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April 20, 2018

Magistrate Judge Robert M. Illman
United States District Court
Northern District of California
Eureka Division

Re: *EEOC and Adrian Scott Duane v. IXL Learning, Inc.*, 3:17-cv-02979-VC

Your Honor,

The parties seek this Court's assistance in resolving a discovery dispute regarding Plaintiff-Intervenor Adrian Scott Duane ("Duane") relating to attorney-client and psycho-therapy privileges. Counsel for Plaintiffs and Defendant discussed the issues raised herein via phone and email. The parties have been unable to reach a resolution and submit this joint letter to outline their positions. Discovery is closed, and the parties have now entered into the expert phase of discovery.

Defendant's Position

California law is clear that parties cannot selectively waive the attorney-client privilege, nor can they categorically shield from disclosure all information related to treatments received when emotional distress is put at issue by that party.

Plaintiffs, as the party asserting the attorney-client privilege, bear the burden of proving that the privilege applies. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir.1981). As a part of proving that the privilege applies, Plaintiffs must prove that they have not waived the privilege. *Id.* "The disclosure of confidential information resulting in the waiver of the attorney-client privilege constitutes waiver of privilege as to communications relating to the subject matter that has been put at issue." *Phoenix Sols. Inc. v. Wells Fargo Bank, N.A.*, 254 F.R.D. 568, 575 (N.D. Cal. 2008). "The privilege which protects attorney-client communications may not be used both as a sword and a shield." *Akamai Techs., Inc. v. Digital Island, Inc.*, 2002 WL 1285126, at *8 (N.D. Cal. May 30, 2002). "The doctrine of waiver of attorney-client privilege is rooted in notions of fundamental fairness" by protecting against the unfairness that would result from a privilege holder selectively disclosing privileged communications to an adversary, revealing those that support the cause while claiming the shelter of the privilege to avoid disclosing those that are less favorable." *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340-41 (9th Cir.1996). It "has been widely held that voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject." *Weil*, 647 F.2d at 24.

Duane frequently and flagrantly waived attorney-client privilege by disclosing attorney-client communications regarding the substance of his factual allegations and legal strategies to third parties. Examples of waiver include:

Date	Recipient	Content
12/23/14	David Keyes	"I went ahead and spoke with an employment attorney to check in about what is mean by 'reasonable accommodation', and she said with certainty that remote work qualifies here – after all, IXL employees frequently work remotely to take care of children, to wait for repair people, because they're sick, or even just to extend vacations. This situation shouldn't (and legally can't) be treated any differently – that is, under the Americans with Disabilities Act, IXL has to provide me with this accommodation." Duane later shared this email with a friend the same day.
12/23/14	Jess Morse	"David is breaking employment law, turns out . . . Lawyer says the case is textbook . . . Yes he does [have to let Duane work remote ½ days], as long as I can perform all essential job functions which of course I can."
12/24/14	Nemo Curiel	"I wrote David a very diplomatic email telling him I'd spoken with a lawyer and she said they legally couldn't deny me what I was asking for, and that I would like to return on the 30th with the 50% remote accommodation."
1/7/15	David Keyes	"As we talked about yesterday, here's some of the info that Cara, who is an employment law attorney working in NYC, passed onto me about the ADA that you might find helpful in the future." Duane provided links to online ADA materials.
1/11/15	William Duane	"The lawyer I spoke with believes that the case is really, really good, for discrimination on disability and on gender identity. Also, postings on sites like Glassdoor are considered protected speech because they are a form of labor organizing. They have absolutely no case for defamation -- defamation is a really high standard, say the lawyers, and my post doesn't even come close. I asked them if I should worry about a counter suit and they said absolutely not. . . . I'm still not totally sure what I'm going to do, but I'm leaning towards pursuing it in court rather than trying to get a bunch of press."

1/13/15	Jess Morse	"Can you do something for me and feel free to say no. . . . No never mind. It'll come out in the Eeoc [sic] investigation. . . . Let me ask the lawyer first. There was a court case though that says if they do have such a policy, it's illegal. . . .What I mean is that companies can't have policies that prevent employees from exercising forms of protected speech. Glassdoor is protected because it's a form of labor organizing."
2/2/15	Jess Morse	"Hey -- I told my lawyer what happened to you. She is wondering two things: 1) Do you want to be part of the National Labor Relations Board charge that they're filing? This is the one that says they fired me illegally because of the Glassdoor review. 2) If you don't want to be part of that charge, are you ok being referenced in the charge they're filing on my behalf? I personally don't think it would do you any harm."
2/9/15	Jess Morse	"Ok. That's what I assumed, so your name is not in the charge although it does reference our conversations about disability stuff (without your name attached). My lawyer added on an item stating that they'd fired a second employee and some details about what happened, again without your name. . . . But if you want we can take it out -- it makes my case stronger but I would understand if you want it left out."
2/10/15	Jess Morse	Duane provided Morse with portions of his attorney's draft of the complaint to be filed with NLRB. Duane wrote: "Below is the text of the only section where anything regarding you is mentioned in the NLRB Complaint against IXL. The reason it's important to keep this part in is that in order for the Glassdoor review to be considered 'concerted labor activity', it has to involve discussion with at least one other employee. . . . Basically, for the relevant statute to apply, the complaint has to say that I talked to at least one other employee about the things in the Glassdoor review. The less vague it is, the better, but it can be more vague if you want it to be." Duane told her that his "lawyers wanna get this to IXL within the next few days."
2/10/15	Jess Morse	"I had the lawyer take out the part about you getting fired."

See Exhibit A, Plaintiff EEOC's Privilege Log of Withheld Documents. Despite the clear waiver, the EEOC instructed Duane not to answer questions in his deposition about his communications with attorneys in December of 2014. Duane cannot cherry-pick. Under very similar circumstances, this Court held that there was a waiver of the attorney-client privilege when the plaintiff disclosed to third parties communications she had with her attorneys regarding possible motives for bringing the lawsuit and factual allegations. *Lenz v. Universal Music Corp.*, 2010 WL 4286329, at *5 (N.D. Cal. Oct. 22, 2010), *objections overruled,* 2010 WL 4789099 (N.D. Cal. Nov. 17, 2010).

Likewise, the EEOC prevented IXL from a meaningful opportunity to cross-examine Duane regarding his claim that he suffered from garden variety emotional distress. Plaintiffs instructed Duane not to answer when asked about treatments he sought following IXL's termination, such as whether he received a diagnosis from a therapist, and argued that Duane does not have to automatically disclose the care he received. Courts have held that IXL is allowed to ask Duane about the medical treatment he sought from therapists, psychotherapists, and the like, both before and after his termination, as this goes directly to IXL's ability to defend against his garden variety emotional distress. *EEOC v. Peters' Bakery,* 301 F.R.D. 482, 486 (N.D. Cal. 2014) ("Defendant retains the opportunity to cross-examine [plaintiff] concerning other stressors in her life that may have contributed to her alleged emotional distress. Defendant may also discover the occurrences and dates of other psychotherapy prior to the incidents alleged in the Complaint."); *Thomas-Young*

v. Sutter Cent. Valley Hosps., No. 1:12-CV-01410-AWI, 2013 WL 3481693, at *7 (E.D. Cal. July 10, 2013) ("Defendant may question Plaintiff regarding facts concerning her medical treatment.").

Plaintiffs believe that the information IXL sought is privileged and protected from disclosure but plan on introducing such information at trial. Plaintiffs should not be permitted to have their proverbial cake and eat it too. Thus, Plaintiffs should not be permitted to rely on evidence or testimony within the scope of the waiver of attorney-client privilege, which applies to the attorney-client communications referred to in Duane's disclosures from presumably December 2014 (assuming Duane's discussions with attorney(s) occurred in December) to February 2015. Likewise, Plaintiffs should also not be permitted to rely on testimony into treatments before and after Duane's termination when Plaintiffs prevented Duane from answering IXL's questions into such matters. To the extent that the EEOC argues that this is a premature motion in limine and wishes instead to reopen discovery in lieu of this evidence being precluded, IXL will seek and is entitled to all available remedies.

Plaintiffs' position

IXL has had months to try to compel evidence that the EEOC has consistently claimed is protected by both the attorney-client and psychotherapist-patient privileges. Now, with hours to spare, IXL is attempting to seek the extraordinary relief of filing a premature motion *in limine* masked as a discovery dispute. Irrespective of the approach, IXL's analysis is wrong. Mr. Duane did not waive attorney-client privilege by referencing the fact that he consulted an attorney and revealing the general subject matter of that consultation. Additionally, by seeking relief for garden variety emotional distress, Mr. Duane has not placed his mental health at issue, and thus should not be compelled to disclose his communications with therapists.

IXL's counsel did not initiate a meet and confer on plaintiffs' assertions of privilege until 6:01pm PDT on April 13, 2018, the day fact discovery closed. On Wednesday, April 18th, IXL counsel explained that it was seeking to re-open Mr. Duane's deposition. Then, yesterday at 3:00pm PDT, counsel changed its strategy to ask the Court to limit testimony and evidence rather than compelling plaintiffs to disclose evidence covered by the privileges. The EEOC informed counsel that its motion *in limine* was both premature and improper. Today, IXL counsel offered to delay seeking the Court's intervention, but only with the EEOC's assurance that it would not oppose subsequent motion *in limine* by arguing that this dispute should have been raised during discovery. The EEOC reiterated that the appropriate recourse is for a motion to compel. IXL nonetheless insists on proceeding with a premature motion *in limine* without articulating the necessary standard for excluding evidence.

Attorney-client privilege

The issue is whether Mr. Duane created an implied waiver of the attorney-client privilege. The Ninth Circuit's three-prong test determines whether Mr. Duane waived the attorney-client privilege. *Roberts v. Clark County School Dist.*, 2:15-cv-00388-JAD-PAL, 2016 WL 2637811, *3 (D. Nev. May 9, 2016) ("First, the court considers whether a party is asserting the attorney-client privilege as a result of some affirmative act. Second, the court examines whether the party asserting the privilege through an affirmative act has put the privileged information at issue. Third, the court evaluates whether allowing the privilege would deny the opposing party access to information vital to its case.") (citing *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir.1999).

Plaintiffs have not placed the privileged information – the legal advice that Mr. Duane received in December 2014 prior to his Glassdoor.com post – at issue in this case. The advice or the soundness of that advice is not critical to a claim or defense; that is, none of the claims rest on the advice of counsel. Whether Mr. Duane's December 30, 2014 Glassdoor.com post constituted protected activity under Title VII and the ADA is an element of plaintiffs' retaliation claims. Protection is limited to individuals who act with a reasonable good faith belief that they are opposing a potential EEO violation. If Mr. Duane believed reasonably that IXL was violating Title VII and the ADA, his discrimination complaints did not need to be actionable. Therefore, the content of legal advice Mr. Duane received is irrelevant. The fact that Mr. Duane sought legal guidance before advocating for a reasonable accommodation is the relevant inquiry to determining his state of mind. That fact does not, however, place the specific legal advice at issue, nor did Mr. Duane waive privileges attached to that advice by pursuing this action.

Further, the evidence cited by Defendant reveals that Mr. Duane did not disclose details of his attorney's advice or analysis. Thus, Mr. Duane did not waive his privilege. *See* Restat 3d of the Law Governing Lawyers, § 79 (3rd 2000). In the first example, Mr. Duane advocated to his immediate supervisor, David Keyes, that he should be permitted to work remotely as a reasonable accommodation. Disclosing that he spoke to an attorney who advised him on the ADA does not constitute a waiver. *See e.g., Saltern v. Nor-Cal Federal Credit Union, et al.*, No. Civ.A. 02-7175, 2003 WL 21250578, *1 (E.D. Pa. April 17, 2003). Other examples only reveal the general subject matter of the legal advice but nothing specific, which also does not constitute waiver. *See e.g., Yellow Robe v. Allender*, No. CIV. 09–5040–JLV, 2010 WL 424194 (D.S.D. Feb. 1, 2010); *Libbey Glass, Inc. v. Onieda, Ltd.*, 197 F.R.D. 342, 347(N. D. Ohio 1999) ("Courts have perceived a difference between an opaque reference to an attorney's advice and disclosure that illuminates the facts and analysis underlying that advice.") Similarly, many of IXL's examples are only relevant to the NLRB action or whether IXL could counter sue for defamation and, therefore, not relevant. Moreover, most of these communications occur **after** Mr. Duane's December 30th Glassdoor.com post. These, too, are irrelevant.

Even if the Court finds that Mr. Duane waived the attorney-client privilege, the waiver should only attach to the communications that relate to claims in this litigation. The only potential relevance is the extent to which the substance of December 2014 communications between Mr. Duane and Cara Chomski influenced Mr. Duane's belief that he was opposing discrimination under Title VII and/or the ADA. Any attorney-client communications after his termination are irrelevant. Further, if the Court finds a waiver, the appropriate remedy is to require Mr. Duane to answer questions his counsel instructed him not to answer and plaintiffs to produce only documents withheld regarding pre-December 2014 legal advice related to IXL's post-surgery actions.

During early stages of the case, Defendant questioned whether Mr. Duane waived the privilege with his email to David Keyes. The EEOC disagreed. Nevertheless, Defendant entered into an agreement in January 2018 that communications between Mr. Duane and attorneys and staff of Liddle & Robinson, the firm that previously represented him, were "clearly privileged". In January 2018, when the EEOC produced the emails cited above, the EEOC also objected to production of other documents based on the attorney-client privilege. IXL did not attempt to meet and confer about those assertions of privilege. The EEOC instructed Mr. Duane not to answer one

question during his deposition on March 27, 2018.[1] IXL counsel opted not to raise the issue to the Court at that time either. Raising issues now is an abuse of the discovery process.

Psychotherapist-Patient Privilege

Mr. Duane has not waived his right to privacy and his psychotherapist-patient privilege by asserting a claim of garden-variety emotional distress. *See EEOC v. Lexus Serramonte*, 237 F.R.D. 220, 224 (N.D. Cal. 2006). The EEOC has repeatedly informed IXL that it will not claim or testify that Mr. Duane suffered severe mental distress or received a mental health diagnosis stemming from the termination of his employment. In answer to IXL's Interrogatory No. 11, the EEOC wrote, "Mr. Duane was never diagnosed with any 'physical, physiological, mental, and/or emotional symptoms as a result of IXL's actions.'" Today, the EEOC again offered the following written assurance: "The EEOC and Mr. Duane will not present any documentary evidence or testimony that Mr. Duane sought therapy because of his termination from IXL."

Moreover, IXL has misrepresented the record regarding its deposition examination of Mr. Duane. The EEOC did not "prevent IXL from a meaningful opportunity to cross-examine Duane regarding his claim that he suffered garden variety emotional distress." The EEOC instructed Mr. Duane not to answer ***one question*** based on the psychotherapist privilege: whether he received a diagnosis from a visit to a therapist in April 2015. This question exceeds the scope of permissible inquiry for garden variety damages. Contrary to IXL's representations, Mr. Duane testified, without objection, that he saw a therapist at the Pacific Center in April 2015. The EEOC did not oppose Mr. Wilson's questions about how Mr. Duane would characterize his emotional distress, allowed Mr. Wilson to question Mr. Duane about the stressors in his life, the effect the termination had on his financial stability and his relationship at the time. Accordingly, there is no basis for IXL's assertion that the EEOC obstructed its discovery of relevant emotional distress evidence, and no basis to sanction plaintiffs by limiting evidence it can introduce at trial.

The EEOC requests an opportunity to fully brief this issue if it becomes necessary, but seeks an order from the Court denying IXL's motion *in limine* since the EEOC's discovery responses already reflect that it will not introduce records or testimony related to therapy at trial.

Respectfully submitted,
/s/ Ami Sanghvi
Ami Sanghvi for Plaintiff EEOC
/s/ David Marek
David Marek for Plaintiff-Intervenor Adrian Scott Duane
/s/ Natasha R. Menezes
Natasha R. Menezes for Defendant IXL Learning, Inc.

[1] The first instruction not to answer based on attorney-client privilege was when IXL counsel Mr. Wilson asked Mr. Duane: "Did your employment attorney in December of 2014 tell you whether or not David's comment about accommodating your situation so that you could work in the office might be a reasonable accommodation?" (Deposition of Adrian Scott Duane, dated March 27, 2018, 126:22-25). Mr. Duane then answered Mr. Wilson's next question: "Mr. Duane, did you disclose to any other individuals in this time frame of December 2014 and January 2015 what your attorneys told you about IXL accommodations and whether or not David was violating your rights?" Mr. Duane answered: "No, not that I remember" *Id*. at 127: 23 – 128:7.