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8 UNITED STATES DISTRICT COURT  
9  
10 NORTHERN DISTRICT OF CALIFORNIA

11 U.S. EQUAL EMPLOYMENT OPPORTUNITY  
12 COMMISSION,

13 Plaintiff,

14 ADRIAN SCOTT DUANE,

15 Plaintiff-Intervenor,

16 vs.

17 IXL Learning, Inc.,

18 Defendant.

Case No.: 17-cv-02979 (VC)

**COMPLAINT IN INTERVENTION**

Civil Rights – Employment Discrimination

**DEMAND FOR A JURY TRIAL**

19 **NATURE OF THE ACTION**

20 Plaintiff-Intervenor, Adrian Scott Duane, intervenes in this action commenced by the U.S.  
21 Equal Employment Opportunity Commission (“EEOC”). The EEOC asserted claims pursuant to  
22 Title VII of the Civil Rights Act of 1964 (“Title VII”), Title V of the Americans with Disabilities  
23 Act (the “ADA”), and Title I of the Civil Rights Act of 1991 (“Title I”) that Defendant IXL  
24 Learning, Inc. (“IXL”) discriminated and retaliated against its former employee, Duane, by  
25 terminating his employment for engaging in protected opposition activity. Duane hereby asserts  
26 claims against IXL arising from the same conduct under Title VII, the ADA, and the California Fair  
27 Employment and Housing Act (“FEHA”).

28 **JURISDICTION AND VENUE**

1. This Court has jurisdiction pursuant to 28 U.S.C. §§1331 and 1367. Section 1367 provides

1 that, “Such supplemental jurisdiction shall include claims that involve joinder or intervention of  
2 additional parties.”

3 2. Venue is proper in the United States District Court for the Northern District of California  
4 because the employment practices occurred in Defendant’s headquarters in San Mateo, California.

5 **PARTIES**

6 3. Plaintiff Equal Employment Opportunity Commission (EEOC) is the federal agency charged  
7 with the administration, interpretation, and enforcement of Title VII and Title I of the ADA.  
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9 4. Plaintiff-Intervenor, Adrian Scott Duane, is a transgender man with an undergraduate degree  
10 from in Mathematics from Carleton College, and a Ph.D. in Mathematics from the University of  
11 California, San Diego. He resides in Oakland, California.

12 5. At all relevant times, Defendant IXL Learning, Inc. (IXL) has been headquartered in San  
13 Mateo, California and has had another office in North Carolina.

14 **ADMINISTRATIVE PROCEDURES**

15 6. Duane has exhausted all of his administrative remedies required to bring his claims under  
16 Title VII, ADA, and FEHA.  
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18 7. On or about March 17, 2015, Duane filed a timely charge of discrimination with the EEOC  
19 alleging that IXL discriminated against him in violation of the retaliation provisions of Title VII, the  
20 ADA, and FEHA.

21 8. On April 22, 2016, the EEOC issued a Letter of Determination finding reasonable cause to  
22 believe that IXL violated the retaliation provisions of Title VII and the ADA.  
23

24 9. On July 28, 2016, the EEOC issued a Notice of Failure of Conciliation.

25 10. All conditions precedent to the initiation of this lawsuit have been fulfilled.

26 **FACTUAL ALLEGATIONS**

27 11. Duane, a transgender man, began working for IXL as a Product Analyst in July 2013.  
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1 12. During his employment, Duane discussed with coworkers his impressions about the culture  
2 at IXL being unwelcoming to employees who are not White or Asian American, who are not able-  
3 bodied, and who do not fit into neat categories of gender identity, orientation, and expression.

4 13. Throughout his employment, employees probed Duane with inappropriate questions about  
5 his gender identity and orientation. On at least one occasion, after seeing scars on Duane's chest, an  
6 employee asked another co-worker if Duane used to be a girl. Similarly, upon learning that Duane  
7 was in a relationship with a woman, a co-worker asked Duane if it was his first time dating a  
8 woman.  
9

10 14. IXL provided employees with unlimited sick leave as a benefit of employment.

11 15. In July 2014 Duane notified his supervisor, David Keyes, about the need for approximately  
12 6-8 weeks of leave for a surgery in November.

13 16. In September 2014, IXL approved Duane's disability leave and processed the necessary  
14 paperwork for California State Disability Insurance benefits.  
15

16 17. On October 3, 2014 Duane emailed his team members that he would begin a two month  
17 leave of absence in November for a surgery and that he wished to keep the details private.

18 18. On at least one other prior occasion that Duane knew of, IXL had disclosed confidential  
19 health information about an IXL employee.

20 19. For approximately six weeks prior to his leave, IXL permitted Duane to work remotely so he  
21 could attend weekly pre-operation appointments.  
22

23 20. Duane started approximately eight weeks of approved short-term disability leave on October  
24 30, 2014 in order to undergo and recover from gender confirmation surgery.

25 21. At the conclusion of his leave, Duane developed post-operative complications, which  
26 required rest in order to effectuate a full recovery, and made it challenging to be out of his home for  
27 long periods of time.  
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1 22. Duane requested a 50% remote work arrangement for his first few weeks back at work in  
2 order to accommodate his recovery. Duane's manager resisted providing the accommodation and  
3 instead suggested that Duane take additional leave until he was able to return.

4 23. Duane informed IXL via email that he had consulted with an employment attorney who  
5 advised that remote work requests because of a medical condition qualified as a reasonable  
6 accommodation under the Americans with Disabilities Act.

7 24. Keyes immediately forwarded Duane's December 23, 2014 email to Maricela Prado and  
8 Lenore Ockerberg, IXL human resources representatives. On or around December 23, 2014,  
9 Duane's December 23, 2014 email was also forwarded to Paul Mishkin, IXL's CEO, and then  
10 shortly after forwarding this email Keyes discussed Duane's allegations with Mishkin.  
11

12 25. On December 29, 2014, Duane provided a note from his surgeon supporting his reasonable  
13 accommodation request. The surgeon advised that Duane work remotely for at least four more  
14 weeks for postoperative healing. This note was on the letterhead of Brownstein & Crane Surgical  
15 Services and included the website [www.brownsteincrane.com](http://www.brownsteincrane.com). Brownstein & Crane's websites  
16 immediately identifies itself as "Gender Surgery in San Francisco." The entire website announces  
17 the medical practice's specialty of providing transgender surgeries.  
18

19 26. After Duane's self-advocacy, IXL relented and allowed Duane to work from home 50% of  
20 the time.

21 27. IXL presented Duane with a detailed remote work plan upon Duane's return to work on  
22 December 30, 2014. That day Duane learned that at least two other employees were permitted to  
23 work remotely between 50% and 100% of the time and were not subject to such a detailed remote  
24 work arrangement. Duane understood that these employees were cisgender, heterosexual, and non-  
25 disabled.  
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27 28. That evening Duane posted a message on Glassdoor.com, a jobs recruiting and ratings  
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1 website, which stated, in relevant part: “There are no politics if you fit in. If you don’t –that is, if  
2 you’re not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who  
3 really likes softball – then you’re likely to find yourself on the outside. Treatment in the workplace,  
4 in terms of who gets flexible hours, interesting projects, praise, promotions, and a big yearly raise, is  
5 different and seems to run right along these characteristics.” Duane also posted “[m]ost  
6 management do not know what the word ‘discrimination’ means, nor do they seem to think it  
7 matters.”  
8

9 29. During Duane’s employment at IXL, IXL encouraged employees to use Glassdoor – a  
10 service that IXL paid for and closely monitored – as a means to communicate with employees,  
11 potential employees, and management. For instance, by email dated February 24, 2014, Prado  
12 instructed IXL employees, including Duane, to “take a moment to login to Glassdoor.com and post  
13 some comments about your work experience.” At IXL events, CEO Mishkin had also orally  
14 instructed IXL employees to do the same.  
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16 30. As a result of IXL’s direct encouragement to do so, Duane had posted a comment about IXL  
17 in the past, and he was aware that the Company reviewed the site.

18 31. On January 6, 2015, Duane directly reported, in a meeting with Keyes, his concerns about  
19 experiencing discrimination in the workplace. Keyes promised to alert the CEO about Duane’s  
20 complaints.  
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22 32. On January 7, 2015, CEO Mishkin emailed Duane to set up a meeting for January 8, 2015  
23 to discuss his discrimination complaints.

24 33. Also on or about January 7, 2015, HR Manager Maricelo Prado allegedly discovered  
25 Duane’s Glassdoor.com posting and forwarded it to CEO Mishkin. Although the posting was  
26 anonymous, IXL suspected that Duane had written it.

27 34. On January 8, 2015, Duane met with CEO Mishkin and outlined the concerns he had about  
28

1 discrimination.

2 35. During the meeting, CEO Mishkin confronted Duane about the Glassdoor.com post. After  
3 confirming that Duane had written the post, CEO Mishkin terminated Duane's employment.

4 36. Mishkin had decided to terminate Duane's employment before the January 8 meeting. When  
5 the meeting ended, and Duane returned to his work station, he became aware that IXL had packed  
6 and removed his belongings while he was in the January 8 meeting with Mishkin.

7 37. IXL claims that the reason for terminating Duane was his December 30, 2014 post on  
8 Glassdoor.com  
9

10 **FIRST CAUSE OF ACTION**  
11 **(Violation of Title VII)**

12 38. Duane repeats and realleges the allegations contained herein.

13 39. Duane was an employee under Title VII, 42 U.S.C. § 2000(e)(f).

14 40. IXL has at all relevant times engaged in industry affecting commerce within the meaning of  
15 Section 701(h) of Title VII, 42 U.S.C. § 2000(e)(h).

16 41. IXL has employed well over 15 people for at least 20 calendar weeks in the current or  
17 proceeding year, and is therefore an employer under 42 U.S.C. § 2000(e)(b).

18 42. As alleged herein, IXL retaliated against Duane in violation of Title VII by terminating his  
19 employment for engaging in legally protected employment activities by opposing IXL's  
20 discrimination when he reported this discrimination to his manager and when he posted on  
21 Glassdoor.  
22

23 43. As a direct and proximate result of IXL's violation of Title VII, Duane suffered actual  
24 damage, including not limited to losses in compensation and benefits, humiliation, emotional  
25 distress, and loss of enjoyment of life.  
26

27 44. IXL's unlawful actions were intentional, willful, malicious, and/or done with reckless  
28 disregard for Duane's rights.

1 45. Duane also seeks an award of punitive damages for IXL's malicious and reckless conduct, as  
2 described herein, in amounts to be determined at trial.

3 **SECOND CAUSE OF ACTION**  
4 **(Violation of ADA)**

5 46. Duane repeats and realleges the allegations contained herein.

6 47. Duane is an employee under the ADA, 42 U.S.C. § 12111(4).

7 48. IXL is an employer under the ADA, 42 U.S.C. §§ 12111(5) and (7).

8 49. As alleged herein, Duane requested an accommodation under the ADA. After IXL initially  
9 refused Duane's request for an accommodation, Duane opposed IXL's employment practice by  
10 engaging in legally protected employment activities, including by publicly posting his opposition to  
11 IXL's practices on Glassdoor.

12 50. As alleged herein, IXL violated the ADA by terminating Duane's employment for engaging  
13 in legally protected employment activities by opposing IXL's discrimination and failure to  
14 accommodate when he complained about IXL's conduct to his manager and when he posted on  
15 Glassdoor.

16 51. As a direct and proximate result of IXL's violation of the ADA, Duane suffered actual  
17 damage, including not limited to losses in compensation and benefits, humiliation, emotional  
18 distress, and loss of enjoyment of life.

19 52. IXL's unlawful actions were intentional, willful, malicious, and/or done with reckless  
20 disregard for Duane's rights.

21 53. Duane also seeks an award of punitive damages for IXL's malicious and reckless conduct, as  
22 described herein, in amounts to be determined at trial.

23 **THRID CAUSE OF ACTION**  
24 **(Violation of FEHA Gov. Code § 12940(h) and (m))**

25 54. Duane repeats and realleges the allegations contained herein.  
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1 55. Government Code § 12940(h) provides that it is unlawful to retaliate against a person  
2 “because the person has opposed any practice forbidden under [Government Code §§ 12900 through  
3 12966] ...”

4 56. Duane is a “person” under Gov. Code § 12925(d).

5 57. IXL is an “employer” under Gov. code § 12926(d).

6 58. As alleged herein, IXL violated FEHA by terminating Duane’s employment for opposing  
7 IXL’s employment practices forbidden under FEHA, including his opposition to IXL’s  
8 discriminatory employment practices and his opposition to IXL’s failure to accommodate. Duane  
9 opposed these practices by engaging in legally protected employment activities, including  
10 complaining to his manager in email and in a meeting, and publicly posting his opposition on  
11 Glassdoor.  
12

13 59. IXL’s conduct described herein constitutes a willful violation Gov. Code § 12940(h) and (m).

14 60. As a proximate result of IXL’s violation of the FEHA, Duane has suffered substantial losses,  
15 including lost back pay with prejudgment interest, in amounts to be determined at trial, and other  
16 affirmative relief necessary to eradicate the effects of IXL’s unlawful employment practices,  
17 including attorneys’ fees and costs.  
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19 61. Duane also seeks an award of compensation for past and future nonpecuniary losses resulting  
20 from the unlawful retaliation complained of herein, including emotional pain, suffering,  
21 inconvenience, loss of enjoyment of life, and humiliation.  
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23 62. Duane also seeks an award of punitive damages for IXL’s malicious and reckless conduct, as  
24 described herein, in amounts to be determined at trial.  
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**PRAYER FOR RELIEF**

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Wherefore, Duane respectfully requests that this Court:

- A. Order IXL to make Duane whole, by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices.
- B. Order IXL to make Duane whole, by providing compensation for past and future nonpecuniary losses resulting from the unlawful retaliation complained of herein, including emotion pain, suffering, inconvenience, loss of enjoyment of life, and humiliation.
- C. Order IXL to pay Duane punitive damages for its malicious and reckless conduct, as described herein, in amounts to be determined at trial.
- D. Grant such further relief as the Court deems necessary and proper in the public interest.
- E. Award Duane his attorneys’ fees and the costs of this action.

**DEMAND FOR A JURY TRIAL**

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Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff requests a jury trial on all questions of fact raised by its complaint.

Dated: December 21, 2017

THE MAREK LAW FIRM, INC.

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