

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

IXL LEARNING, INC.,

Defendant.

Case No. [17-cv-02979-VC](#)

**ORDER RE: SUPPLEMENTAL
BRIEFING ON MOTION TO
INTERVENE**

Re: Dkt. No. 19

It appears that, in normal circumstances, a prior dismissal with prejudice of the sort that took place here would bar Adrian Scott Duane from intervening in this case at all and would also bar the EEOC from seeking damages on Duane's behalf. *See California v. IntelliGender, LLC*, 771 F.3d 1169, 1179 (9th Cir. 2014); *Leon v. IDX Systems Corp.*, 464 F.3d 951, 962-63 (9th Cir. 2006); *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 923 (9th Cir. 2003); *see also Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714-15 (9th Cir. 2001). However, in this case, it appears that IXL Learning, Inc. ("IXL") waived its right to assert res judicata, at least to a certain extent, in the email exchange between IXL and Duane's counsel from June 21-22, 2017 and July 24, 2017. *See* Dkt. No. 24-1, Ex. B.

But there remains a question as to whether this was a partial waiver (applying only to the factual allegations made by the EEOC and the legal theories asserted by the EEOC in support of those factual allegations) or a full waiver (applying to any factual allegations and legal theories Duane could bring in intervention). Therefore, the parties (including the EEOC) are ordered to file supplemental briefs addressing the following questions:

1. Is it possible to have a partial waiver of an affirmative defense such as res judicata? If

not, does this mean that IXL entirely waived its right to assert an affirmative defense based on the preclusive effect of the prior dismissal with prejudice?

2. If a partial waiver is possible, what are the rules for determining the scope of the waiver? Given the ambiguity of the email communication between IXL and Duane's counsel, should the waiver be interpreted broadly or narrowly? That is, is there a default rule that should apply in the case of such ambiguity?

3. When charging parties intervene in EEOC actions like this one, do parties typically assert state law claims along with the Title VII claims that the EEOC has asserted? Should the typical practice be relevant to the question of whether IXL's waiver should be construed broadly or narrowly?

The briefs should not exceed 15 pages and should be filed within 14 days of the date of this order.

IT IS SO ORDERED.

Dated: October 19, 2017



VINCE CHHABRIA
United States District Judge