed complaint has far exceeded this standard. Defendants ask this Court to completely disregard these principles and determine questions of fact before any discovery has commenced. As detailed below, Plaintiff has more than met his pleading burden, and Defendants' Motion must be denied.

B. Plaintiff Has Properly Pled That Defendants' Termination Of His Employment Eight Days After He Returned From Medical Leave Violated The FMLA.

Defendants do not dispute that Plaintiff was an "eligible employee," who "timely and properly requested leave pursuant to the FMLA," and that Defendant IXL was an employer within the meaning of 29 U.S.C. § 2611(4)(A). FAC, ¶¶ 64, 65, 66. In addition, Defendants do not dispute that Plaintiff took a protected medical leave from October 30, 2014 through December 30, 2014, FAC, ¶ 67, and that Defendant's employment was terminated eight days later on January 8, 2015. FAC, ¶ 52.

The law is clear that an employer may not "use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions." 29 C.F.R. § 825.220(c). *See also Liu v. Amway Corp.*, 347 F.3d 1125, 1133 (9th Cir. 2003); *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 160 (1st Cir. 1998).

Here, Defendants claim falsely that "Plaintiff has not alleged any fact indicating that Defendants considered Plaintiff's FMLA leave as a negative factor[3] in their decision to terminate him." Motion, p. 13. (Defendants repeated this same false claim on page 14.) This argument – at the core of Defendants' Motion – simply ignores the pleadings. Plaintiff alleged the following facts that support his assertion that his taking FMLA leave was a negative factor in Defendants' termination decision:

> 68. Immediately upon Duane's return to work, IXL began treating him differently. Whereas he, and other employees, were permitted to work outside the office before he took FMLA leave, after he returns from leave his manager, Keyes, informed him that the Company would not permit Duane to work outside the office, even though Duane had a legitimate health related reason to do so. In addition, Keys indicted for the first time that the Company had issues with

[3] Defendants do not, and cannot, argue that the termination decision must have been motivated solely by Plaintiff's leave. Rather, as the law makes clear, and Defendants concede, the FMLA may not be a negative factor in the decision.

Duane's performance when he worked from outside the office before he took leave, a criticism that was never raised before Duane took his leave.

69. In addition, immediately after his return from FMLA leave, IXL escalated Duane's complaints that the Company was treating him differently after he returned from his leave. Keys informed both human resources and IXL's CEO (who also discussed these issues without Keyes) that Duane had raised these issues. This immediate escalation of issues to the CEO constituted more negative treatment that Duane experienced before his leave.

70. Within days of his return from leave, IXL terminated Duane's employment.

71. While IXL and Mishkin have claimed that they decided to terminate Duane's employment because his Glassdoor.com post showed poor judgment and poor ethics, IXL and Mishkin did not fire any other employees who posted negative comments about the Company on Glassdoor.com, although such posts existed.

Accordingly, the FAC asserts several adverse acts – including the termination itself – that occurred within days of Plaintiff's return from leave. See *Hodgens*, 144 F.3d at 168 ("close temporal proximity between two events may give rise to an inference of causal connection. Thus, 'protected conduct closely followed by adverse action may justify an inference of retaliatory motive.'") (internal citations omitted). In *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1325 (10th Cir. 1997), the Court determined that the employee established a prima facie case (which is far more than Plaintiff must assert at this stage of the proceedings) because the employer "sent a letter of discipline concerning attendance problems on the day she returned from the leave." Similarly, in *Liu*, the Ninth Circuit considered "the proximity in time between the leave and her termination also provides supporting evidence of a connection between the two events." 347 F.3d at 1137. Accordingly, Plaintiff has properly pled this claim.

Furthermore, "where the termination decision was made for subjective, rather than objective, evaluations, as was the case here, careful analysis of possible impermissible motivations is warranted because such evaluations are particularly 'susceptible of abuse and more likely to mask pretext.'" *Id.*, at 1136, *citing Weldon v. Kraft, Inc.*, 896 F.2d 793, 798 (3rd Cir. 1990). Plaintiff pled that the termination decision was based on subjective criteria. FAC, ¶ 57.

Defendants' argument relies exclusively on *Simms v. DNC Parks & Resorts at Tenaya, Inc.*, 2015 WL 1956441 (E.D. Cal. April 29, 2015), an unreported decision[4] that is easily distinguished from the case before this Court. In *Simms*, Defendant terminated Plaintiff's employment four months after he returned from FMLA leave and then "[a]t least twice in the following year and a half, Plaintiff was approached with a job offer from Defendants …." *Id.*, at *1. According to the unreported decision, the plaintiff did not offer any evidence that his FMLA leave was a negative factor in the termination decision other than "two of his coworkers with similar positions complained that they were not able to perform office work and had to work harder because of accommodations being made for Plaintiff." *Id.*, at *4. Unlike *Simms*, who merely asserted "conclusions" and whose complaint appears to be focused on the adverse repercussions he faced because his employer accommodated his disability, the FAC contains detailed pleadings that demonstrate Defendants treated Plaintiff worse than his colleagues and worse than he previously been treated immediately upon his return from FMLA leave. FAC, ¶¶ 68-71.

[4] Defendants citation to and reliance on an unreported case (and failure to even notify the Court that *Simms* was not reported) violates Cal. Rules of Court, rule 8.1115(a) and N.D.Cal. L.R. 3-4(e).

In an effort to liken this case to *Simms*, Defendants make the false argument that "[t]he 'negative treatment' alleged by Plaintiff is that IXL allegedly refused to grant Plaintiff reasonable accommodations in light of his disability." Motion, p. 15. As is clear from the FAC, Plaintiff has alleged that the negative treatment included, among other things, the termination of his employment eight days after returning from FMLA leave.

Defendants also claim that the allegations in the FAC differ from the Complaint and/or the NLRB Complaint. Motion, p. 15. In point of fact, Plaintiff's allegations in the Complaint, FAC, and NLRB Complaint (and even EEOC Charge) are remarkably consistent. Contrary to Defendants' false contention on page 15 of their Motion, Plaintiff has asserted at all times that Defendants terminated his employment "because of his gender identity, gender expression, disability, medical leave, and subsequent complaints to his manager and IXL about IXL's discriminatory and retaliatory conduct in violation of federal and state laws. FAC, ¶ 79. NLRB Complaint, ¶¶ 8, 14. Complaint, ¶¶ 120, 121

What Defendants appear to be arguing is that Plaintiff should be precluded from pleading that Defendants' termination decision was motivated by a variety of factors. *Balog v. LRJV, Inc.*, 204 Cal.App.3d 1295, 1305 (1988) ("when a defendant discharges a plaintiff for several illegal reasons (e.g., because the plaintiff is black, is a woman, and is over the age of forty), then each illegal reason may be considered to be the legal cause of the wrongful discharge even though each illegal reason was merely a contributing reason and even though another reason also contributed to the decision to discharge the plaintiff."). This argument should be rejected.

C. Plaintiff Properly Pled His Claim For Wrongful Termination In Violation Of Public Policy.

"California courts have carved out a specific exception to th[e] general [at-will employment] rule: an employer will be liable if it terminates an employee in violation of public policy." *Liu*, 347 F.3d at 1137, *citing Stevenson v. Superior Court*, 16 Cal.4th 880, 66 Cal.Rptr.2d 888, 941 P.2d 1157 (1997).[5] Defendants do not dispute that discharge in violation of the ADA, Title VII, FEHA,[6] CFRA,[7] FMLA, and Labor Code § 232.5(a) have all been held, as a matter of law, to constitute wrongful discharge in violation of public policy.

Accordingly, Plaintiff has properly pled that Defendants terminated his employment in violation of these federal and state statutes, and therefore that Defendants wrongfully terminated him in violation of public policy.

1. The NLRA Does Not Preempt Plaintiff's Wrongful Termination Claim Because The Public Policies At Issue Are Not Related To, Or Preempted By, The NLRA.

Defendants argue that the NLRA preempts Plaintiff's wrongful termination claim. Motion, p. 6. Plaintiff asserts that Defendants were motivated by numerous factors,

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[5] *See Philips v. St. Mary Regional Medical Center*, 96 Cal.App.4th 218, 227 (2002) ("To support a wrongful discharge claim, the policy must be '(1) delineated in either constitutional or statutory provisions; (2) public in the sense that it inures to the benefit of the public rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental."

[6] Government Code section 12920 provides: "It is hereby declared as a public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical disability, medical disability, medical condition, marital status, sex, age, or sexual orientation.." *See Philips*, 96 Cal.App.4th at 227 ("FEHA's provisions prohibiting discrimination may provide the policy basis for a claim for wrongful discharge in violation of public policy.").

[7] *See Liu*, 347 F.3d at 1137 ("Discharge in violation of the CFRA has been held, as a matter of law, to constitute a wrongful discharge in violation of public policy.").

including the violation of the ADA, Title VII, FEHA, CFRA, FMLA, and Labor Code § 232.5(a). Defendants' argument ignores five of the six motivating factors, and instead misleadingly recasts Plaintiff's claim as simply a violation of the public policy expressed in 232.5. See Motion, Section IV.A.13 (where Defendants mischaracterize Plaintiff's wrongful termination claim as based solely on Defendants' violation "Labor Code § 232.5".).

Where only one of the motivating factors constitutes "activity arguably subject to § 7 or § 8 of the Act," the NLRA does not preempt the state wrongful termination claim. *Balog, Inc.*, 204 Cal.App.3d 1295. In *Balog*, the plaintiff "alleged he was fired for five distinct reasons, only one of which constitutes an unfair labor practice under the NLRA." *Id.*, at 1304. In that case, the Court expressly held that "the mere fact that one of defendants' motives for firing Balog may have been, or was, his refusal to commit an unfair labor practice" does not result in NLRA preemption of his state wrongful termination claim. *Id.*, at 1304. That Court made clear that "so long as defendants' intentional wrongful conduct was motivated by impermissible considerations other than solely a desire or plan to interfere with collective bargaining or unionization, they may be held liable under state law." *Id.*

Here, the NLRA does not preempt Plaintiff's wrongful termination claim because the NLRA is not even arguably related to the public policy embedded in prohibiting illegal workplace discrimination and retaliation under the ADA, Title VII, FEHA, CFRA, and FMLA. *See San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 244, 79 S.Ct. 773, 779 (1959) (*Garmon* expressly carves out claims from preemption that "touch[] interests so deeply rooted in local feeling and responsibility that,

in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."). Defendants do not, and cannot, cite to one case that suggests the NLRA preempts wrongful termination claims in violation of public policy stemming from the ADA, Title VII, FEHA, CRFA, and FMLA. In fact, Defendants do not even attempt to argue that the NLRA preempts such claims.[8]

Moreover, the NLRA also does not even preempt Plaintiff's wrongful termination claim to the extent it arises under § 232.5(a). As the Ninth Circuit explained in *Paige*, 826 F.2d at 857:

> Congress's main goal in enacting the NLRA was to establish an equitable bargaining process.... State laws which set minimum safety standards do not interfere with the bargaining process itself.... In *Metropolitan Life v. Mass*, 471 U.S. 724, 105 S.Ct. 2380 (1985), the Supreme Court considered the legislative history of the NLRA and made the following statement: 'Most significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization. To the contrary, *we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety.* The States traditionally have had great latitude under their police power to legislate as 'to the protection of the lives, limbs, *health*, comfort, and quiet of all persons.' '*States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.* … Thus, the Supreme Court recognized that Congress did not intend to preempt all local regulations that touch or concern the employment relationship. *Inter-Modal Rail Employees Ass'n v. Burlington Northern and Santa Fe Railway Co.*, 73 Cal.App.4th 918, 925-26 (1999).

[8] "Some courts have made the blanket statement that 'wrongful discharge claims on public policy violations are not preempted by federal labor laws." *Luke v. Collotype Labels USA, Inc.*, 159 Cal.App.4th 1463, 1472, 72 Cal.Rptr.3d 440, 446 (App. 1st Dist. 2009), *citing Saridakis v. United Airlines*, 166 F.3d 1272, 1278 (9th Cir. 1999), *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367, 1374 (9th Cir. 1984); *Vincent v. Trena Western Technical Group*, 828 F.2d 563, 565-566 (9th Cir. 1987); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 864 (9th Cir. 1987).

Indeed, "It is only when the controversies are identical that 'a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). *See Kelecheva v. Multivision Cable T.V. Corp.*, 18 Cal.App.4th 521, 530 (1993) (the NLRA does not preempt state law claims "where the controversy presented to the state court is not identical to that which could be presented to the NLRB."). In *Kelecheva*, the Court held that the NLRA does not even preempt a claim "brought by a supervisor who alleges that he or she was terminated for refusing to participate in unfair labor practices." *Id.*, at 529. Comparing these facts to the case before this Court it is clear that the NLRA does not preempt Plaintiff's wrongful termination claim. Plaintiff's wrongful termination claim is not identical to Plaintiff's claim under the NLRA. Plaintiff's NLRA claim alleged that he was terminated because he engaged in "protected, concerted activity." None of the statutes at issue in Plaintiff's wrongful termination claim – including 232.5(a) – require that Plaintiff engage in protected or concerted activity.

Defendants also argue that Plaintiff "conveniently change[d] his story" in the FAC when compared to the original Complaint and NLRB Complaint. Motion, p. 8. This assertion is false. In the both the original Complaint and the FAC, Plaintiff asserted wrongful termination in violation of public policy, and both complaints Plaintiff asserted that the public policies at issues included both workplace discrimination and retaliation statutes and Section 232.5. Complaint, ¶¶ 120, 121. FAC, ¶¶ 77, 78.

Defendants try to analogize the case before this Court to *Luke v. Collotype Labels USA, Inc.*, 72 Cal Rptr. 3d 440, 447 (Cal. Ct. App. 2008). In *Luke*, however, the plaintiff did not allege any type of discrimination or retaliation, and surely did not allege claims for violation of the ADA, Title VII, FEHA, FMRA, and FMLA. *Id.* Rather, in that case, Luke alleged that the defendant wrongfully terminated him because he had "discussions with fellow employees about working conditions, including complaints about inadequate bathroom facilities, lack of adequate meal break facilities, the facility being too hot and the lack of equipment such as a desk, chair or computer to perform the training function." *Id.*, at 447.

2. Plaintiff's Wrongful Termination Claim Has Never Been Heard.

Defendants' also argue that Plaintiff's claim should be denied because he has "restructured [his NLRA claim] as state law claims …." Motion, p. 9. The factual record establishes this argument is false. Plaintiff's state law claim arises from his allegations that Defendants' termination was a violation of public policy because it constituted illegal discrimination and retaliation under the ADA, Title VII, FEHA CFRA, and FMLA an a violation of 232.5(a). FAC, ¶¶ 77, 79. Accordingly, Plaintiff did not "restructure" his claims after receiving an "adverse decision" from the NLRA, as Defendants falsely stated. Rather, Plaintiff asserted these claims to the EEOC March 17, 2015 (FAC, ¶ 60) before the NLRB even filed the NLRB Complaint. Defendants' Motion for Judicial Notice, Exhibit A.

Defendants also argue falsely that Plaintiff "seek[s] relief from both the NLRB and this Court for the same claims." Motion, p. 9. This is plainly false. Defendants know

Plaintiff sought relief from the NLRB for a claim that Defendants violated the NLRA (i.e., that he was terminated for engaging in "protected, concerted activity"), while Plaintiff's claims before this Court are wholly different. *See Sears, Roebuck & Co.*, 436 U.S. at 197 ("The critical inquiry [in the *Garmon* analysis] is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to or different from that which could have been, but was not, presented to the Labor Board.").

Defendants' attempt to analogize this case to *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988) is inapplicable. In *Parker*, a class of union members commenced a lawsuit in Alabama state court alleging various breach of contract and fraud claims only after the exact same claims failed before the NLRB for untimeliness. *Id.*, at 1515. On these facts, the Court held that the NLRA preempted the "restructured" state law claims, which were "identical" to the claims brought before the NLRB. Id., at 1517.

Here, Defendants cannot even make such an argument. Unlike his NLRA claims, Plaintiff's wrongful termination claim arises from allegations of a violation of public policy that prohibits discrimination and retaliation in the workplace. Indeed, the NLRB hearing and its discovery process expressly excluded any reference to the claims pending with the EEOC. Of note, Defendants' same counsel successfully objected to questions that even potentially addressed the claims pending at the EEOC. When a question was asked of an IXL witness, Defendants' counsel objected because the question "veer[ed] into the EEOC charge and discovery on that charge, subject areas that I have met with objections for requesting any information from any witness on." Declaration of Marek, Exhibit A.

Moreover, Plaintiff filed his EEOC Charge before the NLRB even issued the NLRB Complaint.

In addition, there is no actual "risk of interference" with the NLRB Decision. Motion, p. 10. The NLRB ALJ determined that Plaintiff's Glassdoor post "was not a protected, concerted activity" because (i) his posting was not "engaged in with or on the authority of other employees," and was instead solely by and on behalf of Plaintiff himself; and (ii) his conduct did not relate to Section 7 rights, as it did not involve "mutual aid or protection." Defendants' Motion For Judicial Notice, Exhibit B, pp. 25-31. Plaintiff's wrongful termination claim does not include as an element that he engaged in "protected, concerted activity." Indeed, the public policy prohibiting workplace discrimination and retaliation has no connection to the NLRA claim whatsoever, and even the public policy set forth in Section 232.5(a) does not require protected or concerted activity. Thus, the ALJ's Decision has no impact on the wrongful termination claim.

3. Plaintiff Can Assert His Wrongful Termination Claim Against Defendant Mishkin.

Defendants argue that Mishkin cannot be personally sued under Labor Code § 232.5. Motion, p. 11. Thus, Defendants' Motion wholly ignores the other five other statutes underlying Plaintiff's wrongful termination claim. Defendants have not even argued that Plaintiff's wrongful termination claim arising under the ADA, Title VII, FEHA, CRFA, and the FMLA cannot be asserted against Mishkin personally.[9]

[9] Here, Mishkin is the founder and CEO of IXL; clearly acted as the agent of IXL; and was responsible for the decision to terminate Plaintiff's employment. FAC, ¶ 7.

Defendants rely exclusively on *Garcia v. Witt*, No. B215187, 2010 WL 2220885 (Cal. Ct. App., June 4, 2010), an unpublished opinion that the Eastern District of California refused to follow, to argue that Mishkin cannot be personally sued under Section 232.5. *Martinez v. Siemens, Inc.*, No. 2:15-cv-00511-MCE-AC 2015 BL 232948 (E.D. Cal., July 17, 2015) (holding that "This Court was able to find one case on point [*Garcia*] …. But as an unpublished case, *Garcia* would be non-citable by a California court and holds no precedential value.").

Here, Plaintiff's wrongful termination claim arises from Defendants' alleged retaliation for Plaintiff's exercising certain rights under the Labor Code, in addition to discrimination and violation of Section 232.5. FAC ¶ 77. Accordingly, Plaintiff's wrongful termination claim arises under, among other things, California Labor Code § 98.6, which prohibits employers from retaliating, discriminating, or taking adverse action against an employee or a prospective employee for exercising any right under the Labor Code.

In *Martinez*, the District Court rejected defendants' argument that the plaintiff could not a bring wrongful termination for violation of public policy claim against a supervisor. The Court held that Section 98.6(a) – which includes the word "person," defined in Section 18 as "any person, association, organization, partnership, business trust, limited liability company, or corporation" – "creates a cause of action against an individual person … not just against the employer." *Id.* The District Court held that, "The case law … is sparse, and Defendants do not (and cannot) point to settled case law stating that § 98.6 does not apply to supervisors." *Id.* The District Court also relied on *Thompson v. GenOn Energy Servs.*, LLC, No. C13-0187 TEG, 2013 WL 968224 (N.D. Cal. 2013), "in

which the court came to a similar conclusion based on the dearth of case law on Labor Code § 6310." *Id.*

IV. CONCLUSION

For the reasons stated herein, the Court should deny Defendants' Motion.

Dated: April 21, 2017

THE MAREK LAW FIRM, INC.

By:___/s/ David Marek_____
David Marek (SBN 290686)
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David Marek <david@marekfirm.com>

Re: Duane v IXL

1 message

Jeffrey D. Wilson <wilson@youngbasile.com> Mon, Jul 24, 2017 at 4:00 PM
To: David Marek <david@marekfirm.com>
Cc: Natasha Menezes <menezes@youngbasile.com>

Agreed.

Jeff

Jeffrey D. Wilson, Esq.
Shareholder and Litigation Director
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From: David Marek <david@marekfirm.com>
Sent: Monday, July 24, 2017 5:20:03 PM
To: Jeffrey D. Wilson
Cc: Natasha Menezes
Subject: Re: Duane v IXL

Jeff
I am writing to let you know I intend to move to intervene in the EEOC/IXL matter tomorrow. Per the email exchange below, I will represent in the motion that IXL does not oppose the intervention.

Thank you

On Thu, Jun 22, 2017 at 10:20 AM, Jeffrey D. Wilson <wilson@youngbasile.com> wrote:

> We are clear, and I don't have any objection to Duane intervening in the EEOC case. I believe, but could be wrong, that he has a right to intervene.
>
> Jeff
>
> **Jeffrey D. Wilson** | Young Basile Hanlon & MacFarlane, P.C.
> 3001 WEST BIG BEAVER ROAD, SUITE 624 | TROY, MICHIGAN 48084
> DIRECT: (248)244-0173 | FAX: (248)649-3338 | www.youngbasile.com

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From: David Marek <david@marekfirm.com>
Date: Thursday, June 22, 2017 at 12:54 PM
To: Jeffrey Wilson <wilson@youngbasile.com>
Cc: Natasha Menezes <menezes@youngbasile.com>
Subject: Re: Duane v IXL

Jeff
The "we" was Duane, and I was asking if you object to Duane intervening in the EEOC v. IXL matter. I think we are on the same page, but if not, please don't hesitate to call if that's an easier way to assure no miscommunication.

Thanks

On Wed, Jun 21, 2017 at 3:57 PM, Jeffrey D. Wilson <wilson@youngbasile.com> wrote:

"We" being Duane, correct? It may seem like a silly question, but it's not. If you are asking whether IXL objects to Duane intervening in the EEOC case, we would not object. I don't know if we have formally accepted service yet, if that matters. Natasha can let us know. I don't have that information handy.

Jeff

From: David Marek [mailto:david@marekfirm.com]
Sent: June 21, 2017 6:42 PM
To: Jeffrey D. Wilson <wilson@youngbasile.com>
Cc: Natasha Menezes <menezes@youngbasile.com>
Subject: Re: Duane v IXL

We will intervene as a party in the EEOC case.

David Marek

The Marek Law Firm

(917) 721-5042

California • New York • Florida

On Jun 21, 2017, at 3:32 PM, Jeffrey D. Wilson <wilson@youngbasile.com> wrote:

This change to the stipulated order is fine with me. Natasha, can you get it formatted properly and submit to the court?

David, by "motion to intervene" do you mean Duane intervening as a party? Or are you asking about making an appearance as counsel of record?

Thanks,

Jeff

From: David Marek [mailto:david@marekfirm.com]
Sent: June 21, 2017 4:54 PM
To: Jeffrey D. Wilson <wilson@youngbasile.com>
Cc: Natasha Menezes <menezes@youngbasile.com>
Subject: Re: Duane v IXL

Jeff
Please see my attached edits.

Also, please let me know if you intend to object, and if so on what basis, to my motion to intervene in the EEOC v. IXL matter.

On Mon, Jun 19, 2017 at 6:17 PM, Jeffrey D. Wilson <wilson@youngbasile.com> wrote:

> David, thanks for your call last week. I had a chance to speak with IXL and we agree with the stipulated dismissal. Please see attached. Does this work for you?
>
> Thanks,
>
> Jeff
>
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Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
GIUMARRA VINEYARDS CORPORATION, et al., Defendants.

No. 1:09–CV–02255–OWW–SKO.
|
Aug. 13, 2010.

Attorneys and Law Firms

Anna Y. Park, Connie K. Liem, U.S. Equal Employment Opportunity Commission, Los Angeles, CA, for Plaintiff.

Joshua Adam Fields, Kirtland & Packard, El Segundo, CA, for Defendants.

MEMORANDUM DECISION RE: PLAINTIFF–INTERVENORS' MOTION TO INTERVENE (Doc. 7.)

I. *INTRODUCTION.*

OLIVER W. WANGER, District Judge.

***1** This matter is before the Court on Delfino Ochoa, Maribel Ochoa, Jose Ochoa, and Guadalupe Martinez's motion to intervene in this action as plaintiffs pursuant to Federal Rule of Civil Procedure 24(a). Defendant Giumarra Vineyards Corporation ("Giumarra") opposes the motion, arguing that the intervening plaintiffs cannot introduce additional causes of action beyond what was originally alleged in the EEOC's complaint. Defendant also objects to Guadalupe Martinez's motion in its entirety. According to Defendant, Martinez is not an "aggrieved person" under 42 U.S.C. § 2000e–5(f)(1) and his reliance on the "single-filing" rule is inapplicable to the facts of this case.

II. *BACKGROUND.*

The Equal Employment Opportunity Commission ("EEOC") brought the current action against Defendant Giumarra Vineyards Corporation ("Giumarra") on December 29, 2009. The EEOC filed suit under Title VII of the Civil Rights Act of 1964, ("Title VII"), and Title I of the Civil Rights Act of 1991, ("Title I"), to correct unlawful employment practices and to provide relief to charging parties Delfino Ochoa, Maribel Ochoa, and Jose Ochoa, as well as Guadalupe Martinez, a "similarly situated individual."[1] In its complaint, the EEOC alleges that Giumarra subjected Maribel Ochoa to a hostile work environment and retaliation. The complaint also alleges that Delfino Ochoa, Jose Ochoa, and Guadalupe Martinez were discharged "in retaliation for having engaged in statutorily protected activity."

According to the complaint, in early July 2007, Maribel Ochoa, who was employed at Giumarra's Edison, California facility, was subjected to unwelcome conduct of a sexual nature by a male coworker. (Compl.¶ 11.) The co-worker allegedly told Maribel Ochoa that he "wanted to have sex with her," and openly discussed his anatomy. (*Id.*) The repeated advances were unwelcome and Maribel Ochoa complained to management in an attempt to end the harassment, to no avail. (*Id.*)

It is alleged that on July 19, 2007, Delfino Ochoa, Maribel Ochoa, Jose Ochoa, and Guadalupe Martinez complained to Giumarra management concerning the sexual harassment of Maribel Ochoa, who was seventeen years-old at the time. (*Id.* ¶ 12(a).) The four individuals were allegedly terminated the next day, July 20, 2007. (*Id.*) According to the complaint, Giumarra terminated their employment "in retaliation for their opposition to unlawful sexual harassment in their workplace":

> The terminations occurred less than 24 hours after the complaints were made and well in advance of the growing season the Charging Parties and Mr. Martinez were supposed to work through. None of the Charging Parties, nor Mr. Martinez, were given any reason

> for the abrupt terminations and no other similarly situated farmer workers were discharged at that time in that manner.

(*Id.* ¶ 12(c).)

The EEOC seeks permanent injunctions enjoining Giumarra from discriminating based on sex and from engaging in retaliation for conduct protected by Title VII. It also seeks monetary relief that would make Delfino Ochoa, Maribel Ochoa, Jose Ochoa, and Guadalupe Martinez whole, compensation for past and future pecuniary losses, compensation for past and future non-pecuniary losses, and punitive damages for engaging in discriminatory practices.

***2** On February 9, 2010, Intervening–Plaintiffs filed this motion to intervene pursuant to Federal Rule 24(a).[2] Intervening–Plaintiffs' complaint is substantially similar to the EEOC's complaint except for two additions: (1) their Title VII claims include allegations of discrimination/harassment based on national origin; and (2) they advance state law claims of employment discrimination, harassment, retaliation, and related claims under the Fair Employment and Housing Act ("FEHA"), California Government Code § 12940, *et seq.*[3]

Defendant Giumarra opposed the motion to intervene on March 29, 2010.

Intervening–Plaintiffs filed their reply to Defendant's opposition on April 5, 2010. In support of their reply, they submitted: (1) a 21–page reply memorandum; (2) the Declaration of Mario Martinez, counsel for Intervening–Plaintiffs; and (3) numerous exhibits, including EEOC correspondence and "right-to-sue" letters.[4] (Doc. 10.)

The EEOC has not filed an opposition or statement of non-opposition to the motion.

III. *LEGAL STANDARD.*

Four individuals seek to intervene in the EEOC's action: Delfino Ochoa, Maribel Ochoa, Jose Ochoa, and Guadalupe Martinez. Intervening–Plaintiffs argue that they are entitled to intervene as a matter of right, pursuant to Rule 24(a) of the Civil Rules of Civil Procedure. Under Federal Rule 24(a), intervention of right shall be permitted when either federal statute confers the unconditional right to intervene in the action, or when the applicant claims an interest which may, as a practical matter, be impaired or impeded by disposition of the pending action, and that interest is not adequately represented by existing parties.

Title VII is one of the few statutes that provides individuals a right to intervene. See 42 U.S.C. § 2000e–5(f)(1) ("[T]he person or persons aggrieved shall have the right to intervene in a civil action brought by the [EEOC]...."). Most courts agree that this statutory provision permits individuals an "unconditional right to intervene" under Rule 24(a)(1) in a Title VII enforcement action brought by the EEOC against the employer. *See, e.g., E.E.O.C. v. University of Phoenix, Inc.*, No. 06–2303–PHX–MHM, 2008 WL 1971396 at *1 (D.Ariz. May 2, 2008).

Federal Rule 24(a) imposes the additional requirement that the application to intervene be timely. In order to determine whether the motion to intervene is timely, the court considers the length of time between the intervenor's learning of his interest and filing, the prejudice to the defendant from intervention, the prejudice to the intervenor from a denial of intervention, and any unusual circumstances. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir.2003)

IV. *DISCUSSION.*

As a preliminary matter, courts in the Ninth Circuit have held that an application for intervention cannot be resolved by reference to the ultimate merits of the claim the intervenor seeks to assert. *See Cho v. Fujita Kanko Guam, Inc.*, No. CVA08–002, 2009 WL 5342508 (Guam Terr. Dec.31, 2009) (citing *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir.1998)). Rule 24 is to be construed liberally, and doubts resolved in favor of the proposed intervenor. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir.1998). In considering a motion to intervene, the district court must accept as true nonconclusory allegations of the motion and proposed complaint in intervention "absent sham, frivolity or other objections." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir.2001).

***3** Defendant organizes its opposition according to EEOC

status, i.e., it distinguishes between "charging parties" and "similarly situated individuals." As to Delfino Ochoa, Maribel Ochoa, and Jose Ochoa, the "charging parties," Defendant argues that they cannot advance a national origin claim because "the EEOC abandoned those claims." With respect to Guadalupe Martinez, an alleged "similarly situated individual," Defendant contends that the motion should be denied in its entirety because he has not exhausted his administrative remedies and the original EEOC charge does not provide an adequate factual basis to allow "piggybacking."

A. *Delfino Ochoa, Maribel Ochoa, and Jose Ochoa*

1. *Right to Intervene*

Applying Rule 24(a)'s first factor, it is undisputed that Delfino Ochoa, Maribel Ochoa, and Jose Ochoa are aggrieved persons, as they filed the charges upon which the EEOC's lawsuit is based. *See, e.g., E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 291, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) ("If [...] the EEOC files suit on its own, the employee [...] may intervene in the EEOC's suit."); *see also EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C.*, 273 F.Supp.2d 260, 263 (E.D.N.Y.2003) (Under the provisions of 42 U.S.C. § 2000e–5 (f) (1), "an aggrieved person is defined as a person who has filed a charge with the EEOC."). They have the unconditional right to intervene in this case if their motion was timely.

2. *Timeliness*

Timeliness is determined by considering the totality of the circumstances. *NAACP v. New York*, 413 U.S. 345, 365–66, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973). Here, under the totality of the circumstances, the Ochoa Intervenors' motion to intervene is timely. The timeliness of the motion is not disputed, discovery in the case has not yet begun, the trial date has not been set, and the motion was filed within 45 days of the filing of the complaint. In addition, because their claims gave rise to the enforcement action and the motion was filed at the earliest stage of the proceedings, allowing the Ochoa's to intervene is unlikely to prejudice the parties.

3. *Arguments Opposing Intervention*

Defendant Giumarra acknowledges that Delfino Ochoa, Maribel Ochoa, and Jose Ochoa are entitled to intervene to advance hostile work environment and retaliation claims. However, Defendant argues the motion should be denied as to their national origin claims because "[they] have not requested right-to-sue letters, and the EEOC does not have appear to have issued such letters" on this issue. According to Defendant, a right-to-sue letter is a prerequisite to filing a lawsuit and, in this case, no letter was obtained on their national origin claims.

Defendant's arguments are unpersuasive for two reasons. First, Delfino Ochoa, Maribel Ochoa, and Jose Ochoa each received a "right-to-sue" letter from the EEOC on April 5, 2010. (Doc. 10–2, pgs. 17 through 20.) The receipt of the "right-to-sue" letters, which occurred one week after Defendant filed its opposition, moots Defendant's opposition arguments. Second, Defendant provides no authority for the proposition that Rule 24(a) intervention is barred if Intervening–Plaintiffs receive the right-to-sue letters *after* the commencement of litigation. Defendant has cited several cases discussing the parameters of "right-to-sue" letters generally, but does not cite a single case holding that *subsequent* receipt of a "right-to-sue" letter by a charging party bars the individual from intervening in the EEOC action. Absent controlling or persuasive authority on the issue, the receipt of the right-tosue letters on April 5, 2010 controls the facts of this case and permits intervention.

***4** The parties' briefing also includes a discussion of whether Delfino Ochoa, Maribel Ochoa, and Jose Ochoa can properly maintain their national origin claims pursuant to *Surrell v. California Water Service Co.*, 518 F.3d 1097 (9th Cir.2008). In *Surrell*, the Ninth Circuit held that where "a plaintiff is entitled to receive a right-to-sue letter from the EEOC, a plaintiff may proceed absent such a letter, provided they have received a right-to-sue letter from the appropriate state agency."[5] *Id.* at 1005. Because the receipt of "right to sue" letters resolves the Rule 24(a) motion as to Delfino Ochoa, Maribel Ochoa, and Jose Ochoa's national origin claims, it is unnecessary to determine whether the facts of this case "fall squarely within the equitable rule recognized in *Surrell.*"

Intervening–Plaintiffs Delfino Ochoa, Maribel Ochoa, and Jose Ochoa's motion to intervene is GRANTED.

B. *Guadalupe Martinez*

1. *Right to Intervene*

The substance of Defendant's opposition is that Plaintiff–Intervenor Guadalupe Martinez's is not an "aggrieved person" under 42 U.S.C. § 2000e–5(f)(1).[6] According to Defendant, Martinez has not "provided an adequate basis as to whether he filed a charge with the EEOC relating to the allegations in this case [and] he does not appear to have filed an EEOC charge." (Doc. 9 at 5:12–5:13.) Defendant cites *EEOC v. GMRI, Inc.*, 221 F.R.D. 562, 563 (D.Kan.2004) for the proposition that an "aggrieved person" is limited to persons who "have filed a charge with the EEOC."[7]

Mr. Martinez acknowledges that he has not yet received a "right-to-sue" letter from the EEOC concerning his claims against Defendant Giumarra.[8] Mr. Martinez contends, however, that the "single filing" exception to the individual filing requirement supports his motion to intervene. Under this exception, which is known alternatively as the "single filing rule" or "piggybacking," an individual who has not filed an administrative charge can "piggyback" on an EEOC complaint filed by another person who is similarly situated.[9] *See, e.g., Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1110 (10th Cir.2001).

"The policy behind the single filing rule is that it would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC." *Id.* The rule intends to "give effect to the remedial purposes of [Title VII] and to not exclude other suitable plaintiffs from [a Title VII] class action simply because they have not performed the useless act of filing a charge." *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191, 1197 (10th Cir.2004). An act of filing an EEOC charge is deemed "useless" in "situations in which the employer is already on notice that Plaintiffs may file discrimination claims, thus negating the need for additional filings." *EEOC v. Outback Steak House of Fla., Inc.*, 245 F.R.D. 657, 659 (D.Colo.2007) (citation omitted). The Tenth Circuit has observed:

> ***5** As long as the EEOC and the company are aware of the nature and scope of the allegations, the purposes behind the filing requirement are satisfied and no injustice or contravention of congressional intent occurs by allowing piggybacking.

Thiessen, 267 F.3d at 1110.

Courts often look to the predicate or "actually filed" EEOC charge to determine whether a company had sufficient notice to support piggybacking in a given case.[10] *See, e.g., Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 558 (11th Cir.1997) ("A plaintiff who has not filed an individual EEOC charge may invoke the single-filing rule where such plaintiff is similarly situated to the person who actually filed an EEOC charge, and where the EEOC charge actually filed gave the employer notice of the collective or class-wide nature of the charge."); *EEOC v. Cal. Psychiatric Transitions, Inc.*, 644 F.Supp.2d 1249, 1265 ("A charge will be adequate to support piggybacking under the single filing rule if it contains sufficient factual information to notify prospective defendants of their potential liability and permit the EEOC to notify prospective defendants of their potential liability and permit the EEOC to attempt informal conciliation of the claims before a lawsuit is filed."); *see also EEOC v. Albertson's LLC*, 579 F.Supp.2d 1342, 1345 (D.Colo.2008) (finding that the single-filing rule is appropriate *"where the EEOC charge actually filed* gave the employer notice of the collective or class-wide nature of the charge.") (emphasis added). A review of the "actually filed" EEOC charge guarantees that "the settlement of grievances [was] attempted first through the EEOC." *Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 450 (11th Cir.1993).[11]

Whether Guimarra had sufficient notice of the cumulative or class-like nature of the allegations is heavily disputed. Guimarra argues that the earlier EEOC charges did not reference "similarly situated" individuals or class allegations, therefore Mr. Martinez cannot avail himself of the single filing rule. Guimarra explains:

> The EEOC Charges of Discrimination at issue in this case brought by Delfina Ochoa, Maribel Ochoa, and Jose Ochoa do not contain reference to other 'similarly situated' or 'similarly aggrieved' individuals on whose behalf those charges are being brought. Indeed, there is no indication or reference to any other employees other than the charging parties themselves in each of the Ochoas' charges. Here, not only is there no reference to Martinez or any other 'similarly situated individuals' in the Ochoas'

> EEOC charges, but as to the retaliation claims, on which Martinez also seeks to 'piggyback' here, the charges actually specifically indicate that it was the Ochoas' 'family' whom was asked to leave, but there is no reference to any other persons, including Martinez, or 'similarly situated individuals,' who are alleged to have been terminated. For this reason, Martinez cannot 'piggyback' on the Ochoas' EEOC charges, and he cannot rely on the 'single filing rule' to intervene in this case.

***6** (Doc. 9 at 7:12–7:23.)

Mr. Martinez rejoins that Guimarra had sufficient notice of the collective nature of the action as early as December 2007. Mr. Martinez relies on two facts to support this assertion: (1) a December 21, 2007 letter from Guimarra's counsel to the EEOC, which identifies Mr. Martinez as "Ms. Ochoa's boyfriend" and states that he quit his job with the Ochoa's on July 17, 2007; and (2) the EEOC's "Letters of Determination," sent to Giumarra on August 10, 2009, that provide in relevant part:[12] "The Commission also finds that the evidence indicates that there is reasonable cause to believe that Charging Party and other similarly situated employees were subjected to retaliation when they were terminated for engaging in the legally protected activity opposing sexual harassment and/or participating in a complaint or investigation of sexual harassment." Mr. Martinez claims that these letters, taken together, establish that Guimarra had sufficient knowledge to allow piggybacking in this case.

Guimarra's arguments concerning its understanding of the allegations made against it are unpersuasive. Although the relevant EEOC charges did not reference "similarly situated" individuals or class allegations *specifically*, they did provide sufficient information to allow piggybacking in this case. For example, Intervening–Plaintiff Maribel Ochoa's EEOC charge provides that she was "harassed and discriminated against based on [her] national origin," and that a crew leader "often yelled at me, my family, and other indigenous crew members, saying that we are Indians who could not speak Spanish as a second language." Delfino Ochoa and Jose Ochoa's EEOC charges also provide that they and other Guimarra employees were denigrated and discriminated against based on their national origin. At a minimum, these factual allegations put Guimarra "on notice" of national origin discrimination claims from similarly situated employees, which includes Intervening–Plaintiff Guadalupe Martinez.

There is also evidence that Guimarra had notice of the collective nature of the retaliation claims. Although the EEOC charges, by themselves, lack sufficient cumulative content to support piggybacking on this claim, Guimarra had notice based on the EEOC's investigation and correspondence from 2007 onward. For instance, in its December 21, 2007 letter to the EEOC, Guimarra acknowledged that the Ochoas and Mr. Martinez "came in to the Guimarra payroll office and asked to speak with the payroll clerk stating they wanted their final checks because they were quitting." The separation was allegedly a result of retaliation and sexual harassment. More specifically, the EEOC's Letters of Determination, the operative EEOC complaint, and the Proposed Complaint in Intervention, identify Mr. Martinez as a "similarly situated employee" who was "subjected to retaliation" when he was terminated for engaging in legally protected activity, i.e., opposing sexual harassment. All of this evidence supports intervention in this case.

***7** Mr. Martinez's motion to intervene is granted for another reason, namely that most courts confronting the issue have adopted a test requiring only that the timely exhausted claims and the non-exhausted claims arise out of the same circumstances and occur within the same general time-frame. *See EEOC v. Outback Steak House of Fla., Inc.*, 245 F.R.D. at 659 (cataloging cases applying the prevailing test). Applying that test to the facts of this case, Martinez's claim is nearly identical to Delfino Ochoa, Maribel Ochoa, and Jose Ochoa's in terms of temporal proximity and subject matter. In particular, Martinez was allegedly terminated on the same day as the Ochoas, for the same reasons-retaliation and national origin discrimination. They also worked on the same "picking line," lived together in the same Giumarra-provided housing unit, and, on July 17, 2007, collectively complained to the same two Giumarra employees, Ms. Ana Felix and Ms. Anna Gonzalez. Under the test employed by a number of district courts throughout the United States, Mr. Martinez can piggyback his claims onto those of the charging parties, the Ochoas. *See EEOC v. Albertson's LLC,* 579 F.Supp.2d at 1347 ("[The Court] find[s] that the rationale and reasoning in *EEOC v. Outback Steak House*—in conjunction with the single file doctrine as adopted by the Tenth Circuit and

discussed above—to be persuasive and applicable here.").[13]

On similar facts, *EEOC v. Outback Steak House of Fla., Inc.*, 245 F.R.D. 657, held:

> Based on [the Tenth Circuit's] application of the single filing rule, I hold that a plaintiff who failed to file a charge of discrimination with the EEOC, but who asserts she was subject to similar discrimination by the same actors during the same time frame as the charging parties, is an 'aggrieved person' within the meaning of section 2000e-(f)(1). In the instant case, Defendants do not deny that Applicant Joffee's complaint in intervention asserts she was subject to similar discrimination by the same actors during the same time frame as [charging] Plaintiffs. Accordingly, under the facts of this case, I find that Applicant Joffee's filing of a charge with the EEOC would have been useless and she may now piggyback her claim onto those of the charging parties.
>
> Defendants' contention that this court lacks subject matter jurisdiction due to Applicant Joffee's failure to exhaust remedies is similarly misplaced. The single filing rule is an exception to the requirement of exhaustion.

Id. at 659–60.

This language applies with equal force to the present facts because *Outback,* like this case, analyzed whether a non-charging party could intervene in an action where the individual was subject to similar discrimination by the same actors during the same time-frame.

Here, Defendant's arguments are not meritless. First, there is no Ninth Circuit authority on point and motions to intervene cannot be resolved by reference to the ultimate merits of the claims asserted. Absent Ninth Circuit authority defining the application and scope of piggybacking in the Rule 24(a) context, the analogous precedent from other circuit and district courts is persuasive. *See, e.g., Cedars–Sinai Med. Ctr. v. Nat'l League of Postmasters of the United States,* 497 F.3d 972, 977 n. 2 (9th Cir.2007) ("Because there is no Ninth Circuit authority discussing FEHBA pre-emption issues involving the claims of a third-party health care provider, we may look to analogous cases involving the application of ERISA's pre-emption provision.").

***8** Under those precedents, Guimarra had sufficient notice of "the nature and scope of the allegations" to satisfy the requirements of the single filing rule. While the EEOC charges did not specifically identify "similarly situated persons" or Mr. Martinez by name, Guimarra has cited no legal authority that such specific disclosure is a prerequisite to operation of the single filing rule. Rather, the opposite is true.[14] *See Dukes v. Wal–Mart Stores Inc.*, 2002 WL 32769185 at 10–12 (N.D.Cal. Sept.9, 2002) (analyzing the "actually filed" EEOC charges and the complaint to determine whether there was sufficient notice to support piggybacking.) Further, any uncertainty over the requisite notice was removed by virtue of the EEOC's investigation and correspondence, which commenced in 2007 and continued through late 2009. On the current record and resolving doubts in favor of the proposed intervenor, Guimarra had adequate notice of the retaliation and discrimination claims of similarly situated individuals, which includes Mr. Martinez.

Even accepting Guimarra's arguments that the EEOC *charges* did not provide adequate notice of the collective nature of the claims against it, it still could not prevail. As explained in *Gitlitz v. Compagnie Nationale Air France,* 129 F.3d 554 and *EEOC v. California Psychiatric Transitions, Inc.*, 644 F.Supp.2d 1249, the analytical touchstone of the single filing rule is whether the company had adequate notice of the grievance to provide a basis for conciliation. Based on the current record, this standard was met. If discovery reveals otherwise, the issue can be addressed pursuant to a dispositive motion.

As Intervening–Plaintiff Mr. Martinez is an "aggrieved person" under 42 U.S.C. § 2000e–5(f)(1), he has the right to intervene in this case. The motion is GRANTED.

CONCLUSION

For the reasons stated:

1. The motion to intervene by Delfino Ochoa, Maribel Ochoa, Jose Ochoa, and Guadalupe Martinez is GRANTED.

2. The Proposed Complaint in Intervention is ORDERED FILED.

3. Defendant shall have twenty (20) days to respond to the complaint.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3220387

Footnotes

1 In its complaint, the EEOC refers to Mr. Martinez as "Guadeloupe Martinez."

2 Intervening–Plaintiffs attached a "Proposed Complaint in Intervention For Damages and Injunctive Relief" to their Rule 24(a) motion. (Doc. 7–2.)

3 Intervening–Plaintiffs also advance claims pursuant to California Civil Code § 1942.5 and Government Code §§ 1955.7 and 12955(f).

4 It is expected that Intervening–Plaintiffs will familiarize themselves with the Eastern District of California's Local Rules and the "Standing Order," which provides that "reply briefs by moving parties shall not exceed 10 pages."

5 Intervening–Plaintiffs also cite *Surrell* for the proposition that "once a plaintiff is entitled to receive a right-to-sue-letter [...] it makes no difference whether the plaintiff actually obtained it." *Id.* at 1105.

6 For the reasons stated in IV(A)(2), *supra,* the timeliness of Martinez's motion to intervene is not disputed and is not a bar to intervention. Mr. Martinez and the Ochoa Intervenors filed a single motion to intervene, which was filed within 45 days of the filing of the EEOC's Complaint.

7 *EEOC v. GMRI, Inc.* was limited to whether the charging party had a right to intervene in the EEOC's case. *See id.* at 563–64 ("Here, it is undisputed that Ms. Dawson is the aggrieved person, as she is the person who filed the charge upon which the EEOC's lawsuit is based. She therefore has the unconditional right to intervene in this case."). It is undisputed that Mr. Martinez is not a "charging party" in this case.

8 While it is unclear whether Mr. Martinez filed a charge with the EEOC prior to the commencement of this action in December 2009, it is undisputed that he has not received a "right to sue" letter from the EEOC. According to his counsel's declaration, Mr. Martinez contacted the EEOC's Los Angeles office in 2007, but his charge was lost and "the EEOC legal staff [could not] explain why a charge was not ultimately filed on behalf of Mr. Martinez." (Doc. 10–2 ¶ 4–5.) Counsel further explains that Martinez "fully participated" in the litigation both before and after the charges were filed, taking part in two formal interviews with the EEOC prior to December 2009. (*Id.* ¶ 6.) At oral argument on May 17, 2010, the EEOC's counsel clarified that, according to its records, Mr. Martinez contacted the EEOC in 2007, but the file was closed due to inactivity. As such, the nature and purpose of Mr. Martinez's inquiry is unknown, however, it is undisputed that Mr. Martinez did not follow-up with his initial query at the EEOC's Los Angeles office.

9 Although the Ninth Circuit has not specifically addressed the issue, the single filing rule has been applied under various circumstances by the Second, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. *See, e.g., Anderson v. Unisys Corp.,* 47 F.3d 302, 308 (8th Cir.1995); *see also Anson v. Univ. of Tex. Health Science Ctr.,* 962 F.2d 539, 541 (5th Cir.1992) (The single filing rule is "universally [held].").

10 In this case, the "actually filed" charges are the EEOC charges filed by Delfino Ochoa, Maribel Ochoa, and Jose Ochoa on October 31 and November 15, 2007.

11 *Calloway* explained the importance of the EEOC in the context of the single filing rule: "Each of these applications of the single-filing rule has been grounded in the purpose of the EEOC charge requirement 'that the settlement of grievances be first attempted through the office of the EEOC.' By requiring that the relied upon charge be otherwise valid, and that the individual claims of the filing and non-filing plaintiff arise out of similar discriminatory treatment in the same time frame, we have ensured that no plaintiff be permitted to bring suit until the EEOC has been given the opportunity to address the grievance. Indeed, we

have rebuffed attempts to invoke the single-filing rule where the relied upon charge is invalid, or where the claimed discriminatory treatment is not similar or does not arise out of the same time frame." *Id.* at 450.

12 The EEOC issued three near-identical "Letters of Determination," one for each claimant, on August 10, 2009. Intervening–Plaintiffs attached the letters to their reply, which was filed on April 5, 2010. (Doc. 10–2.)

13 *Albertson's* framed the relevant legal issue as: "[D]oes the definition of 'persons aggrieved' set forth in 42 U.S.C. § 2000e–5(f)(1) provide a statutory right to intervene in an EEOC enforcement action to persons other than the party whose charge is the basis of the lawsuit." *Id.* at 1347. The *Albertson's* court concluded that "the Applicants here are aggrieved persons, as set forth in 42 U.S.C. § 2000e–5(f)(1), and thus are given an unconditional right to intervene by federal statute pursuant to Fed.R.Civ.P. 24(a)(1)." *Id.*

14 Moreover, as explained above, the Ochoas' EEOC charges provided adequate notice of the collective nature of the allegations against Defendant.