

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VINCE CHHABRIA, JUDGE

U.S. EQUAL EMPLOYMENT)
OPPORTUNITY COMMISSION,)

Plaintiff,)

VS.)

No. C 17-2979 VC

IXL LEARNING, INC.,)

Defendant.)

San Francisco, California
Thursday, October 12, 2017

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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COMMISSION
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**Reported By: Katherine Powell Sullivan, CSR No. 5812, RMR, CRR
Official Reporter**

1 Thursday - October 12, 2017

11:31 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Calling case number 17-cv-2979, U.S. Equal
5 Employment Opportunity Commission versus IXL Learning, Inc.
6 Counsel, please step forward and state your appearances
7 for the record.

8 **MR. WILSON:** Good morning, Your Honor. Jeff Wilson on
9 behalf of the defendant IXL Learning.

10 **THE COURT:** Good morning.

11 **MR. WILSON:** Good morning, Your Honor.

12 **MS. SANGHVI:** Ami Sanghvi on behalf of the U.S. Equal
13 Employment Opportunity Commission.

14 **THE COURT:** Good morning.

15 **MR. MAREK:** And David Marek on behalf of the
16 intervenor Adrian Scott Duane.

17 **THE COURT:** Good morning.

18 Are you planning on arguing? You're free, if you want, to
19 sit and relax. You're perfectly welcome to.

20 **MS. SANGHVI:** Okay.

21 **THE COURT:** If you end up wanting to participate,
22 you're also welcome to step up --

23 **MS. SANGHVI:** Thank you.

24 **THE COURT:** -- and participate.

25 **MR. MAREK:** Thank you, Your Honor. So --

1 **THE COURT:** Hold on a second. Let me give you my
2 initial thoughts.

3 This is a very strange case. I shouldn't say "a strange
4 case." What I mean is a strange situation with respect to the
5 issue of res judicata.

6 Why did you agree to a dismissal with prejudice in Judge
7 Alsup's case? Why wouldn't it be -- I mean, if the plan was to
8 come back in the case that the EEOC filed and intervene, and
9 assert all the claims that you are asserting were similar
10 claims to the one you were asserting in Judge Alsup's case, why
11 would you agree to a dismissal of Judge Alsup's case with
12 prejudice?

13 **MR. MAREK:** Your Honor, I didn't -- I wouldn't -- I
14 didn't think then and I don't think now that it should matter.

15 **THE COURT:** But a dismissal with prejudice is a final
16 judgment on the merits. And you're not allowed to bring
17 another lawsuit on the same claims, same cause of action, if
18 your case is dismissed with prejudice.

19 **MR. MAREK:** So they're not the same claims. And I do
20 realize the argument there have been cases that have said if
21 you didn't bring the claim because you don't have a Right to
22 Sue letter it could fall under res judicata. But that is not
23 the case where the plaintiff has sought to stay the case. I
24 mean --

25 **THE COURT:** Show me the part of the transcript where

1 you sought to stay the case or show me the brief that you filed
2 requesting a stay.

3 **MR. MAREK:** We didn't file a brief, Your Honor.

4 **THE COURT:** Okay. Where in the transcript in Judge
5 Alsup's case does it indicate that you sought a stay?

6 **MR. MAREK:** Sorry, we don't have a transcript of that
7 proceeding.

8 In my affidavit, which goes unopposed by defendant -- let
9 me back up.

10 **THE COURT:** I looked at the transcript.

11 **MR. MAREK:** Is that --

12 **THE COURT:** I looked at, at least, a rough version of
13 the transcript. And there is no indication in there that you
14 requested a stay.

15 **MR. MAREK:** I'm pretty sure, Your Honor, that I raised
16 the issue that was also raised in my motion, which was that the
17 EEOC case is still out there. And I started to --

18 **THE COURT:** But you didn't ask for a stay.

19 **MR. MAREK:** No. I agree, I didn't.

20 **THE COURT:** And, furthermore, I mean, you -- I mean,
21 you could have -- I think at that time you could have included
22 Title VII claims; right? I think that you could have because
23 you got a Right to Sue letter from the State; right? And
24 that -- as I understand it, that entitles you to bring a Title
25 VII claim.

1 **MR. MAREK:** Well, two things.

2 First, we did not have a Right to Sue letter from the
3 State. That came out -- we didn't get it. I know that it now
4 exists in the record. But, as we said, we first saw that Right
5 to Sue letter -- you know, again, as I explained, maybe --

6 **THE COURT:** But if you were eligible to bring -- I
7 mean, you were eligible to bring -- there was a Right to Sue
8 letter from the State from May 2015; right?

9 **MR. MAREK:** I don't -- I might be confused, Your
10 Honor. The Right to Sue letter that I have seen --

11 **THE COURT:** Adrian Duane versus IXL Learning. Oh,
12 that's the filing date, May --

13 **MR. MAREK:** Yeah.

14 And, again, Your Honor, I admit it's a little confusing
15 because, as you know, what happened was, after defendant made
16 the argument that we didn't have a Right to Sue letter, I then
17 became aware, for the first time -- and I don't have an
18 explanation why, but the EEOC --

19 **THE COURT:** Hold on. Let me just -- let's back up for
20 a second, okay. Happy to hear what you have to say on that.
21 But I want to go back to my first question, okay.

22 I said, Why did you agree to a dismissal with prejudice?
23 And you said because these claims that you're trying to bring
24 now are not part of the same cause of action as the claims you
25 were trying to bring -- you brought in the Alsup lawsuit.

1 That's wrong. Right? I mean, these -- there may be an
2 issue about whether you were able to assert those claims at
3 that time, in that lawsuit, but they are very much part of the
4 same cause of action as the cause of action you were asserting
5 in the Alsup lawsuit.

6 **MR. MAREK:** Sure.

7 **THE COURT:** Do you agree with that?

8 (Unreportable simultaneous colloquy.)

9 **MR. MAREK:** Yeah, they were the same.

10 **THE COURT:** Okay. So they arise from the same set of
11 facts. They are part of the same cause of action.

12 So why on earth did you agree -- if your intent was to
13 assert the same cause of action in this case, why on earth
14 would you agree to a dismissal with prejudice of that same
15 cause of action of those claims arising under that same cause
16 of action in the Alsup case? Why didn't you dismiss it without
17 prejudice?

18 **MR. MAREK:** Look, I --

19 **THE COURT:** It seems like you just made a grievous
20 mistake in agreeing to stipulate to Alsup's case with
21 prejudice.

22 **MR. MAREK:** Again, I don't see it that way, Your
23 Honor.

24 **THE COURT:** Why would you do that? I mean, when
25 you're dismissing a case with prejudice, you are barring

1 yourself from pursuing that cause of action in a future case.

2 **MR. MAREK:** As I said a moment ago, my understanding
3 of the law -- and if there's a distinction between the filing
4 the motion to stay or not, what actually occurred there was --
5 and there are cases that discuss it, we could not bring the
6 Title VII or the California claims because we did not have a
7 Right to Sue letter. And we certainly didn't have a federal
8 Right to Sue letter. That plainly doesn't exist.

9 But even the California Right to Sue letter, it was our
10 understanding we didn't have it. We even wrote in the
11 complaint, we don't have it.

12 **THE COURT:** Yeah, but you never asked -- show me where
13 you asked for a stay. You didn't say you never -- as far as I
14 can tell, you never -- you certainly never filed a motion for a
15 stay. And you never -- it doesn't appear that you even asked
16 Judge Alsup for a stay.

17 **MR. MAREK:** Can I comment on that? Certainly, we
18 didn't do that. Though this is so different than the other
19 cases you are pointing to because, as you know, we did ask --
20 we made our intention clear to defendant, and we asked
21 defendant if they would agree to stay it. They said no. We
22 referenced that in the motion to Judge Alsup. All that is
23 unequivocal.

24 The difference is, the EEOC's case had been filed before
25 it was dismissed. In all of the other cases that have been

1 cited and that we're talking about where res judicata comes
2 into play in this very bizarre situation, where we couldn't
3 bring those other statutory claims --

4 **THE COURT:** Then why did you dismiss the Alsup case
5 with prejudice?

6 I mean, it's like every lawyer, you know, when you are
7 dismissing your case, if you see the words "with prejudice" you
8 stop and you ask, oh, my god, do I really want to dismiss this
9 with prejudice?

10 The words "with prejudice" carry tremendous weight. Why
11 would you do that? I mean, what's the point? Why wouldn't you
12 just dismiss the Alsup case without prejudice? Why would
13 you -- could you have voluntarily -- you probably didn't even
14 need a stipulation, did you?

15 **MR. MAREK:** Your Honor, I don't -- the answer is we
16 were trying to do everything we could to make things less
17 convoluted and put it in front of one judge. And, obviously,
18 here we are now. But --

19 **THE COURT:** Right. But there is a -- you were
20 asserting the same cause of action in the prior case, and a
21 judge dismissed your lawsuit with prejudice.

22 I mean, I have to -- there's, like, no -- I don't have any
23 discretion in whether I can or cannot give that effect. I have
24 to give that effect.

25 **MR. MAREK:** Your Honor, I just think the cases

1 disagree with that.

2 **THE COURT:** What case? What case disagrees with it?

3 **MR. MAREK:** Even the cases that they cite.

4 **THE COURT:** Tell me what case.

5 **MR. MAREK:** Again, if we're --

6 **THE COURT:** Show it to me. Show me the language that
7 says that in this circumstance I cannot honor the dismissal
8 with prejudice.

9 **MR. MAREK:** It has to do with the fact that we did
10 request the stay. The motion -- if you're making --

11 **THE COURT:** So which case are you relying on?

12 **MR. MAREK:** *Owens vs. Kaiser Foundation Health Plan,*
13 that where the plaintiff seeks a stay then you can't be --

14 **THE COURT:** But then why didn't you put in the
15 transcript or the brief that you filed in front of Judge Alsup
16 asking for a stay?

17 **MR. MAREK:** Your Honor, I don't have an answer. I
18 did, obviously, cite to the fact that we requested the stay of
19 plaintiff. That is in the brief that we filed with
20 Judge Alsup.

21 **THE COURT:** Sorry, you requested a stay of plaintiff?

22 **MR. MAREK:** I'm sorry, I asked defendant if they would
23 stay the case. I put that in the brief to Judge Alsup.

24 Again, I find this to be a little more confusing than
25 you're describing it, in the sense that when we were dismissing

1 the other case, this case already had been filed.

2 **THE COURT:** So? How does that affect the res judicata
3 analysis?

4 **MR. MAREK:** Well, if I have a statutory right to join
5 this claim, and every case says that I also have a statutory
6 right to add the California claim, at the time I couldn't bring
7 those claims in front of Judge Alsup. But this case is now
8 pending, yeah, in my opinion --

9 **THE COURT:** Yeah, but -- right. But then the answer
10 is you dismiss the case without prejudice.

11 I mean, it seems quite obvious. I've got this lawsuit and
12 I no longer want to pursue these claims in this lawsuit. I
13 want to pursue the claims all in one lawsuit, the later-filed
14 lawsuit, so we're going to dismiss the earlier lawsuit without
15 prejudice.

16 And, again, you know, maybe you made a mistake. Maybe you
17 were operating under a misunderstanding. Maybe that wasn't --
18 obviously was not your intent to preclude your client from
19 pursuing these other claims.

20 But I don't think that I can do anything about that. I
21 mean because we have a judgment from another court dismissing
22 the case with prejudice. And I don't think that I'm allowed
23 to, you know, pretend that it was dismissed without prejudice.

24 **MR. MAREK:** Your Honor, I -- the rule on res judicata
25 is, it's claims that you brought or could have brought.

1 The fundamental issue here, that I do think we're glossing
2 over, is I could not have brought those claims.

3 Now, having said that, there are cases that have said, for
4 a reason that I think is a little controversial, which is we
5 could have asked for a Right to Sue letter. So they, sort of,
6 say, fine.

7 Under these circumstances, what they try to avoid a
8 plaintiff being allowed to do is litigate a case for five
9 years, come back later on and say, Only now am I bringing my
10 Title VII claim. That is so far from what occurred here.

11 But the critical thing there is, res judicata says claims
12 you brought or could have brought. There's no question that at
13 that time I could not have brought those claims at that time.

14 Now, again, if you ask for the Right to Sue letter. But
15 if you read those cases, you will find cases that say I
16 shouldn't be forced to give up my -- my administrative rights.
17 I shouldn't have to ask the EEOC to stop their investigation.
18 I shouldn't have had to ask the EEOC --

19 **THE COURT:** But why do they have to stop -- you
20 mean -- sorry. Go ahead.

21 **MR. MAREK:** If I ask for my Right to Sue letter from
22 either the State or the EEOC, and I'm ending the administrative
23 process, now, the Courts say under these -- a very small number
24 of cases they say that's what you have to do.

25 The reality is, though, I could not have brought the Title

1 VII or California state claims in the case before Judge Alsup.
2 So now --

3 **THE COURT:** Wait a minute. You just said that
4 Judge Alsup's case was ongoing when the EEOC filed its lawsuit.

5 **MR. MAREK:** Right.

6 **THE COURT:** So once the EEOC filed its lawsuit,
7 certainly you could have added the claims, the Title VII claims
8 to Judge Alsup's lawsuit.

9 **MR. MAREK:** That's incorrect, Your Honor.

10 **THE COURT:** Why not?

11 **MR. MAREK:** All I have is, I have a statutory right to
12 intervene here. So my option at that moment is, I can
13 intervene here and have a case before you here, and have a case
14 in front of Judge Alsup, which is incredibly inefficient for
15 everybody involved, including the Court, and including
16 defendant and me.

17 **THE COURT:** Well, then, why didn't you file Notice of
18 Related Cases?

19 Why didn't you just get the -- once this EEOC lawsuit was
20 filed, why didn't you file a Notice of Related Cases in the two
21 cases and ask Judge Alsup to relate this case to his case? I
22 mean, he had already denied a motion to dismiss filed by the
23 defendant.

24 **MR. MAREK:** I appreciate your point, Your Honor. In
25 my opinion, though, that is another way it could have been

1 done.

2 **THE COURT:** Right. And another way it could have been
3 done is you could have dismissed the Alsup case without
4 prejudice and then intervened in this case.

5 But to dismiss the first case with prejudice and then try
6 and pursue this case, I mean, I think you just made a big
7 mistake.

8 And I am not -- honestly, if I thought that I had the
9 discretion to, you know, help you wiggle out of this mistake, I
10 would. But I don't think I do.

11 I mean, maybe -- maybe you could file a motion to -- maybe
12 you could file a motion with Judge Alsup to alter the judgment.
13 Maybe you could say, Look, this was a mistake. I didn't intend
14 to do this.

15 I don't know the rules about motions to alter the judgment
16 but, you know, I don't think -- I mean, res judicata is
17 res judicata.

18 **MR. MAREK:** Your Honor, again, I still think this is
19 glossing over what res judicata is. It has to be a claim I
20 could have brought.

21 **THE COURT:** Or under the *Owens* case in the Ninth
22 Circuit, could have asked for a stay. Again, we can have a
23 discussion about whether *Owens* is --

24 **MR. MAREK:** Well, then you get into what *Owens* means,
25 though.

1 I don't read *Owens* to mean -- I don't believe *Owens*
2 imposes a steadfast duty that only if you filed the motion for
3 the stay you are entitled to relief but, otherwise, you don't.

4 The purpose of asking for the stay is made very clear in
5 *Owens*. And it's exactly what happened here. If you read
6 *Owens*, it's not -- the magic language is not "Did you file a
7 motion for a stay?"

8 **THE COURT:** But you didn't even ask Judge Alsup for a
9 stay verbally, as far as I can tell.

10 **MR. MAREK:** Again, I don't -- I didn't see the
11 transcript; you did.

12 **THE COURT:** Why didn't you get the transcript? I
13 mean, if your motion to intervene hinges on having requested a
14 stay from Judge Alsup, why didn't you go through the docket and
15 get the -- get whatever it is on the docket that shows that you
16 asked for a stay?

17 **MR. MAREK:** Your Honor, I don't believe I said I asked
18 for a stay. But I thought I remembered what occurred with
19 Judge Alsup, and I do believe that -- I haven't seen it, but I
20 think the way I described it is accurate, that he made it clear
21 that we were not waiting on the EEOC. That's what I thought he
22 said.

23 **THE COURT:** Ms. Sanghvi, you seem like you might want
24 to say something. Do you have anything to add to this
25 discussion?

1 **MS. SANGHVI:** I'm simply going to add, Your Honor,
2 that to the point of plaintiff-intervenor being able to have
3 brought the Title VII and the state law claim at the time, at
4 the time that this was all happening the EEOC had not and has
5 still not issued a Notice of Right to Sue, which we don't do
6 when we actually bring suit in a court.

7 **THE COURT:** So if they had asked for a Right to Sue
8 letter you would have said, no, because we are preparing our
9 own lawsuit on your behalf, or we're investigating whether to
10 bring a lawsuit on your behalf?

11 **MS. SANGHVI:** So the procedure is, generally, if we
12 get a written request for a Notice of Right to Sue we have to
13 issue a Notice of Right to Sue.

14 And we did not receive that request for a Notice of Right
15 to Sue. And it is our belief, and I believe public policy also
16 supports this, that a charging party should have the right to
17 go through the entire administrative process and enjoy the
18 benefit of the EEOC's full investigation into the facts, the
19 EEOC's resources to bear on the investigation. And then after
20 a determination has been made, there is also this very
21 significant opportunity for conciliation which the EEOC engages
22 in.

23 And I believe that Mr. Duane had the right to wait for
24 that process. And then after that, we had made clear, once
25 conciliation fails the EEOC goes into this period of litigation

1 review, in which we determine whether or not we will pursue
2 this case in litigation. If not, if the decision is we are not
3 going to pursue a case that has failed conciliation but for
4 which we have found cause we, at that point, issue a Notice of
5 Right to Sue.

6 Here, we obviously did not issue that Notice of Right to
7 Sue and, instead, filed in this court.

8 **THE COURT:** Okay. And so if having filed in this
9 court -- if they asked for a Right to Sue letter now, would you
10 give them that, would EEOC give them that?

11 **MS. SANGHVI:** Well, we've already pursued the claim,
12 so I don't believe that we can issue a Notice of Right to Sue
13 on a claim that we have pursued.

14 **THE COURT:** Okay. And then if they had asked you for
15 a Right to Sue letter before, would you have given it to them?

16 I know you're saying he had -- you think that he had the
17 right to wait for the process to run its course. And maybe
18 that's right. But would you have been required to give him a
19 Right to Sue letter if he asked for it?

20 **MS. SANGHVI:** I think there is no authority that we
21 could say, no, we won't give you a Notice of Right to Sue.

22 **THE COURT:** He was entitled to one after a certain
23 period of time. Was it 180 days?

24 **MS. SANGHVI:** That's correct. He is entitled to one
25 after a period of time. And we could have issued one.

1 He did not request one, and I think rightfully, because he
2 wanted to pursue his administrative remedies which are
3 contemplated by the law. And they're significant for an
4 individual.

5 And, you know, for the EEOC that's an important
6 perspective, that an individual charging party in this case was
7 represented, but often are not.

8 And we don't want our charging parties put in a position
9 where they, sort of, have to run to court. Which is also why
10 the California code codifies this notion of tolling of the
11 statute of the Department of -- the DFE&H Notice of Right to
12 Sue, which is dated May of 2015, as a one year of statute of
13 limitations.

14 But that statute of limitations is tolled. And it is our
15 opinion that it remains tolled. And, therefore, the claim is
16 not time barred.

17 The other action that was ongoing before Judge Alsup had
18 raised the issues of the Fair Labor -- it was a FMLA claim.

19 **THE COURT:** Family Medical Leave Act.

20 **MS. SANGHVI:** Right. And a state tort claim, as I
21 understand.

22 And while some of the facts are similar, this is a
23 retaliation claim under Title VII and ADA. It's all the same
24 period of time and all the same parties, but it is a different
25 cause of action.

1 **THE COURT:** Wait. How is it a different cause of
2 action? I mean, I thought in the Judge Alsup lawsuit he was
3 alleging that he was wrongly terminated in retaliation for
4 posting the message on Glassdoor and complaining to his
5 manager.

6 **MS. SANGHVI:** Mr. Marek will speak better to this, but
7 that -- the claims that were raised in that lawsuit were FMLA
8 and the State tort --

9 **THE COURT:** Right. But based on the facts I just
10 recited.

11 **MS. SANGHVI:** Based on those facts. But I don't
12 believe it was an allegation of retaliation made in that case.

13 **THE COURT:** They fired me because I posted this
14 message on Glassdoor and because I complained to my manager?

15 **MS. SANGHVI:** But it wasn't under the standard of
16 Title VII or ADA retaliation.

17 **THE COURT:** But that doesn't make it a different cause
18 of action. That makes it a different legal theory in support
19 of your -- the facts you complain of in support of --

20 **MS. SANGHVI:** Right.

21 **THE COURT:** -- the cause of action.

22 So one option he had was to get a Right to Sue letter and
23 add -- and bring the Title VII claims.

24 Another option he had was to seek to stay Judge Alsup's
25 case pending the resolution of the EEOC investigation.

1 Another option he had was, once the -- your lawsuit was
2 filed, was to seek to relate the Alsup case with the Chhabria
3 case.

4 And another option he had was to dismiss the Alsup case
5 without prejudice so he could pursue any claim he wanted to
6 pursue arising out of the same facts in the Chhabria case.

7 He didn't choose any of those options. He chose to
8 dismiss the Alsup case with prejudice.

9 And you're saying that despite the dismissal of the Alsup
10 case with prejudice, he should be entitled to bring these
11 claims in this case?

12 **MS. SANGHVI:** What I have understood from both the
13 papers as well as what I have understood from the
14 representations of the discussions between both Mr. Marek and
15 Mr. Wilson, because this was a discussion and there was a --
16 and I should not be the one representing this, but there was a
17 discussion in which even defendant acknowledged, We know you're
18 going to intervene. We don't oppose your intervention in this
19 other case.

20 But there is, I think, a nuance in terms of what claims
21 they oppose their intervention on -- his intervention on.

22 **THE COURT:** So, in other words, the way I would put it
23 is, the defendant waived the res judicata defense as to at
24 least -- at least as to the claim that you've brought; right?

25 To the extent there might have been an argument that he --

1 that Mr. Duane could not intervene at all in this case, based
2 on res judicata, based on his decision to dismiss the prior
3 lawsuit with prejudice, to the extent there was a
4 res judicata -- that res judicata argument, they waived it
5 because they agreed that they would not oppose intervention.

6 And then there's an ambiguity, though, in their dialogue,
7 about whether what they meant was, We will not oppose any type
8 of intervention, or We will not oppose intervention with
9 respect to the claims that EEOC has brought.

10 **MS. SANGHVI:** Correct. And it was my understanding
11 that they did not oppose an intervention, at the very least, on
12 the claims that the EEOC brought.

13 And whether or not there should have been some
14 understanding, clearer understanding about there will be
15 additional state law claims that --

16 **THE COURT:** Yeah. So I think that absent the waiver,
17 res judicata -- I think, I don't know. It's not an issue that
18 we need to ponder, I guess. I think res judicata would apply
19 across the board to prevent Mr. Duane from intervening at all.
20 I think.

21 But, in any event, there is a res judicata -- there's a
22 waiver of the res judicata defense. And, you know, I guess
23 maybe one question is whether it's a partial waiver, that is a
24 waiver only to the extent that they would not assert
25 res judicata as to the claims that EEOC is bringing, or whether

1 it's a broader waiver.

2 **MS. SANGHVI:** And as to the -- just one other piece
3 that I had understood, that I don't know it was brought up.

4 Mr. Marek might care to speak to the issue of what
5 particularly Judge Alsup had indicated in terms of making it
6 seem as though a motion for a stay would have been futile.

7 **MR. MAREK:** Two things, Your Honor.

8 Firstly, yes, there's, as we attach in our papers, Exhibit
9 B to my affidavit, the reply, which is the written exchange
10 between IXL's counsel and myself, there is an agreement to
11 intervene.

12 Number one, I would argue, yes, that intervention
13 certainly would capture the state claim. I keep wanting to
14 point out this whole motion, I'm not seeking to intervene a
15 claim on some completely ancillary issue.

16 The state law claim is the same claim. Every EEOC case
17 that we -- every case I've cited to you involving the EEOC
18 lawsuit, the courts have held very differently that bringing
19 your California claim is part of your right to intervene.

20 So to say that we have this agreement that we're going to
21 intervene, yeah, it was surprising --

22 **THE COURT:** So, to me, the issue is not California
23 claim versus federal claim.

24 To me, the issue is you're asserting what -- what may be
25 kind of a different set of facts than what EEOC is asserting.

1 **MR. MAREK:** No.

2 **THE COURT:** EEOC is asserting that they retaliated
3 against your client based on the Glassdoor post. And you are
4 asserting they retaliated against your client based on his
5 complaint to management. And that is different.

6 And I assume there's a reason that EEOC -- you brought
7 that to EEOC. And I assume there's a reason EEOC didn't
8 include that in the lawsuit.

9 **MR. MAREK:** Well, I'm sure you know, Your Honor, let's
10 be clear, we actually assert it's one, you know, and/or the
11 other. We're obviously not denying it's the Glassdoor post.
12 But, no, I don't see the addition of -- no one denies that he
13 also told his manager.

14 The reality is, in my opinion, as I've said to IXL's
15 counsel during this process, look, if we go through discovery
16 and it turns out the retaliation actually occurred because he
17 told the manager rather than post it on Glassdoor -- which no
18 one expects to be the case, but I suppose it's theoretically
19 possible -- then the EEOC can try and amend their complaint and
20 be allowed to, and we would then be tagged onto that.

21 And, by the same token, if it comes out that the
22 conversation with management was not the reason for
23 retaliation, it's going to be a moot point one way or other.

24 So I have never seen that difference to be much -- a
25 significant difference. It's just a pleading. Sure, we put it

1 in the pleadings and they didn't. But, ultimately, it's going
2 to all come out in the wash as the case moves forward.

3 So, really, all that we have said here is --

4 **THE COURT:** And that is relevant to this motion, this
5 res judicata issue why?

6 I mean, is that relevant to the --

7 **MR. MAREK:** I don't --

8 **THE COURT:** Is it relevant to the scope of their
9 waiver of the res judicata defense?

10 Are you saying that --

11 **MR. MAREK:** No.

12 **THE COURT:** -- their statement that, We are not going
13 to oppose intervention, you know, should be understood to
14 include nonopposition to intervention based on the allegation
15 of that -- that the retaliation was in response to complaints
16 to the manager?

17 **MR. MAREK:** Again, let me say, I certainly would say
18 that the agreement that we could intervene would cover the
19 California statute, which is identical to the federal statute.

20 In addition, I don't think that additional factual
21 allegation, I just don't think it amounts to anything at the
22 pleading stage.

23 So my answer to your question is, yes, if I was seeking to
24 include something that transformed the case into something
25 different, then I suppose I could see their point.

1 But where they know that they're going to intervene and
2 where, like I said a minute ago, if the retaliation was from
3 Glassdoor, from the conversation, it's going to come out in
4 discovery, and people can just amend their pleadings
5 appropriately, then I would say, yes, the agreement that we're
6 going to intervene is certainly a waiver of any of these
7 arguments and we should have been allowed to intervene.

8 And, again, I do keep coming back to it. On the
9 res judicata, we were not -- these were not claims that we were
10 able to bring at that time. And that does make a big
11 difference even -- even, Your Honor, in what it is that you are
12 allowed to do here.

13 So I think you have to look at the case like *Owens*, or any
14 case that has ever found that way. And the principle that
15 those cases stand for just does not apply here. So when --

16 **THE COURT:** But is there any other case where somebody
17 has brought a lawsuit alleging discrimination, or whatever, and
18 then they have dismissed that case with prejudice and then been
19 allowed to participate in a subsequent EEOC lawsuit making the
20 same allegation?

21 **MR. MAREK:** Your Honor, I --

22 **THE COURT:** What's the answer to my question?

23 **MR. MAREK:** The answer is, I don't know. I didn't
24 find any. But I will say this: I don't believe that's
25 phrasing the question the right way, to be fair to us.

1 The question is, in the ordinary course of res judicata,
2 it only applies to claims that you brought or could have
3 brought. In the most basic way, we could not have brought
4 these claims.

5 There then are a few cases that have come in and said,
6 well, we're going to extend res judicata a little more broadly
7 for the purpose of pending -- you know, when you're waiving
8 your Right to Sue letter.

9 So the reason, I guess, I see it differently than you is
10 you seem to be suggesting that it's apparent that res judicata
11 would apply when actually on its face res judicata would not
12 apply. It requires, sort of, an exception or a broadening of
13 that standard for it to apply.

14 Then I get back to, okay, here we did want to stay it.
15 We've wasted no time. We've done nothing that would cause --

16 **THE COURT:** But the language of *Owens* is appellants
17 had ample time to secure right to sue letters. It may be -- I
18 may not feel that *Owens* is right, but *Owens* is a Ninth Circuit
19 decision that governs here. And it says:

20 "Appellants had ample time to secure Right to Sue
21 letters prior to filing their first action in November of
22 1995. Alternatively, they could have sought a stay from
23 the District Court" -- from the District Court -- "pending
24 their administrative proceedings before the EEOC. In
25 light of appellant's failure to exercise either option, we

1 conclude that their Title VII claims are barred by the
2 doctrine of res judicata."

3 I mean, it seems like a pretty straightforward holding.

4 **MR. MAREK:** Except this case is such a different fact
5 pattern. I don't believe that that -- I think you have to look
6 at why they held that way.

7 The point of the holding, if you read the facts, is
8 because there was -- they were trying to prevent
9 inefficiencies. That's the reason that they reached that
10 holding. It's an unusual holding. It's precisely to prevent
11 inefficiencies.

12 The complete opposite is the case here. We have an
13 agreement with defendant. We're going to intervene. Find --

14 **THE COURT:** I know, but if you're trying to prevent
15 inefficiencies and you make a mistake by dismissing your case
16 with prejudice -- I mean, you still haven't answered the first
17 question I asked you, which is, why on earth didn't you dismiss
18 the case without prejudice?

19 We all know that we've got to be really careful before we
20 agree to have our cases dismissed with prejudice.

21 **MR. MAREK:** I don't have an answer, Your Honor, other
22 than I didn't think that it would -- that it would be -- cause
23 a problem intervening when I had an agreement that we could
24 intervene. And that was the direction that we were taking the
25 case. We were going to intervene.

1 **THE COURT:** Okay. Anything, briefly, from the
2 defendants?

3 **MR. WILSON:** Yes, Judge, just very briefly.
4 With respect to why, that --

5 **THE COURT:** Why what?

6 **MR. WILSON:** Why that Alsup case was dismissed with
7 prejudice, that was because we talked about it. We talked
8 about it at length.

9 I have my notes of saying, okay, so that we don't have any
10 issues, Mr. Duane knows that he's not going to be able to
11 assert any of these other claims, and you're just going with
12 what the EEOC is going into court -- has gone into court to
13 argue, which is, as we know, this case, Title VII, ADA,
14 retaliation.

15 **THE COURT:** Well --

16 **MR. WILSON:** There was no agreement -- I'm sorry.

17 **THE COURT:** I'm sorry, go ahead.

18 **MR. WILSON:** I'm sorry.

19 There was no agreement at that time that, we'll let you or
20 we'll agree or we'll sign our name to a stipulation of
21 dismissal with prejudice and agree to intervention.

22 In fact, I will tell -- I will represent to the Court, it
23 was my absolute clear belief --

24 **THE COURT:** Did you just misspeak? Did you mean to
25 say there's no way we agreed -- we would have agreed to

1 dismissal without prejudice and agreed to intervention?

2 **MR. WILSON:** No, I'm sorry.

3 What I'm saying is, at the time that we signed that
4 stipulated dismissal with prejudice, there was no agreement
5 made contemporaneous with that, that I'll agree to let
6 Mr. Duane intervene or I won't oppose any intervention into
7 this case.

8 At that time, it was my clear belief that Mr. Duane was
9 now free from having to spend money on a lawyer in that case,
10 and it was sort of like a godsend that, ah, the EEOC has
11 decided to pursue this litigation. So we're done and we're
12 just going to, sort of, be spectators.

13 And I made it very clear. It's in multiple emails, this
14 is a dismissal with prejudice, so that he's out. He's out.
15 These claims beyond --

16 **THE COURT:** Then why did you waive the possible
17 res judicata defense with respect to the claims brought by
18 EEOC?

19 **MR. WILSON:** I don't believe -- I don't believe that
20 I've waived anything. I believe that the --

21 **THE COURT:** You just -- you have emails saying, we'll
22 not object to you intervening.

23 **MR. WILSON:** I said we will not object to Mr. Duane
24 intervening as a right under Title VII, which --

25 **THE COURT:** You didn't say intervening under Title

1 VII. That's not what your email exchange says.

2 **MR. WILSON:** I think -- well.

3 **THE COURT:** You said, "We won't object to his
4 intervening. In fact, I think he has the right to."

5 **MR. WILSON:** Because -- I said I believe he has the
6 right to. And what I'm referring to there is, under Title VII
7 there is specific language about a -- an individual complainant
8 intervening as a right in an EEOC-brought lawsuit.

9 That is different than a complainant like this trying to
10 intervene to assert a state law claim, because the FEHA does
11 not provide a right to intervene. It has to be permissive
12 intervention. There has to be other -- it's a different
13 standard. We briefed that.

14 But here's the point. I didn't -- this case was already
15 filed. I didn't waive any res judicata arguments with respect
16 to all the claims that Mr. Duane, in his individual capacity,
17 brought or could have brought in that case.

18 And you've already had the colloquy here about it. I
19 was -- I have my notes. And if we have to go further, I can
20 submit a declaration with my notes saying --

21 **THE COURT:** But you have to agree that you waived a
22 res judicata defense as to the claims, the specific claims
23 brought by the EEOC. You told them, I will not object to
24 intervention.

25 And that was before the case was dismissed; right? That

1 was before the Alsup case was dismissed.

2 **MR. WILSON:** Absolutely not.

3 **THE COURT:** This email exchange?

4 **MR. WILSON:** The intervention, it was after. In fact,
5 I believe the first email I got saying, We would like to
6 intervene, I said, oh, I thought you -- I thought you were
7 done.

8 We can go into those --

9 **THE COURT:** Hold on a minute. Hold on.

10 When was the Alsup case dismissed?

11 **MR. WILSON:** It was -- I have that right here.

12 The timing of this is the Alsup -- it was filed in
13 January 2007. It was dismissed with prejudice on June 27,
14 2017. This case was filed in May. I believe on May 24 --

15 **MR. MAREK:** Your Honor, June 27th. And on June 22nd
16 he agreed, is the answer to your question.

17 **THE COURT:** Right. I'm looking at the email.

18 I mean, this email exchange is part of this file. Didn't
19 you --

20 (Unreportable simultaneous colloquy.)

21 **THE COURT:** -- read it?

22 Excuse me.

23 **MR. MAREK:** I'm sorry. I'm sorry.

24 **THE COURT:** How can you tell me that you absolutely
25 did not agree to not object to his intervening before the

1 dismissal was filed? I mean, I'm looking at it right here.

2 And then how am I supposed to believe you about anything
3 that you say about your dialogue with plaintiff's counsel in
4 light of the statement that you just made to me?

5 **MR. WILSON:** Judge, I'll submit a declaration. I will
6 show you my notes. I'll show you contemporaneous emails --

7 **THE COURT:** The email is right in front of me.

8 **MR. WILSON:** Okay.

9 **THE COURT:** Okay.

10 **MR. WILSON:** Could you tell me what you're referring
11 to? Has it been filed in the docket?

12 **THE COURT:** Yes. It's document number 24-3.

13 **MR. WILSON:** Okay. Thanks. June 19th, I said --

14 **THE COURT:** June 22nd: "We are clear, and I don't
15 have any objection to Duane intervening in the EEOC case."
16 June 22nd. It's right there.

17 How can you tell me you didn't waive your res judicata
18 defense at least as to the claims that EEOC brought in its
19 lawsuit?

20 **MR. WILSON:** I've never made --

21 **THE COURT:** When you say, I don't object to --

22 **MR. WILSON:** I never made any argument -- I'm sorry, I
23 don't mean to cut you off.

24 **THE COURT:** How can you tell me that you did not waive
25 your res judicata defense at least as to the claims the EEOC

1 brought in the lawsuit?

2 **MR. WILSON:** I never --

3 **THE COURT:** It's right there in black and white. "We
4 will not object to your intervening."

5 **MR. WILSON:** I have never made any res judicata as to
6 the EEOC bringing these claims.

7 **THE COURT:** Right. You --

8 **MR. WILSON:** And I --

9 **THE COURT:** As to him intervening and being a
10 plaintiff for the -- a named plaintiff for claims brought by
11 the EEOC; right?

12 **MR. WILSON:** Maybe I am misunderstanding what you're
13 asking.

14 But we researched this at this time. The EEOC and the
15 plaintiff are different parties. And the EEOC is not -- I
16 cannot apply res judicata to the EEOC based on an individual
17 complaint, lawsuit filed by the complainant. I looked at that.

18 I have never made --

19 **THE COURT:** I'm not asking you that.

20 **MR. WILSON:** Okay.

21 **THE COURT:** You said, "I don't object to you
22 intervening" --

23 **MR. WILSON:** Yes.

24 **THE COURT:** -- "as a party" --

25 **MR. WILSON:** Yes.

1 **THE COURT:** -- "to pursue the claim that is also being
2 pursued by EEOC."

3 **MR. WILSON:** As a party to the case --

4 **THE COURT:** Right.

5 So to the extent there was a res judicata defense, you
6 waived that; right?

7 **MR. WILSON:** To the extent there's a -- I don't mean
8 to be quarrelsome with you.

9 To the extent there's a res judicata argument as to
10 Duane's intervention as a co-plaintiff on the existing claims
11 that are asserted by the EEOC, then I waive that. I don't
12 believe that there was. But if there was, I agree that he can
13 intervene as a party, a co-party. That happens in these cases.

14 **THE COURT:** Why didn't you specify, then, in this
15 email exchange that you -- "I don't object." Why didn't you
16 say, I don't object to his intervening on the claim that the
17 EEOC brought, but I do object to his intervening to assert any
18 claims that the EEOC did not bring? Why didn't you say that?

19 **MR. WILSON:** Your Honor, I didn't need to. I didn't
20 think that was even a possibility because we had agreed, the
21 lawyers -- the lawyers, Mr. Marek and I, discussed it. We
22 submitted a stipulated dismissal with prejudice.

23 It would have been meaningless or unnecessary to say, and,
24 by the way, I'm -- make sure you don't think I'm revoking the
25 dismissal with prejudice on all the claims that he brought or

1 could have brought in that claim.

2 So, you know, to the extent I didn't specify something
3 about intervening as a party but not -- don't add any other
4 claims --

5 **THE COURT:** But people add other claims when they
6 intervene as parties; right?

7 **MR. WILSON:** Not claims that are time barred. I'm
8 sorry. Not claims that are time barred or that are barred by
9 res judicata. This FEHA claim is both.

10 **THE COURT:** Right.

11 But I also think that if you hadn't waived it,
12 res judicata would have precluded him from intervening even on
13 the claim that EEOC brought, because he agreed to dismissal of
14 his prior lawsuit with prejudice.

15 **MR. WILSON:** And I have no -- and it was our position,
16 we took at the time, we did not have any problem with Mr. Duane
17 joining this lawsuit as a co-plaintiff with the EEOC on the
18 claims that they have asserted, having now secured for my
19 client a narrowing of this case to just what is in this lawsuit
20 here.

21 And when I saw the intervenor complaint seeking to add
22 additional claims, that's when I contacted Mr. Marek and said,
23 What are you doing? This is beyond -- this is res judicata.
24 This isn't what we agreed to. I never agreed to this, and,
25 ultimately, it turns out you're time barred.

1 I would just like to say, for the record, just because
2 counsel for EEOC brought it up, and I would like to just say
3 this, counsel for the EEOC said something to the effect that
4 it's a public policy that we want to give Mr. Duane and other
5 complainants the ability to go through the conciliation
6 process.

7 And so I know that that was a comment that was made. And
8 what I want to point out is just the timeline here. And the
9 timeline is reflected in the complaint itself by the EEOC, that
10 the -- the letter of determination was issued in April of 2016.
11 The conciliation was at an end formally by the EEOC on July 27,
12 at the latest 28. But in paragraph 9 of the proposed
13 intervenor complaint, for instance, and also in the EEOC's
14 complaint, I believe July 28 is the date they used. July 28,
15 2016. That is when conciliation was over. And then the EEOC
16 took some time to determine whether they were going to file the
17 lawsuit.

18 So even if, going by what counsel for the EEOC has said,
19 that Mr. Duane should have had tolling through the period of
20 time that there was conciliation taking place, that ended
21 July 28, 2016.

22 One year after that is the deadline for filing any state
23 law claims, even if they weren't precluded by res judicata.
24 One year. That one year was July 28, 2017.

25 It wasn't until August 21, 2017, that the motion to

1 intervene to add a new claim was added. So it would be time
2 barred even if it were not barred by res judicata, judge.

3 **MS. SANGHVI:** Your Honor --

4 **MR. WILSON:** So I wanted to make sure I had that date,
5 at least in the record, clearly based on counsel for the EEOC's
6 remarks about the conciliation process.

7 **MS. SANGHVI:** Your Honor, if I might respond to that.

8 **THE COURT:** Sure.

9 **MS. SANGHVI:** My comment was about the full benefit of
10 the administrative process. And I was explaining that that
11 includes the investigation, that includes the determination.
12 That includes a conciliation, and that includes a litigation
13 review period in which the EEOC might determine to litigate.

14 And it doesn't have to be based on public policy. We can
15 look at the law. The California code codifies this notion of
16 equitable tolling. And the statutory conditions there are
17 extraordinarily clear.

18 In the law, it requires that, number one, a charge of
19 discrimination is timely filed concurrently with the EEOC and
20 the DFE&H. That happened here.

21 Number two, the investigation of the charge is deferred by
22 DFE&H to the EEOC. That happened here.

23 Number three, a right to sue is issued to the person
24 claiming to be aggrieved upon deferral of the charge by the
25 DFE&H to the EEOC. That happened here.

1 And, number four, which is the most important piece here,
2 is the time for commencing an action for which the statute of
3 limitations is tolled expires when the federal right to sue
4 period to commence a civil action expires or one year from the
5 date of the Right to Sue notice by DFE&H specifically
6 highlighting, whichever is later.

7 The federal -- the EEOC has not issued a Notice of Right
8 to Sue and, therefore, the statute of limitations, just by the
9 California code, has yet to expire.

10 **THE COURT:** So let me just make sure I -- I assume you
11 take the position that Mr. Duane should be allowed to intervene
12 to assert the claims that he is seeking to assert right now.

13 **MS. SANGHVI:** Yes, Your Honor.

14 **THE COURT:** You believe that even though you didn't
15 include the allegation about retaliation based on complaints to
16 the manager, you believe that he should be able to pursue that?

17 **MS. SANGHVI:** We believe that Mr. Duane is entitled,
18 by right, to raise his Title VII and ADA retaliation claims.

19 What facts he supports to assert those claims are up to
20 him. And we don't dispute that. And we believe that there's
21 supplemental jurisdiction over his FEHA claims.

22 **MR. MAREK:** Your Honor, can I please say one thing?

23 **THE COURT:** One thing. We still have two more cases
24 to go.

25 **MR. MAREK:** There is one thing that has not yet

1 been -- it's a new point.

2 The stipulation to dismissal is very clear that it says
3 only claims, quote, pending in this action.

4 And I do want to point out, in response to my colleague's
5 comments about what was discussed --

6 **THE COURT:** Yeah, but that begs the question about
7 what is a claim.

8 **MR. MAREK:** Let me finish just one thing.

9 That was added -- that was what I added after, in
10 connection with these discussions that are reflected in the
11 email.

12 Meaning, if you look at my red line -- I know you don't
13 have it, but I can provide it if necessary -- that was when I
14 added -- the purpose I'm raising that is, when I look at this
15 email exchange and the June 22nd comment by Mr. Wilson, I do
16 believe that there was an understanding that it would be both
17 the federal and the state claim.

18 The state claims are typically added as a matter of
19 practice. And it would be -- it would be far more unusual to
20 suggest that you couldn't add (unintelligible.)

21 And I also want to add, I do think there's an distinction
22 between the additional factual allegation and the state law
23 claim.

24 I see your point more -- or I see defendant's point more
25 with respect to the additional factual allegation than I do

1 with respect to the California claim.

2 Thank you, Your Honor.

3 **THE COURT:** Okay. All right. I will give it a little
4 thought.

5 **MR. WILSON:** Thank you, Judge.

6 (At 12:24 p.m. the proceedings were adjourned.)

7 - - - -

8

9 **CERTIFICATE OF REPORTER**

10 I certify that the foregoing is a correct transcript
11 from the record of proceedings in the above-entitled matter.

12

13 DATE: Friday, October 13, 2017

14 *Katherine Sullivan*

15

16 _____
17 Katherine Powell Sullivan, CSR #5812, RMR, CRR
18 U.S. Court Reporter

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