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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

ADRIAN SCOTT DUANE,

Plaintiff-Intervenor,

vs.

IXL Learning, Inc.,

Defendant.

Case No.: 3:17-cv-02979-VC

PLAINTIFF EEOC AND PLAINTIFF-INTERVENOR'S JOINT MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT IXL'S MOTION FOR SUMMARY JUDGEMENT AND REPLY IN SUPPORT OF PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT

Date: September 20, 2018
Time: 10:00 am
Courtroom: 4, 17th Floor
Judge: Hon. Vince Chhabria

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I. INTRODUCTION

Scott Duane was a dedicated employee who carefully and thoughtfully balanced the demands of his job and medical appointments while trying to keep his gender confirmation procedures private. During his tenure at IXL, Duane endured and witnessed a pattern of behavior and comments that he believed were discriminatory. He received misinformation from Human Resources about his legal right to take medical leave, withstood prying inquiries about his gender identity and sexual orientation, and challenged IXL's initial denial of a reasonable accommodation for his disability. He voiced opposition to discrimination in writing, during meetings, and finally through a negative review of IXL on Glassdoor. There is sufficient evidence for a jury to conclude that IXL founder and owner, Paul Mishkin, knew Duane had opposed discrimination in writing, consulted an attorney about his rights, resisted IXL's denial of his accommodation request, and made internal discrimination complaints. A jury may infer that Mishkin reacted when he learned that Duane also publicly broadcasted his perceptions about IXL's discriminatory environment and fired Duane because of this protected activity. Accordingly, the Court should deny Defendant's motion for summary judgment.

Additionally, the Court should grant Plaintiffs' Motion for Partial Summary Judgment on the affirmative defenses abandoned by IXL. IXL also has not demonstrated triable issues for the affirmative defenses of (1) failure to mitigate; and (2) preclusion of FEHA claim based on res judicata and statute of limitations.

II. FACTS

A. Duane's Employment With IXL

Adrian Scott Duane is a transgender male. [Sanghvi Declaration in Support of Joint Motion for Partial Summary Judgment, Exh. 1 (EEOC Charge of Discrimination) at ¶1, p.1, ECF No. 69-01.][1] Duane received a Ph.D. in mathematics in June 2013 from the University of California, San

[1] Plaintiffs will cite to all exhibits by their exhibit number and brief description only. All new exhibits will be numbered sequentially following those in the opening brief to avoid confusion between the two (2) Sanghvi declarations. Plaintiffs have enumerated all their exhibits in a Table of Exhibits as required by this Court's Civil Standing Order No. 38.

Diego, with a G.P.A. of 3.93. [*Id.*] Duane began working as a Product Analyst for IXL Learning, Inc. on July 10, 2013, and reported to Kate Mattison. [Exh.11 (IXL Resp. to EEOC RFA) at Nos. 1, 2, p.3.] David Keyes supervised Duane from January 2014 until January 8, 2015. [*Id.*, at No. 4, p.3.] Duane was primarily responsible for writing and reviewing design specifications for the IXL website and mobile applications. [Sanghvi Declaration in Support of Joint Opposition to Defendant IXL's Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Partial Summary Judgment, Exh. 29 (Keyes Dep.) at 34:10-25 (see FN 1).]

B. Duane's Experiences Gave Rise to a Reasonable Good Faith Belief that IXL Engaged in Discriminatory Practices.

Duane's experiences at IXL informed his belief that IXL's workplace environment was discriminatory. Beginning with employee orientation and continuing through his termination, several occasions caused Duane to question IXL's compliance with EEO laws and the competence of HR representatives. During orientation in July 2013, HR Representative, Maricela Prado, glossed over IXL's EEO policies on disabilities, announcing that she was training a "bunch of young, healthy guys" who "didn't need [the information]." [Exh. 1 (EEOC Charge) at ¶ 48, p.12.] Her attitude and glib disclaimer of the need for this information chilled Duane from inquiring and potentially revealing his private medical circumstances. [*Id.*, at ¶ 49, p.12.] Subsequently, IXL's Human Resources Manager, Brad Marshall, provided inaccurate information about the length of short-term disability pay. [Exh. 39 (Prado email compilation) at IXL-1659-1660.] In a meeting to discuss medical leave for surgery, Prado asked about the protective sleeve on Duane's arm. After he revealed he would need hand therapy after surgery, Prado queried why the surgeon had to operate on Duane's right arm instead of his left. [Exh. 1 (EEOC Charge) at ¶¶ 59-60, pp.14-15; *see also* Exh. 34 (Duane Dep.) at 172:10-174:7.] Similarly, Recruiting Manager Karen Penner probed Duane about his surgery after he returned unable to speak properly and with a slight limp. [Exh. 1 (EEOC Charge) at ¶ 32, p.8.] Duane also worried whether IXL managers would keep his private medical information confidential after Penner revealed a co-worker's Lupus diagnosis and liposuction surgery. [*Id.* at ¶¶46-47.]

Duane had several conversations with co-workers and managers involving intrusive

questions related to his gender identity and sexual orientation. In September 2013, while at lunch with Penner and co-worker Nemo Curiel, Prado asked Duane if he liked to date men or women. [Exh. 1 (EEOC Charge) at ¶24, p. 6.] In addition, after Duane began dating Jenna Mandis in July 2014, co-worker Jeremy Murphy asked Duane if it was his first time dating a woman. [*Id.*, at ¶38, p. 9; *see also* Exh. 33 (Murphy Dep.) at 55:5-14.] Michael Pi, a co-worker on IXL's Sales team, asked Duane questions about being gay, referred to a transgender student by the wrong pronoun, and questioned why Duane knew so much about transgender youth. [*Id.*, at ¶25, p.6.] Pi later asked co-worker Nina Wu whether "Scott used to be a girl?" [*Id.*, at ¶ 39, p.9; *see also* Exh 41 (Duane/Wu FB post) EEOC_000363; Exh. 42 (Duane/Wu FB post) EEOC_000364).] Upon learning that colleagues were discussing his gender identity, Duane concluded that IXL fostered an environment that condoned such gossip and did not discourage behavior or comments hostile to queer and transgender employees. [Exh. 1 (EEOC Charge) at ¶ 39, p. 9.]

Duane's co-workers and some managers knew about prominent scars on his body, indicia of his gender confirmation surgeries. [Exh. 32 (Prado Dep.) at 54:13-15.] Shortly after his hire, Duane participated in a "new employee" urban scavenger hunt during which Penner drew the Golden Gate Bridge on his bare chest, which has obvious scarring from a bilateral mastectomy. [Exh. 1 (EEOC Charge) at ¶21, p. 5; *see also* Exh. 32 (Prado Dep.) at 53:15-57:21.] Prado photographed Penner drawing on Scott's bare chest to prove their group completed the activity. [*Id.*, at 556:13-56:16.] IXL used the photograph in a slide show later that day and saved it to the "fun" folder in IXL's shared drive. [Exh. 1 (EEOC Charge) at ¶21, p. 5.] Gary Yee, a co-worker who used the same on-site gym locker room as Duane, asked Duane about the visible scarring on his chest and the purpose for the surgery causing the scars. [*Id.*, at ¶ 29, p.7.]

Duane's co-workers were privy to information that revealed or generated curiosity about his gender identity and sexual orientation. Duane believed that several indicators could have revealed that he was transgender, rather than "mainstream gay."[2] [Exh. 34 (Duane Dep.) at 21:8-23:5.] First,

[2]When asked by counsel how he defined "mainstream gay", Duane explained, "folks who were cis gender, not really too gender variant. Kind of stayed within, you know, one standard deviation of what society would consider normal gender presentation or typical gender presentation and, you

as early as July 2013, Duane's chest scars were visible to anyone present at the scavenger hunt or who later saw the photograph. [*See e.g.*, Exh. 32 (Prado Dep.) at 53:15-54:15.] Second, other employees were aware that Duane engaged in LGBTQ activism, which gave rise to assumptions. [*See e.g.*, Exh. 35 (Mattison Dep.) at 98:20-99:13; Exh. 33 (Murphy Dep.) at 54:12-54:23; Exh. 32 (Prado Dep.) at 78:4-79:1; Exh. 34 (Duane Dep.) at 21:-22:5, 50:22-51:16.] Third, Duane believed his physicality of being "short" and "not [having] a very deep voice for a man" could also have added to the perception that he was transgender. [Exh. 34 (Duane Dep.) at 21:8-23:5.] Finally, he brought his then partner, Jenna Mandis, a cis gender woman who is also gender variant, to the holiday party in December 2014. [Id.] Duane introduced Mandis as his partner to Prado, Murphy, Keyes, and Penner. [Exh. 1 (EEOC Charge) at ¶ 41, p.10.] In Duane's experience, because others often perceived him as a gay man and Mandis as a stereotypically gay woman, their presence together raised questions as to their sexual orientations and gender identities. [*Id.*, at ¶ 42, p.10; *see also* Exh. 34 (Duane Dep.) at 22:9-23:5.] Mandis perceived that IXL employees were "surprised" and that the experience was "awkward." [Exh. 37 (Mandis Dep.) at 10:18-11:15.] Duane communicated to her that it was "uncomfortable." [*Id.*, at 12:4-12:11.] Both Prado and Keyes testified they met Mandis at the party, and despite believing Duane was a gay man, both claimed they were not surprised to see him with a female partner. [Exh 29 (Keyes Dep.) 64:9-66:6; Exh. 32 (Prado Dep.) 75:13-81:3, at 77:14-24, 80:21-81:3.]

In 2014, of the 184 employees at IXL, 161 were White or Asian. [Exh. 30 (Mishkin Dep.) at 138:16-24.] Duane perceived IXL's demographics as a reflection that IXL was unwelcoming to other people of color. [Exh. 34 (Duane Dep.) at 69:8-71:5.] Duane discussed the workforce demographics with his friend and co-worker, Nemo Curiel – one of the few Latino employees at IXL – which contributed to Duane's perception. [Exh. 34 (Duane Dep.) at 71:2-5; *see also* Exh. 31 (Curiel Dep.) at 61:18-62:9.]

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know, dated specifically their own gender. So cis men dating cis men. Cis women dating cis women." [Exh. 34 (Duane Dep.) at 32:1-11.] Duane also listed people he did not deem "mainstream gay": "gender variance and people that have sexualities that are – that are not just man dating man, woman dating woman. So queer people, bisexual people, poly people, those – those categorizations are what I was thinking of when I was saying outside of mainstream gay." [*Id.* at 32:22-33:2.]

Duane also observed examples of gender discrimination. Duane learned that Jessica Morse, a female co-worker, was paid approximately $10,000 less than Curiel, a male comparator with similar skills and qualifications. [Exh. 34 (Duane Dep.) at 178:19-179:20.] Similarly, Duane observed Keyes, a straight, white, cisgender male receiving a promotion over Isidora Milin, a co-worker who Duane perceived to be a woman of color[3] and an immigrant and who deserved the promotion. [Exh. 34 (Duane Dep.) at 178:19-181:10.]

1. IXL's Ineffective HR Staff

Throughout Duane's employment, IXL's HR Department personnel fluctuated and at most consisted of two individuals for a company of almost 200 employees. [Exh. 40 (IXL Answer to EEOC 2nd Rogs) at No. 12, p.4-5.] Lenore Ockerberg managed both HR and operations functions until IXL hired Brad Marshall as the HR Manager in January 2014. [Exh. 36 (Gu 30(b)(6) Dep.) at 31:10-32:21.] IXL asked Ockerberg to step away from HR to focus on operations. [Exh. 30 (Mishkin Dep.) at 55:16-56:20.] IXL then fired Marshall on September 23, 2014, for "performance" issues. [*Id*. at 57:7-18; Exh. 40 (IXL Answer to EEOC 2nd Rogs) at No. 11, p.4; Exh. 44 (IXL termination list) IXL-1240; *see also* Exh. 11 (IXL Resp. to EEOC RFA) at Nos. 52-53, p.11.] Prior to firing Marshall, IXL knew at least one employee had complained about how Marshall gathered ethnicity information for an EEOC form. [Exh. 30 (Mishkin Dep.) at 58:8-19.] After Marshall's termination, Prado handled HR related issues and consulted Lenore Ockerberg. [*Id*. at 154:12-22.] Ultimately, on April 28, 2015, IXL also fired Ockerberg for "ethics." [*Id*. at 50:22-52:23; Exh. 44 (IXL termination list) IXL-1240.]

2. Duane's Leave of Absence and Remote Work Request

In July 2014, Duane requested two months of medical leave. [Exh. 1 (EEOC Charge) at ¶ 52, p.13.] Around the same time, Duane began weekly, two-hour pre-operative afternoon appointments close to his home in Oakland, CA. [*Id*.] Duane asked to work from home to minimize time away from work: he didn't feel comfortable asking for a half day off weekly knowing he would

[3] Defendant submitted a photograph of Ms. Milin to argue that she is not a person of color. Exh. N. The exhibit should be stricken as inadmissible. [*see infra*, Section VI] Duane can be mistaken about Milin's race, as long as his belief is reasonable. Whether his perception was reasonable is a question for the jury.

need two months off later that year. [Exh 34 (Duane Dep.) at 47:14-50:21, at 48:12-16.] Duane described a "culture of guilt" at IXL around taking sick days because employees were expected to produce the same amount even when they were ill. [*Id.*, at 48:16-48:22.] Keyes questioned Duane about decreased productivity on the Tuesdays he worked remotely. [*Id.*, at 49:1-4.] Duane was upset by Keyes's criticism since Keyes knew about his two-hour medical appointments and because Duane was trying, despite the long and painful treatments he received those days, to produce eight hours of work. [*Id.*, at 49:4-50:1.] Keyes later suggested that Duane take sick leave after each appointment so Keyes could adjust his expectations as to Duane's productivity. [*Id.*, at 50:2-50:21; *see also* Exh. 29 (Keyes Dep.) at 74:6-74:21.] At the time, Duane was thankful. [Exh. 34 (Duane Dep.) at 50:11-21.]

During a meeting to finalize his two-month leave, Keyes told Duane he would be flexible if Duane needed to work remotely or part-time when he returned from surgery. [Exh. 1 (EEOC Charge) at ¶ 59-62, p.15.] Duane informed Keyes on December 19, 2014, that he had developed a post-operative fistula and asked to split his work, 50 percent in the office and 50 percent at home, while he healed. [Exh. 49 (12/19/14 Duane/Keyes email) at IXL-572; *see also* Exh. 29 (Keyes Dep.) at 71:16-72:5 (authenticating Exh. 49).] Keyes consulted his supervisor, Kate Mattison, and HR representatives Ockerberg and Prado. [*Id.*, at 66:13-67:11.] Ockerberg warned Keyes that IXL risked suit if they denied Duane's request given his medical condition, since they let other Product Analysts work remotely. [*Id.*, at 72:10-73:5; Exh. 48 (Mattison Gchat) IXL-0817; *see also* Exh. 11 (IXL Resp. to EEOC RFA) at Nos. 10-11, p.4 (authenticating Exh 48).] Nonetheless, because Keyes did not fully agree with Ockerberg, he replied that he preferred Duane to be in the office where Duane was more productive and asked about accommodating him in-office or by extending his leave. [Exh. 49 (12/19/2014 Duane/Keyes Email) at IXL 571; *see also* Exh. 29 (Keyes Dep.) at 73:5-13.] Duane then advised Keyes that he had consulted an employment attorney who explained that his remote work request qualified as a request for reasonable accommodation under the ADA, and pointed out IXL's willingness to permit telecommuting for non-medical needs. [Exh. 49 (12/19/2014 Duane/Keyes Email) at IXL 0571.] Keyes viewed Duane's advocacy as condescending and combative. [Exh. 29 (Keyes Dep.) at 75:16-76:18.] Keyes forwarded Duane's email to HR and

Mishkin. [*Id.*, at 77:23-78:7.] During a phone call the next morning, Keyes, though driving in a car with his wife, provided Mishkin with background details about Duane's pre-operative appointments, his leave of absence, and the development of a post-operative complication giving rise to the telecommute request. [*Id.*, at 78:21-80:5.] Mishkin advised that Keyes draft, for his review, an email accommodating Duane and devise a work plan for Duane that was acceptable to Keyes. [*Id.*, at 80:6-15.] Keyes received Mishkin's approval prior to sending Duane a response. [*Id*. at 80:16-81:6.]

On December 24, 2014, in an email to Duane, Keyes acknowledged that IXL permitted employees to telecommute subject to manager discretion and attributed his reservations about granting Duane this arrangement to Duane's productivity while telecommuting for pre-operative appointments. [Exh. 49 (12/19/2014 Duane/Keyes Email) at IXL-569.] Keyes also requested written documentation to support Duane's accommodation request. [*Id.*] Later that day, Duane explained the difference between the two requests, noting "[i]n retrospect, I should have requested a reasonable accommodation for my medical situation from the beginning, rather than attempting to keep up with work on those days." [*Id*.] Duane submitted a letter from his surgeon recommending a remote work arrangement due to Duane's postoperative complication. Though Duane was satisfied with the arrangement, he "wasn't happy that he had to advocate so fiercely" to get the accommodation and believed the company should have known more about the accommodation process. [Exh. 34 (Duane Dep.) at 163:14-164:21.]

Keyes sent Duane a detailed written Remote Work Plan when he returned to work on December 30, 2014. [Exh. 29 (Keyes Dep.) at 88:15-21; *see also* Exh. 43 (Remote Work Plan) IXL-1650; Exh. 11 (IXL Resp. to EEOC RFA) at No. 56, p.11 (authenticating Exh. 43).] They met later. During the meeting, Keyes announced two new remote work arrangements: new hire Matthew Bleecher was telecommuting full- time because of his inability to relocate his family, and Gina Bland was working remotely half-time so she could be close to her husband, who was living in D.C. [Exh. 29 (Keyes Dep.) 86:5-25, 88:22-90:58; *see also* Exh. 1 (EEOC Charge) at ¶ 74, p.17-18.] Keyes then outlined Duane's remote work plan. [Exh. 29 (Keyes Dep.) at 90:5-19; Exh. 43 (Remote Work Plan).] Duane concluded that IXL was treating him differently than non-disabled, cisgender,

and heterosexual employees regarding remote work because of his disability and sexual orientation. [Exh. 1 (EEOC Charge) at ¶75, p.18; Exh. 34 (Duane Dep.) at 103:3-104:5; Exh. 37. (Mandis Dep.) at 18:3-25.] According to Keyes, Duane appeared angry and non-communicative during this meeting. [Exh. 29 (Keyes Dep.) at 89:16-90:4.] Other employees did not complain about Duane's demeanor upon his return. [Exh. 29 (Keyes Dep.) at 92:3-93:6.] In fact, Milin had a productive meeting with him the morning before he was fired. [Exh. 38 (Milin Dep.) at 45:9-47:8.]

That evening, Duane posted an anonymous review on Glassdoor.com explicitly citing race, national origin, gender, and sex discrimination. [Exh. 50 (Prado email with post) IXL-1677-1684.] Duane posted that IXL managers had "no idea what the word 'discrimination' means," identified specific groups (White, Asian, "mainstream gay") he believed IXL favored, and specified how they were favored, i.e., benefits such as "flexible hours, interesting projects, praise, promotions, and a big yearly raise." [*Id*.] He concluded with the following advice to management: "Build a culture that encourage [sic] respect for people that encourages respect for people of all walks of life." [*Id*.] While many events led to the post, Duane likely would not have posted if he had not felt subjected to discrimination during the accommodation meeting with Keyes. [Exh. 34 (Duane Dep.) 104:16-22.]

3. Discrimination Complaints and Termination

On January 6, 2015, Keyes met with Duane "to clear the air and resolve the conflict." [Exh. 29 (Keyes Dep.) at 98:14-106-25, at 98:14-99:1.] Duane told Keyes about the instances of discrimination he perceived. Duane elaborated that he "was not at all happy with how the company had dealt with [his] disability leave," which left him feeling "uncomfortable and unwelcome" because IXL had denied what he was entitled to under the law. He recounted "a long line of inappropriate things that happened around disability," starting with Prado's dismissive attitude about disability rights during orientation, Marshall providing inaccurate disability benefits information, and Prado asking intrusive questions about the scars on his arm. [Exh. 1 (EEOC Charge) at ¶¶ 77-80, pp.18-19.]

After meeting with Duane, Keyes debriefed Prado, Ockerberg, and Mishkin. He told them Duane was "very upset" because IXL had discriminated against him and not provided a reasonable

accommodation. [Exh. 29 (Keyes Dep.) at 107:6-111:3.] Prado then compiled her emails with Duane, including those where he informed her he had consulted a disability rights attorney, and sent them to Mishkin. [*See* Exh. 32 (Prado Dep.) at 112:9-113:11; Exh. 39 (Prado email compilation) at IXL-1656.] Mishkin emailed Duane to acknowledge that Duane "voiced a complaint about discrimination" and to schedule a meeting, stating, "Discrimination of any type, including disability discrimination, is unacceptable to me and to IXL, and I need to understand what has been occurring so that I can take action immediately to correct it." [Exh. 45 (Duane/Mishkin meeting email) IXL-1663; see also Exh. 11 (IXL Resp. to EEOC RFA) at No. 22, p.6 (authenticating Exh. 11).] Hours later, Prado saw Duane's Glassdoor post and immediately forwarded it to Mishkin. [Exh. 50 (Prado email with post) IXL-1666-1673; *see also* Exh. 11 (IXL Resp. to EEOC RFA) at No. 24, p.6 (authenticating).] Prado and Keyes concluded that Duane authored the post based on the writing style, "the date that it was posted were the same dates that he came back from [disability] leave," and his "attitude." [Exh. 32 (Prado Dep.) 100:25-103:18; Exh. 29 (Keyes Depo.) at 115:21-116:16; Exh. 52 (Prado email re style comparison) at IXL-1688.]

Mishkin, Ockerberg, Prado and Keyes met on January 7, 2015. After Keyes confirmed his belief that Duane wrote the post because of his "attitude," Mishkin decided to fire Duane, claiming the post was "slanderous." [Exh. 29 (Keyes Dep.) at 116:10-16.]

Mishkin was intent on firing Duane for the post irrespective of whether his allegations of discrimination had merit. [*See* Exh. 30 (Mishkin Dep.) at 142:9-12.[4]] Nothing Duane could have said at that point would have changed Mishkin's mind. [*Id.*, at 144:4-18.] Mishkin did nothing other than read the post before concluding the allegations in the post were false. [*Id.*, at 134:1-4.] Mishkin took no steps to investigate the validity of any of Duane's assertions. [*Id.*, at 179:18-182:14.] He did not consult EEO-1 data[5] to review the demographics of his work force. [*Id.*, at 182:6-14.] Mishkin did not consult managers or review past pay or promotion decisions. [*Id.*, at

[4] *But see* IXL Answer at ¶34, ECF No. 12, where IXL denies that on January 7, 2015, Mishkin decided to fire Duane the following day. Again, this contradiction implicates credibility and creates a disputed genuine issue of material fact.

[5]The EEO-1 report (Standard Form 100) is collected annually under the authority of Title VII. 42 U.S. 42 U.S.C. §2000e-8(c). Employers covered by Title VII are required to keep employment data categorized by race/ethnicity, gender and job category. 29 C.F.R. §§1602.7 through 1602.14.

181:16-182:5.] Mishkin decided he did not need to investigate because he believed Duane's claims were false. [*Id.* at 134:1-4].

Duane met with Mishkin on January 8th. [*Id.*, at 145:15-21.] Mishkin claimed he still wanted to hear Duane's discrimination complaints, although he would not have changed his mind about firing Duane. [*Id.*, at 144:4-18.] Duane told Mishkin that Keyes' initial denial of his requested accommodation was illegal: Mishkin disagreed based on his own Google research and "common sense." [*Id.*, at 146:20-149:1] Duane reiterated to Mishkin his complaints about the events of the new employee orientation, Penner's disclosure of a subordinate's medical information, and the inaccurate disability leave information he received from Marshall. [*Id.*, at 152:6 - 153:21; *see also* Exh. 1 (EEOC Charge) at ¶¶ 82-87, pp.20-21.] Duane also suggested that Prado and Keyes needed additional training on disability issues. [Exh. 30 (Mishkin Dep.) at 157:4-12.] Mishkin asked about Duane's claim in the post that "there are no politics [at IXL] if you fit in." [*Id.*, at 170:21-24.] Duane responded that as a queer person he did not fit in. [*Id.*, at 170:25-171:20.] Mishkin disagreed with Duane's impression of the company and asked if Duane was talking about discrimination or friendships. Duane said they were intertwined. [*Id.*, at 170:23-171:20.] Duane also told Mishkin that he believed IXL tolerated a culture of discrimination at IXL. [Exh. 1 (EEOC Charge) at ¶87, p.21.] When Mishkin confronted Duane with the Glassdoor review, Duane offered to remove it. [Exh. 30 (Mishkin Dep.) at 169:24-171:20.] Nonetheless, Mishkin fired Duane because his post showed "poor judgment and ethics." [Exh. 1 (EEOC Charge) at ¶89; Exh. 30 (Mishkin Dep.) at 223:4-224:2.] IXL admits that the Glassdoor post was the reason for Duane's termination. [Answer, ECF 12 at ¶37; Exh. 13 (IXL Resp. to EEOC RFA) at No. 37.]

4. Glassdoor

Glassdoor is an online job and recruiting site that maintains a database of company reviews by employees and applicants as well as provides employers recruiting and branding solutions for purchase.[6] Glassdoor makes clear in "Community Guidelines" that it will "never suppress, filter or delete content simply because it is negative/lower-rated, or positive/higher rated."[7]

[6] https://www.glassdoor.com/about/index_input.htm, last accessed August 16, 2018.
[7] https://help.glassdoor.com/article/Community-Guidelines/en_US/, last accessed August 16, 2018.

IXL subscribed to the website from September 1, 2013, until January 2, 2015, to assist with talent recruitment. [Exh. 36 (Gu 30(b)(6) Dep.) at 109:24-111:3.] IXL encouraged employees to post reviews. [Exh. 33 (Murphy Dep.) at 99:22-100:2] and also monitored the reviews. [Exh. 32 (Prado Dep.) at 96:24-97:13]. IXL did not have a policy prohibiting negative posts. [Exh. 30 (Mishkin Dep.) at 140:15-17.] Indeed, IXL was aware that it did not have control over taking down negative posts. [*Id*., at 89:15-90:2.]

IXL discontinued the Glassdoor contract because it was not yielding promising candidates. [Exh. 36 (Gu 30(b)(6) Dep.) at 110:5-111:3.] The contract had lapsed by the time IXL discovered Duane's post. Between January 2015 to March 2018, IXL has more than doubled in size and has attracted strong talent although negative reviews, including Duane's, remain visible on Glassdoor. [Exh. 30 (Mishkin Dep.) at 186:14-187:18; *see also* Exh. 46 (Negative Glassdoor posts).]

Duane is the only person IXL fired for posting negative comments. [Exh. 11 (IXL Answer to EEOC 1st RFA) at ¶ 38, p.9.] In July 2013, Mishkin was fairly sure he knew who posted negative reviews entitled "New Low" and "Fed Up,", but nonetheless took no action against the employee. [Exh. 30 (Mishkin Dep.) at 87:7-90:19; Exh. 51 (Penner email) at IXL-1349.] IXL rarely endeavors to identify negative posters. [*See* Exh. TK (O'Brien Decl. attaching Exhibit 6).]

III. ARGUMENT IN SUPPORT OF PLAINTIFFS' OPPOSITION

A. Standard for Summary Judgment

A party is entitled to summary judgment if it can show an absence of disputed material facts and that it is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Here, the Court must resolve all ambiguities and inferences in favor of Plaintiffs as non-moving parties. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In addition, the Court "may not make credibility determinations or weigh the evidence." *Reeves. v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). The Ninth Circuit has emphasized the importance of "zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses." *McGinest v. GTE Serv. Corp.*, 360 F.3d

1103, 1112 (9th Cir. 2004) (citations omitted); *see also Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996) (recognizing the Ninth Circuit's "high standard for the granting of summary judgment in employment discrimination cases.")

B. Standard for Retaliation

Plaintiffs have sufficient evidence to establish a *prima facie* claim of retaliation: (1) Duane engaged in multiple forms of protected opposition activity; (2) IXL fired Duane; (3) because of his opposition to discrimination. *See University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013)[8] The degree of proof necessary to establish a prima facie case on summary judgment is "very little", even less than a preponderance of the evidence. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994); *Poland v. Chertoff*, 494 F.3d 1174, 1181 (9th Cir. 2007) (plaintiff need only prove that the protected activity and the negative employment action are not completely unrelated). Plaintiffs can also prove that IXL's reasons for firing Duane are pretext and that retaliation was the but-for cause of his termination. *See Nassar*, 570 U.S. at 364.

C. A Reasonable Jury Could Conclude that Duane Engaged in Protected Activity.

Title VII, the ADA and FEHA protect individuals who oppose practices made unlawful by civil rights statutes. *See* 42 U.S.C. §2000e-3(a); 42 U.S.C. 12203(a); Cal. Gov't Code §12940(h). The protections apply to individuals who act with a reasonable good faith belief that a potential EEO violation exists and in a reasonable manner to oppose it. *EEOC v. Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983). Here, a jury must decide material factual disputes regarding reasonableness.

1. Duane's Opposed Discrimination Multiple Times

"'When an employee communicates to [his] employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's *opposition* to the activity.'" *Crawford v. Metropolitan Government of Nashville and Davidson County*, 555 U.S. 271, 276 (2009) (emphasis in original) (citations omitted). There is ample evidence that Duane communicated his belief that IXL engaged in race, national origin,

[8] Defendant acknowledges that federal law controls claims brought under both Title VII [and the ADA] and FEHA. As a result, Defendant's citations to state law standards are of no moment.

gender, and disability discrimination when he: (1) requested to telecommute as an accommodation for a post-operative condition; (2) informed IXL that he consulted an attorney to dispute its denial of the accommodation; (3) complained of disability discrimination in a meeting with Keyes; and (4) lodged disability, gender identity and sexual orientation complaints in a meeting with CEO Paul Mishkin; and (5) posted a review on Glassdoor claiming IXL discriminated based on race, national origin, gender identity, and sexual orientation .

IXL ignores the entirety of Duane's complaints over time to focus solely on the Glassdoor post, and then argues that Duane did not oppose discrimination because the post did not explicitly mention disability accommodation, discrimination, or sick leave. All the discrimination complaints Duane made before and in the post are covered opposition activities. Further, even if the post was his only form of protest, it is protected activity. "[C]ourts have not imposed a rigorous requirement of specificity in determining whether an act constitutes opposition." *Zellerbach*, 720 F.2d at 1013 (citations omitted). Each sentence in the post cannot be read in isolation, segregated from Duane's overall experiences. Taken in its totality, the post lists protected bases for favored groups, describes some employment actions Duane deemed discriminatory, and identifies some individuals (HR) who engaged in discrimination.

Further, there is evidence that the post implicated disability discrimination[9]. The jury must consider the totality of circumstances to determine what Duane intended and what IXL understood when he referenced "discrimination" in the post. IXL instantly identified Duane as the author because he had just returned from disability leave, had just complained to Keyes about disability discrimination and purportedly had an "attitude." All the circumstances give rise to the reasonable inference that Duane put IXL on notice of Title VII and ADA discrimination. "[T]he 'task of disambiguating utterances is for trial, not for summary judgment.'" *Huff v. UARCO Inc.*, 122 F.3d 374-384 (7th Cir. 1997) (quoting *Shager v. Upjohn Co.*, 913 F.2d 398, 402 (7th Cir. 1990)).

[9] IXL relies on out of circuit case law to argue that the use of the word "discrimination" does not automatically constitute opposition. The cases IXL cites [ECF No. 70-1, at p.12] stand for the broader point that a factfinder must determine whether the employer was on notice of perceived Title VII and ADA discrimination. Here, the facts show that IXL was certainly on notice of disability discrimination.

2. Duane Had a Reasonable Good Faith Belief That He Was Opposing Discrimination.

A reasonable jury could conclude that Duane had a reasonable belief that he experienced and observed discrimination in violation of Title VII, the ADA and FEHA. The "reasonableness of [Duane's] belief . . . must be assessed according to an objective standard - one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims." *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994). Absent evidence of bad faith or intent to harass the employer, a factfinder can conclude that the employee had a reasonable belief that discrimination occurred. *Strother v. So. Cal. Permanente Medical Group*, 79 F.3d 859, 869 (9th Cir. 1996). Moreover, an employee's erroneous belief that an employer engaged in discrimination is reasonable, and thus actionable, if premised on a mistake made in good faith. *Moyo v. Gomez*, 40 F.3d at 984. Thus, the appropriate inquiry is whether, given the totality of circumstances, Duane had a reasonable basis to oppose perceived race, national origin, gender, and disability discrimination. *See EEOC v GoDaddy Software, Inc.*, 581 F.3d 951, 963 (9th Cir. 2009) (*quoting Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001)).

There is sufficient evidence for a jury to conclude that Duane reasonably believed IXL discriminated based on disability. Duane perceived disparate treatment when, on the heels of resisting Duane's accommodation request to telecommute for a few weeks, Keyes announced that two newer, non-disabled employees had received longer term telecommuting privileges so they could be closer to their opposite sex spouses.[10] Even IXL understood the specter of disparate treatment: Ockerberg warned Keyes that IXL risked a lawsuit by denying Duane an arrangement it granted to other Product Analysts. Also, Duane solicited and received legal advice that he was entitled to telecommute as a reasonable accommodation before objecting to Keyes's denial of his request.

Duane's perception of discrimination arose from other actions at IXL that were inconsistent with the ADA and FEHA. A manager disclosed a colleague's confidential medical conditions, an

[10] This observation also framed Duane's belief about disparate treatment based on gender identity and sexual orientation.

act prohibited by the ADA and FEHA. 42 U.S.C. §§12112(d)(3)(B), (4)(C); 29 C.F.R. §1630.14[11]; Cal. Code Regs. tit. 2, §11071(b)(3). Duane tolerated intrusive questions from an Human Resources official, a manager and co-workers about his medical conditions, surgeries, and scars. *Id.* Curiel told him that managers probed about the medical condition underlying Curiel's need for sick leave and criticized Curiel for taking too much leave. Duane, himself, felt pressured to officials to disclose medical information beyond what was statutorily required. *See e.g.,U.S. E.E.O.C. v. Dillard's Inc.*, No. 08CV1780-IEG PCL, 2012 WL 440887, at *4-6 (S.D. Cal. Feb. 9, 2012).

Duane endured hostile behavior because he identifies as "queer," not straight or "mainstream gay." An HR official, Prado, asked Duane if he liked to date men or women[12]. A co-worker queried Duane about being gay and his knowledge of transgender youth, then gossiped about whether Duane "used to be a girl." A colleague asked whether the procedure that caused chest scars was connected to his gender confirmation surgeries. Upon learning about Duane's partner, Jenna, another employee asked Duane if this was his first time dating a woman. A reasonable jury could agree with Duane's subjective impressions that IXL either ignored or permitted harassment based on gender identity and sexual orientation.[13]

Defendant questions the credibility of Duane's complaints that "mainstream gay" employees received favorable treatment, arguing that his colleagues perceived him as part of the favored group. Whether this is true is a question for the jury. Moreover, there is evidence in the record suggesting

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[11] *See also Enforcement Guidance on Disability–Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act* (EEOC Notice 915.002) (EEOC, July 27, 2000). http://www.eeoc.gov/policy/docs/guidance-inquiries.html last accessed August 16, 2018 ("The ADA requires employers to treat any medical information . . . (including medical information . . . voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA")).

[12] Prado's testimony reveals her confusion regarding Duane's gender identity, corroborating Duane's impression that she was ignorant of and insensitive to LGBTQ issues. [Ex. 32 (Prado Dep.) 75:13-81:3.] It also raises a question of fact regarding Prado's credibility requiring a jury determination.

[13] Title VII coverage for gender identity and sexual orientation is evolving. The, however, EEOC is clear that both are covered. *See e.a., Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012), *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015);*Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) Duane's belief is consistent with that of the agency charged with enforcing Title VII. Moreover, both are clearly covered by FEHA. Cal. Gov't Code §12940(a).

co-workers knew or suspected otherwise. Duane did not believe that all his colleagues perceived him to be "mainstream gay."[14] During an orientation exercise, Duane lifted his shirt, revealing the scars from his double mastectomy, which IXL photographed and uploaded into a shared folder accessible by all employees. The same scars were apparent to others in the gym locker room. According to Duane, several indicators, including physical attributes, scars, and his advocacy work could have revealed him as transgender. Most notably Duane testified, "I think that for a lot of people at that company, seeing me with a woman, especially a gender variant woman, was kind of the final clue that sort of, you know, put it in their minds that there was something going on with my gender and not just my sexuality." Keyes and Prado now claim they believed Duane was a gay man, but simultaneously claim no surprise when Duane introduced them to his female partner at the holiday party. Finally, irrespective of IXL's perception of Duane's gender identity, he was indeed not "mainstream gay": he is a transgender man who identifies as "queer" or gender variant.

Duane also had good reason to doubt HR's competence regarding equal employment opportunity workplace matters. In the year and half that Duane worked at IXL, the 200-person company normally employed only 1-2 people in the HR department with an inconsistent head of HR. During Duane's tenure, the HR Manager changed from Ockerberg to Marshall and back to Ockerberg. Whether due to instability or inexperience, the HR Department made mistakes. HR employees misguided Duane about the law surrounding disability pay, asked intrusive questions about his surgeries and sexual orientation, and incorrectly proclaimed that IXL's "young, healthy guys" didn't need to know about disability benefits. [15]

Duane also observed disparities in IXL's employment practices as to women and people of color. In 2014, of the 184 IXL employees, 161 were White or Asian. Duane and Curiel, one of the few Latino employees, discussed how IXL's demographics were not welcoming for a person of

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[14] Defendant's citations are frequently incomplete. For example, Defendant excerpted Duane's testimony to claim that he admitted his colleagues perceived him to be a white, mainstream gay man. [ECF No. 70-1 citing Duane Dep. at 60:16-17.] In fact, Duane said, "To be honest, I think that depends on whether [Keyes] knew about my partner [a woman] at the time or not and I just don't remember if he did or not." [Exh. 34 (Duane Dep.) 60:3-60:25 at 60:18-60:25.]

[15] Prado disputes this allegation and claimed nobody in management inquired about the omission. [Exh. 32 (Prado Dep.) at 64:1-7.] Mishkin claims he discussed the allegation with Prado. [Exh. 30 (Mishkin Dep.) at 166:25-168:16.] The discrepancies require a credibility determination.

color. Duane believed the disparity of Morse being paid less than Curiel was an example of gender discrimination. A jury can reasonably infer Duane perceived discrimination when he observed a woman being paid less than a man. Similarly, Duane perceived Keyes's promotion over Milin to be an example of discrimination at IXL on the basis of race, gender, and national origin.

The totality of Duane's experiences at IXL formed the basis of his Glassdoor post. A jury can reasonably infer from those many experiences and observations that Duane had a reasonable and good faith beliefs regarding IXL's treatment of people, like him, who found themselves "on the outside" based on their race, national origin, gender, including gender identity and sexual orientation, and family status. His beliefs were framed by interactions with managers whose behavior suggested an ignorance of prohibited workplace discrimination, and an HR staff that floundered when dealing with employees' disabilities, sexual orientation and medical conditions.

Defendant cannot sustain its burden by parsing each sentence in the Glassdoor post. This approach ignores the requirement to weigh evidence based on the totality of the circumstances. Plaintiffs need not prove that every sentence opposed discrimination. Context matters. Duane's Glassdoor review provided his overall perception of IXL as a workplace. Duane pointed to discrimination based on race, national origin, gender identity, and sexual orientation. He also listed boredom, menial work and a micromanaging CEO as "cons" at IXL[16]. The fact that he complained about other issues does not vitiate his complaints about discrimination. The law does not require such precision.

Finally, Defendant's argument that Duane had no basis for the assertions in the post, implicates Duane's credibility since Duane testified otherwise. A jury, not the Court, must decide credibility. *Reeves*, 530 U.S. at 150.

3. Duane's Glassdoor post was done in a reasonable manner.

Duane's internet protest is entitled to protection because it was reasonable. Courts balance the employee's right to oppose employment discrimination against the employer's need for a stable

[16] Duane is not the first and only IXL employee to give IXL a poor review. [Exh. 53 (Glassdoor Posts).] Since Prado and Penner received regular notifications regarding Glassdoor posts, IXL knew that others had similar negative impressions about IXL. [Exh. 32 (Prado Dep.) at 96:15-98:14.]

and productive work environment to determine the reasonableness of an employee's mode of protest. Complaints that are aired publicly or even "disloyal" are still entitled to protection. *See EEOC v. Zellerbach*, 720 F. 2d at 1014 (deeming reasonable employees' letter to employer's biggest customer protesting an affirmative action award to a company executive). As the Ninth Circuit observed, "[a]lmost every form of 'opposition to an unlawful employment practice' is in some sense 'disloyal' to the employer . . . [I]f a discharge or other disciplinary sanctions may be imposed based simply on 'disloyal' conduct, it is difficult to see what opposition would remain protected". *Id.* The question turns on whether the protected activity interfered with job performance. *Id*. at 1015.

Applying the Ninth Circuit standard, a jury could conclude Duane's verbal and written protected activities, including the Glassdoor post, were reasonable. IXL has no evidence of disruption to the workplace. IXL's claim that Duane's post interfered with recruitment is speculative, at best, particularly given the other negative posts about IXL on Glassdoor. IXL has no such evidence. [Exh. 30 (Mishkin Dep.) at 186:14-187:18.] Indeed, IXL had deemed Glassdoor an ineffective recruitment tool and terminated its contract before discovering Duane's post. Notably, although Duane's post remains on Glassdoor, IXL has more than doubled in size. [*Id.*]

IXL relies on distinguishable case law to argue unreasonableness. [*See* Def's MOL, ECF 70-01.] In *O'Day v.McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996), the Plaintiff stole documents listing employees targeted for lay-off from confidential files, then shared the list with another employee. The Plaintiff argued that stealing the documents was protected activity. *Id* at 763. The court disagreed, admonishing that it was "loathe to provide employees incentive to rifle through confidential files." *Id*. *Buchanan v. Genentech Inc.* is also factually distinguishable. The email at issue did not mention discrimination and violated a company policy prohibiting racially inappropriate communications. *Buchanan v. Genentech Inc.*, No. 09-01454 CW, 2010 U.S. Dist. LEXIS 90061 (N.D. Cal. Aug. 31, 2010). Duane's post, on the other hand, did not violate any workplace rules or policies. [*See* Exh. 30 (Mishkin Dep.), at 184:19-185:22.] And, in contrast to the *Pool* plaintiff, Duane used the word "discrimination" in his post while also saying that "better treatment" runs along protected classes of White, Asian, straight, or mainstream gay. *Pool v. Van Rheen*, 297 F.3d 899, 910-11 (9th Cir. 2002).

IXL raises questions of fact in its self-defeating attempt to argue that Duane's opposition activity was motivated by bad faith. IXL makes the unsupported assertion that Duane was angry. The assertion, however, begs the question: angry about what? This factual question requires the jury to divine intent or motivation. Furthermore, IXL incorrectly claims Duane "had already decided to quit his job at IXL" by the time he posted on Glassdoor. To the contrary, Duane testified: "I had not decided I was leaving, I had decided I was going to pursue other opportunities, but I wasn't going to leave without another job." [Exh. 34 (Duane Dep.) at 139:24-140:14.] A jury could find that Duane wanted a new job to escape the perceived discriminatory work environment.

4. Causation Raises Questions of Fact

Here, causation is clear. IXL admits it fired Duane because of the post. Nevertheless, a jury can also infer causation based on timing alone when the termination occurred "on the heels"of known protected activity. *McDaniel v. Donahoe*, No. 12-CV-05944-JSC, 2014 WL 4639918, at *12 (N.D. Cal. Sept. 17, 2014), citing *Dawson v. Entek Int'l*, 630 F.3d 928, 937 (9th Cir. 2011) (temporal proximity alone can constitute sufficient evidence of retaliation for purposes of both *prima facie* case and showing of pretext). The mere 24 hours between the Glassdoor post and Duane's precipitous termination raises a strong inference of retaliatory motive and establishes the *prima facie* case.

"Whether an adverse employment action is intended to be retaliatory is a question of fact that must be decided in the light of the timing and the surrounding circumstances." *Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2002). Here, the surrounding circumstances reflect an escalation of discrimination complaints, culminating with the Glassdoor post. In mid-December, Duane warned IXL that an attorney had advised him that the ADA entitled him to an accommodation. Keyes interpreted the email as combative and condescending and shared it with Mishkin. Less than two weeks later, on January 6, 2015, Duane accused Keyes of disability discrimination. Keyes debriefed HR and Mishkin about these complaints. Hours later, IXL discovered an anonymous post containing additional claims of discrimination, this time including race, national origin, gender and marital status. Keyes and Prado concluded that Duane authored the post based, in part, on Duane's recent return from disability leave and his "attitude". A jury could reasonably infer that their reference to Duane's attitude stemmed from his discrimination complaints during the preceding two

weeks. IXL admits that it fired Duane because of the post. A jury could conclude that the discrimination complaints in the post caused Duane's termination.

Nonetheless, Mishkin repeatedly denied that the post raised discrimination complaints. [Exh. 30 (Mishkin Dep.) at 174:3-176:5.] Against the backdrop of Duane's two-week campaign opposing perceived violations of the ADA, this assertion raises credibility questions for the jury.

D. Plaintiffs' Evidence of Pretext Raises Questions of Fact.

IXL asserts that it fired Duane because the Glassdoor post contained false information crafted to harm the company's recruitment efforts. Viewing the record as a whole, there is ample evidence that IXL's explanation is pretextual. Plaintiffs can demonstrate pretext either by "directly persuading the court that a [retaliatory] reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. at 256. When determining pretext, courts consider the information known to the employer when it took the adverse employment decision, the plausibility of the explanations offered in light of the evidence and any inconsistencies within these explanations. *Norris v. City and County of San Francisco*, 900 F.2d 1326, 1331 (9th Cir. 1990).

Mishkin's knowledge of Duane's mounting complaints, including those raised directly with him, provides a factual basis for the jury to conclude that IXL was motivated by retaliation. Further, IXL rejected Duane's offer to remove his post. If IXL was truly concerned about potential damage to its recruitment, it defies logic that the company would forego one of its only opportunities to remove the post. Most telling, however, is IXL's treatment of Duane in contrast to its other employees who posted negative Glassdoor reviews. IXL admits that Duane was the only person it punished for a negative post. Although IXL claims it did not fire anyone else because it could not identify the authors, its assertion is unworthy of credence. IXL never tried to identify them. Even when Mishkin likely knew the identity of a current employee with a "vendetta" who posted reviews entitled "New Low" and "Fed Up," IXL failed to act. In sum, IXL permitted employees to voice "common workforce gripes" on Glassdoor with impunity. It was only when those gripes were coupled with complaints of discrimination that IXL acted swiftly to fire the author, Duane. In other

words, "but for" the discrimination complaints, Duane would not have been fired.

E. Duane's FEHA Claim is Not Barred by Res Judicata

Res judicata is an affirmative defense that can be waived. [*See* Order Granting Intervention, ECF 40.] *See also, Perez v. Gordon & Wong Law Group, P.C.*, 2012 WL 1029425, at *4-5 (N.D.Ca. 2012). Here, IXL waived its res judicata defense with respect to Duane's retaliation claims under Title VII, the ADA, and FEHA pursuant to the agreement between counsel that if Plaintiff dismissed FMLA and tort claims pending before Judge Alsup, IXL would not object to Duane intervening in this action. Notwithstanding this agreement, IXL has now objected to Duane's intervention – specifically to his asserting retaliation claims under the state law that are identical to the EEOC's federal law claims – and represented to this Court that "there was no agreement [between counsel]." [Intervention Hearing Tr. at p. 28, ECF No. 35.] However, the email exchange between IXL's counsel and Duane's counsel establishes unequivocally that they did have such an agreement.[17] [Wilson/Marek intervention email, ECF No. 24-3 ("If you are asking whether IXL objects to Duane intervening in the EEOC case, [IXL] would not object.").] This language is clear and unequivocal.[18] In addition, when IXL initially objected to Duane's motion to intervene, IXL's counsel did not object to the addition of the FEHA claim[19] – which further corroborates that IXL's counsel believed it had waived its res judicata defense with respect to this claim. Moreover, IXL's counsel stated repeatedly he would provide notes and contemporaneous emails that support his

[17] While Duane believes this language is clear, to the extent that the Court concludes it is vague, res judicata is not appropriate in this situation. Courts have routinely stated the principle that "[e]ven if these threshold requirements [of res judicata] are established, res judicata will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed." *Dunkin v. Boskey*, 82 Cal.App.4th 171, 181, 89 Cal.Rptr.2d 44 (2000). Here, allowing IXL to avoid Duane's FEHA claims by asserting the res judicata defense would cause an injustice. Not only did IXL agree to waive its res judicata defense and expressly agree that Duane could intervene in the EEOC action, but also Duane made repeated attempts to stay the Alsup action to promote judicial efficiency and IXL rejected these attempts without any legitimate basis.

[18] As this Court said to IXL's counsel at oral argument when IXL's counsel claimed this language was intended to be only a limited waiver of res judicata: ". . . Why didn't you say, I don't object to his intervening on the claim that the EEOC brought, but I do object to his intervening to assert any claims that the EEOC did not bring? Why didn't you say that?" [Intervention Hearing Tr. at pp. 30-31, ECF No. 35].

[19] On August 11, 2017, IXL counsel emailed Duane's counsel listing IXL's reasons for objecting to the proposed intervenor complaint, but did not include that Duane was prohibited from asserting his FEHA claims because of res judicata. [Wilson/Marek intervention email, ECF No. 38-7.]

contention the parties did not reach any agreement, but he failed to do so.

IV. PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGEMENT.

A. Defendant Abandoned Several Affirmative Defenses

The party moving for summary judgment has the initial burden of showing that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). If the opponent has the burden of proof at trial, "the burden on the moving party may be discharged by 'showing'- . . . that there is an absence of any evidence to support the nonmoving party's case." *Celotext Corp. v. Catrett*,477 US. 317, 323 (1986). "When a non-moving party opposes summary judgment with respect to some claims, but not others, 'a court may, when appropriate, infer from a party's partial opposition that relevant claims or defenses that are not defended have been abandoned.'" *Marentes v. State Farm Mut. Auto. Ins. Co.*, 224 F. Supp. 3d 891, 919 (N.D. Cal. 2016) (quoting *Jackson v. Fed. Express*,766 F.3d 189, 196 (2d Cir. 2014)). The affirmative defenses discussed below must be dismissed because Defendant failed to respond to Plaintiffs' motion failed to raise an issue of material fact and/or the defenses are barred as a matter of law.

B. Defendant Has Failed to Establish a Triable Issue for Mitigation.

IXL's affirmative defense must fail. Defendant presented no proof that Duane failed to mitigate his damages. IXL did not identify even one job that Duane could have and should have obtained. It cannot bear its burden of establishing this defense. *Sias v. City Demonstration Agency*, 588 F.2d 692, 696-97 (9th Cir. 1978) (citing *Kaplan v. Intern. Alliance of Theatrical, etc.*, 525 F.2d 1354, 1363 (9th Cir. 1975) (Defendant must satisfy both prongs of the test)).

Further, there is sufficient evidence to show that Duane diligently searched for a position like his job at IXL for six months without success. He enrolled in AppAcademy after concluding he needed to increase his marketability by supplementing his skill set. [Duane Dep. at 187:5-15.] "[E]nrollment in school after a diligent job search does not constitute a failure to mitigate." *Killian v. Yorozu Auto. Tenn., Inc.* 454 F.3d 549, 557 (6th Cir. 2006) (citing cases). Duane utilized personal networks and placement offices to help him find work. IXL has not introduced any evidence contradicting Duane's testimony about his diligent efforts to find work, and therefore has not shown

that Duane failed to use reasonable care or diligence in seeking alternative employment.

C. The Issue of Damages Is Not Ripe For Summary Adjudication

Defendant's motion for alternate relief is perplexing since it seems to ignore the fact that Plaintiffs have asserted claims under Title VII, the ADA and FEHA. ECF No. 1 at ¶ 40, compare ECF No. 1 at ¶39. If Defendant is found liable for retaliation under Title VII and/or FEHA, Duane may be entitled to equitable relief as well as compensatory and punitive damages. 42 U.S.C. 1981a(b). Thus, it is premature to restrict Plaintiffs' damages to equitable remedies. Plaintiffs agree that *Alvarado v. Cajun Operating Co*, 588 F.3d 1261, 1270 (9th Cir. 2009) is controlling in the Ninth Circuit, and that Duane will not be entitled to compensatory or punitive damages under the Civil Rights Act of 1991 if a liability finding is restricted to the ADA claim. Nevertheless, Duane would remain entitled to the full range of damages available pursuant to Section 107 of the ADA (incorporating Title VII Section 706, 42 U.S.C. § 2000e-5(g)): the court may "enjoin the [defendant] from engaging in . . . unlawful employment practice[s], and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., or any other equitable relief as the court deems appropriate." *Id.*

D. Duane's State Law Claims Are Not Time-Barred

IXL's reliance on *E.E.O.C. v. PC Iron, Inc.*, No. 16CV02372CABWVG, 2018 WL 2018103 (S.D.Cal. May 1, 2018) is misplaced. In that case, the court held that the plaintiff's time to file her FEHA claims had not been tolled "[b]ecause [the intervenor plaintiff] did not act reasonably and in good faith by waiting more than a year after the EEOC issued its letter of determination and almost eleven months after the EEOC filed its complaint to assert her FEHA claims." *Id.*, at *6. Here, Duane intervened (on August 21, 2017) less than three months after the EEOC filed its complaint (on May 24, 2017) and notified IXL of its intent to do so (and secured an agreement from IXL that it would not object to the intervention) less than two months after the EEOC filed its complaint (on June 19, 2017). Thus, unlike in *PC Iron*, Duane's time to file his FEHA claim has been tolled by the doctrine of equitable tolling. *Id.*, ("Equitable tolling – extending the deadline for a filing because of an event or circumstance that deprives the filer, through no fault of his own, of the full period

accorded by the statute – seeks to vindicate what might be considered the genuine intent of the statute.")

IXL's interpretation of *PC Iron* leads to an absurd conclusion. Had the EEOC not decided to file this lawsuit on May 24, 2017 and instead issued its right-to-sue letter at that time, Duane's time to file his FEHA claims would certainly have been tolled. There is no support for an outcome whereby Duane is in a worse position because the EEOC elected to bring suit on his behalf.

V. ABANDONED DEFENSES

Plaintiffs are entitled to summary judgment on the following affirmative defenses because Defendant abandoned them by failing to present any supporting facts or argument: Affirmative Defenses Nos. 3 and 5; for EEOC; Affirmative Nos. 1, 3, 6, 7 and Conditions Precedent for Duane.

VI. ADDITIONAL RELIEF: MOTION TO STRIKE

Plaintiffs move to strike from Defendant's Summary Judgment papers the following exhibits as constituting or containing inadmissible hearsay: Exhs.; B; C; F; G; P; X; Y; Z.[20] Additionally, Plaintiffs move to strike from the record all pages of deposition transcripts filed by Defendants that it did not cite in its brief. Defendant's use of complete transcripts rather than relevant excerpts unnecessarily place inadmissible evidence as well as superfluous, private, or embarrassing details in the public record: Exhs. A; D; E; F; L. Fed. R. Evid. 401, 402, 403.

In considering a motion for summary judgment, a court may consider only evidence that would be admissible at trial. *See* Fed. R. Civ. P. 56(e) (affidavit shall set forth facts that would be admissible in evidence); *Chuang v. University of California Davis Board of Trustees*, 225 F.3d 1115, 1128 (9th Cir. 2000) (at summary judgment stage, any form of evidence that is otherwise admissible may be used to prove discrimination). Here, Defendant does not provide any information to show the authenticity of the documents and does not attach it to a letter swearing to the matters referred in the letter. Fed, R. Evid. 901, Fed. R. Evid. 801. As a result, it is inadmissible hearsay and should be stricken from the record.

[20] Defendant attached additional exhibits without appropriate authentication, but the EEOC does not oppose those because authentication was possible.

VII. CONCLUSION

A jury can draw reasonable inferences from disputed material facts that Duane reasonably believed he experienced and observed discrimination at IXL. He challenged the discrimination through e-mails, in-person, and ultimately on the internet. IXL, tired of Duane's persistent advocacy, impetuously decided enough was enough when it saw Duane's discrimination claims on Glassdoor. IXL admits that it fired him because of the post. This case cannot be resolved without weighing the evidence and drawing inferences regarding Duane's reasonableness and good faith, the credibility of witnesses and IXL's retaliatory intent. In addition, IXL has failed to raise triable issues for the affirmative defenses addressed in Plaintiffs' Motion for Partial Summary Judgment. Plaintiffs respectfully request this Court to:(1) deny Defendant's summary judgment motion; (2) grant Plaintiffs' Motion for Partial Summary Judgment; (3) strike Defendant's inadmissible evidence; and (4) grant the EEOC costs for unnecessary expenditure of time to bring a motion on topics Defendant intended on abandoning.

Respectfully submitted,

Dated: August 16, 2018

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

/s/ Ami Sanghvi
AMI SANGHVI, Senior Trial Attorney
Attorney for Plaintiff

THE MAREK LAW FIRM

/s/ David Marek
DAVID MAREK
Attorney for Plaintiff-Intervenor

LOCAL RULE 5-1(i)(3) ATTESTATION

I, Ami Sanghvi, am the ECF User whose ID and password are being used to file the Motion for Partial Summary Judgment. In compliance with Local Rule 5-1(i)(3), I hereby attest that David Marek concurred in this filing

Dated: August 16, 2018

/s/ Ami Sanghvi
AMI SANGHVI, Senior Trial Attorney

Sanghvi Decl ISO Plaintiffs' Motion for Partial Summary Judgment			
Exh #	**Description**	**Prodution #**	**ECF #**
1	EEOC Charge	EEOC_000003-	69-1
2	Notice to Duane/IXL	EEOC_000046	69-2
3	Intake letter	EEOC_000047	69-3
4	Transfer letter	EEOC_000048	69-4
5	Determination letter	EEOC_000001 - EEOC_000002	69-5
6	NLRB Charge	IXL-0001 - IXL-0007	69-6
6-1	NLRB Dismissal	IXL-0779	69-7
7	NLRB Order	IXL-0200 - IXL-0205	69-8
7-1	NLRB transcript excerpt		69-9
8	IXL Resp to EEOC Rogs		69-10
9	IXL Answer to EEOC 3rd Rogs		69-11
10	IXL Resp to EEOC RFD		69-12
11	4-9 IXL Answer to EEOC 1sr RFA		69-13
12	2-21 IXL Corrected Amd Discl		69-14
13	4-13 EEOC 2nd Suppl Discl		69-15
14	EEOC Resp IXL First Rogs		69-16
5	MC ltr re Aff Defenses		69-17
16	Counsel email excerpt re defenses		69-18
17	Mishkin transcript excerpt		69-19
18	Keyes transcript excerpt		69-20
19	Duane transcript excerpt		69-21

Sanghvi Decl ISO Plaintiffs' Motion for Partial Summary Judgment			
Exh #	**Description**	**Prodution #**	**ECF #**
20-1	Data Scientist application	EEOC_000933 - EEOC_000935; EEOC_000944	69-22
20-2	MIND application	EEOC_000482 - EEOC_000487	69-22
20-3	Hired.com enrollment	EEOC_000952	69-22
20-4	Pandora Scientist inquiries	EEOC_000921	69-22
20-=5	Salesforce application	EEOC_000442 - EEOC_000445; EEOC_000602	69-22
20-6	Center for Talented Youth (CTY) Instructor inquiries	EEOC_000435 - EEOC_000437	69-22
20-7	San Diego Pride application	EEOC_000429 - EEOC_000431	69-22
20-8	Bay Area Video Coalition (BVAC) career coach	EEOC_000424 - EEOC_000428; EEOC_000512 - EEOC_000515	69-22
21-1	Study.com Front End Engineer application	EEOC_000460 - EEOC_000462; EEOC_000622 - EEOC_000623	69-23
21-2	Piazza Product Pro application	EEOC_000457 - EEOC_000459	69-23
21-3	Kizoom Research & Analytics Lead application	EEOC_000454 - EEOC_000456	69-23
21-4	Caliber Schools Student Data Analyst application	EEOC_000449 - EEOC_000452; EEOC_000922 - EEOC_000924	69-23
21-5	EdSurge Data Engineering application	EEOC_000438 - EEOC000440	69-23
21-6	Salesforce Associate Software Developer application	EEOC_000600	69-23
21-7	Khan Academy software or data application	EEOC_000432 - EEOC_000434	69-23
21-8	Edulastic Math Curriculum and Assessment Designer application	EEOC_000421 - EEOC_000423; EEOC_000607	69-23
21-9	Honk Software Engineer application	EEOC_000403 - EEOC_000409	69-23

Sanghvi Decl ISO Plaintiffs' Motion for Partial Summary Judgment			
Exh #	**Description**	**Prodution #**	**ECF #**
21-10	Persist IQ Backend Engineer application	EEOC_000410 - EEOC_000413	69-23
21-11	Sensor Tower Full Stack Engineer application	EEOC_000414 - EEOC_000416	69-23
21-12	Customer Lobby Ruby on Rails Developer application	EEOC_000401 - EEOC_000402	69-23
21-13	OpenDoor Customer Success Engineer application	EEOC_000399 - EEOC_000400	69-23
21-14	Robert Half Technology Front End Engineer application	EEOC_000397 - EEOC_000398	69-23
21-15	Salesforce Intern, Member of Technical Staff application	EEOC_000599	69-23
21-16	Amazon Front End Engineer application	EEOC_000665	69-23
22-1	Content Strategist Education Portal rejection	EEOC_000962	69-24
22-2	Kizoom Research & Analytics Lead rejection	EEOC_000606	69-24
22-3	Microsoft data scientist rejection	EEOC_000936	69-24
22-4	Kink rejection	EEOC_000441	69-24
22-5	Khan Academy Product Manager rejection	EEOC_000596	69-24
22-6	Insight Health Data Science Fellows Program rejection	EEOC_000604	69-24
22-7	No RedInk rejection	EEOC_000598	69-24
22-8	Robert Half Technology Front End Engineer rejection	EEOC_000603	69-24
22-9	Remind rejection	EEOC_000396	69-24
22-10	Khan Academy Software Developer rejection	EEOC_000621	69-24
23-1	Reporting Data and Conducting Reproducible Research enrollment	EEOC_000951	69-25
23-2	Mathematical Biostatistics Boot Camp 1 participation	EEOC_001005	69-25
23-3	R Programming participation	EEOC_000959	69-25
23-4	Getting and Cleaning Data participation	EEOC_000968	69-25

Sanghvi Decl ISO Plaintiffs' Motion for Partial Summary Judgment			
Exh #	**Description**	**Prodution #**	**ECF #**
23-5	Obtaining Data enrollment	EEOC_000975	69-25
23-6	Data Analysis enrollment	EEOC_0001004	69-25
23-7	Computational Methods for Data Analysis enrollment	EEOC_001012	69-25
23-8	Exploratory Data Analysis participation	EEOC_001008	69-25
23-9	Statistical Inference participation	EEOC_001010	69-25
23-10	Algorithms, Part I participation	EEOC_001014	69-25
23-11	Data Analysis and Statistical Inference participation	EEOC_001011	69-25
24-1	Teacher application	EEOC_000475 - EEOC_000477	69-26
24-2	Support Aanalyst application	EEOC_000478 - EEOC_000480	69-26
24-3	After-school Math Teaching application	EEOC_000660 - EEOC_000662	69-26
24-4	Math Tutoring application	EEOC_000472 - EEOC_000474	69-26
25	App Academy Bootcamp admission	EEOC_000624 - EEOC_000625	69-27
26	App Academy Job Search Agreement	EEOC_000539 - EEOC_000540	69-28
27	Wikispaces offer of employment	EEOC_000641 - EEOC_000644	69-29
28	App Academy offer of employment	EEOC_000605	69-30

Sanghvi Decl ISO Plaintiffs' Opp to MSJ and Reply ISO MPSJ			
Exh #	**Description**	**Prodution #**	**ECF #**
29	Keyes transcript excerpt		77-1
30	Mishkin transcript excerpt		77-2
31	Curiel transcript excerpt		77-3
32	Prado transcript excerpt		77-4
33	Murphy transcript excerpt		77-5
34	Duane transcript excerpt		77-6
35	Mattison transcript excerpt		77-7
36	Gu transcript excerpt		77-8
37	Mandis transcript excerpt		77-9
38	Milin transcript excerpt		77-10
39	Prado/Duane email compilation to Mishkin	IXL-1656 - IXL-1661	77-11
40	IXL Answer to EEOC 2nd Rogs		77-12
41	Duane/Wu Facebook post	EEOC_000363	77-13
42	Duane/Wu Facebook post	EEOC_000364	77-14
43	Duane Remote Work Plan	IXL-1650	77-15
44	IXL terminations list	IXL-1240	77-16
45	Duane/Mishkin email setting 1/8 meeting	IXL-1663	77-17
46	GD posts	EEOC_000728, et al.	77-18
47	O'Brien Declaration	EEOC_001017; EEOC_001185 - EEOC_001198	77-19
48	Mattison/Keyes 12/22/14 Gchat	IXL-817	77-20

Sanghvi Decl ISO Plaintiffs' Opp to MSJ and Reply ISO MPSJ			
Exh #	**Description**	**Prodution #**	**ECF #**
49	Duane/Keyes/Prado 12/19/14 email string	IXL-569 - IXL-572	77-21
50	Prado/Mishkin/Ockerberg/Keyes email re 12/30/14 Glassdoor post	IXL-1677 - IXL-1684	77-22
51	Penner/Mishkin email re Glassdoor postings	IXL-1349	77-23
52	Prado/Mishkin/Ockerberg/Keyes email forwarding Glassdoor post	IXL-1688 - IXL-1695	77-24
53	Exhibit 53 is a true and correct copy of a 7/30/2013 Glassdoor Quote, 9/30/2013 Glassdoor Quote and 12/15/2014 Glassdoor Insertion Order, all to IXL Learning	EEOC_001020 - EEOC_001022	77-25