



**APPEARANCES (CONTINUED) :**

**FOR INTERVENOR**

THE MAREK LAW FIRM  
228 HAMILTON AVENUE  
PALO ALTO, CA 94301 FIRMS"FIRM}

**BY: DAVID M. MAREK, ESQUIRE**  
(TELEPHONICALLY)

**FOR DEFENDANT**

YOUNG, BASILE, HANLON & MACFARLANE, PC  
3001 W. BIG BEAVER ROAD, SUITE 624  
TROY, MICHIGAN 48084

**BY: NATASHA R. MENEZES, ESQUIRE**

1 MONDAY, MAY 7, 2018 10:07 A.M.

2 (TRANSCRIBER'S NOTE: DUE AT TIMES TO COUNSELS' FAILURE TO  
3 IDENTIFY THEMSELVES WHEN SPEAKING, CERTAIN SPEAKER  
4 ATTRIBUTIONS ARE BASED ON EDUCATED GUESS.)

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6 PROCEEDINGS

7 **THE CLERK:** U.S. EQUAL EMPLOYMENT OPPORTUNITY  
8 COMMISSION VERSUS IXL LEARNING, INC., CASE NO. 3:17-CV-2979 VCR  
9 RMI.

10 PARTIES STATE THEIR APPEARANCES FOR THE RECORD.

11 **MS. SANGHVI:** THIS IS AMI SANGHVI FOR PLAINTIFFS,  
12 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

13 **MR. MAREK:** DAVID MAREK FOR THE INTERVENOR SCOTT  
14 DUANE.

15 **MS. MENEZES:** NATASHA MENEZES FOR DEFENDANT IXL  
16 LEARNING.

17 **THE COURT:** ALL RIGHT, EVERYONE. WE'RE HERE ON THE  
18 DISCOVERY LETTER BRIEF, TWO ISSUES BEFORE THE COURT. ONE  
19 RELATES TO THE ATTORNEY-CLIENT PRIVILEGE, AND THE SECOND  
20 RELATES TO PSYCHO PATIENT THERAPY PRIVILEGE.

21 SO, I NOTE THAT WITHIN THE DISCOVERY LETTER BRIEF IT  
22 POINTS ME TO EXHIBIT A. I DIDN'T SEE THAT ATTACHED TO THE  
23 PLEADINGS. AM I MISSING IT?

24 **MS. MENEZES:** OUR APOLOGIES, YOUR HONOR, IT WAS NOT  
25 ATTACHED. BUT IT WAS THE EEOC'S PRIVILEGE LOG OF WITHHELD

1 DOCUMENTS.

2 **THE COURT:** OKAY. THAT MAY NOT BE -- IT MAY BE ALL  
3 RIGHT TO PROCEED WITHOUT THAT. IT'S JUST THE LOG.

4 SO, LET'S TALK ABOUT THE FIRST ISSUE RAISED IN THE  
5 BRIEF, WHICH WOULD BE THE ATTORNEY-CLIENT PRIVILEGE. WHAT IS  
6 IT EXACTLY THAT YOU ARE ATTEMPTING TO COMPEL HERE? DO YOU WANT  
7 TO SIT DOWN WITH THE PLAINTIFF HERE AND ASK HIM WHAT?

8 **MS. MENEZES:** WE DON'T ACTUALLY WANT TO SIT DOWN AND  
9 ASK HIM SOMETHING. WE WOULD -- YOU KNOW, IF EEOC IS GOING TO  
10 ALLEGE -- ACTUALLY, FIRST OF ALL, WE ARE ABLE TO LIMIT THIS.  
11 SO WE ARE WILLING TO AGREE TO FOCUS ONLY ON ATTORNEY-CLIENT  
12 COMMUNICATIONS THAT HAPPENED ON OR BEFORE DECEMBER 30TH, 2014.  
13 SO I THINK THAT LIMITS THE -- SOME OF THE ISSUES WITH REGARD TO  
14 SOME OF THE COMMUNICATIONS THAT WE'RE LOOKING AT.

15 **THE COURT:** WHAT COMMUNICATIONS EXACTLY ARE YOU  
16 TRYING TO DISCOVER HERE?

17 **MS. MENEZES:** SOME HISTORY WITH REGARD TO  
18 SPECIFICALLY WHAT WE'RE LOOKING AT: IN DECEMBER 2014, DUANE  
19 ASKED HIS SUPERVISOR IF HE WOULD BE WILLING TO ALLOW HIM TO  
20 WORK FROM HOME. HIS SUPERVISOR RESPONDED AND SAID THAT DUANE  
21 IN THE PAST HAS BEEN MORE PRODUCTIVE IN THE OFFICE AND ASKED IF  
22 THERE'S ANYTHING IXL COULD DO TO ACCOMMODATE HIM SO HE COULD  
23 WORK IN THE OFFICE OR TO HAVE, YOU KNOW, (INDISCERNIBLE) TO  
24 EXTEND HIS LEAVE AS WELL.

25 DUANE'S RESPONSE WAS THAT HE TALKED TO AN ATTORNEY

1 AND THAT SHE SAID WITH CERTAINTY THAT REMOTE WORK QUALIFIES  
2 HERE, AND DUANE INDICATED THAT IXL HAS TO PROVIDE HIM THIS  
3 ACCOMMODATION.

4 AND THE EEOC HAS POTENTIALLY INDICATED IN THEIR -- IN  
5 THIS LETTER BRIEF THAT THIS INFLUENCED MR. DUANE'S BELIEF THAT  
6 HE WAS OPPOSING DISCRIMINATION UNDER TITLE VII AND THE ADA. SO  
7 THEY'RE ESSENTIALLY RELYING ON AND SAYING, YOU KNOW, IT  
8 INFLUENCED HIM, BUT THEN WE ARE NOT NECESSARILY ALLOWED TO KNOW  
9 THE SPECIFICS ABOUT THE COMMUNICATION.

10 **THE COURT:** SO YOU WANT -- YOU WANT HIM TO DO WHAT  
11 WITH REGARD TO THAT COMMUNICATIONS -- WITH REGARD TO THAT  
12 COMMUNICATION SPECIFICALLY?

13 **MS. MENEZES:** WE THINK THAT WE ARE -- BECAUSE OF THE  
14 ATTORNEY-CLIENT PRIVILEGE, WE THINK WE ARE ENTITLED TO, YOU  
15 KNOW, TAKE DISCOVERY ON THIS ISSUE.

16 **THE COURT:** WHICH WOULD BE WHAT? WHAT DO YOU WANT TO  
17 DO WITH REGARD TO THAT?

18 **MS. MENEZES:** IDEALLY, IT WOULD BE TO PREVENT THEM  
19 FROM RELYING ON THIS EVIDENCE. I KNOW THE EEOC HAS INDICATED  
20 THAT THIS IS MORE IN LINE WITH A MOTION IN LIMINE.

21 WE ACTUALLY THREW THAT IDEA OUT SAYING WE'RE FINE,  
22 YOU KNOW, MOVING THIS DOWN THE ROAD, SAYING THAT WE WILL FILE A  
23 MOTION IN LIMINE PROVIDED THE EEOC WOULDN'T ARGUE THAT WE  
24 SHOULD HAVE RAISED THIS AS A DISCOVERY DISPUTE. EEOC DIDN'T  
25 AGREE. THAT'S THE DISCOVERY DISPUTE.

1           **THE COURT:** SO LET ME ASK THE EEOC.  
2           YOU WOULD OPPOSE A MOTION IN LIMINE ON THIS BECAUSE  
3 IT WASN'T RAISED THROUGH THE DISCOVERY PROCESS; IS THAT  
4 CORRECT?

5           **MS. SANGHVI:** YES, YOUR HONOR. AND JUST TO BE CLEAR,  
6 WE DID GO BACK AND FORTH WITH OPPOSING COUNSEL ON THIS POINT IN  
7 OUR MEET AND CONFER (INDISCERNIBLE).

8           FOR A BRIEF HISTORY, THIS HAS BEEN AN ISSUE THAT HAS  
9 BEEN PRESENT IN THE CASE SINCE AS EARLY AS JANUARY, IF NOT  
10 BEFORE. THEY HAVE HAD THIS POSITION FOR THE LENGTH OF THE  
11 CASE. THEY CHOSE TO BRING IT TO OUR ATTENTION AT 6:00 P.M. ON  
12 APRIL 13TH, 2018, WHICH IS THE ACTUAL DAY FACT DISCOVERY  
13 CLOSED, AND THAT IS THE FIRST TIME COUNSEL SAID: LET'S HAVE A  
14 MEET AND CONFER ABOUT THIS.

15           AND SO TO COMPLY WITH THE RULES OF -- RAISE ALL  
16 DISCOVERY DISPUTES WITHIN SEVEN DAYS FROM THE DATE OF FACT  
17 DISCOVERY CLOSING, WE MANAGED TO HAVE A MEET AND CONFER. IN  
18 THAT MEET AND CONFER THAT WE HAD ON WEDNESDAY, THE 18TH, I  
19 ASKED COUNSEL VERY SPECIFICALLY, WHAT IS IT THAT YOU ARE  
20 SEEKING HERE, BECAUSE IF WE CAN FIGURE THAT OUT, THEN MAYBE WE  
21 CAN FIND A WAY FORWARD.

22           AND WHAT SHE TOLD ME WAS WE WANT TO REOPEN HIS ENTIRE  
23 DEPOSITION, TO WHICH I OPPOSED AND EXPLAINED THERE WERE MANY  
24 OPPORTUNITIES TO ASK CERTAIN QUESTIONS. THAT WAS NOT DONE.  
25 THEN THE VERY NEXT DAY AT 3:00 P.M. I GOT A LETTER SIMILAR TO

1 THE ONE THAT WAS FILED INDICATING THAT THEY WANTED TO  
2 ESSENTIALLY EXCLUDE THE EVIDENCE RELATED TO ANY COMMUNICATION  
3 WITH AN ATTORNEY IN DECEMBER OF 2014.

4 WHAT EXACTLY THAT ENTAILS IS STILL VERY VAGUE TO ME,  
5 BUT I RESPONDED TO EXPLAIN TO THEM THAT THAT WAS VERY MUCH A  
6 MOTION IN LIMINE, THAT JUDGE CHHABRIA HAS VERY STRICT LIMITS ON  
7 HOW MANY MOTIONS IN LIMINE THAT HE WILL ALLOW AND THAT THAT IS  
8 SIMPLY JUST NOT AN APPROPRIATE RECOURSE DURING THE DISCOVERY  
9 DISPUTE PHASE OF THIS, AND THAT IF THEY ARE SEEKING TO COMPEL  
10 SOMETHING, THEY SHOULD TELL ME THAT. THEY HAVE NOT.

11 THEY THEN DOUBLED DOWN ON THAT AND SAID, NOPE, WE  
12 WANT TO CONTINUE THIS AS BASICALLY A MOTION IN LIMINE TO  
13 EXCLUDE EVIDENCE, AND THAT IS WILDLY INAPPROPRIATE AND AN ABUSE  
14 OF THE DISCOVERY PROCESS. THEY HAD MULTIPLE OPPORTUNITIES HERE  
15 TO TRY TO GET AT IT.

16 THEY COULD HAVE EVEN CALLED YOUR HONOR DURING  
17 DEPOSITION ON MARCH 27TH WHEN I GAVE ONE INSTRUCTION NOT TO  
18 ANSWER TO MR. DUANE WHEN THEY ASKED ABOUT THE COMMUNICATIONS.  
19 AND FROM THE EEOC'S PERSPECTIVE, I HAVE NO CHOICE BUT TO  
20 INSTRUCT HIM NOT TO ANSWER UNLESS A COURT ORDERS ME THAT  
21 THERE'S BEEN SOME WAIVER, WHICH I VERY STRONGLY CONTEND THAT  
22 THERE HAS BEEN NO WAIVER.

23 ALL OF THAT IS ASIDE FROM THE FACT THAT THERE'S  
24 SIMPLY NOT A WAIVER AT ISSUE HERE, BECAUSE THE CONTENT OF THE  
25 LEGAL ADVICE THAT MR. DUANE RECEIVED IS NOT AT ISSUE IN THE

1 CLAIMS, AND IT'S NOT CRITICAL TO A CLAIM OR DEFENSE. SO  
2 THERE'S NO NOTION OF UNFAIRNESS HERE.

3 (SIMULTANEOUS COLLOQUY.)

4 **THE COURT:** ARE YOU INTENDING --

5 **MS. SANGHVI:** -- ATTORNEYS SPECIFICALLY SAID TO  
6 MR. DUANE IN DECEMBER OF 2014.

7 **THE COURT:** ARE YOU INTENDING TO RELY ON THAT AT  
8 TRIAL?

9 **MS. SANGHVI:** I'M FLUMMOXED, TO BE HONEST, YOUR  
10 HONOR, BECAUSE THERE IS NO MOTION TO COMPEL BEFORE YOU.  
11 THERE'S NO DISCOVERY THEY'RE SEEKING TO COMPEL. THEY'RE SIMPLY  
12 TRYING TO EXCLUDE DISCOVERY, WHICH IS INAPPROPRIATE.

13 **THE COURT:** ARE YOU INTENDING TO RELY ON THESE  
14 COMMUNICATIONS AT TRIAL?

15 **MS. SANGHVI:** I MEAN, ONE OF THE KEY COMMUNICATIONS  
16 THAT THEY HAVE ON THEIR LIST -- AND THAT'S WHAT I CARE ABOUT,  
17 IF THEY'RE TRYING TO TAKE THIS ENTIRE EMAIL OUT -- BUT THERE'S  
18 AN EMAIL BETWEEN SCOTT DUANE AND DAVID KEYES, HIS SUPERVISOR.

19 AND JUST FROM -- YOU KNOW, TAKE A STEP BACK, THIS  
20 HAPPENS ALL THE TIME WHERE EMPLOYEES WHO ARE IN A HUGE POWER  
21 IMBALANCE WITH THEIR EMPLOYERS SAY, LOOK, I TALKED TO A LAWYER  
22 AND I REALLY THINK THAT I AM ENTITLED TO THIS REASONABLE  
23 ACCOMMODATION THAT I'M ADVOCATING FOR.

24 SO THAT EMAIL STRING WHERE SCOTT DUANE RAISES A  
25 CONCERN ABOUT A REASONABLE -- OR SEEKS A REASONABLE

1 ACCOMMODATION, DAVID KEYES RESPONDS TO THAT REASONABLE  
2 ACCOMMODATION REQUEST, AND THEN SCOTT DUANE RESPONDS BACK  
3 INDICATING I'VE SPOKEN TO AN ATTORNEY AND THIS IS A REASONABLE  
4 ACCOMMODATION. THEY'RE SAYING THAT IS A WAIVER. OF COURSE,  
5 THAT'S A VERY IMPORTANT EMAIL THAT BOTH SIDES ARE GOING TO WANT  
6 TO USE DURING TRIAL.

7 NOW THE OTHER EMAILS, I DON'T KNOW. YOU KNOW, THAT'S  
8 WHY THESE THINGS ARE MORE APPROPRIATE RIGHT BEFORE TRIAL AS A  
9 MOTION IN LIMINE BECAUSE YOU HAVE A BETTER SENSE OF WHAT YOU'RE  
10 GOING TO USE, BUT I CAN TELL YOU THAT OF COURSE THE EMAIL  
11 CHANGE BETWEEN SCOTT DUANE AND DAVID KEYES IS GOING TO BE AN  
12 IMPORTANT PIECE OF EVIDENCE.

13 BUT, AGAIN, I DON'T THINK WHAT THE ATTORNEY TOLD HIM  
14 IS AT ALL AT ISSUE HERE. THIS IS A RETALIATION CASE. THIS IS  
15 NOT WHETHER OR NOT IXL DISCRIMINATED AGAINST HIM ON THE BASIS  
16 OF GENDER IDENTITY OR ON THE BASIS OF DISABILITY. IT'S SIMPLY  
17 A RETALIATION CASE, NOTHING MORE.

18 THE CRITICAL ISSUE IS WHETHER MR. DUANE ACTED WITH A  
19 REASONABLE GOOD FAITH BELIEF THAT HE WAS OPPOSING A POTENTIALLY  
20 EEO VIOLATION.

21 AND SO WHAT WE WOULD SAY IS THAT, YES, THE FACT THAT  
22 HE CONSULTED AN ATTORNEY IS ONE FACTOR OF MANY, MANY, MANY  
23 FACTORS THAT SHOW THAT HE HAD A REASONABLE GOOD FAITH BELIEF  
24 WHEN HE POSTED ON GLASSDOOR.COM ON DECEMBER 30TH, 2014.

25 WHAT THE ATTORNEY TOLD HIM ISN'T AT ISSUE BECAUSE SHE

1 COULD HAVE BEEN WRONG ABOUT THE LAW. I DON'T KNOW. THAT'S NOT  
2 THE POINT. RETALIATION EXTENDS TO PEOPLE EVEN WHEN THEY'RE  
3 WRONG ABOUT THE LAW, BECAUSE AS LONG AS THEY HAVE A REASONABLE  
4 GOOD FAITH BELIEF, EVEN IF THAT REASONABLE GOOD FAITH BELIEF IS  
5 INCORRECT, THEY STILL GET THE PROTECTION OF THE ANTI  
6 RETALIATION PROVISIONS UNDER TITLE VII AND THE ADA, YOUR HONOR.

7 **THE COURT:** THE FACT THAT HE STATES -- I MEAN, THE  
8 FACT THAT HE MAY TESTIFY THAT HE RELIED ON WHAT APPEARS TO HAVE  
9 BEEN A POSSIBLE DISCUSSION WITH AN ATTORNEY OVER THIS ISSUE,  
10 THAT GOES TO WHAT HE RELIED ON AS OPPOSED TO THE SUBSTANCE OF  
11 THE COMMUNICATIONS. I DON'T KNOW THAT THERE'S A SPECIFIC  
12 WAIVER TO THE SUBSTANCE OF THE COMMUNICATIONS FOR DEFENDANT  
13 IF -- I MEAN, YOU'VE RAISED IT. I'M GOING TO DENY IT. AND  
14 THEN YOU CAN BRING THAT UP WHEN YOUR MOTION IN LIMINE -- IN  
15 FRONT OF JUDGE CHHABRIA AS YOU GET CLOSER TO TRIAL.

16 I DON'T SEE WHAT IT IS THAT YOU WANT FROM THIS. SO I  
17 DON'T -- I DON'T FIND YOU'VE BEEN ABLE TO PIERCE THE  
18 ATTORNEY-CLIENT COMMUNICATION PRIVILEGE.

19 SO LET'S MOVE TO THE NEXT ISSUE, WHICH IS THE ISSUE  
20 RELATED TO HIS EMOTIONAL DISTRESS. SO LET'S TALK ABOUT THAT  
21 FOR A SECOND. I NOTE IN THE LETTER BRIEF -- AND I'M ON PAGE 3,  
22 THE SECOND PARAGRAPH THERE --

23 **MS. MENEZES:** YOUR HONOR?

24 **THE COURT:** YES.

25 **MS. MENEZES:** I HATE TO INTERRUPT, BUT I ACTUALLY --

1 IXL IS WILLING TO ESSENTIALLY COMPROMISE ON THIS ISSUE. SO I'M  
2 WONDERING IF THAT MAY MAKE IT EASIER FOR ALL PARTIES.

3 SO PART OF OUR CONCERN IS THAT DUANE'S DEPOSITION  
4 TESTIMONY IS VERY DIFFERENT AND, ACTUALLY, YOU KNOW, A 180 FROM  
5 SOME OF THE THINGS THAT THE EEOC INDICATED IN THEIR RESPONSE TO  
6 INTERROGATORIES.

7 SO, YOU KNOW, WE WANT DUANE AND THE EEOC TO AGREE TO  
8 STIPULATE THAT, ESSENTIALLY, WHAT THEY HAVE IN THEIR LETTER  
9 THAT THEY -- YOU KNOW, NEITHER DUANE OR THE EEOC WILL ATTEMPT  
10 TO PRESENT ANY EVIDENCE -- LET ME SEE SPECIFICALLY WHAT THEY  
11 SAY -- THAT, YOU KNOW, HE SOUGHT THERAPY BECAUSE OF HIS  
12 TERMINATION FROM IXL, WHICH WOULD ALSO EXCLUDE THEM RELYING ON  
13 HIS DEPOSITION TESTIMONY. TO THE EXTENT THEY ARE WILLING TO  
14 AGREE TO THAT, THEN WE NO LONGER HAVE AN ISSUE, AT LEAST IN OUR  
15 EYES.

16 **THE COURT:** ALL RIGHT. WHAT DO YOU THINK ABOUT THAT,  
17 EEOC?

18 **MS. SANGHVI:** I'M NOT SURE I UNDERSTOOD ANY OF THAT,  
19 YOUR HONOR. THAT WE'RE NOT ALLOWED TO RELY ON HIS DEPOSITION  
20 TESTIMONY AT ALL?

21 **THE COURT:** NO, I THINK WHAT SHE'S SAYING IS THAT YOU  
22 ARE NOT GOING TO BE PRESENTING EVIDENCE, LIKE MEDICAL TESTIMONY  
23 OR ANYTHING, OR THE FACT THAT HE EVEN SOUGHT THERAPY, IS THAT  
24 CORRECT, IN MAKING YOUR CLAIM FOR EMOTIONAL DISTRESS?

25 **MS. SANGHVI:** YOUR HONOR, WE'VE BEEN CLEAR ALSO ON

1 THIS POINT. AND IN JANUARY OF 2018 WE SAID IN OUR  
2 INTERROGATORY RESPONSE THAT MR. DUANE WAS NEVER DIAGNOSED WITH  
3 ANY PHYSICAL, PHYSIOLOGICAL, MENTAL AND/OR EMOTIONAL SYMPTOMS  
4 AS A RESULT OF IXL'S ACTIONS.

5 THEN IN A MEET AND CONFER AND VIA EMAIL, I AGAIN  
6 OFFERED THAT THE EEOC AND MR. DUANE WILL NOT PRESENT ANY  
7 DOCUMENTARY EVIDENCE OR TESTIMONY THAT MR. DUANE SOUGHT THERAPY  
8 BECAUSE OF HIS TERMINATION FROM IXL. AND THEY HAD THE -- AND  
9 DURING -- YOU KNOW, PART OF MY CONCERN IS THAT THERE ARE WILD  
10 MISREPRESENTATIONS TO THIS COURT ABOUT THE RECORD HERE.

11 IN THEIR LETTER THEY INDICATE THAT HE WAS INSTRUCTED  
12 NOT TO ANSWER WHEN ASKED ABOUT TREATMENTS HE SOUGHT FOLLOWING  
13 IXL'S TERMINATION. IT'S SIMPLY NOT TRUE. HE WAS ASKED, AND HE  
14 WAS PERMITTED TO ANSWER WHEN HE SOUGHT A THERAPIST FOR THE  
15 FIRST TIME AFTER HIS TERMINATION. HE WAS ASKED AND PERMITTED  
16 TO ANSWER THE NAME OF THAT THERAPIST OR THE NAME OF THE  
17 FACILITY HE WENT TO.

18 IT WAS ONLY ASKED ABOUT ANY DIAGNOSIS GIVEN THAT I  
19 INSTRUCTED HIM NOT TO ANSWER. SO IT'S, YOU KNOW  
20 (INDISCERNIBLE) A MISREPRESENTATION HERE THAT IS PROBLEMATIC.

21 AND THEN DEFENDANT ALSO SAYS IN THEIR LETTER, WITH NO  
22 SUPPORT, THAT EEOC PLANS ON INTRODUCING SUCH INFORMATION AT  
23 TRIAL. WE HAVE THE RULE 26 DISCLOSURES HERE. THOSE RULE 26  
24 DISCLOSURES DO NOT HAVE THE NAME OF ANY PHYSICIAN OR ANY  
25 THERAPIST ON THEM.

1 WE HAVE A MAY 1ST EXPERT DISCOVERY DEADLINE THAT  
2 CAME, THAT WENT. I HAD ALREADY TOLD THEM THIS BEFORE IT CAME  
3 AND WENT THAT WE DID NOT AND HAVE NOT PRODUCED ANY EXPERT  
4 REPORT FROM ANY PHYSICIAN AS TO HIS EMOTIONAL DISTRESS.

5 SO IT'S SIMPLY NOT AN ISSUE. WE'VE WASTED YOUR TIME.  
6 AND THEY KNEW ALL OF THIS. THEY HAVE WRITTEN ASSURANCES BY WAY  
7 OF OUR INTERROGATORY RESPONSES. THEY HAVE WRITTEN ASSURANCES  
8 BY WAY OF EMAIL COMMUNICATIONS WITH US. THERE IS NO -- THERE  
9 IS SIMPLY NO REASON TO SUGGEST THAT WE ARE NOT GOING TO BE  
10 TRUTHFUL ON THAT MATTER. WE JUST SAID HE IS NOT GOING TO -- WE  
11 ARE NOT PRESENTING TESTIMONY NOR EVIDENCE THAT MR. DUANE SOUGHT  
12 THERAPY BECAUSE OF HIS TERMINATION FROM IXL.

13 **THE COURT:** SO --

14 **MS. SANGHVI:** I DON'T KNOW HOW MUCH CLEARER TO BE ON  
15 THAT POINT.

16 **MS. MENEZES:** YOUR HONOR.

17 **THE COURT:** DOES THAT SATISFY IXL'S CONCERNS?

18 **MS. MENEZES:** YES, I THINK IT DOES. OBVIOUSLY, WE  
19 DISAGREE WITH THE EXTENT THAT THE EEOC THINKS THERE WERE WILD  
20 MISREPRESENTATIONS BEFORE THE COURT. AND SOME OF OUR CONCERNS  
21 STEM FROM THE FACT THAT THERE IS A -- YOU KNOW, DUANE SAYS IN  
22 HIS DEPOSITION THAT HE DID SEEK THERAPY BECAUSE OF HIS  
23 TERMINATION FROM IXL, WHICH IS DIFFERENT THAN WHAT IXL -- WHAT  
24 THE EEOC SAID IN THEIR INTERROGATORIES.

25 SO, CLEARLY, THIS IS A CONCERN OF OURS, AND TO THE

1 EXTENT THAT WE ARE ON THE SAME PAGE, YOU KNOW, THAT'S -- TO THE  
2 EXTENT THEY AGREE NOT TO USE THAT TESTIMONY OR DOCUMENTARY  
3 EVIDENCE WHICH, YOU KNOW, I'VE NEVER BASICALLY DOUBTED BECAUSE,  
4 YOU KNOW, AS INDICATED THE EXPERTS DEADLINE HAS PASSED, NO  
5 DOCUMENTS WERE PRODUCED. SO TO THAT EXTENT WE ARE IN  
6 AGREEMENT.

7 **THE COURT:** WAIT, WAIT, WAIT, WAIT, WAIT. IT APPEARS  
8 WE'RE ARGUING OVER TO THE EXTENT THAT WE ARE IN AGREEMENT. SO  
9 LET ME JUST SAY THIS -- AND JUST A BRIEF ANSWER TO THIS FROM  
10 THE EEOC.

11 THERE'S NO CLAIM HERE FOR A SPECIFIC PSYCHIATRIC  
12 INJURY, I BELIEVE, BASED ON WHAT YOU SAID WITH REGARD TO  
13 DIAGNOSES AND THINGS LIKE THAT. THERE'S NO CLAIM HERE FOR  
14 UNUSUALLY SEVERE DISTRESS, AND YOU'RE NOT GOING TO HAVE A  
15 MENTAL HEALTH EXPERT TESTIFY IN THIS CASE.

16 ARE ALL THOSE CORRECT?

17 **MS. SANGHVI:** THAT IS CORRECT (INDISCERNIBLE) GARDEN  
18 VARIETY EMOTIONAL DISTRESS DAMAGES.

19 **THE COURT:** OKAY. SO APPLYING EITHER THE NARROW OR  
20 LIMITED BROAD WAIVER STANDARDS ADOPTED IN THE VAST MAJORITY OF  
21 CASES DECIDED IN THIS DISTRICT, THE COURT FINDS THAT THE  
22 PLAINTIFF HAS NOT WAIVED THE PSYCHOTHERAPIST PATIENT PRIVILEGE.  
23 ALL RIGHT? SO THAT WILL BE MY RULING ON THAT.

24 AND I BELIEVE EARLIER I MIGHT HAVE SAID  
25 PSYCHO-PATIENT THERAPIST PRIVILEGE. I DON'T KNOW IF THAT WAS

1 FREUDIAN OR YUNGIAN SLIP, BUT EITHER WAY IT'S REALLY  
2 PSYCHOTHERAPIST-PATIENT PRIVILEGE.

3 ALL RIGHT. WELL, THANK YOU FOR YOUR TIME THIS  
4 MORNING. THOSE ARE MY RULINGS: NO AND NO.

5 DOES EITHER PARTY WANT A MORE SPECIFIC DETAILED  
6 WRITTEN ORDER ON THIS, OR ARE YOU GUYS OKAY WITH A MINUTE  
7 ORDER?

8 **MS. SANGHVI:** YOUR HONOR, THE --

9 **THE COURT:** IN OTHER WORDS, IS ANYONE GOING TO APPEAL  
10 ME?

11 **MS. SANGHVI:** THE EEOC DOES NOT PLAN ON FILING  
12 OBJECTIONS TO YOUR ORDER, YOUR HONOR.

13 **MS. MENEZES:** IXL LEARNING DOES NOT PLAN ON FILING  
14 OBJECTIONS TO YOUR ORDER, YOUR HONOR.

15 **THE COURT:** ALL RIGHT. I WILL GET AN ORDER OUT  
16 TODAY. THANK YOU EVERYONE. HAVE A GOOD MORNING.

17 (PROCEEDINGS ADJOURNED AT 10:26 A.M.)  
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CERTIFICATE OF TRANSCRIBER

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR, RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE ACTION.

  
JOAN MARIE COLUMBINI

MAY 22, 2018