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September 29, 2017

The Honorable Vince Chhabria  
San Francisco Courthouse, Courtroom 4-17<sup>th</sup> Floor  
450 Golden Gate Avenue  
San Francisco, California 94102

Re: *EEOC and Adrian Scott Duane v. IXL Learning Inc.*; 17-cv-02979 (VC)

Dear Judge Chhabria:

On August 21, 2017, Duane moved to intervene as of right pursuant to Fed. R. Civ. P. 24(a). In the alternative, Duane also sought permissive intervention pursuant to Fed. R. Civ. P. 24(b). Defendant's current argument, in light of the DFEH Notice of Right to Sue,<sup>1</sup> that the claims are time-barred and precluded by *res judicata* are more appropriate for a motion to dismiss than they are to oppose a motion to intervene. Nonetheless, in the interest of efficiency, Duane responds to the assertions in the context of the motion to intervene and in the context of a motion to dismiss.

Fed. R. Civ. P. 24(a) provides two ways for parties to intervene as of right: (1) when a US statute confers an unconditional right to intervene and (2) when the party claims an interest relating to the underlying subject matter of the action. The application to intervene must be timely.<sup>2</sup>

Here, Duane did not delay in moving to intervene. Duane moved this Court at the beginning of the litigation, less than three months after the original complaint was filed, before the Case Management Conference, and before any meaningful discovery has taken place. Duane is involved in the scheduling of the mediation and plans to attend. Fact discovery is not set to close for over six months and trial is a little over one year away. Defendant has not and cannot assert any prejudice. In fact, as previously briefed, Duane sought to minimize the prejudice to IXL and promote judicial efficiency by dismissing the prior action so that the relevant claims could be tried in one action rather than having two separate actions.

The timeliness of Duane's application to intervene in the federal claims in this action should not be in question. The EEOC did not issue a right-to-sue letter ("RTS") because the EEOC itself brought the employment discrimination complaint against IXL. There is no statute of limitations ("SOL") applicable to the EEOC's suit. *See Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977). Therefore, pursuant to Fed. R. Civ. P. 24(a)(1), Duane has an unconditional right to intervene and assert federal claims under Title VII and the ADA. *See* 42 U.S.C. §2000e-

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<sup>1</sup> IXL's argument advanced at page 7-9 of its Opposition are moot because of the existence of the DFEH RTS, which IXL had for nearly three weeks before filing its Opposition.

<sup>2</sup> Generally, courts consider three factors in assessing whether an application to intervene is timely: (1) the stage of the proceedings; (2) whether the parties would be prejudiced; and (3) the reason for any delay in moving to intervene.

5(f)(1); 42 U.S.C. §12117 (incorporating by reference 42 U.S.C. §2000e-5(f)(1)). Given that right to intervene, nothing should prevent this court from exerting supplemental jurisdiction over the state law claim of retaliation under FEHA. All of the retaliation claims share a common nucleus of operative facts.

Given the addition of state law claims, to the extent that Fed. R. Civ. P. 24(a)(2) is a more appropriate avenue for intervention as of right, Duane satisfies these requirements as well. Courts generally follow “practical and equitable considerations: and construe the Rule ‘broadly in favor of proposed intervenors’ because it serves “both efficient resolution of issues and broadened access to the courts.” *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002); *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). The relevant test there is a 4-part test: (1) application for intervention is timely; (2) applicant possesses a significantly protectable interest in the subject matter of the action; (3) without intervention the action may impair or impede the applicant’s ability to protect the interest; and (4) the interest is inadequately represented by the existing parties. First, as noted above, Duane’s timely motion to intervene comes early in this action. Second, the protectable interest need not be protected by the statute under which the litigation is brought to qualify as “significantly protectable.” *See Wilderness Soc’y v. United States Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (citing *Sierra Club*, 995 F.2d at 1481, 1484. (“[i]t is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue.”)). Third, failure to grant the intervention would result in prohibiting Duane from bringing his state law claims in this action, which indeed impairs his ability to seek full recovery. He could bring them separately in state court, however, that defeats the purpose of promoting judicial efficiency when the issues are already being litigated in federal court. Finally, the EEOC cannot adequately represent Duane’s FEHA claim because it is beyond the scope of Title VII and the ADA.

**Duane’s FEHA claim is not time barred because the statutory condition of EEOC issuing a notice of RTS has not been met to trigger a termination of the tolling.**

Duane does not dispute that as a rule, a plaintiff must file an action under the FEHA within one year from the date of the notice of right to sue issued by DFEH.<sup>3</sup> Cal. Govt. Code §12965(b). Duane’s one-year SOL applicable to his FEHA claim remains tolled, however, because the following requirements set forth in Cal. Govt Code §12965(d) have been met: (1) a charge of discrimination is timely filed concurrently with the EEOC and the DFEH; (2) the investigation of the charge is deferred by the DFEH to the EEOC; (3) a RTS is issued to the person claiming to be aggrieved upon deferral of the charge by the DFEH to the EEOC; and (4) the time for commencing an action for which the SOL is tolled expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the DFEH, *whichever is later*. Cal Govt Code §12965(d)(2). The EEOC has not issued a right-to-sue notice and therefore the SOL has yet to expire. *See Salgado v. Atlantic Richfield Co.*, 823 F.3d 1322, 1324 (9<sup>th</sup> Cir.

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<sup>3</sup> Duane has no record of having received the DFEH right-to-sue letter prior to September 19, 2017, when the EEOC provided him with a copy. The letter is not dated and does not include a cover letter or any other indication that it was ever sent to Duane. Notably, the letter does not include Duane’s address, as do other documents the EEOC sent to Duane. See Exhibit C to the Affidavit of David Marek submitted with the Motion to Intervene (DE 20).

1987) (holding that the employee's one-year time limit contained in Government Code 12965 was tolled until the EEOC issued its RTS).

The EEOC's administrative process is not complete until a decision is made about litigation. Defendant argues that the tolling period expired one year after the EEOC issued its Determination. Defendant cites nothing in support of this argument. According to Defendant, the SOL should have commenced even before the EEOC and the parties engaged in conciliation efforts. Duane should not be penalized for pursuing the administrative process he is entitled to and for exploring an administrative resolution. Moreover, any delay in the EEOC's litigation review period should not be charged against Duane. Similarly, the law simply does not contemplate that Duane must terminate the administrative process by requesting a RTS. *See EEOC v. Kovacevich "5" Farms*, 2006 WL 3060149, at \*8-9 (E.D. Cal. Oct. 27, 2006) ("K5").

*K5*, an Eastern District of California case, is instructive on this issue of when the state limitation tolling expires when EEOC has initiated litigation. In *K5*, after the charging parties intervened in an EEOC initiated action, the Defendants moved to dismiss on grounds that their FEHA claims were time-barred because they were brought more than one year after EEOC notified the parties that conciliation failed. The Court noted that where the EEOC sued, the statutory condition terminating tolling of the FEHA limitation period did not occur because the EEOC had not issued a RTS. As a result, "there is no legal basis that the FEHA claims are time-barred." *K5*, 2006 WL 3060149, at \*11 (declining to imply additional terms into the statute when the EEOC files litigation) (citing *EEOC v. Harris Farms, Inc.*, No 1:02-cv-6199 AWI LJO, Memorandum Opinion and Order Re Defendant's Motion to Dismiss Complaint in Intervention, ECF No. 43 (E.D.Cal. Feb.4, 2004)). As the court also noted, this outcome is consistent with the statutory purpose of tolling, "avoidance of unnecessary filings in state and federal courts, economy in centering the claims in one court, and the absence of prejudice because [defendant] had full notice of the claims and the ability to investigate." *K5*, 2006 WL 3060149, at \*11.

**Duane's FEHA claim is not barred by *res judicata*.**

The law does not contemplate forcing an individual to forego his right to the benefit of a full administrative process to which he is entitled. Duane was entitled to an administrative investigation by the EEOC as well as the potential of administrative resolution through the conciliation process. Additionally, given the expense of litigating, and the potential of incurring significant attorney's fees, Duane should be entitled to wait until the EEOC concluded its litigation review and made a final determination on whether it would litigate the retaliation claims. Nothing supports Defendant's argument that Duane should be penalized for not forgoing those rights and requesting a RTS. Moreover, Defendant can assert no prejudice that it suffered because of Duane's decision to dismiss the FMLA and state tort claims *after* the EEOC commenced this action. Defendant now enjoys the contemplated benefit of having only one action rather than two separate, related actions. Further, where Duane requested a stay of his action against IXL, *res judicata* cannot be used under these circumstances to bar Duane from asserting his FEHA claim.

Respectfully Submitted,

/s/

David Marek