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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, v. IXL LEARNING, INC., Defendant.	Case No.: 3:17-cv-02979-VC Hon. Vince Chhabria Courtroom: Hearing Date: Hearing Time: **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

Defendant IXL Learning, Inc. ("Defendant" or "IXL") seeks summary judgment in its favor and against Plaintiff U.S. Equal Employment Opportunity Commission ("Plaintiff" or "EEOC") and Plaintiff-Intervenor Adrian Scott Duane ("Intervenor" or "Duane") (collectively, the "Plaintiffs"). IXL relies on and incorporates by reference its facts and arguments stated in its Motion for Summary Judgment (ECF 70, the "Motion") and its supporting exhibits (ECF 71).

A. Summary Judgment

Summary judgment as to Plaintiffs' claims should be granted in IXL's favor because Duane did not have an objectively reasonable, good faith belief that IXL engaged in unlawful employment practices.

B. Alternate Relief

Alternatively, this Court should grant summary judgment in favor of IXL on any ADA-related damages that are not equitable because equitable relief is the only remedy for an ADA retaliation claim.

This Court should also grant summary judgment in favor of IXL as to Duane's FEHA claim. Res judicata bars Duane's state law claim when Duane voluntarily dismissed with prejudice his previous lawsuit against IXL. Additionally, Duane's FEHA claim is time barred.

C. Response to Plaintiffs' Motion to Strike

Plaintiffs' Motion to Strike must be rejected when it is not clear what Plaintiffs seek to strike and the basis for such relief. Further, Plaintiffs include many of the same exhibits in their filings that they now seek to strike from IXL's Motion.

II. ARGUMENT

In response to Defendant's Motion, Plaintiffs argue forcefully for a case they didn't bring. ECF 76 (the "Response"). Specifically, Plaintiffs now argue that Duane engaged in *other* opposition activity in addition to his Glassdoor.com post (the "Post"), despite never alleging this throughout the course of this case. In their Response, Plaintiffs seek to avoid summary judgment by arguing that Duane was fired for alleged opposition activities before and after his December 30, 2014 Post, claiming that "[a]ll the discrimination complaints Duane made before and in the [P]ost are covered opposition activities." ECF 76 at 13:9-10. Yet, the EEOC's retaliation case, from May 2017 to date, has been solely based upon the allegation that *Duane's Post was the opposition activity* in their retaliation claims. *See* ECF 1 (EEOC's

Complaint), ¶ 38 ("IXL retaliated against Duane by terminating him for engaging in legally protected employment activities by ***publicly posting on a website*** his opposition to discrimination at IXL.") (emphasis added). Plaintiffs have argued that the Post, and only the Post, was the opposition activity throughout the course of this case.[1] In Plaintiffs' Partial Motion for Summary Judgment ("Plaintiffs' MSJ"), Plaintiffs stated that Duane, "[g]iven the benefit of discovery . . . withdrew his assertion from his federal and state claims that IXL retaliated because he reported discrimination to his manager David Keyes. He ***retained the claim that IXL retaliated because of the Glassdoor.com post***." ECF 68 (Plaintiff's MSJ) at 4:19-21 (emphasis added). Plaintiffs' MSJ also argued that their Complaints "assert and IXL admits that (1) Duane posted discrimination complaints on Glassdoor.com on December 30, 2014; (2) IXL discovered the post on January 7, 2015; and, (3) IXL fired Duane on January 8, 2015, *because of* his Glassdoor.com post." *Id*. at 14:28-15:7 (emphasis in original). Plaintiffs chose to assert a narrow retaliation claim based on the alleged opposition activity of Duane posting a review on Glassdoor.com. Now they want to change that at the summary judgment stage, which is prejudicial to Defendant and not permitted by controlling law.

Plaintiffs may not amend their complaint through arguments in a brief opposing summary judgment. *Stanford Hosp. and Clinics v. Humana, Inc*., No. 5:13-cv-04924, 2015 WL 5590793, at *6, (N.D. Cal. Sept. 23, 2015). Courts permit a liberal pleading standard for complaints; however, that does not afford plaintiffs with an opportunity to raise new claims at the summary judgment stage. *Swierkiewicz*

[1] In Plaintiffs' Partial Motion for Summary Judgment, Plaintiffs stated that the EEOC alleged "that IXL retaliated against Duane in violation of Title VII and the ADA, by terminating him for engaging in legally protected employment activities, i.e., posting his opposition to discrimination on a website." ECF 68 at 4:1-3. In the parties' Joint Case Management Statement, the parties agreed that the legal issues were (1) "Whether Duane's Glassdoor.com post is protected activity covered by the opposition clause of Title VII and ADA's retaliation provisions" and (2) "Whether Defendant unlawfully retaliated against Duane." ECF 23 at 4:20-25. In a filed discovery dispute letter brief, Plaintiffs argued "Plaintiff U.S. Equal Employment Opportunity Commission and Plaintiff-Intervenor Mr. Duane allege that IXL retaliated against Mr. Duane by terminating his employment one day after discovering his negative Glassdoor.com post in which Mr. Duane raised discrimination complaints against IXL. IXL admits to terminating Mr. Duane because of his Glassdoor.com post but contends that the post does not constitute protected opposition activity." ECF 55 at p. 1. In another filed discovery dispute letter brief, Plaintiffs reiterate that "[w]hether 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." ECF 61 at p. 5. In the EEOC's First Initial Disclosures, the EEOC listed employees who may have knowledge about employee posts on Glassdoor.com, "specifically Mr. Duane's post giving rise to the instant action." Menezes Decl., Ex. CC at 2:9-10. The EEOC objected to a document request on the basis that "[s]earching for communications that Mr. Duane had about any alleged complaint of discrimination or denial of reasonable accommodation . . . after Mr. Duane's December 30, 2014 Glassdoor post would not generate information relevant to the claims or defenses in this matter." Menezes Decl., Ex. DD at 5:24-27 and 8:8-13 (objecting to a document request on the basis that it "would not generate information relevant to the claims or defenses in this matter because the communications did not influence [Duane's] state of mind when he posted on Glassdoor.com").

v. Sorema N.A., 534 U.S. 506, 512 (2002). *See Wargnier v. Nat'l City Mortg. Inc.*, No. 09-CV-2721, 2012 WL 12953738, at *6 (S.D. Cal. Mar. 29, 2012) ("At the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed.R.Civ.P. 15(a). A plaintiff may not amend her complaint through argument in a brief opposing summary judgment.") (citations omitted); *Netbula, LLC v. BindView Dev. Corp.*, 516 F. Supp. 2d 1137, 1153 fn. 9 (N.D. Cal. 2007) (refusing to consider new fraud theory raised in opposition to summary judgment); *Logan v. Doe*, No. 1:02-cv-06428, 2007 WL 1147070, at *10 (E.D. Cal. Apr. 18, 2007), *report and recommendation adopted*, No. 1:02-cv-06428, 2007 WL 1894186 (E.D. Cal. July 2, 2007) (holding plaintiff may not now expand the scope of this litigation via deposition testimony or his opposition to defendant's motion for summary judgment). Plaintiffs cannot now, during summary judgment, argue claims they never asserted and attempt to expand the scope of the litigation they chose to bring.

A. Plaintiffs Are Not Allowed To Amend Their Narrow Retaliation Claim In Response to Defendant's Summary Judgment To Now Include Multiple Alleged Opposition Activities

Plaintiffs, plainly recognizing the weakness of their retaliation claim, now allege that IXL retaliated against Duane for *other* opposition activities. These additional alleged opposition activities are: (1) requesting to telecommute as an accommodation for a post-operative condition; (2) informing IXL that Duane consulted an attorney to dispute its "denial" of the accommodation; (3) complaining of disability discrimination in a meeting with Keyes; and (4) lodging disability, gender identity, and sexual orientation complaints in a meeting with IXL's CEO Paul Mishkin. ECF 76 at 13:1-6.

As set forth above, Plaintiffs should not be allowed to amend their complaint through arguments in a brief opposing summary judgment. *Stanford Hosp. and Clinics*, 2015 WL 5590793, at *6. In *Jackson v. Curry*, No. C 08-05207, 2013 WL 5366982, at *3 (N.D. Cal. Sept. 25, 2013), the court held that plaintiff "cannot avoid summary judgment with a ***new theory of retaliation that is not alleged in the complaint and is asserted for the first time on summary judgment***." (emphasis added). *See Wasco Products, Inc. v. Southwall Technologies, Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings."). The Ninth Circuit has held that "when the complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court." *Navajo Nation v. U.S.*

Forest Serv., 535 F.3d 1058, 1080 (9th Cir. 2008). Likewise, in *City of Los Angeles v. Bank of Am. Corp*., No. CV 13-9046, 2015 WL 4880511, at *5 (C.D. Cal. May 11, 2015), *aff'd*, 691 F. App'x 464 (9th Cir. 2017), the court condoned plaintiff's "types of bait-and-switch litigation tactics" when plaintiff alleged and argued one set of facts and legal theories in its complaint and then abandoned those facts and theories in opposition to the motions for summary judgment. In light of this, the court concluded that defendant was entitled to summary judgment. *Id*.

Plaintiffs attempt to argue that Duane opposed discrimination when he "requested to telecommute as an accommodation for a post-operative condition." ECF 76 at 13:1-2. Plaintiffs are referring to Duane's December 19, 2015 email to Keyes, stating:

> Great to see you [i.e. Keyes] briefly at the Christmas party. I wanted to give you a quick update on how things are going and begin to finalize my plan for returning to work.
>
> As you probably have heard, things have been going very well in terms of healing, for the most part. Unfortunately, the day after the party, a complication called a fistula appeared. This is not very serious, but will make it challenging to be out of the house for long periods of time until it fully heals. My doctor believes I should heal from this quickly, but it may affect how soon I can return.
>
> For now, I am still planning on returning Dec 30, but I'm wondering if you'd be open to me working half days in the office and half days at home for the first few weeks. This would make the transition much easier for me, I think.
>
> Let me know what you think. Looking forward to being back at it. Have a good holiday

Ex. I (ECF 71-9) at p. 3. Nothing in this email is a protest or opposition of any unlawful employment discrimination. *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir.), *amended*, 40 F.3d 982 (9th Cir. 1994). No unlawful employment practices or discrimination are even identified. *At most*, this email is as a request for a disability-related accommodation.[2] It is disingenuous for Plaintiffs to argue that this email is opposition activity, especially when Plaintiffs' Complaints stated that "Duane requested a 50% remote work arrangement in order to accommodate his recovery" when describing this email. ECF 1 (EEOC's Complaint) at ¶ 25; ECF 41 (Intervenor's Complaint) at ¶ 22.

[2] *See Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (EEOC Note 915.002) (EEOC, Oct. 17, 2002), https://www.eeoc.gov/policy/docs/accommodation.html last accessed August 23, 2018 ("When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition.").

Plaintiffs also attempt to argue that Duane informing IXL that he consulted an attorney to dispute "its denial of the accommodation" also qualifies as opposition activity. Plaintiffs' Response is the first instance in which Plaintiffs now argue that this is a form of opposition activity. ECF 76. In response to Duane's December 19 email, Keyes responded:

> Glad to hear your recovery is going pretty smoothly. As far as the plan goes for returning to work, **I would prefer that you be in the office for your hours when you come back since you are more productive here. Is there anything we can do to accommodate your situation so that you can work in the office? If you would need to extend your leave to aid in your recovery, that would be totally fine as well. Just let me know!**

Ex. I (ECF 71-9) at p. 2 (emphasis added). Duane does not deny that Keyes had a legitimate concern about Duane's productivity while working at home, and in fact stated the following in his reply: "I completely understand your concerns about remote work and productivity . . ." *Id*. In Duane's reply, he also stated that the law required IXL to provide him with the accommodation he demanded: "I went ahead and spoke with an employment attorney to check in about what is meant by 'reasonable accommodation', and she said with certainty that remote work qualifies here . . . under the Americans with Disabilities Act, IXL has to provide me with this accommodation." *Id*. Duane further stated: "My doctor is happy to provide written documentation." *Id*. Again, Plaintiffs are disingenuous in making this argument. First, the EEOC already determined in its Letter of Determination that IXL allowed Duane to work from home for half of his work days upon his return from leave after surgery. Ex. S (ECF 71-19). The EEOC also determined that IXL *did not deny Duane a reasonable accommodation*. *Id*. (emphasis added). *See Huck v. Kone, Inc.*, 539 F. App'x 754, 754–56 (9th Cir. 2013) ("An employer cannot be held liable for failing to engage in interactive process when the employee was in fact offered a reasonable accommodation.") (citation omitted). Second, Duane is not opposing any unlawful employment practices when Duane and IXL were engaging in what the EEOC defines as the interactive process.[3] *Moyo*, 32 F.3d at 1384. Informing IXL that he consulted an attorney is not opposition activity. Duane is not opposing unlawful employment discrimination by simply

[3] *See Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (EEOC Note 915.002) (EEOC, Oct. 17, 2002), https://www.eeoc.gov/policy/docs/accommodation.html last accessed August 23, 2018 ("While an individual with a disability may request a change due to a medical condition, this request does not necessarily mean that the employer is required to provide the change. A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer. In some instances, before addressing the merits of the accommodation request, the employer needs to determine if the individual's medical condition meets the ADA definition of 'disability,' a prerequisite for the individual to be entitled to a reasonable accommodation." (citation omitted).

informing IXL that he spoke with an attorney. *Id*. Third, before now attempting to argue that this was opposition activity, Plaintiffs previously argued that, in relation to this email, none of their claims "rest on the advice of counsel." ECF 61 at p. 5 ("The advice or the soundness of that advice is not critical to a claim or defense . . . 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."). Regardless, no reasonable person would believe that the routine interaction between Duane and IXL, which resulted in Duane receiving exactly the accommodation he requested, would be unlawful activity under federal or state employment law.

Moreover, Plaintiffs completely contradict and misrepresent themselves by arguing that Duane engaged in opposition activity by complaining of disability discrimination in a meeting with his manager, David Keyes. The EEOC chose never to make this allegation. Rather, in Plaintiffs' MSJ, Plaintiffs stated that Duane, "[g]iven the benefit of discovery . . . withdrew his assertion from his federal and state claims that IXL retaliated because he reported discrimination to his manager David Keyes. He ***retained the claim that IXL retaliated because of the Glassdoor.com post***." ECF 68 at 4:19-21 (emphasis added). Given that the EEOC never made this allegation and that Duane explicitly withdrew this allegation as a basis for retaliation, Plaintiffs cannot now argue that Duane's meeting with Keyes constituted opposition activity.

Plaintiffs also now claim that Duane engaged in opposition activity when he lodged disability, gender identity, and sexual orientation complaints in a meeting with IXL's CEO, Paul Mishkin. However, events that occurred after the Post – the opposition activity at issue – have no bearing on the case. Plaintiffs have argued that events and communications "that Mr. Duane had about any alleged complaint of discrimination or denial of reasonable accommodation . . . after Mr. Duane's December 30, 2014 Glassdoor post would not generate information relevant to the claims or defenses in this matter." Menezes Decl., Ex. DD at 5:24-27. Further, IXL made the decision to terminate Duane based on his Post before Duane's January 8 meeting with Mishkin. Ex. EE (Mishkin Dep 224:11-13). Because this January 8 meeting happened after Duane's Post, this meeting is completely irrelevant to Plaintiffs' retaliation claims.

In addition, Plaintiffs misrepresent the Post in stating that Duane "explicitly cited race, national origin, gender, and sex discrimination." ECF 76 at 8:7-8. There is not a single mention of gender or sex discrimination, explicit or implicit, in the Post. At most, Duane describes treatment in the workplace that "seems to run right along the characteristics" of being "white or Asian straight or mainstream gay":

> There are no politics if you fit in. If you don't—that is, if you're not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball—then you're likely to find yourself on the outside. Treatment in the workplace, in terms of who gets flexible hours, interesting projects, praise, promotions, and a big yearly raise, is different and seems to run right along these characteristics.

Ex. N (ECF 71-14). There is no mention of gender or sex in the Post, and Duane was confronted with this fact in his deposition, to which he replied "I thought I mentioned gender [in his Post] but I might not have." Ex. FF (Duane Dep. Tr.) at 181:22-25. Opposition activity must put IXL on notice that Duane is actually alleging discrimination. Plaintiffs argue that the Post "implicated disability discrimination." ECF 76 at 13:17. There is no implication or reference to disability discrimination anywhere in his Post. The fact that Plaintiffs feel the need to expand Duane's Post into containing allegations he did not make demonstrates vividly the frivolousness of their opposition activity retaliation claim.

Plaintiffs argue that, despite never alleging anything but the Post as the opposition activity for their retaliation claims, the court should now also consider "the entirety of Duane's complaints over time" and Duane's "overall experiences" in seeking to defeat summary judgment. However, Plaintiffs do not get a second chance at the summary judgment stage to flesh out their inadequate pleadings. *Wasco Products, Inc.*, 435 F.3d at 992.

B. Duane Did Not Have a Reasonable Good Faith Belief He Was Opposing Discrimination

In attempting to argue that Duane has a reasonable belief he was opposing discrimination, Plaintiffs again completely disregard the basis for their retaliation claims as alleged in their Complaints. A prima face case of retaliation requires that Plaintiffs show that Duane protested or opposed unlawful employment discrimination and that this opposition was based on a good-faith and reasonable belief that IXL engaged in an unlawful employment practice. *Moyo*, 32 F.3d at 1385 (citation omitted). Plaintiffs alleged that Duane's opposition was "publicly posting on a website." ECF 1 (EEOC Complaint) at ¶ 38. Duane has testified in his deposition and in the NLRB trial about his reasons for the Post and his beliefs behind the Post. IXL discussed these reasons and Duane's unreasonable beliefs in its Motion, relying on Duane's testimony in its arguments.

Plaintiffs now utilize the "kitchen sink" method in which they attempt to argue any and all facts from Duane's initial EEOC Charge, despite the EEOC's findings in its Letter of Determination and despite Plaintiffs failing to allege such facts in this case. Ex. S (71-19).

Plaintiffs attempt to argue that Duane endured hostile behavior because he did not identify as "mainstream gay." Such an argument completely disregards the fact that Duane's colleagues and managers testified that they thought he was mainstream gay throughout his employment.[4] Such an argument also disregards the EEOC's finding that IXL did not discharge Duane because he is transgender and that IXL did not discriminate against Duane because he is transgender. Ex. S (71-19). Plaintiffs can point to no evidence – besides Duane's personal and unreasonable assumptions – to prove otherwise. Duane's perception that he was not perceived to be "mainstream gay" is because (1) Duane had scars on his chest from his double mastectomy and (2) because he was a part of an orientation exercise in which he lifted his shirt and because he used the gym locker room. Duane's unfounded perceptions about what others may have thought (despite deposition testimony to the contrary) because he used the gym locker room and engaged in advocacy work cannot defeat summary judgment. Plaintiffs cannot simply rest on the mere allegations of their pleadings or Duane's EEOC Charge to defeat summary judgment, and Plaintiffs have not and cannot set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). Plaintiffs admit that Duane's perceptions are "assumptions" and "perceptions" and not specific facts. For example, Plaintiffs argue that Duane engaging in LGBTQ activism could have given "rise to ***assumptions***" that Duane is transgender and that Duane "believed" that being short and not having a deep voice "***could*** also have added to the ***perception*** that he was transgender." ECF 76 at 4:3-7 (emphasis added).

Plaintiffs' reliance on a few instances of allegedly poor performance by IXL's Human Resources, over sixteen (16) months of Duane's employment, is misguided and offers no support for their retaliation claim. Plaintiffs hope this Court will find it reasonable to believe IXL violated federal employment law because an IXL HR manager made a mistake about the timing of short-term disability benefits, an HR generalist "glossed over" the discussion of long-term disability benefits during orientation a year before Duane's surgery and also inquired about a medical procedure on his right arm (which he disclosed to IXL

[4] *See* ECF 70-1 at fn. 8; *see also* Ex. GG (Jeremy Murphy Dep. Tr.) at 52:14-54:16 (Murphy thought Duane was gay and only learned that Duane is transgender a few days before his deposition with Plaintiffs); Ex. HH (Gary Yee Dep. Tr.) at 66:24-68:6 (Yee thought Duane was a homosexual man and only found out that Duane is transgender a day before his deposition with Plaintiffs); Ex. II (Kathleen Mattison Dep. Tr.) at 99:2-3, 72:17-19 (Mattison thought Duane might have been gay and did not learn that Duane is transgender until after he was terminated).

for purposes of getting an ergonomic mouse). No objectively reasonable person would believe that these isolated comments made over a sixteen-month period would constitute unlawful activity, especially where it is undisputed that Duane received every single accommodation, remote work, flexible schedule and sick day request he ever made. *See* ECF 70-1.

C. Duane's Post Was Not Done In A Reasonable Manner

Plaintiffs again argue a case they did not bring, stating that Duane's "verbal and written protected activities, including the Glassdoor post, were reasonable." ECF 76 at 18:9-10. Before Plaintiffs' Response, Plaintiffs have, as previously discussed, claimed and argued that only the Post constituted opposition activity. For example, in the EEOC's June 27, 2018 Letter to IXL's counsel, the EEOC, in arguing against IXL's affirmative defense, states: "The issue here – retaliatory discharge because of Duane's Glassdoor.com post – is not prohibited by or protected by §7 or § 8 of the NLRA . . . Duane is claiming that his Glassdoor.com post constituted protected activity and that his termination for that activity was in violation of the FEHA retaliation provision." ECF 69-17 (Ex. 15) at p. 5.

Plaintiffs try to minimize Duane's deliberate attempt to harm IXL's recruiting effort by misrepresenting IXL's use of Glassdoor. Plaintiffs incorrectly argue that IXL deemed Glassdoor an ineffective recruitment tool and terminated its contract before discovering Duane's Post. ECF 76 at 18:13-14.[5] However, IXL signed a new contract with Glassdoor on December 15, 2014, which was to last for thirteen months. Ex. B (ECF 71-2) at p. 2; Plaintiffs' MSJ, Ex. 53 (ECF 77-25). Thus, contrary to Plaintiffs' statement, IXL had a contract with Glassdoor when it discovered Duane's Post. *Id.*

Further, Plaintiffs claim that IXL made the "unsupported assertion that Duane was angry." ECF 76 at 19:1-4. This was not an unsupported assertion but Duane's testimony provided in the NLRB trial and reluctantly confirmed by Duane in his deposition that one of the reasons for his Post was that he was upset. Ex. FF (Duane Dep. Tr.) at 105:1-106:24. Specifically, IXL provided a list of the reasons Duane

[5] Plaintiffs rely on the deposition of Jennifer Gu in stating that IXL subscribed to Glassdoor from September 1, 2013 until January 2, 2015, that the Glassdoor contract had lapsed by the time IXL discovered Duane's Post, and that IXL discontinued the Glassdoor contract because it was not yielding promising candidates. ECF 76 at 11:1-10. However, Jennifer Gu was not designated as IXL's Fed. R. Civ. Pro. 30(b)(6) witness on IXL's agreements/contracts for services from Glassdoor. Ex. JJ (Def's Supp Objections to 30b6 Dep) at ¶ 13. When Plaintiffs asked Gu whether she was familiar with the Glassdoor contracts, Gu responded, "I am not familiar." Ex. KK (Gu Dep. Tr.) at 108:11-14. Further, the Glassdoor invoices themselves, which Plaintiffs included as an exhibit to their Response, explicitly show that IXL had a contract with Glassdoor when it discovered Duane's Post and that this contract was to continue for the next thirteen months. Plaintiffs' MSJ, Ex. 53 (ECF 77-25).

gave for creating his Post, which included being upset with how Keyes handled his sick leave accommodation, being unhappy that Mishkin canceled a video project, and being disappointed with how narrow his job was. ECF 70-1 at 12:2-17. There is no need for a jury to "divine intent or motivation" when Duane himself has already testified to what made him upset.

D. Causation Due To Proximity Is Irrelevant In This Case When IXL Admits It Terminated Duane For His Post

IXL admits, and has admitted throughout three years of litigation, that it fired Duane because of his Post. To establish a prima facie case of retaliation, Plaintiffs must show that Duane reasonably and in good faith opposed unlawful employment discrimination, Duane lost his job, and a causal link exists between the protected activity and the adverse action. *Moyo*, 32 F. 3d at 1384. Not only does the Post not qualify as opposition activity, but Duane had no reasonable, good faith belief that IXL engaged in unlawful employment practices. ECF 70-1.

Plaintiffs' reliance on case law pertaining to inferences of causation due to proximity is misplaced. A proximity inference is irrelevant where, as in this case, IXL admits it terminated Duane for his Post. Plaintiffs cannot establish, however, that "but for" the one or two arguably protected sentences in the Post Duane would not have been fired. Plaintiffs have failed to meet this essential requirement; IXL is entitled to summary judgment as a result. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

E. There Is No Evidence To Show That IXL's Legitimate, Non-Discriminatory Reason For Duane's Termination Is Pretextual

Not only can Plaintiffs not establish a prima facie case of retaliation, but they have failed to show pretext. IXL has articulated a legitimate, non-discriminatory reason for Duane's termination, and Plaintiffs must show that this articulated reason is "pretextual either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002) (citations omitted). Any reliance on circumstantial evidence "must be both specific and substantial." *Id.*

IXL's reason for Duane's termination has not shifted in the course of administrative proceedings against the NLRB, a trial before an administrative law judge, administrative proceedings against the

EEOC, and a dismissed lawsuit against Duane.[6] *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1996). Throughout more than three years of administrative proceedings and litigation, IXL has consistently argued that it terminated Duane because of his false and malicious accusations about the company, its CEO, the work performed by its employees, and Duane's lack of ethics and judgment revealed in making such defamatory comments.

Further, Plaintiffs attempt to use statistical evidence as a form of indirect evidence to show pretext by stating that Duane is the only person it punished for a negative post. First, IXL distinguishes between a negative post and a false post, such as Duane's Post, which IXL determined to be false, untrue, and absurd. Ex. EE (Mishkin Dep) at 133:19-21 ("I understood that this [Duane's Post] is a post that's making a lot of false allegations about the company.") and 134:14-136:10. Second, the fact that IXL may have known the identity of one other current employee who posted a negative review of IXL and did not terminate the employee does not show pretext. In *Sengupta v. Morrison–Knudsen Co., Inc.*, 804 F.2d 1072, 1076 (9th Cir. 1986), the court declined to consider evidence that four out of five employees laid off in a pool of 28 employees were African American, noting that "statistical evidence derived from an extremely small universe has little predictive value and must be disregarded." (citation omitted); *see Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 663 (9th Cir. 2002) ("[T]he fact that three of the four casuals singled out for lay off that night were white could constitute circumstantial evidence of discrimination demonstrating pretext.... Yet, because the sample size is so small, we decline to give it much weight"). In Mishkin's deposition, Plaintiffs identified only one negative Glassdoor review from a current employee (Ex. 60 of Mishkin's Deposition) and only one negative Glassdoor review from an applicant who did not receive a job offer (Ex. 59 of Mishkin's Deposition). Plaintiffs' argument that two negative Glassdoor reviews (only one of which was from a current employee) means that IXL permitted employees to post negative reviews "with impunity" is completely illogical. Comparing Duane's Post and

[6] Ex. LL (IXL's Position Statement) (After discovering the Post, "Mishkin concluded that [Duane's] judgment and ethics were below what he expected from IXL team members. Mishkin decided to terminate [Duane]'s employment for this reason."); Ex. MM (IXL's NLRB Post-Hearing Brief) at p. 2 ("When IXL's CEO Paul Mishkin saw the post, he believed it amounted to defamation. He concluded that [Duane]'s blatantly untrue statements were deliberately intended to harm IXL's recruitment efforts, which were particularly challenging in the present job market. . . Based upon the recklessness of the accusations by [Duane], coupled with [Duane]'s deliberate attempt to harm IXL's ability to attract talented prospects, Mishkin decided to terminate [Duane]'s employment.); Ex. EE (Mishkin Dep. Tr.) at 183:1-7 ("I believed [the Post] was defamatory because most of it is – it's obvious false statements, and I -- and I believed it was intentional and particularly seeing the -- the place where it was posted and the manner in which it was written directly to job seekers.").

IXL's termination based on his Post to two negative reviews identified by Plaintiffs has little predictive value and must be disregarded. *Sengupta*, 804 F.2d at 1076. Importantly, Plaintiffs ignore the critical difference between Duane's Post and the "negative reviews" they identified in the Response: Duane's review was riddled with false accusations. IXL has never argued that employees would be fired for truthful negative reviews. Thus, this comparison is meaningless.

Plaintiffs have not and cannot show pretext because there is no evidence that a discriminatory reason more likely motivated IXL in terminating Duane or that IXL's proffered explanation is unworthy of credence. *Villiarimo*, 281 F.3d at 1062. Plaintiffs have not and cannot show that Duane would not have been fired but for his alleged discrimination complaint in his Post. *Univ. of Texas Sw. Med. Ctr.*, 570 U.S. at 360. Plaintiffs cannot rest on mere speculation in IXL's motivation in attempting to defeat summary judgment. To defeat a motion for summary judgment, Plaintiffs must "do more than simply show that there is some metaphysical doubt as to the material facts.... In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted).

F. Alternate Relief

Alternatively, this Court should grant summary judgment in favor of IXL on any ADA-related damages that are not equitable because equitable relief is the only remedy for an ADA retaliation claim. This Court should also grant summary judgment in favor of IXL as to Duane's FEHA claim. Res judicata bars this claim when Duane voluntarily dismissed with prejudice his previous lawsuit against IXL.

i. Plaintiffs admit that only equitable remedies are available if liability is restricted to their ADA retaliation claim.

Summary judgment as to any damages that are not equitable remedies based on a finding of liability on Plaintiffs' ADA retaliation claim must be granted in IXL's favor. Plaintiffs admit 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. ECF 76 at 23:9-10. IXL does not dispute that Duane can seek other remedies based on a liability finding under Title VII or FEHA; however, only equitable damages are available for an ADA retaliation claim. Thus, for the ADA retaliation claim only, summary judgment must be awarded in IXL's favor based on any damages that do not constitute equitable remedies.

ii. Duane's FEHA claim must be dismissed because it is barred by res judicata.

At no time did IXL agree to waive its res judicata defense. Contrary to Plaintiffs' argument, the email exchange between IXL's counsel and Duane's counsel (ECF 24-3) does not clearly and unequivocally establish that the res judicata defense was waived. ECF 76 at 21:14-15. The email only illustrates that IXL did not object to Duane intervening in the instant action because Duane has a statutory and unconditional right to do so. 42 U.S.C. § 2000e-5(f)(1). At no time in the email exchange did Duane inform IXL that Duane planned on making additional claims and, if so, what those additional claims would be. ECF 24-3. It is illogical and absurd that IXL would give Duane carte blanche to add any and all claims against IXL without objection and without even knowing what those claims were. IXL objected to Duane's additional claims in its Opposition to Plaintiff-Intervenor's Notice of Motion to Intervene. ECF 22.

IXL could only have waived its affirmative defense of res judicata if it was "voluntary, knowing and done with adequate awareness of the relevant circumstances and likely consequences." *In re GVF Cannery, Inc.*, 202 B.R. 140, 145 (N.D. Cal. 1996) (citation omitted). Specifically, waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only. *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.*, 30 Cal. App. 4th 54, 59 (Ct. App. 1994). The burden is on the party claiming a waiver to prove it by clear and convincing evidence, and doubtful cases will be decided against the existence of waiver, especially when the right alleged to be waived is one that is favored by law. *In re GVF Cannery, Inc.*, 202 B.R. at 145 (citations omitted); *see City of Ukiah v. Fones*, 410 P.2d 369, 370–71 (Cal. 1966) ("The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence ***that does not leave the matter to speculation***.") (citation omitted) (emphasis added).

In this Court's Order Granting Motion to Intervene, the Court stated: "There must be an independent basis for bringing such an additional [FEHA] claim. And the state law claim Duane wishes to bring appears to be barred, under res judicata principles, by the dismissal of the prior lawsuit with prejudice." ECF 40 at p. 2. The Court ultimately held that IXL would be permitted to pursue its res judicata defense against Duane at the "summary judgment stage of the case, with the likely result being that Duane will be precluded from asserting his state law claim." *Id.* at 2.

III. RESPONSE TO PLAINTIFFS' MOTION TO STRIKE

In seeking to strike eight exhibits, Plaintiffs are not clear as to why these exhibits should be stricken. Plaintiffs argue, in sweeping statements, that the exhibits contain inadmissible hearsay and are not authenticated. However, Plaintiffs do not specifically identify what exhibits are not properly authenticated and/or what exhibits contain inadmissible hearsay, including whether the entire exhibit or only portions thereof constitute inadmissible hearsay. This confusion is heightened when Plaintiffs attached some of the same exhibits to their filings; thus, some of the exhibits Plaintiffs object to already exist on the record.[7]

At the summary judgment stage, courts focus on admissibility of the evidence's content, not its form. *Clark v. Cty. of Tulare,* 755 F. Supp. 2d 1075, 1083 (E.D. Cal. 2010) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986) (opposing party need not "produce evidence in a form that would be admissible at trial in order to avoid summary judgment")). *See also Fraser v. Goodale,* 342 F.3d 1032, 1036–37 (9th Cir. 2003) ("At the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents.") (citation omitted); *Accord Hughes v. United States,* 953 F.2d 531, 543 (9th Cir.1992) (litigation adviser's affidavit may be considered on summary judgment despite hearsay and best evidence rule objections; the facts underlying the affidavit are of the type that would be admissible as evidence even though the affidavit itself might not be admissible).

IXL's Exhibit P (ECF 71-16), the Decision issued by Administrative Law Judge in the NLRB trial, is a public record, and Plaintiffs attached as an exhibit to their Response the Order in which the NLRB "adopts the findings and conclusions of the Administrative Law Judge as contained in his Decision." FRE 901(b)(7); ECF 69-7. Likewise, IXL Exhibit C (ECF 71-3) and Exhibit G (ECF 71-7) are both internal IXL emails, and Plaintiffs have deposed the receipts of both emails. The Court need not decide whether the emails themselves are admissible as it is sufficient if the contents of the emails are admissible at trial.

[7] Plaintiffs objected to IXL's Exhibit F (ECF 71-6) (Duane's Dep. Tr.), but filed portions of Duane's deposition transcript as Exhibit 19 and Exhibit 34 in their MSJ (ECF 69-21) and Response (ECF 77-6). Plaintiffs objected to IXL's Exhibit Y (ECF 71-24) (Nemo Curiel's Dep. Tr.), but filed portions of this transcript as Exhibit 31 in their Response (ECF 77-3). Plaintiffs objected to IXL's Exhibit X (ECF 71-23) (Milin's Dep. Tr.), but filed portions of this transcript as Exhibit 38 to their Response (ECF 77-10). Plaintiffs objected to IXL's Exhibit B (Glassdoor invoices), but filed the exact same documents as Exhibit 53 to their Response (ECF 77-25).

Fraser, 342 F.3d at 1036–37. The contents of the emails can be admitted into evidence at trial in a variety of ways, including having the receipts of the email (i.e., Kate Mattison and David Keyes) testify to all the relevant portions of the email from their personal knowledge. *Id*. Likewise, IXL counsel can testify to IXL's Exhibit Z (ECF 71-25), an image of Isidora Milin retrieved from her public LinkedIn account on August 2, 2018.

Plaintiffs' Motion to Strike must be rejected when it is not clear what Plaintiffs seek to strike and the basis for such relief. Plaintiffs have also not articulated any reason as to why the contents of these exhibits would not be admissible.

IV. CONCLUSION

Summary judgment as to Plaintiffs' claims of Title VII retaliation, ADA retaliation, and FEHA must be granted in favor of IXL when Duane has been unable to provide any objectively reasonable, good faith belief that IXL engaged in any unlawful employment practice. Further, Plaintiffs cannot be permitted to expand the scope of this lawsuit. Alternatively, summary judgment must be awarded in IXL's favor based on any ADA retaliation damages that are not equitable remedies, and IXL is entitled to summary judgment on Duane's FEHA claim under res judicata principles and because the FEHA claim is time-barred.

Respectfully submitted,

Dated: August 23, 2018

YOUNG BASILE HANLON & MACFARLANE, P.C.

By: */s/ Jeffrey D. Wilson*
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-and-

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IXL Learning, Inc.

PROOF OF SERVICE

STATE OF MICHIGAN, COUNTY OF OAKLAND
U.S. Equal Employment Opportunity Comm. v. IXL Learning, Inc.
Case No.: 3:17-CV-02979-VC

I am employed in the County of Oakland, State of Michigan; I am over the age of eighteen (18) and not a party to the within action; my business address is 3001 W. Big Beaver Road Suite 624, Troy, MI 48084. On August 23, 2018, I served the foregoing document(s) described as **Defendant's Reply in Support of Its Motion for Summary Judgment** on all interested parties to this action by delivering a copy thereof via electronic mail to each of said interested parties at the following address(es):

Ami Sanghvi Equal Employment Opportunity Commission 350 The Embarcadero, Suite 500 San Francisco, CA 94105 P: (415) 625-5640 F: (415) 625-5657 ami.sanghvi@eeoc.gov	Attorneys for Plaintiff US EEOC
David Marek The Marek Law Firm 228 Hamilton Avenue Palo Alto, CA 94301 P: (917) 721-5042 david@marekfirm.com	Attorneys for Proposed Plaintiff-Intervenor Adrian Scott Duane

☐ **(BY MAIL)** I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our firm's office address in Troy, Michigan. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☒ **(BY ELECTRONIC FILING)** I caused such document to be delivered via electronic filing and service of court via Notice of Electronic Filing ("NEF").

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on August 23, 2018 at Troy, Michigan.

/s/ Jeffrey D. Wilson
Jeffrey D. Wilson

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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, v. IXL LEARNING, INC., Defendant.	Case No.: 3:17-cv-02979-VC Hon. Vince Chhabria Courtroom: 4, 17th Floor Hearing Date: September 20, 2018 Hearing Time: 10:00 AM **DECLARATION OF NATASHA R. MENEZES IN SUPPORT OF DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

I, Natasha R. Menezes, declare as follows:

1. I am an associate attorney with the law firm of Young Basile Hanlon & MacFarlane, P.C., attorneys of record for Defendant IXL Learning, Inc. ("IXL" or "Defendant").

2. I submit this Declaration in support of Defendant's Reply in Support of Motion for Summary Judgment.

3. I have personal knowledge of the following facts and, if called as a witness, I could and would competently testify thereto. Nothing in this Declaration is intended to be a waiver of the attorney-client privilege, the attorney work-product doctrine, or any other applicable privilege.

4. A true and correct copy of Plaintiff Equal Employment Opportunity Commission's Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1) is attached hereto and incorporated herein as Ex. CC.

5. A true and correct copy of Plaintiff EEOC's Responses and Objections to Defendant's Second Set of Requests of Documents to Plaintiff Equal Employment Opportunity Commission is attached hereto and incorporated herein as Ex. DD.

6. A true and correct copy of the excerpts of the Paul Mishkin Deposition Transcript is attached hereto and incorporated herein as Ex. EE.

7. A true and correct copy of the excerpts of the Adrian Scott Duane Deposition Transcript is attached hereto and incorporated in as Ex. FF.

8. A true and correct copy of the excerpts of the Jeremy Murphy Deposition Transcript is attached hereto and incorporated herein as Ex. GG.

9. A true and correct copy of the excerpts of the Gary Yee Deposition Transcript is attached hereto and incorporated herein as Ex. HH.

10. A true and correct copy of the excerpts of the Kathleen "Kate" Mattison Deposition Transcript is attached hereto and incorporated herein as Ex. II.

11. A true and correct copy of Defendant's Supplemental Objections to Plaintiff's Rule 30(b)(6) Deposition is attached hereto and incorporated herein as Ex. JJ.

12. A true and correct copy of the excerpts of the Jennifer Gu Deposition Transcript is attached hereto and incorporated herein as Ex. KK.

13. A true and correct copy of IXL's Position Statement is attached hereto and incorporated herein as Ex. LL.

14. A true and correct copy of IXL's Post-Hearing Brief is attached hereto and incorporated herein as Ex. MM.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct and this Declaration was executed on August 23, 2018 in Troy, Michigan.

Dated: August 23, 2018

YOUNG BASILE HANLON & MACFARLANE, P.C.

By: */s/ Natasha R. Menezes*
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Exhibit CC

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, vs. IXL LEARNING, INC., Defendant	Case No.: 3:17-cv-02979 EEOC'S FIRST INITIAL DISCLOSURES PURSUANT TO FED. R. CIV. P. 26(A)(1)

PLAINTIFF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S INITIAL DISCLOSURES PURSUANT TO FED. R. CIV. P. 26(a)(1)

Pursuant to Federal Rule of Civil Procedure 26(a)(1), Plaintiff Equal Employment Opportunity Commission (EEOC) submits the following Initial Disclosures. In providing these disclosures, EEOC does not waive any objections regarding the production, use, or admissibility of all or part of these Disclosures. EEOC reserves its right to amend or supplement these Disclosures.

(i) Witnesses: The name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

Adrian Scot Duane – Charging Party
Mr. Duane has knowledge of the facts alleged in the EEOC's Complaint and damages he suffered when Defendant retaliated against him. Mr. Duane plans to

intervene in this action and therefore any attempt to contact Mr. Duane should only be made through the EEOC or Mr. Duane's private counsel.

Nemo Curiel – Witness and former co-worker at IXL Learning, Inc.
298 Fairmount Ave, Apt. 3, Oakland, CA (619) 581-6786

Mr. Curiel worked with Mr. Duane at IXL Learning, Inc. He has knowledge of Mr. Duane's experiences while working at IXL and can provide information relevant to IXL policies, procedures, and practices.

The following witnesses are current or former employees of Defendant that have information regarding EEOC's claims. These individuals may have information relating to Mr. Duane's hiring, employment, performance, productivity, and the decision to terminate him. They may also have information related to: IXL's use of Glassdoor.com, including the company's encouragement to post on the website and to monitor employee posts, including Mr. Duane's; any actions taken by IXL in response to employee posts on Glassdoor.com, specifically Mr. Duane's post giving rise to the instant action. The following individuals also will have information related to IXL's policies and procedures for handling reasonable accommodation requests and discrimination complaints, and its treatment of employees who complain about discrimination or otherwise unfair practices. The individuals will also have information about the content and frequency of anti-discrimination training the company provided to new and existing employees and managers. The last known addresses and telephone numbers of the following individuals are in Defendant's possession.

1. Paul Mishkin, CEO
2. David Keyes, Manager
3. Maricelo Prado, HR Manager
4. Karen Penner, Recruitment Manager
5. Kate Mattison, Manager
6. Lenore Ockerberg, Operations Manager

(ii) Documents: a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

The following list represents a list of the relevant, non-privileged portions of the EEOC's investigative file that the EEOC may use to support its claims.

Full Name	Date	Bates - Begin	Bates - End
EEOC Determination Letter	4/22/2016	EEOC_000001	EEOC_000002
Charge of Discrimination	3/10/2015	EEOC_000003	EEOC_000028
Charge Exhibit A	3/10/2015	EEOC_000029	EEOC_000029

Full Name	Date	Bates - Begin	Bates - End
Duane/Keyes email string re return to work	12/19/14 - 12/23/14	EEOC_000030	EEOC_000031
Charge Exhibit B	3/10/2015	EEOC_000032	EEOC_000032
Doctor's note re medical leave to telecommute	12/29/2014	EEOC_000033	EEOC_000033
Charge Exhibit C	3/10/2015	EEOC_000034	EEOC_000034
Duane Working Remotely Plan	NA	EEOC_000035	EEOC_000035
Charge Exhibit D	3/10/2015	EEOC_000036	EEOC_000036
IXL employee reviews (Micromanaged and problematic)	=< 12/30/14	EEOC_000037	EEOC_000038
Charge Exhibit E	3/10/2015	EEOC_000039	EEOC_000039
Mishkin/Duane cell text re discrimination complaint	1/7/2015	EEOC_000040	EEOC_000041
Notice of Charge of Discrimination	5/4/2015	EEOC_000042	EEOC_000043
Notice of Charge of Discrimination	5/13/2015	EEOC_000044	EEOC_000045
DFEH Notice of Complaint of Right-to-Sue	5/13/2015	EEOC_000046	EEOC_000046
EEOC/Duane letter re claims process	NA	EEOC_000047	EEOC_000047
EEOC/Duane letter re transfer of charges	5/6/2015	EEOC_000048	EEOC_000048
EEOC/IXL/Duane letter re notice of receipt of charge	5/4/2015	EEOC_000049	EEOC_000049
EEOC What You Should Do After You Have Filed A Charge handout	NA	EEOC_000050	EEOC_000051
EEOC Mishkin interview notes	10/30/2015	EEOC_000052	EEOC_000058
EEOC Keyes interview notes	10/30/2015	EEOC_000059	EEOC_000063
EEOC Prado interview notes	10/30/2015	EEOC_000064	EEOC_000068
EEOC/IXL letter requesting information and interviews	10/7/2015	EEOC_000069	EEOC_000069
EEOC/IXL email string re request for medical records and disciplinary files	10/15/15 - 10/16/15	EEOC_000070	EEOC_000070
Doctor's note re medical leave to telecommute	12/29/2014	EEOC_000071	EEOC_000071
IXL/EEOC letter forwarding documents	10/15/2015	EEOC_000072	EEOC_000072
EDD Notice of Wages Used for Unemployment Insurance Claim	3/10/2015	EEOC_000073	EEOC_000073
EDD Request for Additional Information	1/14/2015	EEOC_000074	EEOC_000074
Duane/Prado email re COBRA coverage	1/29/2015	EEOC_000075	EEOC_000075
ADP letter re Duane change of address	2/4/2015	EEOC_000076	EEOC_000076
IRS 2013 W-4	7/10/2013	EEOC_000077	EEOC_000077
Emergency Contact Information form	7/10/2013	EEOC_000078	EEOC_000078
Building Access Card Request Form	7/10/2013	EEOC_000079	EEOC_000079
Fitness facility General Release	7/10/2013	EEOC_000080	EEOC_000080
Acknowledgement of Receipt of Notification of COBRA Rights	7/10/2013	EEOC_000081	EEOC_000081
IXL New Hire Checklist	7/10/2013	EEOC_000082	EEOC_000082
Employee Direct Deposit Enrollment Form	7/10/2013	EEOC_000083	EEOC_000083
Release of Liability and Waiver for On-Site Massage Services Conducted at IXL Learning	7/10/2013	EEOC_000084	EEOC_000084

Full Name	Date	Bates - Begin	Bates - End
Sexual Harassment Policy Acknowledgement	7/16/2013	EEOC_000085	EEOC_000085
Confirmation of Receipt of At-will Language	7/10/2013	EEOC_000086	EEOC_000086
Employer Property Return Agreement	7/10/2013	EEOC_000087	EEOC_000087
Conditions of Employment Agreement	7/10/2013	EEOC_000088	EEOC_000088
Non-Disclosure Agreement, signature page only	7/10/2013	EEOC_000089	EEOC_000089
Employee Withholding Allowance Certificate	7/10/2013	EEOC_000090	EEOC_000091
IXL/Duane letter re offer of employment	2/15/2013	EEOC_000092	EEOC_000093
IXL Offer Letter/Contract Request Form	NA	EEOC_000094	EEOC_000094
IXL Employment Application (Duane)	11/1/2012	EEOC_000095	EEOC_000096
Duane Resume	=< 11/01/12	EEOC_000097	EEOC_000097
Duane cover letter	11/9/2012	EEOC_000098	EEOC_000098
Termination Checklist	1/8/2015	EEOC_000099	EEOC_000099
IXL Final Pay stub (Duane)	1/7/2015	EEOC_000100	EEOC_000100
IXL Final Vacation Pay stub (Duane)	1/7/2015	EEOC_000101	EEOC_000101
Employee Contact Confirmation	1/8/2015	EEOC_000102	EEOC_000102
Employee Exit Agreement	1/8/2015	EEOC_000103	EEOC_000103
IXL Option Ledger (Duane)	07/10/13 - 07/26/13	EEOC_000104	EEOC_000104
IXL 2010 Stock Option Plan letter (blank)	NA	EEOC_000105	EEOC_000105
Personnel Data Change Form (leave of absence)	12/26/2014	EEOC_000106	EEOC_000106
Duane/IXL email re leave for surgery	10/3/2014	EEOC_000107	EEOC_000107
EDD Notice of Determination/Ruling	2/3/2015	EEOC_000108	EEOC_000109
CA EDD Application form (blank)	NA	EEOC_000110	EEOC_000110
Personnel Data Change Form (short term disability)	9/26/2014	EEOC_000111	EEOC_000111
Personnel Data Change Form (leave of absence)	12/26/2014	EEOC_000112	EEOC_000112
EDD Notice to Employer of Disability Insurance Claim Filed, p.1 only	11/18/2014	EEOC_000113	EEOC_000113
IXL Introductory Period Evaluation, pp.1, 3 only	11/6/2013	EEOC_000114	EEOC_000115
IXL Introductory Period Evaluation, p.1 only	9/12/2013	EEOC_000116	EEOC_000116
EDD Notice to Employer of Disability Insurance Claim Filed, p.1 only	11/18/2014	EEOC_000117	EEOC_000117
Personnel Data Change Form (short term disability)	10/31/2014	EEOC_000118	EEOC_000118
IXL employee reviews (The Sales Dept is a Disaster)	6/29/2015	EEOC_000119	EEOC_000119
IXL employee reviews (Not a place to have a career in Sales Dept)	6/29/2015	EEOC_000120	EEOC_000121
IXL Introductory Period Evaluation	9/12/2013	EEOC_000122	EEOC_000123
IXL Introductory Period Evaluation	11/6/2013	EEOC_000124	EEOC_000126
IXL Position Statement, with fax cover sheet	07/10/15 - 07/13/15	EEOC_000127	EEOC_000145
IXL employee reviews	07/20/15 - 09/04/15	EEOC_000146	EEOC_000150
IXL employee reviews	03/10/15 - 07/16/15	EEOC_000151	EEOC_000155

Full Name	Date	Bates - Begin	Bates - End
IXL employee reviews	09/08/14 - 03/16/15	EEOC_000156	EEOC_000160
IXL employee reviews	02/24/14 - 08/07/14	EEOC_000161	EEOC_000165
IXL employee reviews	07/10/13 - 01/15/14	EEOC_000166	EEOC_000170
IXL employee reviews	05/03/11 - 07/25/13	EEOC_000171	EEOC_000174
IXL employee reviews	07/20/15 - 08/23/15	EEOC_000175	EEOC_000176
IXL employee reviews	07/21/15 - 09/04/15	EEOC_000177	EEOC_000179
IXL employee reviews	07/21/15 - 09/04/15	EEOC_000180	EEOC_000182
IXL employee reviews	06/24/15 - 06/28/15	EEOC_000183	EEOC_000185
IXL employee reviews	05/24/15 - 06/28/15	EEOC_000186	EEOC_000188
IXL employee reviews	09/14/14 - 12/30/14	EEOC_000189	EEOC_000191
IXL employee reviews	07/10/13 - 07/25/13	EEOC_000192	EEOC_000194
IXL employee reviews	05/03/11 - 05/28/13	EEOC_000195	EEOC_000197
IXL employee reviews	06/20/11 - 05/24/13	EEOC_000198	EEOC_000200
EEOC/IXL letter re conciliation failure	7/28/2016	EEOC_000201	EEOC_000201
EEOC/Duane letter re conciliation failure	7/28/2016	EEOC_000202	EEOC_000202
EEOC/IXL letter re conciliation failure	7/27/2016	EEOC_000203	EEOC_000203

(iii) Damages: a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

Without the benefit of discovery, the EEOC cannot provide a concrete computation of damages. Generally, the EEOC seeks compensatory damages for emotional distress, other incidental expenses incurred, and punitive damages. Although the EEOC's compensatory and punitive damages are statutorily capped at $200,000, Mr. Duane is nonetheless entitled to backpay, lost bonuses, and other benefits beyond the statutory cap. Mr. Duane's annual salary at the time of his termination was approximately $82,400 but he anticipated at least a 5% raise in salary for the coming year. Mr. Duane was unemployed despite efforts to obtain employment for a period of approximately one year. The exact nature of these damages, the potential lost bonuses, and the value of other benefits will be the subject of discovery through the course of litigation.

The EEOC also seeks injunctive relief to prevent future discrimination as stated in the Complaint.

(iv) Insurance: for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

This information is only applicable to Defendant and solely in the possession of Defendant.

Dated: August 15, 2017

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

By: */s/ Ami Sanghvi*
AMI SANGHVI
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I am, and was at the time the herein service took place, a citizen of the United States, over the age of eighteen (18) years and not a party to the above-entitled cause.

I am employed in the Legal Unit of the San Francisco District Office of the United States Equal Employment Opportunity Commission.

My business address is U.S. Equal Employment Opportunity Commission, San Francisco District Office, Phillip Burton Federal Building, 450 Golden Gate Ave., 5th Floor West, P.O. Box 36025, San Francisco, CA 94102.

On the date that this declaration was executed, as shown below, I personally served the following document(s):

EEOC'S FIRST INITIAL DISCLOSURES PURSUANT TO FED. R. CIV. P. 26(A)(1)

by forwarding via E-mail to the following person(s):

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Attorneys for Defendant

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 15, 2017, at Phoenix, Arizona.

Colleen D. McCartney

Exhibit DD

ROBERTA L. STEELE, SBN 188198 (CA)
MARCIA L. MITCHELL, SBN 18122 (WA)
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Attorneys for Plaintiff EEOC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

ADRIAN SCOTT DUANE,

Plaintiff-Intervenor,

vs.

IXL Learning, Inc.,

Defendant.

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

EEOC'S RESPONSES AND OBJECTIONS TO DEFENDANT'S SECOND SET OF REQUESTS OF DOCUMENTS TO PLAINTIFF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff Equal Employment Opportunity Commission, by and through its undersigned counsel, objects and responds to Defendant IXL Learning, Inc.'s Second Set of Requests for Documents. Plaintiff's responses are based upon information currently available. Plaintiff will comply with Fed. R. Civ. P. 26(e) and supplement its discovery responses in a timely manner.

GENERAL OBJECTIONS

1. Plaintiff objects to the Instructions and Definitions in Defendant's requests that exceed what is required or permitted by the Federal Rules of Civil Procedure, the Local Rules of the Northern District of California, or applicable court orders. Specifically, Fed. R. Civ. P. 34 requires a responding party to either state what they are withholding because of an objection or, alternatively, describe the scope of the production the party is willing to make. The withholding party is not required to specifically identify or log withheld documents as suggested in Defendant's instructions. *See* Fed. R. Civ. P. 34, Advisory Committee Notes on 2015 Amendments.

2. Plaintiff will not produce information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the governmental deliberative process privilege, the common interest privilege. Plaintiff will continue to adhere to the parties' agreement to forego the need for a privilege log detailing individual communications between: (a) IXL and attorneys and staff of Young Basile Hanlon & MacFarlane; (b) Adrian Scott Duane and attorneys and staff of Liddle & Robinson; (c) Adrian Scott Duane and David Marek of the Marek Law Firm; and (d) Adrian Scot Duane and the EEOC after the Complaint in this action was filed on May 24, 2017.

3. Plaintiff objects to all requests seeking documents and communications among or between Duane and "any former employee of IXL"; "any current employee of IXL"; and "any third party" because they fail to meet Fed. R. Civ. P. 34's reasonable particularity standard. The EEOC will not search for, collect, or produce documents from "any former employee of IXL", "any current employee of IXL" and "any third party." The EEOC has no way of identifying all IXL's former or current employees and the term "any third party" is vague and lacks any specificity that would allow for a reasonable or proportional search. There is marginal relevance, if any, of the collecting communications with "any third party" to the claims and defenses in this litigation. The request for communications with current or former IXL employees may not be proportional to the needs of the case to the extent that it seeks duplicative information that Defendant necessarily has in its possession if the communications occurred on IXL provided devices.

4. Notwithstanding these objections, the EEOC conducted a reasonable and proportional search of a forensic copy of Mr. Duane's personal cell phone text messages, Facebook account, and three email accounts. To the extent that the EEOC identified communications relevant to the claims and defenses in the case, they have not been withheld.

REQUESTS FOR PRODUCTION OF DOCUMENTS

Document Request No. 24: All documents and communications, including social media posts/messages, text messages, and instant messages, concerning, relating to, describing, or discussing Duane's criticisms and complaints of IXL from July 2013 to the present among or between:

a. Duane and any former employee of IXL;

b. Duane and any current employee of IXL; and

c. Duane and any third party.

RESPONSE:

The EEOC objects that the request is overbroad and vague. IXL fails to specify what types of "criticisms and complaints of IXL" it seeks through this request. Therefore, the request is vague, ambiguous, and does not meet Fed. R. Civ. P. 34's requirement to state matters with reasonable particularity. Central to the claims and defenses in this case is whether Mr. Duane had a reasonable good faith belief that he was opposing IXL's discriminatory conduct when he engaged in protected opposition activity. To the extent that Mr. Duane communicated criticisms and complaints of IXL that did not give rise to his opposition activity, they will not generate information relevant to the claims or defenses in this case. For example, hypothetically, if Mr. Duane complained about the food at IXL, this would be a 'criticism or complaint of IXL' but such a complaint has nothing to do with why Mr. Duane claims he posted his opposition activity.

The temporal scope of this request is also overbroad. Mr. Duane's 'criticisms and complaints of IXL' from January 8, 2015 to present are not relevant to the claims and defenses at issue in this case.

This request is also unduly burdensome because it is cumulative and duplicative of information already sought and produced in response to Defendant's previous document requests.

The discovery request is not proportional to the needs of the case considering the marginal importance of the materials to the claims and defenses in this litigation and the substantial cost to identify additional responsive materials balanced against the amount in controversy.

The EEOC already produced responsive documents pursuant to a reasonable and proportional search. The EEOC produces additional documents after searching communications with the following specific individuals: Nina Wu, Jess Morse, Nemo Curiel. Please refer to documents previously produced and produced herein.

Document Request No. 25: All documents and communications, including social media posts/messages, text messages, and instant messages, concerning, relating to, describing, or discussing Duane's December 2014 request to work remotely among or between:

a. Duane and any former employee of IXL;

b. Duane and any current employee of IXL; and

c. Duane and any third party.

RESPONSE:

The EEOC objects that the request is overbroad, lacks a temporal scope, and seeks information not proportional to the needs of the case. The discovery request is not proportional to the needs of the case considering the marginal importance of the materials to the claims and defenses in this litigation and the substantial cost to identify additional responsive materials balanced against the amount in controversy.

This request is unduly burdensome because it is cumulative and duplicative of information already sought and produced in response to Defendant's previous document requests.

The EEOC already produced responsive documents pursuant to a reasonable and proportional search. The EEOC produces additional documents after searching communications with the following specific individuals: Nina Wu, Jess Morse, Nemo Curiel. Please refer to documents previously produced and produced herein.

Document Request No. 26: All documents and communications, including social media posts/messages, text messages, and instant messages, concerning, relating to, describing, or discussing any alleged complaints of discrimination or any alleged denials of accommodation by any current or former IXL employee from July 2013 to January 2015 among or between:

a. Duane and any former employee of IXL;

b. Duane and any current employee of IXL; and

c. Duane and any third party.

RESPONSE:

The EEOC objects that the request is overbroad and seeks information not proportional to the needs of the case. Central to the claims and defenses in this case is whether Mr. Duane had a reasonable good faith belief that he was opposing IXL's discriminatory conduct when he engaged in opposition activity. The relevant inquiry therefore should be related to complaints of discrimination or denials of accommodation that influenced Mr. Duane prior to his December 30, 2014 Glassdoor post.

Additionally, the request does not provide a temporal scope. Searching for communications that Mr. Duane had about any alleged complaint of discrimination or denial of reasonable accommodation at IXL by a current or former employee years after Mr. Duane's December 30, 2014 Glassdoor post would not generate information relevant to the claims or defenses in this matter.

Finally, this request is unduly burdensome because it is cumulative and duplicative of information already sought and produced in response to Defendant's previous document requests.

The EEOC already searched and produced responsive documents pursuant to a reasonable and proportional search of Mr. Duane's ESI data sources for communications about Mr. Duane's perception of IXL's handling of his remote work request in December 2014. The EEOC produces additional documents after searching communications with the following specific individuals: Nina Wu, Jess Morse, Nemo Curiel. Please refer to documents previously produced and produced herein.

Document Request No. 27: All documents and communications, including social media posts/messages, text messages, and instant messages, concerning, relating to, describing, or discussing Duane's December 2014 Glassdoor.com post among or between:

a. Duane and any former employee of IXL;

b. Duane and any current employee of IXL; and

c. Duane and any third party.

RESPONSE:

The EEOC objects to producing 'all documents and communications' relating to 'Duane's December 2014 Glassdoor.com post' because the request is vague, overbroad and seeks information not proportional to the needs of the case. By failing to articulate what about "Duane's December 2014 Glassdoor.com post" Defendant is seeking, the request does not meet Fed. R. Civ. P. 34's reasonable particularity standard. As written, the EEOC would have to search the ESI data sources, without reference to a time period, for communications that may simply reference the fact that Mr. Duane was fired for posting on Glassdoor.com. The reason for his termination is not a disputed fact in the case. The overbroad search required to comply with this request is disproportionate to the needs of the case because it would not generate information relevant to the claims and defenses in this matter.

This request is also unduly burdensome because it is cumulative and duplicative of information already sought and produced in response to Defendant's previous document requests.

The EEOC already produced responsive documents pursuant to a reasonable and proportional search of Mr. Duane's ESI data sources. The EEOC produces additional documents after searching communications with the following specific individuals: Nina Wu, Jess Morse, Nemo Curiel. Please refer to documents previously produced and produced herein.

Document Request No. 28: All documents concerning, relating to, describing, or discussing Duane's December 2014 Glassdoor.com post, including any and all drafts of Duane's December 2014 Glassdoor.com post.

RESPONSE:

The EEOC objects to producing documents in response to this request because it is vague, duplicative, fails to meet Fed. R. Civ. P. 34's reasonable particularity standard, and not proportional to the needs of the case. To the extent that this is seeking the same information requested in Request No. 27, the EEOC refers IXL to the objections noted in response to Request No. 27. The EEOC conducted a reasonable search and is unaware of any drafts of Duane's December 2014 Glassdoor.com post.

Document Request No. 29: All documents and communications, including social media posts/messages, text messages, and instant messages, concerning, relating to, describing, or discussing any former or current IXL employee's working remotely plan from July 2013 to January 2015 among or between:

a. Duane and any former employee of IXL;

b. Duane and any current employee of IXL; and

c. Duane and any third party.

RESPONSE:

The EEOC objects to producing documents in response to this request because it is vague, overbroad, and does not meet Fed. R. Civ. P. 34's reasonable particularity standard. The term "working remotely plan" is vague and ambiguous and unclear if it refers to an informal arrangement to work remotely or a more formalized written plan like the one Mr. Duane received on December 30, 2014 after returning from leave.

Additionally, this request is overbroad as it places no limitation on a relevant time frame. Searching for communications that Mr. Duane had about any former or current employee's "working remotely plan" from July 2013 to January 2015 years after Mr. Duane's December 30, 2014 Glassdoor post would not generate information relevant to the claims or defenses in this matter because the communications did not influence his state of mind when he posted on Glassdoor.com.

Finally, this request is unduly burdensome because it is cumulative and duplicative of information already sought and produced in response to Defendant's previous document requests.

The EEOC has already produced responsive documents pursuant to a reasonable and proportional search of Mr. Duane's communications regarding his perception of IXL's handling of his remote work request in December 2014 from his ESI data sources. The EEOC produces additional documents after searching communications with the following specific individuals: Nina Wu, Jess Morse, Nemo Curiel. Please refer to documents previously produced and produced herein.

Document Request No. 30: All documents and communications, including social media posts/messages, text messages, and instant messages, concerning, relating to, describing, or discussing Duane's September 11, 2013 Glassdoor.com post among or between:

a. Duane and any former employee of IXL;

b. Duane and any current employee of IXL; and

c. Duane and any third party.

RESPONSE:

The EEOC objects to producing "all documents and communications" relating to "Duane's September 11, 2013 Glassdoor.com post" because the request is vague, overbroad and seeks information not proportional to the needs of the case. By failing to articulate what about "Duane's September 11, 2013 Glassdoor.com post" Defendant seeks, the request does not meet Fed. R. Civ. P. 34's reasonable particularity standard. As written the EEOC would even have to search the ESI data sources, without reference to a time period or custodians, for communications that may simply reference the fact that Mr. Duane posted on Glassdoor.com in September 2013. That fact is not in dispute. Moreover, IXL had, but did not avail itself of, the opportunity to question Mr. Duane about his September 2013 and the motivations behind the post during his deposition. This would have been a far less burdensome way to pursue discovery on the issue or at least identify specific areas of additional discovery. The overbroad search required to comply with this request is disproportionate to the needs of the case because it would not generate information relevant to the claims and defenses in this matter.

Document Request No. 31: All documents and communications, including social media posts/messages, text messages, and instant messages, concerning, relating to, describing, or discussing IXL's profitability, finances, and/or performance from July 2013 to January 2015 among or between:

a. Duane and any former employee of IXL;

b. Duane and any current employee of IXL; and

c. Duane and any third party.

RESPONSE:

The EEOC objects to searching and producing "all documents and communications" related to IXL's "performance" because it is vague and ambiguous. The term "performance" can be

interpreted in multiple ways, including economic performance as well as performance with users and customers, as well as performance with employees and their satisfaction levels. The term "finances" could include a myriad of subjects. The request is also unduly burdensome because many of such possible communications would be in the possession, custody, and control of Defendant if they occurred over IXL-provided devices, overbroad, and seeks information not proportional to the needs of the case.

Document Request No. 32: All documents and communications, including social media posts/messages, text messages, and instant messages, concerning, relating to, describing, or discussing any former or current employee's promotions, raises, and/or praise from July 2013 to January 2015 among or between:

a. Duane and any former employee of IXL;

b. Duane and any current employee of IXL; and

c. Duane and any third party.

RESPONSE:

The EEOC objects to searching and producing "all documents and communications" relating to "any former or current employee's promotions, raises, and/or praise from July 2013 to January 2015" because the request is overbroad and seeks information not proportional to the needs of the case. Central to the claims and defenses in this case is whether Mr. Duane had a reasonable good faith belief that he was opposing IXL's discriminatory conduct when he engaged in opposition activity. The relevant inquiry therefore should be related to communications about promotions, raises, and/or praise that influenced Mr. Duane prior to his December 30, 2014 Glassdoor post. Additionally, the request does not provide a temporal scope as to when the communications occurred. Searching for communications that Mr. Duane had about current or former employee's promotions, raises, and/or praise from July 2013 to January 2015 years after Mr. Duane's December

30, 2014 Glassdoor post would not generate information relevant to the claims or defenses in this matter because they did not influence his state of mind when he posted to Glassdoor.com. Finally, this request is unduly burdensome because it is cumulative and duplicative of information already sought and produced in response to Defendant's previous document requests.

Based on these objections, the EEOC has not conducted a new search beyond the EEOC's previous reasonable and proportional search for documents. The EEOC already produced responsive documents pursuant to a reasonable and proportional search. The EEOC produces additional documents after searching communications with the following specific individuals: Nina Wu, Jess Morse, Nemo Curiel. Please refer to documents previously produced and produced herein.

Document Request No. 33: All documents and communications, including social media posts/messages, text messages, and instant messages, concerning, relating to, describing, or discussing IXL's human resource staff from July 2013 to January 2015 among or between:

a. Duane and any former employee of IXL;

b. Duane and any current employee of IXL; and

c. Duane and any third party.

RESPONSE:

The EEOC objects that the request is vague, overbroad, fails to state matters with reasonable particularity, and seeks information not proportional to the needs of the case. IXL fails to specify subject matters or characterizations of the communications about IXL's human resource staff. As written the EEOC would have to search multiple ESI data sources, without reference to a time period, for communications that may simply reference a benign housekeeping issue involving human resources, but that will not generate information relevant to the claims and defenses in this case.

This request is unduly burdensome because it is cumulative and duplicative of information already sought and produced in response to Defendant's previous document requests.

The EEOC has already produced responsive documents pursuant to a reasonable and proportional search. The EEOC produces additional documents after searching communications with the following specific individuals: Nina Wu, Jess Morse, Nemo Curiel. Please refer to documents previously produced and produced herein.

Document Request No. 34: All documents and communications, including social media posts/messages, text messages, and instant messages, concerning, relating to, describing, or discussing IXL's management, including IXL managers David Keyes and Kate Mattison and IXL's CEO Paul Mishkin, from July 2013 to January 2015 among or between:

a. Duane and any former employee of IXL;

b. Duane and any current employee of IXL; and

c. Duane and any third party.

RESPONSE:

The EEOC objects that the request is vague, overbroad, fails to state matters with reasonable particularity, and seeks information not proportional to the needs of the case. IXL fails to specify subject matters or characterizations of the communications about IXL's "management." As written the EEOC would have to search multiple ESI data sources, without reference to a time period, for communications that may simply reference a benign housekeeping issue involving human resources, but that will not generate information relevant to the claims and defenses in this case.

This request is unduly burdensome because it is cumulative and duplicative of information already sought and produced in response to Defendant's previous document requests.

The EEOC has already produced responsive documents pursuant to a reasonable and proportional search. The EEOC produces additional documents after searching communications with the following specific individuals: Nina Wu, Jess Morse, Nemo Curiel. Please refer to documents previously produced and produced herein.

Document Request No. 35: All documents and communications, including social media posts/messages, text messages, and instant messages, concerning, relating to, describing, or discussing Duane's termination from IXL among or between:

a. Duane and any former employee of IXL;

b. Duane and any current employee of IXL; and

c. Duane and any third party.

RESPONSE:

The EEOC objects that the request is vague, overbroad, fails to state matters with reasonable particularity, and seeks information not proportional to the needs of the case. IXL fails to specify what about Mr. Duane's termination from IXL that it seeks information. As written the EEOC would have to search multiple ESI data sources, without reference to a time period, for communications that may simply reference the fact that IXL fired Mr. Duane in January 8, 2015 with no reference to the reason behind the termination.

This request is unduly burdensome because it is cumulative and duplicative of information already sought and produced in response to Defendant's previous document requests.

The EEOC has already produced responsive documents pursuant to a reasonable and proportional search. The EEOC produces additional documents after searching communications with the following specific individuals: Nina Wu, Jess Morse, Nemo Curiel. Please refer to documents previously produced and produced herein.

Document Request No. 36: All documents and communications, including social media posts/messages, text messages, and instant messages, among or between:

a. Duane and Alexander Karsten;

b. Duane and Cara Chomski; and

c. Duane and any other attorneys with whom Duane waived the attorney-client privilege.

RESPONSE:

The EEOC objects to searching for or producing documents responsive to this request. The request is a blanket request for all documents and communications without any subject matter or temporal scope limitation. It is overbroad, calls for communications protected by the attorney-client privilege, lacks specificity required by Fed. R. Civ. P. 34, and is not proportional to the needs of the case. Mr. Karsten is lawyer from whom Mr. Duane occasionally sought legal advice. The EEOC already provided a privilege log referencing relevant communications that it withheld. IXL has made no showing of why the privilege does not apply. Communications with Ms. Chomski are covered by the parties' agreement that a privilege log is not required for communications with attorneys and staff of Liddle Robinson, the law firm that Mr. Duane retained when he first filed his NLRB and EEOC charges. The reference to "any other attorneys with whom Duane waived the attorney-client privilege" assumes a fact about which the EEOC fundamentally disagrees. Mr. Duane has not waived any attorney-client privilege. The EEOC is withholding documents pursuant to these objections.

Document Request No. 37: All documents and communications, including social media posts/messages, text messages, and instant messages, that form the basis for all statements made in Duane's December 2014 Glassdoor.com post.

RESPONSES:

The EEOC objects to producing communications in response to an overbroad and unduly burdensome request that is cumulative and duplicative of information already sought and produced in response to Defendant's previous document requests. The EEOC already produced responsive documents pursuant to a reasonable and proportional search. The EEOC produces additional

documents after searching communications with the following specific individuals: Nina Wu, Jess Morse, Nemo Curiel. Please refer to documents previously produced and produced herein.

Dated: April 13, 2018

Respectfully Submitted,

/s/ Ami Sanghvi

AMI SANGHVI
Senior Trial Attorney
Equal Employment Opportunity Commission
450 Golden Gate Avenue, 5th Floor W., POB 36025
San Francisco, CA 94102
Tel: (415) 522-3071

CERTIFICATE OF SERVICE

I hereby certify that I am serving EEOC's Responses and Objections to Defendant's Second Set of Requests for Documents on April 13, 2018 to Defendant, IXL Learning, Inc. by electronic mail to the following attorneys of record:

Jeffrey Wilson
wilson@youngbasile.com

Natasha Menezes
menezes@youngbasile.com

DATED: April 13, 2018

BY: */s/ Ami Sanghvi*
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Tel. (415) 522-3071
Attorney for Plaintiff

Exhibit EE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

---O0O---

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

DEPOSITION OF PAUL MISHKIN

Taken before DIANA L. GONZALEZ

CSR No. 7935

March 7, 2018

from Glassdoor for yourselves."

Did you come to a conclusion who it was from -- who it was by, excuse me, who the Glassdoor review was by?

A. Well, when they first sent it, I could tell that they were suggesting that it was from Scott, but I didn't -- I didn't have a definite opinion on -- of my own about that.

Q. How could you tell that Mr. Prado was suggesting that it was from Scott?

A. Well, in this e-mail it's -- it's kind of attached on to some other information about Scott, so I think that implies that she's saying that it's from Scott.

Q. Did you understand that the person was complaining that if you work for IXL and you're not white or Asian, that you'll be discriminated against?

MR. WILSON: Objection; form.

THE WITNESS: I understood that this is a post that's making a lot of false allegations about the company.

BY MS. SANGHVI:

Q. How did you come to an understanding that the post was making false allegations about the company?

A. From reading it.

Q. Other than reading it, did you take any other steps to understand the -- that the post was raising false allegations about the company?

A. No.

Q. If you look at the fourth paragraph of the post that begins, "There are no politics if you fit in," do you see that paragraph?

A. I see it. Uh-huh.

Q. Did you understand from that paragraph that the person was complaining that if you work for IXL and you're not white or Asian, that you'll be discriminated against?

MR. WILSON: Objection; form, foundation.

THE WITNESS: I understood -- I interpreted that as, you know, a damaging statement, untrue about the company's culture aimed at poten -- directly at potential job seekers. Just kind of absurd.

BY MS. SANGHVI:

Q. When you say it's untrue, that there are statements that are untrue, can you identify for me from the beginning which statements you perceived as untrue?

A. "Micromanaged, easy unchallenging work," that's definitely untrue. "The company isn't going anywhere right now," that's definitely untrue. "They play to the traditional classroom," that's certainly untrue. "Don't

expect a challenge here," untrue. "Gives their employees boring, menial work to fill the day," that's certainly untrue. "The CEO is overly involved in every product, every decision, every everything." Well, we don't have very many products, so it -- "overly involved," untrue. Obviously, I'm "involved in every product, every decision, every everything," that's ridiculous. That's untrue. That "there are no politics if you fit in," that's -- I -- that's -- that's generally very apolitical place in general, doesn't have much to do with fitting in.

"If you're not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball then you're likely to find yourself on the outside" is most certainly untrue.

"Treatment in the workplace, in terms of who gets flexible hours, interesting projects, praise promotions, and a big yearly raise, is different and seems to run right along these characteristics," that's untrue.

"There is essentially no HR knowledge or staff at this company," that's untrue. "Know your rights when you work here, because they don't, and they don't care to learn," that's not true. "Most management has no idea what the word 'discrimination' means, nor do they

think it matters," that's untrue. "Don't pull the bait and switch on employees," that's untrue. "Build a culture that encourages respect for people of all walks of life," the implication that -- that is not what is in place at IXL is untrue. I think I probably just read almost the whole post.

I am not -- by the way, let me add, "I have been working at IXL Learning full time, more than three years," knowing that this is from Scott, this is also untrue.

Q. To the first three things that you noted, those are in the pros section, do you think those are not positives of IXL?

A. No. I -- "easy, unchallenging work" is not really a positive thing to say, you know, especially when you combine that with gives "employees boring, menial work to fill the day."

Q. So let's focus a bit on the paragraph about the "politics if you fit in" for a moment.

Setting aside your belief that it was untrue, is it accurate that you read this post to say that if you are not white or Asian or mainstream gay with 1.7 kids, if you do not like sports and if you don't have kids, then you won't be discriminated against?

MR. WILSON: Objection; form.

Q. Why did you believe Mr. Duane's post was defamatory?

A. I believed it was defamatory because most of it is -- it's obvious false statements, and I -- and I believed it was intentional and particularly seeing the -- the place where it was posted and the manner in which it was written directly to job seekers.

Q. Did you pursue legal action against Mr. Duane for defamation?

A. No.

Q. Why not?

A. I thought -- knowing how important -- I guess I worried about making -- making the situation worse and Scott possibly engaging in -- in more of this type of behavior.

Q. Without telling me the contents of any discussion you had with an attorney, did you consult an attorney about a potential defamation claim against Mr. Duane?

MR. WILSON: That does reveal a communication with counsel about potential defamation. I don't know how he can -- object. I don't know how he can answer that without, you know, revealing the contents of what he talked about. I'd ask if there's a way that you could rephrase it.

stood up and said, "You'll be hearing from my lawyer," and left my office.

Q. And did you think you couldn't work together anymore with Mr. Duane because he thought IXL treated certain characteristics of people differently?

A. No.

Q. There was a back and forth between you and Mr. Marek about what information and what decision you had made prior to the January 8th meeting, and I just want to be -- make sure I'm extremely clear.

You had already decided to terminate Mr. Duane prior to the January 8th meeting, correct?

A. Yes.

Q. And the reason for that termination decision was what?

A. It was the Glassdoor posting.

Q. And is there anything that Mr. Duane could have told you in that meeting that would have changed that decision for you because it wouldn't have changed the post?

A. It's hard to imagine something.

Q. You've also made the point with Mr. Marek that the -- that the post was made in a very public forum and it was meant to harm IXL's business, and that's one of the primary reasons you thought it was appropriate to

REPORTER'S CERTIFICATE

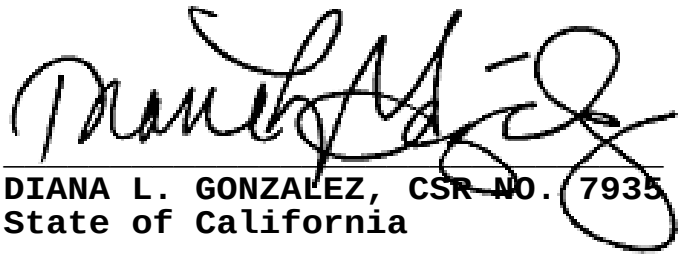
I, DIANA L. GONZALEZ, a Shorthand Reporter, State of California, do hereby certify:

That PAUL MISHKIN, in the foregoing deposition named, was present and by me sworn as a witness in the above-entitled action at the time and place therein specified;

That said deposition was taken before me at said time and place, and was taken down in shorthand by me, a Certified Shorthand Reporter of the State of California, and was thereafter transcribed into typewriting, and that the foregoing transcript constitutes a full, true and correct report of said deposition and of the proceedings that took place;

That before completion of the proceedings, review of the transcript was requested.

IN WITNESS WHEREOF, I have hereunder subscribed my hand this 14th day of March 2018.



DIANA L. GONZALEZ, CSR NO. 7935
State of California

Exhibit FF

In the Matter Of:

U.S. EEOC vs IXL LEARNING

3:17-cv-02979-VC

ADRIAN SCOTT CAMPE DUANE

March 27, 2018

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

ADRIAN SCOTT DUANE,

Plaintiff-Intervenor,

v.

IXL LEARNING, INC.,

Defendant.

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

DEPOSITION OF

ADRIAN SCOTT CAMPE DUANE

March 27, 2018

10:05 a.m.

44 Montgomery Street, Suite 1100

San Francisco, California

Sarah J. Bingham, CSR #13720

"You were disappointed with how narrow your job was and how your creativity was not permitted, right?

"Answer: Correct. That was one of the reasons.

"And that was one of the reasons you posted?

"Answer: Correct."

Was that a truthful answer at the time?

A. Yes.

Q. Okay. You felt that one of the reasons that you posted was that you were upset about the initial reaction from David Keyes in December to your request for a -- 50 percent work at home, right?

A. It was really more to do with the meeting that we had that day, but there -- the e-mail exchange was -- was part of it as well. It all led up to this meeting.

Q. So on page -- of your transcript, on bottom of page 114, which I pulled up for you, I asked the question, "Part of the reason that you filed your post -- you wrote", and then on to 15 -- 115, "and filed your post on Glassdoor was that you were upset about that initial reaction from David to your request.

"Answer: Yes. And I thought it showed a pattern."

Was that truthful testimony?

A. Yes. And like I said there, it was part of a pattern that led up to that December 30th conversation.

Q. Right. So my question simply is is that truthful?

A. I think I answered that, but yes, it's truthful.

Q. Okay.

A. And it's part of a pattern.

Q. Right. Well, exactly, that's what you said. "Yes. And I thought it showed a pattern." And that's a truthful statement that you made, correct?

A. Yes.

Q. All right. I asked you, "A pattern of what?"

And you answered, "A pattern of sick leave and disability not being accommodated, not just for me but for other employees as well."

Was that a truthful statement?

A. Yes.

Q. Okay. I asked you, "But you didn't say in your post that you were upset about sick leave for myself and others, correct?

You said, "No. I have a fear of retaliation.

"Question: That's a no?

"Answer: No."

Was that truthful testimony?

A. Yes. I was afraid of retaliation.

Q. Was the answer that you gave on lines 9 and then

else created, you did. You said white or Asian, straight or mainstream gay, okay, with kids that -- softball and kids. What I'm asking you is Jessica and -- and Isadora, were they in that category of white or Asian, straight, or mainstream gay people?

A. I don't think I'd put Isadora in that category. I mean, she's an immigrant. I know that he's an immigrant. She has, you know, a green card status that was up in the air at the time. So in my mind, I was putting her in the same category as people of color.

Q. Okay. And Nemo is a person of color --

A. Yes.

Q. -- in your view?

A. That's correct.

Q. And you're saying Nemo was paid more than the white coworker in the same position named Jessica, right? Correct?

A. He was being paid more than a woman doing the same job as him, which is a --

Q. Okay.

A. -- problem in tech.

Q. And you don't say anything about female or male in your Glassdoor post, correct?

A. I thought I mentioned gender but I might not have.

C E R T I F I C A T I O N

I, SARAH J. BINGHAM, a Certified Shorthand Reporter, within and for the State of California, do hereby certify:

That ADRIAN SCOTT CAMPE DUANE, the witness whose examination is hereinbefore set forth, was first duly sworn by me and that this transcript of said testimony is a true record of the testimony given by said witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of March, 2018.

Sarah J. Bingham
CSR #13720

Exhibit GG

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

---OOO---

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

DEPOSITION OF JEREMY MURPHY

Taken before DIANA L. GONZALEZ

CSR No. 7935

March 1, 2018

A. Can you clarify your question actually?

Q. I'm just -- you said "I believed he was a man." So you believed at the time. And do you still believe he is a man?

A. Yes.

Q. Are you aware that Mr. Duane is transgender?

A. Yes.

Q. Were you aware when you were working at IXL?

A. No.

Q. Sorry, I'm going to rephrase that.

Were you aware when you were working at IXL with Mr. Duane?

A. No.

Q. When did you become aware that he was transgender?

A. Tuesday of this week.

Q. You said you're friends with Mr. Duane on Facebook; is that correct?

A. Yes.

Q. And prior to Tuesday of this week, you had no knowledge that Mr. Duane was transgender?

MR. WILSON: Objection; form.

THE WITNESS: Yes.

BY MS. SANGHVI:

Q. How did you learn that he was transgender?

A. From the court proceedings.

Q. What court proceedings?

A. Well, I should say the explanation of the case when I met with Jeff on Tuesday.

Q. Are you a frequent user of Facebook?

A. No.

Q. When's the last time you logged on?

A. A couple of days ago.

Q. In a week, how often would you log on?

A. Once a week.

Q. And does Mr. Duane or any of his posts show up on your news feed?

A. No.

Q. Why is that?

A. I've muted them. I did that a long time ago.

Q. Why did you do that?

A. I basically mute anybody that spends most of their time on politics, like in political discussions, I tend to just turn the volume down on all of those people.

Q. When you first became friends on Facebook -- I believe that was in June of 2015; does that seem accurate?

A. Yes.

Q. -- do you recall taking a look at Mr. Duane's

profile?

A. No.

Q. Have you ever messaged with Mr. Duane on Facebook?

A. I don't know. If I had, it was quite a while ago when we first became friends.

Q. So after becoming friends with him in June of 2015 on Facebook, when do you think you muted his posts?

A. Probably pretty close to the beginning, but I can't be sure.

Q. Did you form any impressions about Mr. Duane's sexual orientation?

A. Yes.

Q. What was that?

A. That he was gay.

Q. When did you form that impression?

A. Quite early on he would talk about it openly.

Q. What did he talk about?

A. I know that he was very involved in the LGBT community, and that would come up quite frequently, and so I drew that -- I made that connection. I made that assumption basically.

Q. So within a month of working with him, would you have come to the conclusion that he was gay?

REPORTER'S CERTIFICATE

I, DIANA L. GONZALEZ, a Shorthand Reporter, State of California, do hereby certify:

That JEREMY MURPHY, in the foregoing deposition named, was present and by me sworn as a witness in the above-entitled action at the time and place therein specified;

That said deposition was taken before me at said time and place, and was taken down in shorthand by me, a Certified Shorthand Reporter of the State of California, and was thereafter transcribed into typewriting, and that the foregoing transcript constitutes a full, true and correct report of said deposition and of the proceedings that took place;

That before completion of the proceedings, review of the transcript was requested.

IN WITNESS WHEREOF, I have hereunder subscribed my hand this 8th day of March 2018.

_____
DIANA L. GONZALEZ, CSR NO. 7935
State of California

Exhibit HH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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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

DEPOSITION OF GARY YEE

Taken before DIANA L. GONZALEZ

CSR No. 7935

February 28, 2018

necessarily recall any very specifics about it, but I would have done these things.

Q. Do you recall having any additional conversations with him in this meeting in July of 2013 about personal, hi, how are you kind of conversations?

A. Not more than hi, the name, and then moved to the task. That's really how we worked on it.

Q. When -- in your first interaction with him, did you form any opinion about Scott's gender identity?

A. No.

Q. Did you form any opinion about Scott's sexual orientation?

A. During this meeting?

Q. Yes.

A. No.

Q. Did you later come to form any opinion about Scott's gender identity?

A. Yes.

Q. When would you say that was?

A. I don't know.

Q. Within a year of having met him or within a few weeks of having met him?

A. Maybe a year.

Q. And what was that opinion?

A. I took him to be a homosexual man.

Q. And what was the basis of that belief?
A. I think maybe standard stereotypes.
Q. Can you elaborate?
A. Speech patterns, gestures.
Q. So within one year, you would have had enough opportunity to observe Scott so that you came to this conclusion that he was a homosexual man?
A. Yeah.
Q. Can you describe some of those interactions?
A. Mostly idle chatter, hi, how are you, how are you doing. Nothing in particular stands out, oftentimes because it's just sort of small talk.
Q. And did you come to form an opinion about his gender identity? Sorry, excuse me. Strike that. You answered that.
Are you currently aware that Mr. Duane is a transgender man?
A. I was only made aware of that fact yesterday.
Q. That is the first time you learned that information?
A. Correct.
Q. And who did you learn it from?
A. Jeff mentioned it to me. Mr. Wilson.
Q. And what was the context of that mention?
A. I think in preparation for this. But it was --

I don't remember the specifics, but I remember -- I remember him mentioning -- him mentioning in a similar line of questioning. And he asked me about what I thought the gender orientation of Scott was, and I told him the same thing I told you. And then he mentioned to me that Scott is actually transgender.

Q. And that was the first time you had knowledge of, but had you heard any comments relating to that prior to your conversation with Mr. Wilson yesterday?

A. No, actually.

Q. Did you ever discuss your impression of Scott being a homosexual man with any of your co-workers?

A. No.

Q. Did you ever use the gym at IXL?

A. Yes.

Q. How often?

A. Multiple times a week.

Q. And that's from the time you started in 2012 through 2018?

A. Yeah.

Q. Do you recall ever being in the locker room with Scott?

A. Not any one particular instance, no. Wait. I do remember him coming in after -- after his runs or leaving for his runs.

REPORTER'S CERTIFICATE

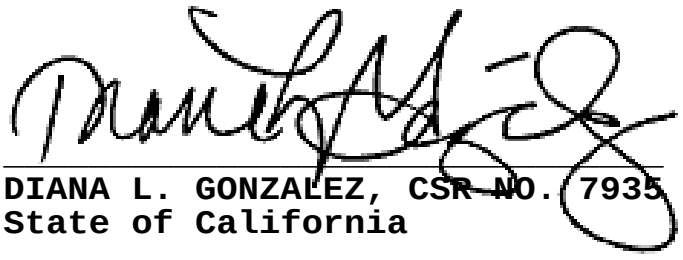
I, DIANA L. GONZALEZ, a Shorthand Reporter, State of California, do hereby certify:

That GARY YEE, in the foregoing deposition named, was present and by me sworn as a witness in the above-entitled action at the time and place therein specified;

That said deposition was taken before me at said time and place, and was taken down in shorthand by me, a Certified Shorthand Reporter of the State of California, and was thereafter transcribed into typewriting, and that the foregoing transcript constitutes a full, true and correct report of said deposition and of the proceedings that took place;

That before completion of the proceedings, review of the transcript was requested.

IN WITNESS WHEREOF, I have hereunder subscribed my hand this 7th day of March 2018.



DIANA L. GONZALEZ, CSR NO. 7935
State of California

Exhibit II

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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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

DEPOSITION OF KATHLEEN "KATE" MATTISON

Taken before DIANA L. GONZALEZ

CSR No. 7935

February 28, 2018

Q. And what is that?
A. Being transgender.
Q. Anything else?
A. I don't think so.
Q. And when I asked you -- I've asked you did it bother you to know that --
A. Are you asking does it bother me now or --
Q. Does it bother you now to know that the company he worked at is being accused of discrimination?
A. Yes.
Q. Why did it bother you?
MR. WILSON: Objection; form.
THE WITNESS: Because it's not true, and it hurts the reputation of the company.
BY MS. SANGHVI:
Q. And how do you know that it's not true?
A. Well, I know that I didn't even know that Scott was transgender until after he was terminated. I don't think that David knew either.
Q. I'm asking you how do you know that the discrimination did not exist? Did you do anything to discover that?
A. I -- I don't believe he was discriminated against.
Q. And did you have any -- since then, in your

orientation?

A. I thought he might have been gay, but I wasn't sure.

Q. And what was the basis of that belief?

A. When I interviewed Scott, I asked him to give me an example of a time that he showed leadership, and the example he gave me involved LGBTQ anti-discrimination activism. So based on that I thought maybe he was gay, but I also knew there's a lot of straight people who are involved in LGBTQ activism.

Q. Any other reason other than the interview answer?

A. No.

Q. Did you discuss that belief with anybody?

A. I don't think so.

Q. Did you -- I think you testified earlier that you didn't recall this February 2014 leave of absence. Do you recall when he returned from it whether there were any visible scars on his body?

A. I don't recall seeing any.

Q. Do you remember ever discussing with Lenore Ockerberg your impressions about Scott's leave of absence or his gender identity?

A. No.

Q. Do you remember discussing anything regarding

REPORTER'S CERTIFICATE

I, DIANA L. GONZALEZ, a Shorthand Reporter, State of California, do hereby certify:

That KATHLEEN "KATE" MATTISON, in the foregoing deposition named, was present and by me sworn as a witness in the above-entitled action at the time and place therein specified;

That said deposition was taken before me at said time and place, and was taken down in shorthand by me, a Certified Shorthand Reporter of the State of California, and was thereafter transcribed into typewriting, and that the foregoing transcript constitutes a full, true and correct report of said deposition and of the proceedings that took place;

That before completion of the proceedings, review of the transcript was requested.

IN WITNESS WHEREOF, I have hereunder subscribed my hand this 7th day of March 2018.

_____
DIANA L. GONZALEZ, CSR NO. 7935
State of California

Exhibit JJ

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Attorneys for Defendants
IXL Learning, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and ADRIAN SCOTT DUANE, Plaintiff-Intervenor, v. IXL LEARNING, INC., Defendant.	Case No.: 17-CV-02979-VC **DEFENDANT'S SUPPLEMENTAL OBJECTIONS TO PLAINTIFF'S RULE 30(b)(6) DEPOSITION NOTICE**

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that Defendant IXL Learning, Inc. ("IXL" or "Defendant"), by and through its undersigned counsel, hereby objects to Plaintiff U.S. Equal Employment Opportunity Commission's ("EEOC") Rule 30(b)(6) deposition notice ("Rule 30(b)(6) Notice") previously served on February 23, 2018 and March 22, 2018.

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff's definition of "Defendant" and expressly responds to the Requests subject to said objection. The definition of "Defendant" includes "all others acting or purporting to act on its behalf," without regard to Defendant's knowledge of said third party actions. Defendant cannot respond to such Matters without objection because the definition incorrectly assumes that Defendant has knowledge of and/or control over this third-party activity or information.

2. Defendant objects to Plaintiff's definitions of "document," "documents," and "communication" to the extent that the definitions purport to impose obligations greater than those set forth in the Federal Rules of Civil Procedure or that the definitions call for documents, ESI, and communications protected from disclosure by the attorney-client privilege, attorney work product privilege, or any other applicable privilege. Defendant objects to this definition because it is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and that the burden and expense of the proposed discovery outweighs its likely benefit. Defendant further objects to the requested production of ESI that exceeds the limitations imposed by Fed. R. Civ. P. 26.

3. Defendant objects to the Matters to the extent they are not permitted under the Federal Rules of Civil Procedure. Without waiving this objection, Defendant agrees to respond to these Matters pursuant to Fed. R. Civ. P. 34 in order to facilitate discovery in this civil action.

4. Defendant objects to the extent that the Matters seek information immune from disclosure under the attorney-client privilege, attorney work product doctrine, or any other applicable privilege or doctrine.

5. Defendant further objects to the Matters to the extent that they are premature, overly broad, unduly burdensome, would require undue expense to answer, or are beyond the scope of permissible discovery.

6. Defendant's responses to the Matters are without a waiver of, and with the expressed reservation of:

a. All objections as to competency, relevancy, materiality, and admissibility of any and all information contained in said responses; and

b. The right to object to the use of such information on any ground in any further proceeding in this action (including trial of this action) or any other action.

7. Defendant further objects to the Matters to the extent they are vague, ambiguous, and/or indefinite.

8. Defendant further objects to the Matters to the extent they seek confidential or trade secret information before the entry of a protective order governing disclosure of same.

9. Defendant further objects to the Matters to the extent that any such Matter, or any definition or other introductory material associated with such Matter, purports to impose a greater duty of supplementation than that required by law.

INSUFFICIENT NOTICE UNDER FRCP 30(B)(1) AND FRCP 34

Defendant objects to Plaintiff's 30(b)(6) Notice based upon insufficient notice of the contemplated proceeding under Fed. R. Civ. P. 30(b)(1).

Fed. R. Civ. P. 30(b)(1) states in pertinent part: "[a] party who wants to depose a person by oral questions must give reasonable written notice to every other party." A number of California Courts discussing reasonable notice have found that, for a deposition without production of

documents, at least ten business days notice is reasonable. *See Pacific Maritime Freight, Inc. v. Foster*, 2013 WL 6118410, at *2 (S.D. Cal. Nov. 20, 2013) (citing to a number of cases applying the ten day rule); *Lam v. City & Cty. of San Francisco*, No. C 08-04702, 2011 WL 4915812, at *3 (N.D. Cal. Oct. 17, 2011). Although ten days is *generally* considered reasonable, the analysis is highly fact intensive and depends largely on the circumstances of each case. *Shinde v. Nithyananda Foundation*, 2015 WL 12778434, at *4 (C.D. Cal. May 21, 2015) (internal citations omitted); *Lam*, 2011 WL 4915812, at *3 ("[T]he reasonableness of the notice must be evaluated in light of the circumstances of each particular case.") (internal citation omitted).

However, when a deposition notice requires production of documents at the deposition, Fed. R. Civ. P. 30(b)(2) dictates that "reasonable notice" is provided as stated in Fed. R. Civ. P. 34. Fed. R. Civ. P. 34(b)(2) states that the party to whom a request for production of documents is directed must respond within 30 days after service of the request. Thus, if a deponent must produce documents at a deposition, then the notice must comply with the thirty-day notice under Fed. R. Civ. P. 34. Courts have held that a Fed. R. Civ. P. 30(b)(6) notice is a thinly veiled attempt to evade the 30 day response requirement for production of documents, as required by Fed. R. Civ. P. 34, when the Fed. R. Civ. P. 30(b)(6) notice seeks the production of documents not previously requested. *Guzman v. Bridgepoint Educ., Inc.*, No. 11-0069-WQH WVG, 2014 WL 1670094, at *2–3 (S.D. Cal. Apr. 28, 2014). In *Guzman*, the court held that plaintiff did not previously seek from defendant documents regarding some of the topics listed in plaintiff's Fed. R. Civ. P. 30(b)(6) notice. Because the Fed. R. Civ. P. 30(b)(6) notice was a veiled attempt to evade the 30 day response requirement for production of documents under Fed. R. Civ. P. 34, the court held that plaintiff failed to give "reasonable notice" of the deposition and failed to comply with Fed. R. Civ. P. 30(b)(1) and (2) and 34(b)(2). *Id.*

Here, Plaintiff issued its Rule 30(b)(6) Notice on Friday, February 23, 2018, indicating that deposition proceedings were to commence on Wednesday, March 7, 2018. The issuance of the Rule 30(b)(6) Notice was in response to Defendant's request for such a notice given the upcoming

depositions of significant deponents, including Defendant's CEO (Paul Mishkin) on March 7, 2018. For the sake of efficiency and to prevent deponents having to sit for two different depositions at two different times, Defendant planned on, for example, Mr. Mishkin to be deposed individually and on behalf of Defendant on March 7, 2018.

Plaintiff's Rule 30(b)(6) Notice set forth fifteen (15) subject matter categories, four of which contain four or more subject matter subsets. To the extent that the subject matters cannot be covered by Mr. Mishkin, it is unreasonable to expect Defendant to identify persons most qualified with respect to each category in just seven business days, especially when four of these business days contained depositions. *Tyler v. City of San Diego*, No. 14-CV-01179-GPC-JLB, 2015 WL 1956434, at *2 (S.D. Cal. Apr. 29, 2015) (holding that seven days was insufficient notice for a party to be able to adequately prepare for its Fed. RCP 30(b)(6) deposition). Specifically, there were six depositions in a matter of four days with the days leading up to these depositions including travel and preparation. Plaintiff is aware that Defendant is a sizable corporation, not only in number of employees, but also in geographic scope with some employees living outside of California. Under these circumstances, Defendant will require at least 10 business days, if not more, to identify and designate the appropriate deponents, make travel arrangements, and adequately prepare those persons to provide meaningful testimony for each of the matters Plaintiff detailed in the Rule 30(b)(6) Notice. Given the upcoming deposition set to occur on March 7, Defendant has designated those Matters on which Paul Mishkin will testify on behalf of Defendant. With regard to the remaining Matters, Defendant is currently engaging in a good-faith process to designate a person to testify on those Matters, and Defendant will supplement these Objections accordingly.

Further, Plaintiff requests the production of documents that the deponent consulted, examined, reviewed, referred to, or relied on in preparing to testify about the area of inquiry. Plaintiff had not previously requested the production of documents regarding some of the topics listed in the Rule 30(b)(6) Notice. For example, Plaintiff's First Set of Requests for Production of Documents ("Plaintiff's RFP") requested, and Defendant provided, workplace policies (including

policies related to discrimination and retaliation), table of contents, and employee handbooks in effect during the relevant time period. Pl.'s RFP, Nos. 10 and 11. As defined by Plaintiff, the relevant time period spanned from July 1, 2013 to January 8, 2015. Now, Plaintiff requests documents relating to IXL's employee's policies, practices, and procedures regarding discrimination, retaliation, or harassment from July 2013 to date, which includes the creation and implementation of any version of IXL's Employee Handbook and concurrent presentations. Rule 30(b)(6) Notice, No. 7. Likewise, Plaintiff requested documents showing Duane's compensation and benefits, and Defendant produced, in part, an employee benefits booklet. Pl.'s RFP, No. 13. Now, Plaintiff requests documents associated with the drafting, adoption, subsequent modifications, and dissemination of this employee benefits booklet. Rule 30(b)(6) Notice, No. 5. Thus, to the extent that Plaintiff seeks documents it has not originally sought, Plaintiff's Rule 30(b)(6) Notice is a veiled attempt to evade the 30 day response requirement for the production of documents as required by Fed. R. Civ. P. 34. *Guzman*, 2014 WL 1670094.

OBJECTIONS TO PARTICULAR MATTER CATEGORIES

MATTER NO. 1: Defendant IXL's organizational structure, including in particular how Defendant handled Operations and Human Resources functions. This includes information concerning individuals who performed operational and human resource functions and their job responsibilities and performance.

OBJECTION TO NO. 1: Defendant designates Paul Mishkin to testify on this Matter.

MATTER NO. 2: The resources of IXL from July 2013 through present, including the gross revenue of defendant's business(es); the liabilities of the business(es); the net profit of the business(es); the fair market value of defendant's assets; defendant's accounts receivable; the amount of liquid assets on hand, which includes amounts that can be reasonably borrowed; the resale value of the business; and tax returns.

OBJECTION TO NO. 2: Defendant objects to this Matter on the basis that it is not reasonably calculated to the discovery of admissible evidence. Defendant's resources, including

Defendant's gross revenue, liabilities, net profit, assets, accounts receivable, liquid assets, resale value, and tax returns have no bearing on or relation to Plaintiff's claims in this case. Defendant objects to this Matter on the basis that it is unduly burdensome, overly broad, and disproportional to the needs of this case. Defendant further objects that the Matter is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, and the importance of the discovery in resolving the issues.

Defendant further objects to the extent that this Matter seeks confidential and financial business information, which are protected from disclosure. Defendant will not produce or disclose any financial or proprietary information, including information related to profit margins, which is secret and vitally important to Defendant's business health and reputation. Disclosure of Defendant's financial business information may put Defendant at a competitive disadvantage vis-à-vis its market competitors.

MATTER NO. 3: From July 2013 to present, any facts relating to internal investigations conducted regarding employee or ex-employee allegations of discrimination, harassment, or retaliation.

OBJECTION TO NO. 3: Defendant objects to this Matter to the extent it seeks information in violation of the notice requirements of Fed. R. Civ. P. 30 and 34.

Defendant designates Paul Mishkin to testify on this Matter.

MATTER NO. 4: Information relating to the creation of IXL-0030 and the underlying facts regarding the termination decisions of the following individuals, noted by Defendant as having discoverable information:

a. Adrian Scott Duane;

b. Jessica Morse;

c. Lenore Ockerberg;

d. Bradley Marshall

OBJECTION TO NO. 4: Defendant objects to this Matter to the extent it seeks information in violation of the notice requirements of Fed. R. Civ. P. 30 and 34.

Defendant designates Paul Mishkin to testify on this Matter.

MATTER NO. 5: The drafting, adoption, subsequent modifications, and dissemination of IXL's "Employee Benefits" booklet (IXL-1241).

DEFENDANT'S MARCH 5, 2018 OBJECTION TO NO. 5: Defendant objects to this Matter to the extent it violates the notice requirements of Fed. R. Civ. P. 34. Defendant is currently engaging in a good-faith process to designate a person to testify on this Matter, and Defendant will supplement this Matter shortly.

DEFENDANT'S APRIL 26, 2018 OBJECTION TO NO. 5: Defendant incorporates by reference its previous objections as stated in Defendant's March 5, 2018 Objection. Defendant designates Jennifer Gu to testify on this Matter.

To the extent that the EEOC seeks, pursuant to Fed. R. Civ. P. 34, documents that the deponent consulted, examined, reviewed, referred to, or relied on in preparing to testify about this particular area of inquiry, please see documents previously produced and produced herein. Defendant objects on the basis that this Matter and the documents produced herein are not reasonably calculated to the discovery of admissible evidence and seek information that has no relevance to the controversies at issue in this case. Defendant will supplement this Request as information becomes available.

MATTER NO. 6: Information relating to the drafting, adoption and presentation of the Power Point presentation produced at IXL-1394.

DEFENDANT'S MARCH 5, 2018 OBJECTION TO NO. 6: Defendant objects to this Matter to the extent it seeks information in violation of the notice requirements of Fed. R. Civ. P. 30 and 34. Defendant is currently engaging in a good-faith process to designate a person to testify on this Matter, and Defendant will supplement this Matter shortly.

DEFENDANT'S APRIL 26, 2018 OBJECTION TO NO. 6: Defendant incorporates by reference its previous objections as stated in Defendant's March 5, 2018 Objection. Defendant designates Jennifer Gu to testify on this Matter.

To the extent that the EEOC seeks, pursuant to Fed. R. Civ. P. 34, documents that the deponent consulted, examined, reviewed, referred to, or relied on in preparing to testify about this particular area of inquiry, please see documents previously produced and produced herein. Defendant objects on the basis that this Matter and the documents produced herein are not reasonably calculated to the discovery of admissible evidence and seek information that has no relevance to the controversies at issue in this case. Defendant will supplement this Request as information becomes available.

MATTER NO. 7: The drafting, adoption and dissemination of IXL's employee policies, practices, procedures, and guidance relating to discrimination, retaliation or harassment based on sex and disability covering the period from July 2013 to date. (e.g., IXL-1929) This includes information relating to the creation and implementation of any version of the IXL Employee Handbook and concurrent presentations. (See IXL-1740; IXL-1772; IXL-1843).

DEFENDANT'S MARCH 5, 2018 OBJECTION TO NO. 7: Defendant objects to this Matter to the extent it seeks information in violation of the notice requirements of Fed. R. Civ. P. 30 and 34. Defendant is currently engaging in a good-faith process to designate a person to testify on this Matter, and Defendant will supplement this Matter shortly.

DEFENDANT'S APRIL 26, 2018 OBJECTION TO NO. 7: Defendant incorporates by reference its previous objections as stated in Defendant's March 5, 2018 Objection. Defendant designates Jennifer Gu to testify on this Matter.

To the extent that the EEOC seeks, pursuant to Fed. R. Civ. P. 34, documents that the deponent consulted, examined, reviewed, referred to, or relied on in preparing to testify about this particular area of inquiry, please see documents previously produced and produced herein. Defendant objects on the basis that this Matter and the documents produced herein are not

reasonably calculated to the discovery of admissible evidence and seek information that has no relevance to the controversies at issue in this case. Defendant will supplement this Request as information becomes available.

MATTER NO. 8: Any and all training provided by IXL to its managers, supervisors, employees, agents, and contractors, relating to discrimination, retaliation or harassment based on sex and disability in the workplace from July 2013 to date.

DEFENDANT'S MARCH 5, 2018 OBJECTION TO NO. 8: Defendant objects to this Matter to the extent it seeks information in violation of the notice requirements of Fed. R. Civ. P. 30 and 34. Defendant is currently engaging in a good-faith process to designate a person to testify on this Matter, and Defendant will supplement this Matter shortly.

DEFENDANT'S APRIL 26, 2018 OBJECTION TO NO. 8: Defendant incorporates by reference its previous objections as stated in Defendant's March 5, 2018 Objection. Defendant designates Jennifer Gu to testify on this Matter.

To the extent that the EEOC seeks, pursuant to Fed. R. Civ. P. 34, documents that the deponent consulted, examined, reviewed, referred to, or relied on in preparing to testify about this particular area of inquiry, please see documents previously produced and produced herein. Defendant objects on the basis that this Matter and the documents produced herein are not reasonably calculated to the discovery of admissible evidence and seek information that has no relevance to the controversies at issue in this case. Defendant will supplement this Request as information becomes available.

MATTER NO. 9: Information relating to the "Discrimination and Sexual Harassment Prevention Training" (IXL-0851). The relevant information should include, at a minimum:

a. How was the training provided;

b. When was the training provided;

c. Where was the training provided;

d. Who received the training;

e. Who was responsible for establishing the training at IXL;

f. The reasons or impetus behind providing the training;

g. Information on whether and how the training has since been repeated.

DEFENDANT'S MARCH 5, 2018 OBJECTION TO NO. 9: Defendant objects to this Matter to the extent it seeks information in violation of the notice requirements of Fed. R. Civ. P. 30 and 34. Defendant objects to this Matter on the basis that it is vague, ambiguous, and overly broad and as such, fails to describe with reasonable particularity the matters for examination as required by Fed. R. Civ. P. 30(b)(6). Specifically, this Matter is vague (e.g., "at a minimum") to the extent it seeks information beyond that listed.

Defendant is currently engaging in a good-faith process to designate a person to testify on this Matter, and Defendant will supplement this Matter shortly.

DEFENDANT'S APRIL 26, 2018 OBJECTION TO NO. 9: Defendant incorporates by reference its previous objections as stated in Defendant's March 5, 2018 Objection. Defendant designates Jennifer Gu to testify on this Matter.

To the extent that the EEOC seeks, pursuant to Fed. R. Civ. P. 34, documents that the deponent consulted, examined, reviewed, referred to, or relied on in preparing to testify about this particular area of inquiry, please see documents previously produced and produced herein. Defendant objects on the basis that this Matter and the documents produced herein are not reasonably calculated to the discovery of admissible evidence and seek information that has no relevance to the controversies at issue in this case. Defendant will supplement this Request as information becomes available.

MATTER NO. 10: Information relating to the "Sexual Harassment Prevention for Managers and Supervisors – California (AB 1825/2053)" (IXL-1088). The relevant information should include, at a minimum:

a. How was the training provided;

b. When was the training provided;

c. Where was the training provided;

d. Who received the training;

e. Who was responsible for establishing the training at IXL;

f. The reasons or impetus behind providing the training;

g. Information on whether and how the training has since been repeated.

DEFENDANT'S MARCH 5, 2018 OBJECTION TO NO. 10: Defendant objects to this Matter to the extent it seeks information in violation of the notice requirements of Fed. R. Civ. P. 30 and 34. Defendant objects to this Matter on the basis that it is vague, ambiguous, and overly broad and as such, fails to describe with reasonable particularity the matters for examination as required by Fed. R. Civ. P. 30(b)(6). Specifically, this Matter is vague (e.g., "at a minimum") to the extent it seeks information beyond that listed.

Defendant is currently engaging in a good-faith process to designate a person to testify on this Matter, and Defendant will supplement this Matter shortly.

DEFENDANT'S APRIL 26, 2018 OBJECTION TO NO. 10: Defendant incorporates by reference its previous objections as stated in Defendant's March 5, 2018 Objection. Defendant designates Jennifer Gu to testify on this Matter.

To the extent that the EEOC seeks, pursuant to Fed. R. Civ. P. 34, documents that the deponent consulted, examined, reviewed, referred to, or relied on in preparing to testify about this particular area of inquiry, please see documents previously produced and produced herein. Defendant objects on the basis that this Matter and the documents produced herein are not reasonably calculated to the discovery of admissible evidence and seek information that has no relevance to the controversies at issue in this case. Defendant will supplement this Request as information becomes available.

MATTER NO. 11: Information relating to the training or presentation, "Stop Sexual Harassment California" (IXL-1951). The relevant information should include, at a minimum:

a. How was the training provided;

b. When was the training provided;

c. Where was the training provided;

d. Who received the training;

e. Who was responsible for establishing the training at IXL;

f. The reasons or impetus behind providing the training;

g. Information on whether and how the training has since been repeated.

DEFENDANT'S MARCH 5, 2018 OBJECTION TO NO. 11: Defendant objects to this Matter to the extent it seeks information in violation of the notice requirements Fed. R. Civ. P. 30 and 34. Defendant objects to this Matter on the basis that it is vague, ambiguous, and overly broad and as such, fails to describe with reasonable particularity the matters for examination as required by Fed. R. Civ. P. 30(b)(6). Specifically, this Matter is vague (e.g., "at a minimum") to the extent it seeks information beyond that listed.

Defendant is currently engaging in a good-faith process to designate a person to testify on this Matter, and Defendant will supplement this Matter shortly.

DEFENDANT'S APRIL 26, 2018 OBJECTION TO NO. 11: Defendant incorporates by reference its previous objections as stated in Defendant's March 5, 2018 Objection. Defendant designates Jennifer Gu to testify on this Matter.

To the extent that the EEOC seeks, pursuant to Fed. R. Civ. P. 34, documents that the deponent consulted, examined, reviewed, referred to, or relied on in preparing to testify about this particular area of inquiry, please see documents previously produced and produced herein. Defendant objects on the basis that this Matter and the documents produced herein are not reasonably calculated to the discovery of admissible evidence and seek information that has no relevance to the controversies at issue in this case. Defendant will supplement this Request as information becomes available.

MATTER NO. 12: Defendant's established remote work policies and practices for employees during calendar years 2014 and 2015.

OBJECTION TO NO. 12: Defendant designates Paul Mishkin to testify on this Matter.

MATTER NO. 13: Defendant's agreements and/or contracts for services from Glassdoor.com, including Defendant's expectations for engaging with that service.

OBJECTION TO NO. 13: Defendant objects to this Matter to the extent it seeks information in violation of the notice requirements of Fed. R. Civ. P. 30 and 34. Defendant objects to this Matter on the basis that it is vague, ambiguous, and overly broad and as such, fails to describe with reasonable particularity the matters for examination as required by Fed. R. Civ. P. 30(b)(6).

Defendant designates Paul Mishkin to testify on this Matter.

MATTER NO. 14: Defendant's agreements and/or contracts for services from Sequoia, Inc.

DEFENDANT'S MARCH 5, 2018 OBJECTION TO NO. 14: Defendant objects to this Matter to the extent it seeks information in violation of the notice requirements of Fed. R. Civ. P. 30 and 34.

Defendant is currently engaging in a good-faith process to designate a person to testify on this Matter, and Defendant will supplement this Matter shortly.

DEFENDANT'S APRIL 26, 2018 OBJECTION TO NO. 14: Defendant incorporates by reference its previous objections as stated in Defendant's March 5, 2018 Objection. Defendant designates Jennifer Gu to testify on this Matter.

To the extent that the EEOC seeks, pursuant to Fed. R. Civ. P. 34, documents that the deponent consulted, examined, reviewed, referred to, or relied on in preparing to testify about this particular area of inquiry, please see documents previously produced and produced herein. Defendant objects on the basis that this Matter and the documents produced herein are not reasonably calculated to the discovery of admissible evidence and seek information that has no relevance to the controversies at issue in this case. Defendant will supplement this Request as information becomes available.

MATTER NO. 15: The facts underlying Defendant's Answers to Plaintiff's First Set of Interrogatories.

OBJECTION TO NO. 15: Defendant designates Paul Mishkin to testify on this Matter.

Dated: March 26, 2018

Respectfully submitted,
Young Basile Hanlon & MacFarlane, P.C.

By: */s/ Natasha R. Menezes*
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-and-

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Attorneys for Defendant
IXL Learning, Inc.

PROOF OF SERVICE

STATE OF MICHIGAN, COUNTY OF OAKLAND

U.S. Equal Employment Opportunity Commission v. IXL Learning, Inc.
Case No.: 17-CV-02979

I am employed in the County of Oakland, State of Michigan; I am over the age of eighteen (18) and not a party to the within action; my business address is 3001 W. Big Beaver Road Suite 624, Troy, MI 48084. On March 26, 2018, I served the foregoing document(s) described as **Defendant's Objections to Plaintiff's Rule 30(b)(6) Deposition Notice** on all interested parties to this action by delivering a copy thereof via electronic mail to each of said interested parties at the following address(es):

Ami Sanghvi, Senior Trial Attorney Marcia Mitchell, Supervisory Trial Attorney Equal Employment Opportunity Commission 350 The Embarcadero, Suite 500 San Francisco, CA 94105 Ami.sanghvi@eoc.gov Marcia.mitchell@eeoc.gov	Attorneys for Plaintiff U.S. Equal Employment Opportunity Commission
David Marek The Marek Law Firm, Inc. 228 Hamilton Avenue Palo Alto, CA 94301 david@marekfirm.com	Attorney for Plaintiff-Intervenor Adrian Scott Duane

☐ **(BY MAIL)** I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our firm's office address in Troy, Michigan. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☒ **(BY ELECTRONIC SERVICE)** I caused such document to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth above.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on March 26, 2018, at Troy, Michigan.

/s/ Natasha R. Menezes
Natasha R. Menezes

Exhibit KK

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

---oOo---

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and ADRIAN SCOTT DUANE, Plaintiff-Intervenor, vs. IXL LEARNING, INC., Defendants.	)	Case No. 3:17-cv-02979-VC

DEPOSITION OF JENNIFER GU

MARCH 29, 2018, 9:06 A.M.

San Francisco, California

REPORTED BY:

Katy E. Schmidt

RPR, RMR, CRR, CSR. 13096

155351

Q. Were you aware that when Mr. Duane was employed?

A. No.

Q. So sometime between January of 2015 to a month or two ago, you learned that Mr. Duane was transgender; correct?

A. Yes.

Q. Okay. Did you learn it from another individual?

A. I don't remember.

Q. Are you familiar with Glassdoor -- or are you familiar with the contracts for services that Glassdoor dot com has with IXL or had in 20- --

A. I'm not familiar.

Q. Are you familiar with Glassdoor dot com?

A. I know of the website, yes.

Q. Have you ever been on the website?

A. Yes.

Q. For what purpose?

A. I don't remember.

Q. You mentioned earlier that you worked with the recruiting manager; correct?

A. Correct.

Q. And was part of the recruitment effort at IXL -- did it involve Glassdoor at all?

STATE OF CALIFORNIA)
)
COUNTY OF SACRAMENTO)

I, Katy E. Schmidt, a Certified Shorthand Reporter, do hereby certify:

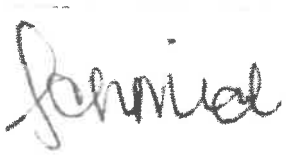
That prior to being examined, the witness in the foregoing proceedings was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth;

That said proceedings were taken before me at the time and place therein set forth and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

I further certify that I am neither counsel for, nor related to, any party to said proceedings, not in anywise interested in the outcome thereof.

In witness whereof, I have hereunto subscribed my name.

Dated: April 11, 2018



Katy E. Schmidt
RPR, RMR, CRR, CSR 13096

Exhibit LL

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

IN RE:

ADRIAN SCOTT DUANE

EEOC Charge No. 520-2105.02025

_____/

POSITION STATEMENT
OF RESPONDENT IXL LEARNING, INC.

I. INTRODUCTION

Adrian Scott Duane ("Complainant") has filed a charge against his former employer, IXL Learning, Inc. ("IXL"). The charge takes the shotgun approach and alleges that Complainant was discriminated against on a scattershot of alternative bases, including sex, gender identity, gender expression, disability perceived disability, request for reasonable accommodation, decision to take protected medical leave, and retaliation for complaining of discrimination. Complainant's "belief" that he was terminated for any reason prohibited by law is simply not correct.

IXL denies that Complainant was discriminated or retaliated against, including on the basis of his sex, gender identity, disability, or in retaliation for engaging in protected conduct. IXL terminated Complainant's employment because Complainant made inaccurate and inappropriate statements about IXL and the company's CEO on Glassdoor.com, a website used by IXL to recruit new employees. Complainant's charge should be dismissed.

II. STATEMENT OF FACTS

A. Description of Respondent

IXL Learning Inc. is a technology leader that has been creating and supporting the latest in educational technology since 1998. IXL's products are used in over 190 countries around the world to enhance and enrich the education of millions of students. IXL is headquartered in San Mateo, California. IXL is an equal opportunity employer and does not tolerate any discrimination or harassment.

B. Complainant's Employment with IXL

Complainant applied for employment at IXL on or about November 1, 2012. At the time he applied for employment, Complainant indicated that he was male on a voluntary self-identification survey. IXL extended an offer of at-will employment for the position of Product Analyst on February 15, 2013, which Complainant accepted February 23. Complainant started work July 10, 2013. Complainant presented as male during the entire course of his employment at IXL.

Complainant received performance reviews on September 12, 2013 and November 6, 2013. Both performance reviews indicated that Complainant's job performance required improvement in a number of areas. In particular, Complainant's lack of organization, time management, promptness, and resourcefulness were identified in his reviews as areas needing improvement. For example, Complainant's supervisor indicated that Complainant should "minimize distractions…to increase productivity." Complainant did not receive a formal performance review in January 2014 as alleged.

In February 2014, Complainant requested and was granted one week sick leave for surgery. Complainant makes no complaints regarding IXL's handling of this leave or surgery. Later, in July 2014, Complainant notified David Keyes, his supervisor, that he would be undergoing additional surgery in November and would be absent from work for six-eight weeks to recover. Complainant

indicated that he would be having weekly pre-operative appointments, and Keyes agreed to permit Complainant to work from home the days of those appointments. On the days that Complainant worked from home, his productivity suffered, as the Complainant admitted in an e-mail to Keyes on December 24, 2014. Exhibit A.

In September 2014, IXL approved Complainant's disability leave and processed all necessary paperwork for Complainant to receive California State Disability Insurance benefits. Neither Complainant nor the Employment Development Department of California informed IXL of the nature of the medical procedure that was the basis of Complainant's leave. Complainant informed IXL that his last day of work would be October 30, 2014 and that he expected to return December 30, 2014. IXL requested that Complainant confirm his return to work date shortly before the expected return date.

On December 19, 2014, Complainant e-mailed Keyes, indicating that he still planned to return December 30 despite a complication had arisen which extended his time for recovery. Complainant inquired: "I'm *wondering* if you'd be *open* to me working half days in the office and half days at home for the first few weeks. This would make the transition much *easier* for me, I think." (emphasis added). Keyes responded on December 22, stating that he'd "*prefer* that you be in the office for your hours when you come back since *you are more productive here*." (emphasis added). Keyes asked if there was anything that IXL could do to accommodate Complainant working in the office upon his return.

On December 23, Complainant responded by insisting that he be allowed to work from home 50% of the time despite the fact that he understood Keyes' concerns about his lack of productivity when working from home. Complainant suggested that metrics be put into place to monitor his productivity, that regular in-person meetings be set up, and a weekly productivity review be put into

place. On December 24, Keyes assented to Complainant's request for a 50% work-at-home schedule. Consistent with the Complainant's suggestions, Keyes prepared a "Working Remotely Plan" including scheduling, objectives, and metrics to control Complainants 50% work-at-home schedule and shared this Plan with Complainant on December 30 when he returned to work.

Despite this Plan being the accommodation that Complainant insisted on, Complainant was visibly upset about it and became non-communicative and unprofessional. Complainant's response of being upset and non-communicative continued over the following week, making it difficult for his co-workers to effectively work with him. On January 6, 2015, Keyes met with Complainant in hopes of proactively resolving whatever was causing Complainant's dissatisfaction and change in demeanor. Complainant responded that he was angry with IXL's handling of his disability leave and return to work; he complained that Keyes did not immediately agree to let him work from home. Keyes reminded Complainant that IXL was, in fact, providing Complainant with the full accommodation that Complainant had requested. Complainant remained unhappy with his personal situation, however, and so Keyes relayed the concerns to IXL's CEO, Paul Mishkin.

Upon being informed of Complainant's concerns, Mishkin scheduled a meeting with Complainant for January 8 (two days after Keyes met with Complainant). Mishkin planned to give Complainant his individual attention and find out if and how IXL could resolve his concerns.

On January 7, after the meeting between Complainant and Mishkin had been scheduled, IXL HR Coordinator Maricela Prado discovered a negative review of IXL posted December 30 on Glassdoor.com. Prado periodically reviews postings made about IXL on Glassdoor.com. IXL uses the Glassdoor.com platform to attract and recruit new employees. Based on the writing style of the review, it was clear to Prado that the review was posted by Complainant. Upon seeing that Complainant publicly posted that IXL "isn't going anywhere right now" and that a "Con" of the

company is that the CEO is "overly involved in every product, ever decision, every everything" Mishkin concluded that Complainant's judgment and ethics were below what he expected from IXL team members. Mishkin decided to terminate Complainant's employment for this reason on the afternoon of January 7, and informed Complainant of the termination the following day at the previously-scheduled meeting.

III. ARGUMENT IN RESPONSE TO DISCRIMINATION ALLEGATIONS

To prove a claim of discrimination, Complainant must show that he is a member of a protected class, an adverse employment action took place, and discriminatory intent—that is, the adverse employment action was undertaken because the Complainant was a member of the protected class. *DiDiana v. Parball Corp.*, 472 F. App'x 680, 681 (9th Cir. 2012); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). The Complainant can show discriminatory intent with direct evidence or via the so-called *McDonald Douglas* framework. Under *McDonald Douglas*, to establish a *prima facie* case, the Complainant must show that he was performing according to the employer's legitimate expectations and that other employees with qualifications similar to his were treated more favorably. *DiDana*, 472 F.App'x at 681. If the Complainant makes a *prima facie* showing of discrimination, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the adverse employment action. *Id.* Once a legitimate non-discriminatory reason is articulated, the Complainant is given the opportunity to demonstrate that the reason was pretextual. *Id.*

A. Complainant Was Not Discriminated Against on the Basis of Sex *Per Se*

Complainant alleges that he was discriminated against on the basis of sex, yet he supplies no factual basis for this allegation. First, Complainant alleges that he is male and transgendered. Based on Complainant's allegations, IXL now presumes, on information and belief that Complainant was

born as a woman.

Other than the general allegation of being discriminated against on the basis of sex, Complainant makes no allegation in his 23-page Charge that he was discriminated against on the basis of him being a man, being a woman, or being transgendered. Complainant does, however, devote about a quarter of his Charge to a description of how he is transgendered and the few ways that he believes that IXL may have peripherally or circumstantially become aware of his identification as a transgendered individual.

Even if it were assumed that identifying as transgendered is a protected class under Title VII (which it is not[1]) and Complainant were a member of that class, IXL did not discriminate against Complainant because he identifies as transgendered.

Complainant does not state that any decision-maker at IXL knew that he identified as transgendered. Instead, he relies on his belief that an employee (in sales) at IXL had asked some questions about his identity and an allegation that management had access to medical records. Quite simply, Complainant can't show that any IXL manager or decision maker knew of his transgender identity. Indeed, Complainant himself asserts that he did not believe that his manager, David Keyes, was even aware of his transgender identity. Charge at ¶¶ 53, 80 ("I do not believe that Mr. Keyes was or is aware that I am transgender."). Complainant instead indicates that he only knows of four individuals that knew of his identity. Charge at ¶ 22.

Complainant also does and cannot state any facts supporting any allegation that IXL made

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[1] *See, e.g., E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2015 WL 1808308, at *4-5 (E.D. Mich. Apr. 21, 2015) ("There is no Sixth Circuit or Supreme Court authority to support the EEOC's position that transgender status is a protected class under Title VII."); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.");

any adverse employment decision as to him on the basis of his transgendered identity. IXL did not terminate Complainant because he was female, presented as male, or identified as transgendered. In sum, IXL did not discriminate against Complainant on the basis of sex and there are no facts to support Complainants conclusory allegations.

B. Complainant Was Not Discriminated Against on the Basis of Sex Stereotyping, Gender Identity, or Gender Expression

Complainant's allegations of discrimination on the basis of sex stereotyping, gender identity, and gender expression are presumably based on sex stereotyping as set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See also Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000). Under this doctrine, Title VII "protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender." *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2015 WL 1808308, at *5 (E.D. Mich. Apr. 21, 2015) (citing *Myers v. Cuyahoga Cnty, Ohio*, 183 F. Appx. 510, (6th Cir. 2006); *Smith v. City Of Salem*, 378 F.3d 566 (6th Cir. 2004); and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005)). When evaluating a sex stereotyping claim, the "critical inquiry ... is whether gender was a factor in the employment decision at the moment it was made." *Schwenk*, 204 F.3d at 1201 (quoting *Price Waterhouse*, 490 U.S. at 241).

IXL did not discriminate against Complainant because of his gender (e.g., because Complainant was perceived as male and did not act or identify as male or was perceived as female and did not act or identify as female). Complainant's allegations simply have no basis in fact.

From the time that Complainant applied to IXL, to the time that Complainant was hired, and throughout his employment, Complainant presented himself as a man. Nothing about Complainant's gender visibly changed in the intervening months of employment. Complainant, by his own

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Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984).

admission, took extensive steps to conceal the fact that he was, in fact, biologically female. In fact, Complainant himself believes that he was so successful in doing so, that his manager, who interacted with him on a very regular basis, was never aware that Complainant identified as being transgendered. Charge at ¶¶ 53, 80. A sex stereotyping claim requires some disparity between the Complainants perceived gender and his actions, identity, or appearance. Complainant does not allege that anyone at IXL commented about or criticized how manly he was or did not fulfill any particular male stereotypes. Because Complainant, by his own admission, acted, presented, appeared, and was perceived to be male, there is no basis for a sex stereotyping claim.

The only fact alleged by Complainant that is potentially relevant to this claim is his belief that "I'm queer and I stick out." Charge at ¶ 87. But Complainant does not allege why he considers himself to stick out and what stereotypes he did not allegedly conform to. Complainant cannot do so because, by his own admission, the vast majority of his coworkers and managers did not even know he was a woman living as a man. Furthermore, even if some of his coworkers did know, he cannot show that Mishkin did know. *See, e.g., Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 704 (8th Cir. 2012) (holding that company could not have discriminated against employee when decision maker was unaware of employee's gender non-conformity).

Furthermore, because Complaint's gender presentation remained unchanged throughout his employment, he cannot show (and there was no) connection between his termination and any incongruence between his perceived gender and his actions or identification. Paul Mishkin, IXL's CEO, both approved the hiring of Complainant and fired Complainant within the span of less than two years. *See, e.g., Grossmann v. Dillard Dep't Stores, Inc.*, 109 F.3d 457, 459 (8th Cir. 1997) (no discrimination where same decision maker both hired and fired employee within 4 year period); *Coghlan v. Am. Seafoods Co. LLC.*, 413 F.3d 1090, 1097 (9th Cir. 2005) ("where the same actor is

responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory action."). Complainant simply does not and cannot allege any facts that the decision to terminate him was based even in part on him not conforming to any gender or sex expectations.

C. Complainant Was Terminated for a Non-Pretextual Legitimate, Non-Discriminatory Reason

Complainant posted a negative and derogatory post about IXL on a website used by IXL to attract and recruit new employees. Complainant's post included a number of false and disparaging remarks about the company, including that the company was "not going anywhere," that the work is "unchallenging" "boring" and "menial," that the company "micromanages" employees and that employees "can do way better." Complainant posted these comments without first raising his concerns with any managerial employee at IXL.

Complainant's termination was not pretextual. IXL periodically reviews glassdoor.com reviews and in connection with that process discovered Complainant's glassdoor.com review on January 7. Paul Mishkin, IXL's CEO, made the decision to terminate Complainant on the basis of that review the afternoon of January 7. Because Mishkin already had a meeting scheduled with Complainant the morning of January 8 he decided, on January 7, to terminate Complainant at that meeting. Quite simply, Complainant's termination was wholly unrelated to Complainant's sex, gender, or disability.

IV. ARGUMENT IN RESPONSE TO DISABILITY ALLEGATIONS

Complainant was not a qualified individual with a disability. The ADA, as amended, prohibits discrimination "against a qualified individual with a disability." See 42 U.S.C. §§ 12111(2), 12112(a). "Disability" is defined as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an

impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

The duration of an impairment is one factor that is relevant in determining whether an impairment substantially limits a major life activity. See 29 CFR §1630.2(j)(1)(ix). Impairments that last for only a short period of time are typically not covered. *Id.* Here, Complainant's Charge presumes he was a qualified individual with a disability following his surgery. His recovery, however, did not substantially limit a major life activity and was expected to last only a few weeks. Even under the broadened definition of disability of the amended ADA, Complainant's post-surgery complications that required a temporary, less demanding work schedule did not render him a qualified individual with a disability.[2]

Even assuming that Complainant was a qualified individual with a disability, IXL lawfully engaged in an interactive process with Complainant after he requested an accommodation to his work schedule. *See, e.g., Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir. 2000) vacated on other grounds. *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002) (employer required to engage in interactive process).

Complainant first raised the issue of working from home by stating, via e-mail: "I'm wondering if you'd be open to me working half days in the office and half days at home for the first few weeks. This would make the transition much easier for me, I think." Keyes responded the next business day, in accordance with the interactive process, that he would "prefer that you be in the office for your hours when you come back since you are more productive here." Keyes' preference was based on his experience with Complainants prior attempt to work from home—during which Complainant's productivity was unsatisfactory. Keyes asked "Is there anything we can do to accommodate your situation so that you can work in the office?" Complainant responded with the

[2] Moreover, Complainant's transgender status is not itself a disability under the ADA as amended. 42

ultimatum that IXL "has to provide me with this accommodation."

IXL suggested an alternative accommodation (extending Complainant's leave) that would have also addressed Complainant's concerns, but Complainant refused to consider that option. One of the factors that the employer considers in evaluating a reasonable accommodation is whether or not the reasonable accommodation would be effective to permit the employee to perform his job duties. *Barnett*, 228 F.3d at 1115. Complainant's manager was reasonably concerned that the proposed accommodation would not permit Complainant to perform his job duties as expected. Complainant later acknowledged that this was a valid concern.

Nonetheless, IXL acquiesced to Complainant's demand that he be permitted to work from home 50% of his schedule. Complainant's manager spent the time to draft a working remotely plan on the basis of Complainant's suggested accommodation. Complainant was permitted to work remotely for approximately half of his schedule starting from his return to work on December 30, 2014.

Because IXL engaged in the interactive process and provided Complainant with the reasonable accommodation that he requested, there is no basis for Complainant's allegations.

V. ARGUMENT IN RESPONSE TO RETALIATION ALLEGATIONS

Title VII provides that employers cannot retaliate against employees for opposing employment practices made unlawful by Title VII. To establish a *prima facie* case of retaliation, Complainant must show that (1) he engaged in protected activity, (2) he suffered an adverse employment action, and (3) a causal link exists between the protected activity and the adverse employment action. *Nilsson v. City of Mesa*, 503 F.3d 947, 953 (9th Cir. 2007). Not all opposition

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U.S.C.A. § 12211(b).

activity is protected. For example, vague charges of discrimination are not protected. *See, e.g., Arn v. News Media Grp.*, 175 F. App'x 844, 846 (9th Cir. 2006); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1047, 116 P.3d 1123, 1133 (2005) ("complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct").

Complainant was quite simply not terminated in retaliation against protected activity. Complainant's alleged "opposition activity" did not oppose unlawful employment practices and thus is not protected: "There are no politics if you fit in. If you don't -- that is, if you're not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball -- then you're likely to find yourself on the outside. Treatment in the workplace, in terms of who gets flexible hours, interesting projects, praise, promotions, and a big yearly raise, is different and seems to run right along these characteristics." This statement does not specifically oppose or identify any particular unlawful practice. Instead, it is a vague and conclusory complaint that not everyone "fits in." Federal employment laws do not guarantee everyone will "fit in" to an employer's "culture" nor are employers required to create a general atmosphere of friendliness among coworkers. *See, e.g., Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34, 37 (1st Cir. 2003) ("Title VII is neither a civility code nor a general anti-harassment code").

IXL management asked Complainant whether he was complaining of actual discrimination or rather a lack of friendliness among coworkers because he felt he did not "fit in." Complainant believed that there was no difference between employment discrimination and lack of friendship among employees from different walks of life. The law, of course, does not require employees all get along and become friends. Any claim for retaliation based on Complainant's supposed "opposition" to IXL's failure to enforce such a civility code cannot succeed under federal law.

At most, Complainant's online post contained a vague accusation that IXL's managers did not understand discrimination law. This was not sufficient to put IXL's decisionmaker on notice that Complainant was opposing a practice made unlawful by Title VII. *See e.g. Scheske v. University of Michigan Health Services*, 59 F.Supp.3d 820, 828 (E.D. Mich. 2014) (for activity to be protected the plaintiff must put her employer on notice that she is opposing a practice made unlawful by Title VII) *citing Brown v. VHS of Michigan, Inc.*, 545 Fed. Appx. 368, 373 (6th Cir. 2013) (protections of Title VII are not invoked by "vague charge of discrimination.")

Accordingly, Complainant did not complain of any employment practice made unlawful by Title VII before his termination. His termination was based upon his unfair, untrue and misleading criticism of the company and its CEO that were wholly unrelated to his employment and any purported violations of federal employment law. In this regard, Complainant falsely accused the CEO of being too involved in the company's products and services and that IXL as a company was not going anywhere. This is not opposition activity, but rather unfair and untrue insults directed to the business strategy and decision making of the CEO and the future success of IXL. Terminating an employee for publicizing such unfair and untrue statements unrelated to discrimination laws specifically or even generally is not a violation of Title VII. *See e.g. Hatmaker v. Memorial Medical Center*, 619 F.3d 741, 745 (7th Cir. 2010) (retaliation claim dismissed where plaintiff fired not for opposition activity "but for comments demonstrating bad judgment and a preoccupation with superficial characteristics of her new boss, and for harping on issues, at once irrelevant and sensitive…").

VI. CONCLUSION

IXL denies that Complainant was discriminated against for being a member of a protected class (e.g., on the basis of sex, gender, gender identity, or gender stereotypes), was retaliated against

for exercising his Title VII or ADA rights, or was denied reasonable accommodations for a disability. Quite simply, Complainant was fired for making public, inaccurate, and disparaging remarks about IXL on a website used by IXL to attract and hire new employees. Accordingly, Complainant's Charge does not establish a factual basis for the alleged violation of federal law, and IXL therefore respectfully requests that the Charge be summarily dismissed.

Dated: July 10, 2015

Respectfully submitted,

Young Basile Hanlon & MacFarlane, PC

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Counsel for IXL Learning, Inc.

Exhibit A

From: David Keyes [dkeyes@ixl.com]
Sent: Thursday, December 25, 2014 6:22 PM
To: Scott Duane
CC: Maricela Prado
Subject: Re: Return update

Hi Scott,

This all sounds good. I've set up a meeting for us on the 30th from 10-11 am. Let me know if you'd prefer a different time.

I can get you caught up on what's been going on the past couple months and we can go over a game plan for your part time remote situation.

Thanks,
David

On Wed, Dec 24, 2014 at 11:06 PM, Scott Duane <sduane@ixl.com> wrote:

> Hi David,
>
> I can understand your concerns, given the brief situation with remote work while trying to balance my pre-op appointments. At that time I was trying my best to contribute, while undergoing lengthy appointments that were physically and mentally exhausting. I did not always keep up, despite my best efforts. In 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.
>
> I do believe that this situation is very different. What I need is the opportunity to rest my physical body from the kind of everyday movement that most people take for granted -- I am not attempting to attend appointments during that time as I was previously. If you feel like I'm not keeping up with work with this accommodation, please tell me directly. I'm happy to reevaluate if necessary.
>
> My doctor is not in his office at this time, but he and his staff will get a written statement to you as soon as possible.
>
> The 30th still works for me. I'll see you then.
>
> Best,
>
> Scott
>
> On Wed, Dec 24, 2014 at 11:50 AM, David Keyes <dkeyes@ixl.com> wrote:
>
> > Hi Scott,
> >
> > Thanks for the response. We are definitely on the same page here as far as goals are concerned - that is, having you achieve a complete recovery while also being able to fully contribute to the team when you return. To start, I would like to clarify a couple things from our previous emails.
> >
> > When you worked remotely the days of your pre-op appointments, I noticed that productivity was down. This is why we tried having you work half days and take half sick days. It is also why I said I preferred that you return to work in the office full time if we could accommodate you appropriately.
> >
> > You are definitely correct that the IXL development team does allow employees to work remotely in a variety of situations (sick children, waiting for repair people, sick, extending vacations etc...). This is allowed by manager discretion based on the employee's ability to work well in these types of situations. Also, these sorts of working remotely requests are sporadic in nature (a day here, a day there), and are different than working remotely part time every day. These more regular requests are not always granted.

Based on your doctor's recommendation, it sounds like reasonable accommodation in your case is to set up a part time remote working situation. It would be great if you could provide written documentation for this - and we can move forward with this plan.

I'm happy to come up with performance goals and a progress monitoring plan for you as well. Having your office time be in the morning sounds great to me - thanks for that suggestion! I'm looking forward to having you back and think that the 30th still works. We can talk about specifics of our plan then.

Thanks,
David

On Tue, Dec 23, 2014 at 3:39 PM, Scott Duane <sduane@ixl.com> wrote:

Hi David,

So before I start I want to let you know that I'm writing with the intent of finding a solution with you collaboratively -- there's a chance some of this email could be read as combative or hostile, and that is not the tone I'm intending at all.

I went ahead and spoke with an employment attorney to check in about what is meant 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. The attorney I spoke with also provided several online resources to me about the federal law which I am happy to pass onto you so that you can see some examples of how the ADA is implemented. I'm also CCing Maricela, who I believe is still filling in as the HR manager and should be familiar with the protections provided by the ADA.

My doctor is happy to provide written documentation, and actually suggested as much remote time as possible so that things heal quickly, particularly the complication that has arisen.

I completely understand your concerns about remote work and productivity, and I also understand that your primary responsibility is to make sure the math team meets all of its goals. But the bottom line is, I want to return to work, and I am certain I can perform the essential functions of my job while working remotely 50%. I'd like to find a solution under which I return on the 30th with this accommodation, or something very close to it. I suggest that we find some metrics that we can put in place so that you can monitor my progress to your satisfaction. I'd also suggest making all office time in the morning, so that you're sure to always have a chance to catch me in person to let me know what you'd like prioritized, etc. If there's anything else you'd like to include, such as a weekly productivity review, I'm happy to do that as well.

Best,

Scott

On Mon, Dec 22, 2014 at 3:47 PM, David Keyes <dkeyes@ixl.com> wrote:

Hi Scott,

It was great to see you as well! Glad to hear your recovery is going pretty smoothly.

As far as the plan goes for returning to work, I would prefer that you be in the office for your hours when you come back since you are more productive here.

Is there anything we can do to accommodate your situation so that you can work in the office? If you would need to extend your leave to aid in your recovery, that would be totally fine as well. Just let me know!

Thanks,
David

On Fri, Dec 19, 2014 at 12:53 PM, Scott Duane <sduane@ixl.com> wrote:

Hi David,

Great to see you briefly at the Christmas party. I wanted to give you a quick update on how things are going and begin to finalize my plan for returning to work.

As you probably have heard, things have been going very well in terms of healing, for the most part. Unfortunately, the day after the party, a complication called a fistula appeared. This is not very serious, but will make it challenging to be out of the house for long periods of time until it fully heals. My doctor believes I should heal from this quickly, but it may affect how soon I can return.

For now, I am still planning on returning Dec 30, but I'm wondering if you'd be open to me working half days in the office and half days at home for the first few weeks. This would make the transition much easier for me, I think.

Let me know what you think. Looking forward to being back at it. Have a good holiday,

Scott

Exhibit MM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADRIAN SCOTT DUANE,

Charging Party,

and **Case No. 20-CA-153625**

IXL LEARNING, INC.,

Employer.

IXL LEARNING INC.'S POST-HEARING BRIEF

I. INTRODUCTION

Respondent IXL Learning, Inc. ("IXL" or "Respondent") is a technology company in Silicon Valley that provides online learning services for kindergarteners through grade 12 students. IXL places a high priority on recruiting talented employees in a competitive tech environment like Silicon Valley. To compete for the best candidates, IXL entered into a subscription with Glassdoor.com, a popular job searching website. The subscription provided IXL enhanced tools to promote the company to job seekers and attract ideal candidates.

In December 2014, Charging Party Adrian Scott Duane (CP) was returning to work at IXL from a two-month medical leave of absence and requested a partial work-at-home arrangement. His manager did not immediately approve his request, but did so two days later. CP became extremely upset, and believed his manager had illegally discriminated against him based on a disability. In response, CP posted a review titled "Micromanaged and problematic" on Glassdoor.com, complaining about the company to job seekers. CP's review disparaged IXL and its managers including the CEO, who he described as "overly involved in … everything." He stated that the "company isn't going anywhere right now" and "don't expect the profits to pass

onto you, either." CP warned candidates "don't expect a challenge working here" and that IXL gives employees "boring, menial work to fill the day." He complained that treatment in the workplace is based on certain characteristics ("family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball") and that "there are no politics if you fit in." CP stated that IXL had essentially no HR knowledge or staff and did not care to learn "what the word discrimination means."

When IXL's CEO Paul Mishkin saw the post, he believed it amounted to defamation. He concluded that CP's blatantly untrue statements were deliberately intended to harm IXL's recruitment efforts, which were particularly challenging in the present job market. Mishkin was offended at CP's warning to job seekers that there are "no politics if you fit in", which Mishkin viewed as contrary to his personal values and the environment he worked hard to cultivate at IXL. Based upon the recklessness of the accusations by CP, coupled with CP's deliberate attempt to harm IXL's ability to attract talented prospects, Mishkin decided to terminate CP's employment.

The General Counsel alleges that CP's anonymous Glassdoor.com review itself constitutes a protected concerted activity, and therefore his termination violates Section 8(a)(1) of Act. This allegation, however, is not supported by the language of CP's online review, the nature of the job review website on which it was posted, nor the facts and circumstances surrounding how and why CP posted the review. CP's anonymous post was not a group complaint, but an individual gripe made by and on behalf of CP himself that was addressed to an audience of *non-employee* job seekers considering IXL as a place of employment. The post does not contain any language indicating it is either a group complaint or arises from concerted activity. The nature of Glassdoor.com, which is not a social media site but rather a recruiting and

employer promotional service, is unlike popular social media venues like Facebook, LinkedIn or Twitter. Employees do not communicate with each other through public or private messages, the posts are always anonymous, there is no comment section for posts, and the audience is non-employee recruits. CP's anonymous review plainly arose from his unfounded disappointment with IXL's handling of his medical leave and from his feeling, as a transgender man, of not fitting in to IXL's culture. He admits that his Glassdoor.com review arose from being upset with how his manager handled his particular remote work arrangement. The General Counsel has not proven this CP's activity is concerted under any possible interpretation of controlling Board precedent.

The General Counsel amended the Complaint shortly before trial, perhaps recognizing it took a step too far in alleging the Glassdoor.com post to be concerted activity. The amended complaint tacks on a claim that IXL maintained a rule requiring employees to register complaints about working conditions with their supervisor before complaining to third parties, and terminated CP for violating that rule. Yet these allegations are frivolous; there is no evidence of any such "rule" or policy at IXL, and CP himself admitted never hearing of any such rule or policy. Similarly, there is no merit to the General Counsel's passing assertion at the hearing that IXL terminated CP as a preemptive strike to suppress protected concerted activity. The General Counsel has no basis to even speculate that IXL's actions were a calculated effort to preempt unspecified protected concerted activity among employees.

Lastly, the General Counsel also presented testimony of a handful of discussions between CP and two or three coworkers in 2013 and early 2014. Whether or not CP's discussions with these employees and former employees constituted protected concerted activity, it is undisputed that IXL had no knowledge of them. CP admits that he never mentioned discussions with other

employees in his meetings with management, including his meeting with Mishkin. Likewise, he did not mention any such discussions in his Glassdoor.com review. The General Counsel could offer only speculation that some unidentified manager may have overheard CP's conversations, occurring six to twelve months prior to CP's termination, because "doors were often open." The General Counsel plainly failed to prove that IXL had knowledge of any alleged protected concerted activity by CP, which is an essential element to its prima facie case.

Accordingly, the evidence presented at the Hearing demonstrates that IXL did not violate the Act when it terminated CP's employment.

II. STATEMENT OF FACTS

IXL Learning Inc. was founded by Paul Mishkin in 1998, who has served as the company's CEO since that time. TR 241.[1] IXL is an educational technology company based in San Mateo, California that, among other products and services, develops and provides math and English practice software for K-12 students. TR 24. In early 2015, IXL had approximately 200 employees. TR 199-200. IXL's website, www.ixl.com contains the online learning content, which includes "lots of math questions, as well as some other subjects" such as language arts, science and social studies. TR 200-201.

A. IXL Uses Glassdoor.com To Recruit Top Candidates For Employment

IXL has been a subscriber of services provided to employers by the job search and advertisement site Glassdoor.com since 2013. JT-1. IXL subscribes to the "Glassdoor Essentials" package, which helps employers "attract top talent with bundled job advertising and employer branding." The package helps IXL "influence candidates with a strong employment brand, and measure the impact of your brand and recruiting efforts." *Id*.

[1] The transcript of trial testimony is referenced herein as TR __ and trial exhibits are referenced as GC-__, JT-__, or ER-__.

Glassdoor.com is a site that job seekers visit to find information about companies they are considering for employment. *Id*. Anyone can post reviews about companies on Glassdoor.com, including current and former employees of a company. All reviews are anonymous, it is not possible to post a review identifying yourself as the author, and the website does not have any comment section where other users can comment such as Facebook. TR 117.

For example, former IXL employee Nina Wu testified that she checked reviews of IXL on Glassdoor.com to see what the company's interview process was like. TR 178. She also used the site for other job hunts. TR 182.

Glassdoor.com is an important part of IXL's recruiting efforts. CEO Paul Mishkin testified that the company pays "for service on Glass Door that allows us to help recruit candidates to the Company, prospective hires, and gives us enhanced services on -- on the website and lets us put more information on it." TR 241. He explained that IXL utilizes Glassdoor.com primarily as a recruitment tool. TR 262. "It's such a widely used site among job seekers that we're able to have – we call it an enhanced page on the site" that allows for more content about IXL, what working for the company entails, and for IXL to have a more "welcoming" presence. TR 281.

IXL encouraged employees and managers to post reviews on Glassdoor.com to help attract "top talent" and "find the best talent." GC-12. In fact, earlier in his employment, CP posted a positive review of IXL on Glassdoor.com (anonymously). GC-11. Former employee Nina Wu testified that she chose not to post a review, and was not treated negatively as a result. TR 182.

B. Charging Party's Employment with IXL

CP began working for IXL in July 2013 as a Product Analyst in the math department. TR

25-26. Starting in January 2014, CP's supervisor was Program Manager David Keyes. TR 200-201. Keyes explained that CP's job duties primarily consisted of writing math problems for students to use for studying and practice purposes (known as spec writing). TR 206-208. Spec writing involved drafting "what each problem is going to be about, what the text in that problem is, how students answer it. If they like multiple choice, or type their answer." *Id*. CP would create actual math problems and explanations for the answers to those problems. *Id*. Once the spec is written, an engineer writes the software code to implement that math problem on the website. CP's job also included testing those coded math problems and answers. Thus, spec writing and testing the resulting problem and answer sets were core functions of his employment. *Id*.

CP received performance reviews on September 12, 2013 and November 6, 2013. R-2. Both performance reviews indicated that CP's job performance required improvement in a number of areas. In particular, CP's lack of organization, time management, promptness, and resourcefulness were identified in his reviews as areas needing improvement. For example, CP's supervisor indicated that CP should "minimize distractions…to increase productivity." *Id*. p. 2.

Throughout 2014, CP requested and was granted substantial time off pursuant to IXL's unlimited sick leave policy. CP admitted that throughout his employment, except for the remote work arrangement discussion in December 2014, Keyes was very flexible with his need to work remote or take time off because of sporadic medical issues. TR 88.

During his employment, **IXL approved every single instance when CP requested a remote work day or any time off. In fact, every time he requested to work remotely or take time off, including partial days, leaving early or coming in late, it was approved by IXL!** TR 95-96.

C. CP's Leave Of Absence For Surgery, And Return To Work

In July or August 2014, CP informed Keyes that he would be requiring an extended leave of absence in the fall for surgery. TR 205. Keyes approved it. *Id*. IXL had an unlimited paid sick leave policy, the terms of which are simple: when employees want to take a sick day, they tell their manager they want to take a sick day and they get a paid day off. TR 206. Their sick days are unlimited, and there are no criteria for what constitutes "sick" under the policy. *Id*.

CP began his leave of absence in November 2014, with his last day of work scheduled for October 30 and an expected return date of December 30, 2014. GC-3.

On December 19, after being on leave for nearly two months, CP emailed Keyes about his return to work. GC-4-3. In what he characterizes a request for disability accommodation, CP informed Keyes that a complication from surgery has appeared, that it was "not very serious" and: "I am still planning on returning Dec. 30, *but I'm wondering if you'd be open to me working half days in the office and half days at home for the first few weeks*. This would make the transition much easier for me, I think. Let me know what you think." *Id*. (emphasis added).

In what CP describes as an illegal "denial" of his disability accommodation request (TR 92-99), Keyes responded on December 22 as follows:

> "It was great to see you as well! Glad to hear your recovery is going pretty smoothly.
>
> As far as the plan goes for returning to work, **I would prefer that you be in the office for your hours when you come back since you are more productive here.**
>
> **Is there anything we can do to accommodate your situation so that you can work in the office? If you would need to extend your leave to aid in your recovery, that would be totally fine as well. Just let me know!**"

GC-4-2 (emphasis supplied).

Keyes explained that his concerns about productivity stemmed from CP's prior remote work arrangement earlier in the year in which he took half sick days. TR 211-212. CP admitted

that his productivity suffered when he worked at home following his prior medical procedure. TR 93. In fact, in his December 23, 2104 email to Keyes, CP wrote "I completely understand your concerns about remote work and productivity . . ." R-4-2. Mishkin explained that CP also admitted to him that he had productivity issues in the past when working remotely. TR 256.

CP conceded at the hearing that he believed Keyes was trying to find a solution despite the prior issues with productivity and remote working. TR 120. In his emails to Keyes at the time, CP insisted that his rights under federal disability laws required IXL to allow him to work at home. R-4-2. CP proposed still returning to work on December 30, but an arrangement where he worked 50% of each day at home. He suggested that "we find some metrics that we can put in place so that you can monitor my progress to your satisfaction." *Id*.

On December 24, Keyes responded that he and CP were "definitely on the same page here as far as goals are concerned" and that based on CP's doctor's recommendation "it sounds like reasonable accommodation in your case is to set up a part time remote working situation." *Id*. Keyes offered to come up with performance goals and a progress monitoring plan, and agree that having his office time in the morning "sounds great to me – thanks for that suggestion!" *Id*. Keyes suggested they talk specifics of the plan when he returned on the 30th, if that date still worked for CP. In response, CP confirmed the 30th and both of them scheduled a meeting on CP's first day back. *Id*.

On December 30, Keyes emailed CP a one-page "Working Remotely Plan" that included the arrangement CP requested and included metrics and progress monitoring as CP suggested. R-1. Keyes met with CP on December 30, discussed the plan, and CP did not voice any complaints about the arrangement. TR 212-213. Yet, despite providing CP exactly what he requested, for the week after he returned CP was clearly unhappy when he returned to work. He was non-

communicative and "visibly upset." TR 212-214.

D. CP's Glassdoor.com Post on December 30, 2014

Unbeknownst to IXL management at the time, CP posted a negative review of IXL titled "Micromanaged and problematic" on Glassdoor.com on the evening of his first day back to work. R-8. He conceded he does not know when IXL management first saw the post. TR 123.[2]

The full text of CP's online post is as follows:

"Micromanaged and problematic "

Current Employee - Anonymous Employee

I have been working at IXL Learning full-time (More than 3 years)

Doesn't Recommend Neutral Outlook Disapproves of CEO

Pros

Easy, unchallenging work, good medical benefits, free drinks. Hours are not too crazy. The people are generally well-meaning and nice.

The company isn't going anywhere right now. They play to the traditional classroom, which is good for profits. You won't have to worry about the company going under (but don't expect the profits to pass onto you, either).

Cons

Don't expect a challenge working here. This company sets the bar extremely high for who they hire, and then gives their smart, talented employees boring, menial work to fill the day. The CEO is overly involved in every product, every decision, every everything.

There are no politics if you fit in. If you don't -- that is, if you're not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball -- then you're likely to find yourself on the outside. Treatment in the workplace, in terms of who gets flexible hours, interesting projects, praise, promotions, and a big yearly raise, is different and seems to run right along these characteristics.

There is essentially no HR knowledge or staff at this company. Know your rights when you work here, because they don't, and they don't care to learn. Most management has no idea what the word "discrimination" means, nor do they seem to think it matters.

Advice to Management

Choose one: listen to the ideas of a group of smart, talented employees, or micromanage a group of mediocre employees. Don't pull the bait and switch on employees who can do way better.

Build a culture that encourages respect for people of all walks of life.

[2] Also unbeknownst to IXL at the time, CP had started looking for a job and wanted to leave IXL in mid-December. TR 135.

R-8.

CP admits he did not state anywhere in the post that he was speaking on behalf of other employers, but believes it is "implied." TR 125. He also admits that he knew he would be reaching *potential employees* of IXL to let them know that he felt IXL had a "bait and switch" or misleading campaign to recruit employees. TR 117.

E. IXL Managers Met With CP In January 2015 Concerning His Concerns

On January 6, 2015, Keyes met with CP to determine why he was acting upset and non-communicative. TR 214. CP told him he was upset with how Keyes had handled his sick leave, and that Keyes had discriminated against him by not immediately approving his remote work suggestion. TR 215. CP described it as an "emotional meeting for both of us. I was talking about issues that were very, very present in my life and had caused me a lot of struggle." TR 127. Keyes told him he would escalate his concerns to upper management, which CP admitted he appreciated. TR 122.

CP did not talk about any other employees at the January 6 meeting. TR 216. His complaints where about how Keyes had handled *his* sick leave and return to work in December. It is still unclear what he was so upset about, but at the hearing he explained his belief that his return to work restrictions in January 2015 were more restrictive than other employees:

> "Q. How do you know that your work restrictions or your plan for remote working in early 2015 was more restrictive than other employees whose restrictions you don't know about?
>
> A. I had observed that employees with children would send an off the bat email saying I'm going to be staying home today and working remotely with my kids. *And I can only assume* that they didn't have to check in regularly with their managers as I did, because it was sporadic."

TR 88 (emphasis added). Keyes testified, however, that this was not true. TR 221-223.

Despite his disappointment with IXL's treatment of his sick leave requests, CP testified

that in 2014, he was allowed to work at home 25 to 30 days for medical or health reasons. TR 89. When CP worked at home those 25-30 times, he admits that Keyes did not impose any restrictions or reporting requirements on CP at any point in time. *Id*.

> "Q And so, when you say that you saw employees with children who were allowed to work at home, and you assumed that they weren't required to have any reporting or other restrictions, *would you agree that you also were allowed 20 to 30 times to, similarly, work at home without such restrictions*?
>
> A Yes, I think that's fair."

TR 89-90.

Nonetheless, Keyes arranged for Mishkin to meet personally with CP on January 8. Mishkin emailed CP on January 7, setting a meeting for January 8 at 11 am, and informed him that "discrimination of any type, including disability discrimination, is unacceptable to me and IXL, and I need to understand what has been occurring so that I can take action immediately to correct it." R-5. *Mishkin testified that although he has frequent meetings with employees about various topics every day, he could not think of any other discrimination issues ever being raised at IXL*. TR 260.

On January 7, after the meeting between CP and Mishkin had been scheduled, IXL HR Coordinator Maricela Prado discovered the December 30 negative review of IXL posted on Glassdoor.com. Based on the writing style of the review, it was clear to Prado that the review was posted by CP. R-8.

When Mishkin read CP's post, he considered it to be defamatory. TR 248. "My problem with the post was first how blatantly untrue it was and also that it was designed -- the way it was written and the place it was posted were specifically designed to hurt the Company." TR 273. He concluded that CP's review was deliberately intended to harm IXL's recruitment efforts, which were particularly challenging in the present job market in Silicon Valley. TR 248. Mishkin was

offended at CP's warning to job seekers that there are "no politics if you fit in", which Mishkin viewed as contrary to his personal values and the environment he worked hard to cultivate at IXL. TR 252. Based upon the recklessness of the accusations by CP, coupled with CP's deliberate attempt to harm IXL's ability to attract talented prospects, Mishkin decided at that time to terminate CP's employment. TR 247.

Mishkin met with CP as scheduled on January 8 at 11 am. CP explained his reasons for being upset with Keyes and also IXL's HR managers for the way they handled various personnel matters for him. TR 248-250. **CP admits that he did not mention any of his prior discussions with other employees at IXL in the meeting with Mishkin.** TR 152.

All of the issues raised by CP at the meeting were individual concerns and specific to CP's particular medical leave and disability issues. For example, in addition to complaining about the way Keyes did not immediately agree with his remote work suggestion in December 2014, CP described an incident in which HR representative Maricela Prado asked once about a wrap that was on CP's arm. TR 121. It is still unclear what his complaint is with Prado's question, other than "it felt like she wanted me to explain further", but he explained to her that he would need an ergonomic mouse due to limited use of his right hand after a surgery and she obtained the ergonomic mouse for him. TR 121.

CP's complaint about not "fitting in" in the workplace was based more on personality differences among employees and not on actual discriminatory policies or practices. In this regard, Mishkin asked CP at the meeting *whether he is talking about friendship at work or discrimination*. CP did not distinguish between the two, and said they blended together. TR 151. CP does not recall his exact words. TR 151. CP told Mishkin that that "as a queer person, he doesn't fit in." TR 255.

CP told Mishkin that he wrote the Glassdoor.com review *because he was mad at the time*. TR 123. He apologized and offered to take the post down, and Mishkin said he would like that but he did not demand it be taken down. TR 253.

Mishkin concluded the meeting by telling CP that what he did "was unacceptable, it showed extremely poor judgment, poor ethical values. I told him that I couldn't – I couldn't trust him, I couldn't imagine ever trusting him, ever being able to work with him. And I -- at that point, you know, Scott got the gist of what was happening and he -- he stood up, he -- he said, 'You'll be hearing from my lawyer,' and just stormed out of my office." TR 257.

III. ARGUMENT

A. The General Counsel Did Not Prove That IXL's Discharge of CP Violated Section 8(a)(1) of the Act

Section 7 of the Act guarantees employees the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act makes it an unfair labor practice "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." For an employee's activity to be "concerted" the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee him/herself. *Meyers Industries (Myers I)*, 268 NLRB 493 (1984), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986). The statute requires the activities under consideration be "concerted" before they can be "protected." *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999).

An employee's activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp*., 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. *El Gran Combo*, 284 NLRB 1115 (1987), *enfd*. 853 F.2d

996 (1st Cir. 1988). The Act clearly protects discussions between two or more employees concerning terms and conditions of employment, and in a group meeting context, a concerted objective may be inferred from the circumstances. *Whittaker Corp*., 289 NLRB 933, 934 (1988), *citing Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976). Those discussions, however, must look toward group activity to be protected concerted activity and ***mere griping is not protected***. *See Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). [3]

The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. *See, e.g., Ewinc v. NLRB*, 861 F.2d 353 (2d Cir. 1988). Additionally, as discussed in greater detail below, employer knowledge of the concerted nature of employee activity is an *indispensable* requirement for any finding that an employee has been discharged, or otherwise disciplined, in violation of Section 8(a)(1). *See Amelio's*, 301 NLRB 182 (1991).

1. CP's Glassdoor.com Is Not Concerted Activity

The General Counsel's first theory is that CP's post on Glassdoor.com is itself protected concerted activity, and thus a termination because of the post violates Section 8(a)(1). The General Counsel focuses substantially on the protected nature of the post. But the General Counsel glosses over the question of whether the post is concerted activity. It is not. To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, p. 3 (August 11, 2014). Although these elements are closely related, they must be analyzed separately. *Id*.

[3] *See, e.g., NLRB General Counsel Advice Memorandum, Sagepoint Financial, Inc*., Case No. 28-CA-23441 (August 9, 2011) (GC advised not an 8(a)(1) violation to terminate employee for Facebook posts complaining about supervisor's preferential treatment of coworkers; posts made solely on his own behalf and were not designed to advance any cause other than his own).

The Glassdoor.com post does not constitute concerted activity under even the most expansive interpretation of Section 7 of the Act. The post contains none of the hallmark indicia of concertedness. There is no indication that the author is acting with or on the authority of other employees, does not expressly or impliedly seek to initiate, induce or prepare for group action, and does not bring truly group concerns to the attention of management. CP posted the review in a fit of pique after an individual dispute with his manager over his return to work in January 2015. CP admits that the posted his disparaging and petty review because he was mad at David Keyes. In an email to former employee Wu that same night, in which he falsely claimed that Keyes "insisted on a doctor's note" (CP was the one who suggested it), CP stated he was "committed to moving on from IXL." R-4.

Instead of group action, CP's online comments were made "solely by and on behalf of the employee himself" are thus not concerted. *Meyers I*, 268 NLRB at 497. Without any factual basis, which the hearing made clear, CP wrote that management favors those who "fit in" to certain characteristics.[4] In *Tampa Tribune*, 346 NLRB 369, 371-372 (2006), an employee raised a concern about *favoritism* was speaking "only for himself" and there was no evidence that his coworkers even shared his belief that favoritism existed, his complaint was "a personal gripe" not protected concerted activity. *See also, National Wax Company*, 251 NLRB 1064, 1064-65 (1980).

There is nothing unique about Glassdoor.com that transforms an individual gripe such as CP's post into concerted activity by having been posted on the site. In recent years, several Board decisions have addressed whether Facebook posts were, or became, concerted activities. Facebook, however, is a 21st Century watercooler around which employees, during or after

[4] It is difficult to avoid noting that the "characteristics" CP alleges to be favored at IXL are a relatively diverse composition of employees who are family-oriented, white, Asian, straight, mainstream gay, parents of 1.7 children and/or softball enthusiasts.

working hours, communicate out in the open. Facebook permits these conversations (it isn't called social media for no reason), and in fact actively seek to foster them with algorithms aimed at connecting friends and coworkers. Facebook posts are individually identifiable and permit others to leave individually identifiable "likes" and substantive comments. Thus, it is no surprise that online conversations between employees about terms and conditions of employment have been found at times to constitute protected concerted activity. *See, e.g.,* NLRB General Counsel Operations Memorandum 12-31 (January 24, 21020; NLRB General Counsel Operations Memorandum 11-74 (August 18, 2011) (GC Operations Memos discussing multiple social media cases). Generally, fact patterns concerning social media sites that meet the *Meyers* standard involve two-way communications between employees.

Glassdoor.com, however, is not a social media website. It is a job seeking website and an employer advertisement forum. The site is purposefully constructed to prohibit individually identifiable posts, has no comments sections and the audience of the site is primarily is not nearly exclusively non-employees seeking to evaluate a prospective employer.

Moreover, to the extent the General Counsel argues that CP "brought group concerns" to management via Glassdoor.com, that is not sufficient for his conduct to be concerted. It must be shown that he did more than merely repeat to management jointly held concerns of other employees. *Compuware Corp*., 320 NLRB 101, 102 (1995) *citing Manimark Corp. v. NLRB*, 7 F.3d 547 (6th Cir. 1993). In *Manimark*, the employee never told other employees what he was going to do or that he had contacted management. Thus the court found that he was acting in concert with other employees only in a "theoretical sense" and such was insufficient to support a violation. *Id*. He must "actually, rather than impliedly" be representing the views of other employees rather than raising a personal gripe or grievance. *Manimark Corp. v. NLRB*, 7 F.3d 547, 550 (6th Cir. 1993) (no concertedness when employee was summoned to manager's office

to discuss a matter that only affected the employee); *See also NLRB v. Portland Airport Limousine Co.*, 163 F.3d 662, 666 (1st Cir. 1998) (no concertedness when brief conversation between employees did not demonstrate a concerted plan of action). In this case, *CP admits he never informed management of any group discussions or that he was representing the views of other employees*.

Moreover, the General Counsel argued at the hearing that CP's Glassdoor.com review was inherently concerted, because it raised concerns that affect other employees of essential terms and conditions of employment. This argument is misguided. The concept of "inherently concerted" may be applicable in determining whether a conversation involving a speaker and listener about critically important workplace issues is concerted even if group action is not contemplated. *See Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (employee discussions of schedule changes were concerted, even though no suggestion that discussions had the object of initiating group action). In this case, however, there is *no conversation between employees* and no reason for IXL to have knowledge that this online post aimed at recruits was a discussion among employees. An individual gripe can't be "inherently concerted" solely because a monologue uploaded to the Internet involves employment issues important to the speaker. The General Counsel is missing the second part of the concerted equation – an employee listener. If an anonymous post on Glassdoor.com containing an employee's personal gripe about his workplace, which did not involve any other identifiable employee of the company (and no evidence that any other non-management employee even saw it), can be concerted under Section 7, then "concerted" activity is meaningless.

CP's singular and individual gripe on Glassdoor.com was not concerted activity. Because it is undisputed that IXL terminated PC solely for posting his false and disparaging review on Glassdoor.com, and because his post is not concerted activity, the General Counsel has not

proven a violation of Section 8(a)(1).

2. CP's Glassdoor.com Post Is Not Protected Activity

Even if CP's post is concerted activity, the General Counsel cannot establish that it was for "mutual aid and protection" under Section 7. The Board has expanded the scope of this provision as follows:

> "We hold that an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection. This decision applies equally to cases where, as here, an employee seeks to raise that complaint directly to the employer, or, as in *Holling Press*, to an outside entity."

Fresh & Easy Neighborhood Mkt., Inc., 361 NLRB No. 12 (Aug. 11, 2014).

In this case, however, the CP was not seeking the assistance or support of any coworker in raising a complaint about himself or anyone else. His online gripe did not mention group complaints and was plainly aimed at dissuading *prospective* employees from working at IXL. That is not for mutual aid and protection, but rather seeking revenge on company he was admittedly leaving by hurting its well-known efforts to recruit talented employee through Glassdoor.com.

The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). CP posted a blatantly false and malicious review of his company because he was angry about an individual issue. GC-1(a) ULP Charge ¶13. At the hearing, however, he attempted to put a "concerted" spin on his reason for posting the review by adding "and I thought it showed a pattern . . . of sick leave and disability not being accommodated, not just for me but for other employees as well." TR 114-15. This is an outrageous statement from an employee who admitted that he during his entire employment, IXL approved every single request

he made to work remotely, and take time off, including partial days, leaving early or coming in late. instance of remote work. TR 95-96. CP admitted, however, that he never mentioned any such concerns. *Id*.

Employee statements are unprotected if they are shown to be maliciously untrue, i.e., if they are knowingly false or made with reckless disregard for their truth or falsity. *Food Services of America*, 360 NLRB No. 123, slip op. at 5 (May 30, 2014). CP knew what he was doing by choosing Glassdoor.com, and out of spite he sought to damage and harm IXL's reputation (and that of its CEO) in a venue critical for the promotion of IXL's business. Such acts are not protected by the NLRA. Because the Glassdoor.com posting was not protected activity, IXL's termination of CP was not in violation of the NLRA.

B. There Is No Evidence To Prove That IXL's Termination Of CP Was A "Preemptive Strike" To Suppress Future Protected Concerted Activity

In response to IXL's motion to dismiss after the General Counsel rested its case, it raised for the first time the theory that IXL fired CP to suppress protected concerted activity by other employees. This argument is reckless and offensive.

The General Counsel cited *Parexel International*, 356 NLRB No. 82 (2011), in which an employee was terminated because the employer did not want her to discuss wages and discrimination with other employees. The employee, under the impression that co-worker had left the company and come back with a raise, told her supervisor that "perhaps everyone ought to quit and come back with a raise." The supervisor reported this up the chain of command. Upper management was concerned with: 1) what the employee and co-worker had discussed, and 2) who else the employee had discussions with other than the supervisor.

There is not the slightest hint of evidence to support this last-second preemptive strike theory. The General Counsel did not introduce any evidence that Mishkin considered the

possibility that CP would later attempt to *actually* engage in concerted activity, and certainly no evidence that his decision was motivated by a desire to preemptive Section 7 activity. To the contrary, Mishkin's concern was the falseness of CP's comments and the fact they were purposefully aimed at dissuading *non-employee* job seekers from considering IXL for employment. The Act does not prohibit such a motive.

The General Counsel's "preemptive strike" gambit is unworthy of serious consideration and plainly unsupported by the evidence.

C. The General Counsel Did Not Prove That IXL Promulgated A Rule Requiring Employee Complaints To Be Made To A Supervisor Before A Third Party

To bolster its groundless Section 8(a)(1) termination claim, the General Counsel amended its Complaint shortly before trial. The October 22, 2015 amendment alleged CP was fired for violating an unlawful rule prohibiting employees from bringing workplace complaints to third parties without first raising them with their supervisor. GC-1(l), ¶6(b), (e).

The General Counsel failed to prove any rule, policy or practice promulgated by IXL that prohibits employees from raising workplace concerns outside the company without first raising them with their supervisors. To the contrary, IXL encouraged employees to leave reviews of their experiences at IXL on Glassdoor.com. IXL clearly hoped that the reviews would be positive to help its effort to attract top candidates in the recruitment process, but employees were free to leave negative reviews without consequence (or leave no review, as Nina Wu decided to do without any adverse consequences (TR 181)). It was only when CP lashed out when upset about a personal, individual gripe in a calculated attempt to injure IXL's recruiting efforts that IXL took disciplinary action against an employee.

The General Counsel's "unlawful rule" allegation is based solely on a comment made by Mishkin in his January 8, 2015 meeting with CP (after he had decided to terminate CP's

employment).[5] CP admitted that "going into that [January 8, 2015] meeting" he was not "aware of any policy, in writing or otherwise, at this company, IXL, that prohibited you from complaining about your job to a third party without first talking to your supervisor." TR 147. Further, other than what Mishkin allegedly said to him at the January 8 meeting, he had not heard of any such policy. TR 148.

Mishkin's comments in the January 8, 2015 meeting were clearly not evidence of a "rule" or policy as alleged by the General Counsel. Mishkin said only that he "couldn't understand why" CP would not have spoken to David Keyes about the issues he included in his post. TR 256. Although Mishkin believed CP should have discussed the "not fitting in" concerns with his manager, there is no evidence offered by the General Counsel that CP's failure to do so violated a rule that led to termination. In fact, CP admitted that Mishkin never mentioned a policy or rule in his January 8 meeting, and never said "this is against our policy". TR 152.

Mishkin denied, without contradiction from evidence submitted by the General Counsel, that any such rule or policy existed. TR 257. Mishkin also denied as "absolutely false" the allegation that his termination decision was based in whole or in part on CP not raising his accusations with his supervisor before posting them to Glassdoor.com. *Id*.

[5] The General Counsel also appears to rely on one sentence taken from IXL's position statement submitted to the EEOC in response to CP's allegations that his termination was based on his sex, gender identity, gender expression, disability, perceived disability, request for accommodation, decision to take protected medical leave, and for complaining about discrimination. The General Counsel asked Mishkin twice to confirm that in the position statement the following sentence exists: "Complainant posted these comments without first raising his concerns with any managerial employee at IXL." TR 275, 281-282. IXL's position statement, to be clear, repeatedly states that CP was terminated because he "made inaccurate and inappropriate statements about IXL and the company's CEO on Glassdoor.com, a website used by IXL to recruit new employees." IXL submits that the General Counsel's use of IXL's position statement, which it did not show to Mishkin or offer in evidence, should be ignored. Even if not, the factual statement cherry-picked by General Counsel hardly establishes the existence of a rule promulgated by IXL under which CP was terminated.

The General Counsel failed to prove either the existence of an unlawful policy or unlawful termination for violating any rule or policy whatsoever. IXL's termination of CP was based on the particular circumstances of CP's false and reckless online attack against the company, made out of spite when he did not immediately get exactly what he asked for from his manager.

D. The General Counsel Did Not Prove That Discussions Between CP and Coworkers Early In His Employment Were Protect Concerted Activities Of Which IXL Had Knowledge

Even if the General Counsel had established that CP had engaged in protected, concerted activities under Section 7 based on his recollection at the hearing of a handful of discussions with coworkers (some of which were six to twelve months prior to termination), there is no credible evidence that the decision-maker at IXL had any knowledge of those discussions. Without such evidence, the General Counsel cannot demonstrate that the decision to terminate CP was unlawfully motivated.

Employer knowledge of the concerted nature of employee activity is an *indispensable requirement* for any finding that an employee has been discharged, or otherwise disciplined, in violation of Section 8(a)(1). In *NLRB v. Burnup & Simms*, 379 U.S. 21, 22 (1964) the Supreme Court plainly stated:

> In sum, Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, *that the employer knew it was such*, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct. (Emphasis added.)

Admittedly, knowledge of concerted activity may be established by circumstantial evidence from which a reasonable inference may be drawn. *See, e.g., Montgomery Ward & Co*., 316 NLRB 1248, 1253 (1995). However, without sufficient evidence of knowledge by the

employer, a charge of unlawful termination cannot stand. *See Guardsmark, LLC & Serv. Employees Int'l Union, Local 2417*, 2004 WL 1743024 Case Nos. 20-CA-31495-1 (July 28, 2004) ("there is nothing Higgins wrote in his memo or said during his subsequent joint interview with representatives of the Respondent and the Fairmont that would have reasonably indicated that his complaint was concerted"); *Park N Fly, Inc. & Int'l Bhd. of Teamsters, Local 120*, 349 NLRB 132, 145 (2007) (finding that a plural reference was insufficient to alert the listener to group activity).

Moreover, in an 8(a)(1) discharge case like this, "the issue is whether the decisionmaker knew of the concerted protected activity, not whether the decisionmaker should or reasonably could have known." *Reynolds Electric, Inc.*, 342 NLRB 156, 157 (2004).[6] Similarly, courts repeatedly require the General Counsel to prove that the decisionmaker, and not management in general, has knowledge of protected activity. In this case, it is undisputed the Mishkin had no knowledge of any purported concerted activity by CP when he decided to terminate CP's employment. When Mishkin met with CP on January 8, 2015 to discuss the Glassdoor.com post, CP admits he did not mention anything about prior conversations with coworkers. TR 152. There

[6] *See e.g. Gestamp South Carolina, L.L.C. v. NLRB*, 769 F.3d 254, 262 (4th Cir. 2014); *Fed'n of Union Representatives v. NLRB*, 339 F.2d 126, 129 (2nd Cir. 1964) ("Knowledge . . . not communicated to . . . the sole actors in the firing, obviously could not have been a cause of the firing"); *Delchamps, Inc. v. NLRB*, 585 F.2d 91, 94 (5th Cir. 1978) ("the Board must show that the particular supervisor responsible for the firing knew about the discharged employee's union activities"); *Air Surrey Corp. v. NLRB*, 601 F.2d 256, 257-58 (6th Cir. 1979) (vacating Board Order on the basis that the supervisor who discharged the employee was unaware of the employees' protected concerted activity); *NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634, 640 (5th Cir. 1986) ("before an employer can be said to have discriminated against its employee for their protected activity, the Board must show that the supervisor responsible for the alleged discriminatory action knew about the" protected activity); *NLRB v. McCullough Environmental Servs. Inc.*, 5 F.3d 923, 932 (5th Cir. 1993) ("In establishing the knowledge element, the Board may not simply 'impute' the knowledge of a lower-level supervisor to the decision-making supervisor."); and *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 503 (7th Cir. 2003) ("the General Counsel had to show that the decisionmaker(s) responsible for the firing of [the charging party] knew that he was involved in union activities").

is no evidence, or even allegation, that IXL had knowledge of CP's discussions with Nemo Curiel and Nina Wu about working conditions in late summer and fall 2014 (which were not concerted activity anyway as it is undisputed that they were *not employees of IXL*). TR 129. Moreover, even the General Counsel concedes IXL had no knowledge of CP's private Facebook conversations with Jessica Morse, Curiel and Wu in August 2014 (R-3). TR 133 ("there's no evidence that [IXL] had knowledge of this communication.").

Despite this utter lack of evidence establishing employer knowledge, or perhaps because of it, the General Counsel hypothesizes that IXL management might have overheard discussions between CP and a couple coworkers about their work assignments or sick leave. Even if an inference of knowledge were warranted, such factors as the temporal proximity of the concerted action and termination are considered. *See, e.g., Montgomery Ward & Co*., 316 NLRB 1248, 1253 (1995). In this case, however, CP's alleged conversation with coworkers were remote in time from his termination. CP's Glassdoor.com post, in contrast, occurred less than ten days prior to termination. There is no reasonable basis to infer knowledge by IXL of isolated and suspect protected conversations, much less that it laid in wait for nearly a year to terminate CP because of those conversations.

Moreover, CP's complaints to Keyes and Mishkin were highly personal in nature and limited to *his individual* employment issues. As he described at the hearing, his discussion with Keyes on January 6, 2015 was an "emotional meeting" in which he talked about "issues that were very, very present in my life and had caused me a lot of struggle." TR 127. In these circumstances, it is not reasonable to allege that IXL management should have known that CP was raising "group" concerns.

The General Counsel's knowledge argument is baseless speculation that cannot support a

finding of Section 8(a)(1) unlawful termination. *Reynolds Electric*, *supra* at 157 ("speculative" evidence of employer knowledge insufficient to establish prima facie case); *see also Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 677, 687 (7th Cir. 2000) ("This crosses the line from reasonable inference to wholesale speculation. If the General Counsel wanted to create a record from which this inference could be drawn, [he] needed to elicit some testimony on the matter.") (internal quotation and citation omitted).

IV. CONCLUSION

Based on the foregoing reasons, and the record evidence taken as a whole, the General Counsel's Amended Complaint should be dismissed in its entirety and a decision should issue finding that Respondent IXL Learning, Inc. has not violated the Act.

Dated: December 21, 2015

Respectfully submitted,

Young Basile Hanlon & MacFarlane, PC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 4, 2015, he caused the foregoing **IXL Learning, Inc.'s Post-Hearing Brief** to be filed with the NLRB by electronic filing protocols, and that same will be served upon the following via electronic mail:

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