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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

and

ADRIAN SCOTT DUANE,

Plaintiff Intervenor,

vs.

IXL Learning, Inc.,

Defendant.

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

**ERRATA: JOINT PROPOSED JURY
INSTRUCTIONS**

Trial Date Re: October 22, 2018

Courtroom Re: 4, 17th Floor

Judge Re: Hon. Vince Chhabria

Pursuant to this Court's Standing Order for Civil Trials, Nos. 7-11, and Minute Entry Setting CMC Dates (ECF No. 27)] the parties hereby submit their Joint Jury Instructions. The parties have indicated in *bold, italics* where there are modifications to the Ninth Circuit's Model Instructions. The parties have similarly provided justifications for disputed instructions.

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I. STIPULATED/MODIFIED/DISPUTED INSTRUCTIONS TO BE GIVEN AT THE START OF THE CASE

Disputed Instruction No. 1 Re ROLE OF THE EEOC AND ADRIAN SCOTT DUANE Offered by Plaintiffs

This case was filed by the U.S. Equal Employment Opportunity Commission, also known as “the EEOC” under two federal anti-discrimination laws: Title VII of the Civil Rights Act of 1964, which is often referred to as Title VII and the Americans with Disabilities Act, which is often referred to as the ADA. The EEOC is an agency of the United States government responsible for enforcing federal laws such as Title VII and the ADA. that prohibit employment discrimination, Title VII is a federal law that prohibits discrimination based on sex, sexual orientation, gender identity, national origin, race and retaliation. The ADA is a federal law that prohibits discrimination based on disability and retaliation.

When the EEOC learns of alleged violations of Title VII and the ADA, it has the responsibility to investigate these claims. It learns of such claims through complaints, referred to as “charges of discrimination” filed by individuals. In this case, Adrian Scott Duane filed a charge of discrimination with the EEOC.

The EEOC chose to file this lawsuit after investigating Mr. Duane’s charge, which it is authorized to do, and Mr. Duane joined this lawsuit as a private party, represented by his own attorney, which he is permitted to do under Title VII and the ADA. Therefore, during this trial, when you hear references to the “Plaintiffs” in this case, that is a reference to both the EEOC and Mr. Duane.

Source: 42 U.S.C. § 2000e-5(f)(1) and (3) and 42 U.S.C. §12117(a) (incorporating by reference Sections 706 (f)(1) and (3) of Title VII); *EEOC v. Waffle House*, 534 U.S. 279, 287-88, 291 (2002); *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 323-26 (1980).

**Disputed Instruction No. 1 Re: ROLE OF THE EEOC AND ADRIAN SCOTT DUANE
Offered by Defendant**

This case was filed by the U.S. Equal Employment Opportunity Commission, also known as “the EEOC” under two federal anti-discrimination laws: Title VII of the Civil Rights Act of 1964, which is often referred to as Title VII and the Americans with Disabilities Act, which is often referred to as the ADA. Title VII is a federal law that makes it illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex. The ADA is a federal law that seeks to protect individuals against disability discrimination in the workplace. The EEOC is an agency of the United States government responsible for enforcing federal laws such as Title VII and the ADA. that prohibit employment discrimination, Title VII is a federal law that prohibits discrimination based on sex, national origin, race and retaliation. The ADA is a federal law that prohibits discrimination based on disability and retaliation.

When the EEOC learns of alleged violations of Title VII and the ADA, it has the responsibility to investigate these claims. It learns of such claims through complaints, referred to as “charges of discrimination” filed by individuals. In this case, Adrian Scott Duane filed a charge of discrimination with the EEOC.

The EEOC chose to file this lawsuit after investigating Mr. Duane’s charge, which it is authorized to do, and Mr. Duane joined this lawsuit as a private party, represented by his own attorney, which he is permitted to do under Title VII and the ADA. Therefore, during this trial, when you hear references to the “Plaintiffs” in this case, that is a reference to both the EEOC and Mr. Duane.

Source: 42 U.S.C. § 2000e-5(f)(1) and (3) and 42 U.S.C. §12117(a) (incorporating by reference Sections 706 (f)(1) and (3) of Title VII); *EEOC v. Waffle House*, 534 U.S. 279, 287-88, 291 (2002); *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 323-26 (1980).

Plaintiffs’ Justification for Disputed Instruction No. 1 Re ROLE OF THE EEOC AND ADRIAN SCOTT DUANE

Plaintiffs’ proposed instruction will educate the jury about the EEOC’s unique role in this case. It also instructs the jury briefly about the scope of coverage for Title VII, including gender identity and sexual orientation, and the ADA. Defendants seek to eliminate references to sexual orientation and gender identity although they are clearly at issue in this case. To do so would be contrary to the law and could mislead the jury in its determination of whether comments directed toward Mr. Duane’s (or others’) sexual orientation or gender identity could form his good faith belief of discrimination. *See e.g., Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 115 (2d Cir. 2018)(holding that Title VII jury instruction should explain that “because of sex” includes actions taken because of sexual orientation); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574-75 (6th Cir. 2018) (“We also hold that discrimination on the basis of transgender and transitioning status violates Title VII.”); *Dawson v. Entek Intern.*, 630 F.3d 928, 936 (9th Cir. 2011)(Title VII prohibits retaliation for complaint alleging sexual orientation harassment); *McCarthy v. R.J. Reynolds Tobacco Co.*, No. CIV. 2:09-2495 WBS, 2011 WL 4006634, at *2 (E.D. Cal. Sept. 8, 2011)(recognizing that the Ninth Circuit has “answered unequivocally” that an employee has a viable Title VII retaliation claim arising out of sexual orientation discrimination); *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012), *Lusardi v. Dep’t of the Army*, EEOC Appeal No. 0120133395, 2015, WL 1607756 (Apr. 1, 2015). Given that several courts have held that both sexual orientation and gender identity are covered by Title VII, it was unquestionably reasonable for Mr. Duane to believe that gender identity is covered by Title VII. It would be prejudicial to Plaintiffs to leave these references out of the instruction.

**Defendant's Justification for Disputed Instruction No. 1 Re ROLE OF THE EEOC AND
ADRIAN SCOTT DUANE**

Defendant's objection to this instruction is limited to the description of Title VII as a federal law that prohibits discrimination based on sexual orientation and gender identity. The EEOC's interpretation of the term "sex" in Title VII is not controlling law, and thus it is improper for the Court to give such instruction. Moreover, this is not a case of sexual orientation or gender identity discrimination.

Disputed Instruction No. 2 Re: DEFINITIONS RELEVANT TO THE CASE Offered by Plaintiffs

You will hear some terms throughout this case that you may find unfamiliar or for which you may have a different definition. For purposes of this trial, the [parties agree to] the following definitions:

“Transgender” is a broad term that is used to describe people whose gender identity is different from the gender they were assigned at birth.

“Gender identity” is your internal knowledge of your gender.

“Gender non-conforming” describes an individual whose gender expression is different from society’s expectations related to that person’s gender.

“Sexual orientation”: describes the gender(s) a person is attracted to: e.g., heterosexual, lesbian, gay, bisexual, or asexual.

“Cisgender” is a person whose gender identity corresponds to the sex the person had or was identified as having at birth.

Source: Adapted from the Resource section of the National Center for Transgender

Equality; <https://www.merriam-webster.com/dictionary/cisgender> (last viewed 10/7/2018).

Plaintiffs' Justification for Disputed Instruction No. 2 Re DEFINITIONS RELEVANT TO THE CASE Offered by Plaintiffs

Plaintiffs propose this jury instruction to ensure that the Court, counsel and the jurors are on the same page regarding terminology that will be used throughout the case. Gender and sexual orientation are complex. The language around gender, gender identity and sexual orientation is evolving rapidly. Related terminology and definitions can be confusing. Plaintiffs believe the jurors will appreciate having a common definition for the terminology. Further, defining these terms will minimize the opportunity for unnecessary and perhaps misinformed debate or confusion about what the terms mean.

Defendant claims definitions aren't necessary because this is not a case of transgender, gender identity or sexual orientation discrimination. True, plaintiffs do not allege that Defendant discriminated against Mr. Duane because of these protected traits. Nevertheless, plaintiffs do allege that Mr. Duane reasonably believed IXL engaged in discrimination based, in part, on gender identity and/or sexual orientation. Accordingly, the terms in the proposed instruction will necessarily be used throughout the trial. It is critical for all involved to have a common understanding of their meaning. Plaintiffs have not offered definitions for terms that will arise during the case, such as "mainstream gay" because they do not have a common definition. Plaintiffs agree that it is appropriate for Mr. Duane to testify about his personal definition of these terms.

Defendant's Objections to Disputed Instruction No. 2 Re DEFINITIONS RELEVANT TO THE CASE Offered by Plaintiffs

IXL objects to this instruction. These terms are not relevant to the opposition activity alleged by Plaintiffs. To the extent Mr. Duane's term "mainstream gay" (used in the Glassdoor Post) requires definition, Mr. Duane can testify what he meant by that term, as he did in his deposition. This is not a case of transgender, gender identity, or sexual orientation discrimination, and IXL objects to the Court instructing the jury about such terms as such instruction further confuses the allegation raised in this case.

Disputed Modified Instruction No. 3 Re DUTY OF JURY Offered by Plaintiffs

Members of the jury:

You are now the jury in this case. It is my duty to instruct you on the law.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Do not decide the case based on “implicit biases.” As we have discussed in jury selection, everyone including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

At the end of the trial I will give you final instructions. It is the final instructions that will govern your duties.

Please do not read into these instructions, or anything I may say or do, that I have an opinion regarding the evidence or what your verdict should be.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.3, as modified.

Disputed Modified Instruction No. 3 Re DUTY OF JURY Offered by Defendant

Members of the jury:

You are now the jury in this case. It is my duty to instruct you on the law.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

At the end of the trial I will give you final instructions. It is the final instructions that will govern your duties.

Please do not read into these instructions, or anything I may say or do, that I have an opinion regarding the evidence or what your verdict should be.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.3, as modified.

Plaintiffs’ Justification for Disputed Modified Instruction No. 3 Re: DUTY OF JURY Offered by Plaintiffs

It is well-recognized that implicit biases influence decision-making daily. Both the bench and bar have recognized and encouraged using jury instructions as a tool for minimizing the encroachment of implicit bias into jury considerations. The Western District of Washington adopted four¹ criminal jury instructions regarding unconscious bias “to alert the jury to the concept of unconscious bias and then to instruct the jury in a straightforward way not to use bias, including unconscious bias, in its evaluation of information and credibility in its decision-making. The instructions thus serve the purposes of raising awareness to the associations jurors may be making without express knowledge and directing the jurors to avoid using these associations.”² The same court adopted a video to show prospective jurors³. *U.S. v. Lin*, 15-cr-00065-BLF, (ECF 207, Order Granting Joint Defense Request for the Court to Give Preliminary Instruction on Unconscious Bias and to Play W.D. Washington Video on Unconscious Bias to Jury Venire), filed 4/26/18. Finally, the American Bar Association created a toolbox, which includes a proposed model instruction and sample instructions, after recognizing that the likelihood of a fair verdict is enhanced when a jurors are mindful of their own internal biases⁴. *See also*, California Civil Instruction 113 (Bias⁵).

Attitudes towards transgender people and people who do not identify as heterosexual can be steadfast, emotionally charged and polarizing. Thus, there is a heavier risk that such attitudes, whether express or implicit, may encroach upon decision-making in this case. Plaintiffs propose language adopted from Judge Bennett’s implicit bias instruction in the ABA Toolbox to minimize the improper influence of such attitudes and biases.

¹ Preliminary Instruction, Witness Credibility Instruction, Closing Instruction and a Pre-*Voir Dire* instruction

² *See Understanding the Effects of Unconscious Bias*, <http://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf> (last visited 10/7/2018)

³ <http://www.wawd.uscourts.gov/jury/unconscious-bias> (last visited 10/7/2018)

⁴ *Achieving an Impartial Jury (AIJ) Toolbox*, p. 16-22 https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.authcheckdam.pdf (last visited 10/7/2018)

⁵ Judicial Council of California, California Civil Jury Instructions (CACI) 113 (2017)(Bias)

Defendant's Justification for Disputed Modified Instruction No. 3 Re DUTY OF JURY Offered by Defendant

Defendant submits that model instruction 1.3 is appropriate as is, without the additional language added by Plaintiffs pertaining to implicit biases. Moreover, this additional language contains argument by Plaintiffs that everyone has implicit prejudices, biases and stereotypes that is disguised as a jury instruction from the Court. The model instruction already admonishes jurors not to be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. Defendant objects to the additional commentary as unnecessary and prejudicial.

Stipulated Instruction No. 4 Re CONDUCT OF THE JURY

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case, and how long you expect the trial to last. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch or listen to any news or media accounts or commentary about the case or anything to do with it[,although I have no information that there will be news reports about this case]; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use

Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings[, and a mistrial could result that would require the entire trial process to start over]. If any juror is exposed to any outside information, please notify the court immediately.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction 1.15

Disputed Modified Instruction No. 5 Re CLAIMS AND DEFENSES Offered by Plaintiffs

To help you follow the evidence, I will give you a brief summary of the positions of the parties. The Plaintiffs have described their claims as follows:

The plaintiffs assert that the law protects Mr. Duane's ability to publicly complain about discrimination at IXL as long as he acted in good faith and with a reasonable belief. Plaintiffs claim that his workplace experiences and observations formed his reasonable good faith belief that IXL engaged in practices that are unlawful under federal anti-discrimination laws. Plaintiffs claim that IXL would not have fired Mr. Duane if he had not publicly posted discrimination complaints on a website. Ultimately, the plaintiffs claim that IXL violated the anti-retaliation provisions in Title VII of the Civil Rights Act of 1964 and/or the Americans with Disabilities Act when it fired Mr. Duane and caused Mr. Duane actual injury and damages. The plaintiffs have the burden of proving retaliation and Mr. Duane's entitlement to damages by a preponderance of the evidence.

The Defendant describes its defenses as follows:

The Defendant IXL Learning denies those claims and contends that it terminated Mr. Duane's employment for making f accusations about the company that have nothing to do with anti-discrimination laws. Defendant asserts that Mr. Duane's accusations were not in good faith or based on reasonable beliefs about discrimination. Finally, IXL contends that Mr. Duane's accusations were made in an unreasonable manner.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017

Edition, last updated June 2018, Civil Jury Instruction No. 1.5.

Disputed Modified Instruction No. 5 Re: CLAIMS AND DEFENSES Offered by Defendant.

To help you follow the evidence, I will give you a brief summary of the positions of the parties. The Plaintiffs have described their claims as follows:

The plaintiffs assert that the law protects Mr. Duane's ability to publicly complain about discrimination at IXL as long as he acted in good faith and with a reasonable belief. Plaintiffs claim that his workplace experiences and observations formed his reasonable good faith belief that IXL engaged in practices that are unlawful under federal anti-discrimination laws. Plaintiffs claim that IXL would not have fired Mr. Duane if he had not publicly posted discrimination complaints on a website. Ultimately, the plaintiffs claim that IXL violated the anti-retaliation provisions in Title VII of the Civil Rights Act of 1964 and/or the Americans with Disabilities Act when it fired Mr. Duane and caused Mr. Duane actual injury and damages. The plaintiffs have the burden of proving retaliation and Mr. Duane's entitlement to damages by a preponderance of the evidence.

The Defendant describes its defenses as follows:

The Defendant IXL Learning denies those claims and contends that it terminated Mr. Duane's employment for making false and disparaging accusations about the company that have nothing to do with anti-discrimination laws, and because he made them anonymously on a job recruiting website that IXL relied upon to attract the best job candidates. Defendant asserts that Mr. Duane's accusations were not in good faith or based on reasonable beliefs about discrimination, but instead were untrue allegations about such things as IXL's products and services, its profitability, whether the work was challenging or boring, and whether the CEO micromanaged the company. Finally, IXL contends that Mr. Duane's accusations were made in an unreasonable manner after he had already decided to leave IXL and was intentionally trying to steer potential employees away from working at IXL after he was gone.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.5.

Plaintiffs' Justification for Disputed Modified Instruction No. 5 Re CLAIMS AND DEFENSES Offered by Plaintiffs.

Plaintiffs propose a description of the Claims and Defenses that provides sufficient information to enable the jury to understand the issues of the case without impermissibly trying to slant the jury in their favor. Defendant's proposed language extends far beyond what is necessary or permissible. Defendant's statement of its defenses is more akin to a closing argument than an opening instruction to the jury. Therefore, it is inappropriate.

Stipulated Instruction No. 6 Re NO TRANSCRIPT AVAILABLE TO JURY

I urge you to pay close attention to the trial testimony as it is given. During deliberations, you will not have a transcript of the trial testimony.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.17.

Stipulated Instruction No. 7 Re: TAKING NOTES

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you go to the jury room to decide the case. Do not let notetaking distract you. When you leave, your notes should be left in the [courtroom] [jury room] [envelope in the jury room]. No one will read your notes.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of other jurors.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.18

Stipulated Instruction No. 8 Re BENCH CONFERENCES AND RECESSES

From time to time during the trial, it ~~{may become}~~~~{became}~~ necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury ~~{is}~~~~{was}~~ present in the courtroom, or by calling a recess. Please understand that while you ~~{are}~~~~{were}~~ waiting, we ~~{are}~~~~{were}~~ working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we ~~{will do}~~~~{have done}~~ what we ~~{can}~~~~{could}~~ to keep the number and length of these conferences to a minimum. I ~~{may}~~~~{did}~~ not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.20, as modified.

Stipulated Instruction No. 9 Re RULING ON OBJECTIONS

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore that evidence. That means when you are deciding the case, you must not consider the stricken evidence for any purpose.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.13.

Stipulated Modified Instruction No. 10 Re OUTLINE OF TRIAL

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The plaintiffs will then present evidence, and counsel for the defendant may cross-examine. Then the defendant may present evidence, and counsel for the plaintiff may cross-examine.

The plaintiff will then present rebuttal evidence, and counsel for the defendant may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.21, as modified.

Disputed Instruction No. 11 Re BURDEN OF PROOF – PREPONDERANCE OF THE EVIDENCE Offered by Defendant

When a party has the burden of proving any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

Plaintiffs bear the burden on all of their claims in this case and bear the burden of proving all the elements of their claims by a preponderance of the evidence. If you find that Plaintiffs have not proven any one of the elements of their claim by a preponderance of the evidence, you must find for Defendant as to that claim.

You should base your decision on all of the evidence, regardless of which party presented it.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.6 as modified; 3 Fed. Jury Prac. & Inst. § 101:42; 4-74 Modern Federal Jury Instructions-Civil P 74.01.

Plaintiffs' Objections to Disputed Instruction No. 11 Re: BURDEN OF PROOF – PREPONDERANCE OF THE EVIDENCE Offered by Defendant

Plaintiffs oppose and instruction regarding the burden of proof at the start of trial. It is unnecessary and will be confusing to the jury when they don't have any information regarding the elements for the underlying cause of action. In other words, there will be no anchor for the burden of proof. Accordingly, Plaintiffs request that the Court instruct the jury regarding the burden of proof after the close of evidence. Further, if the Court decides to provide the burden of proof as a preliminary instruction, Plaintiffs request the model instruction without modification. The language added by Defendant is unnecessary and duplicative, particularly since the Retaliation Elements Instruction already informs the jury that Plaintiffs must prove each element of the case.

Stipulated Instruction No. 12 Re WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits that are admitted into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I [may instruct] [have instructed] you to accept as proved.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.9.

Stipulated Instruction No. 13 Re WHAT IS NOT EVIDENCE

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

- (1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they ~~{may say}~~~~{have said}~~ in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
- (2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.
- (3) Testimony that is excluded or stricken, or that you ~~{are}~~~~{have been}~~ instructed to disregard, is not evidence and must not be considered. In addition some evidence ~~{may be}~~~~{was}~~ received only for a limited purpose; when I ~~{instruct}~~~~{have instructed}~~ you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.
- (4) Anything you may ~~{see or hear}~~~~{have seen or heard}~~ when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.10, as modified

Stipulated Instruction No. 14 Re DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned on garden hose, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience and common sense

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.12, as modified.

Stipulated Instruction No. 15 Re CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much

weight you think their testimony deserves.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.14

II. STIPULATED INSTRUCTIONS THAT MAY BE NECESSARY DURING THE CASE

Stipulated Instruction No. 16 Re EVIDENCE FOR LIMITED PURPOSE⁶

Stipulated Instruction No. 17 Re JUDICIAL NOTICE⁷

Stipulated Instruction No. 18 Re DEPOSITION IN LIEU OF LIVE TESTIMONY⁸

Stipulated Instruction No. 19 Re USE OF INTERROGATORIES⁹

Stipulated Instruction No. 20 Re USE OF REQUESTS FOR ADMISSION¹⁰

Stipulated Instruction No. 21 Re: IMPEACHMENT EVIDENCE - WITNESS¹¹

⁶ Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.11

⁷ Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 2.3, will be modified if necessary to give this instruction. Given outstanding disputes, the parties cannot anticipate the various possibilities when this instruction may be necessary, but want to alert the Court of the potential of one or more parties seeking judicial notice of a fact.

⁸ Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 2.4.

⁹ Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 2.11.

¹⁰ Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 2.12.

¹¹ Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 2.9.

III. STIPULATED INSTRUCTIONS TO BE GIVEN AT THE END OF THE CASE

Stipulated Instruction No. 22 Re DUTY OF JURY

Members of the Jury:

Now that you have heard all of the evidence and the arguments of the attorneys, it is my duty to instruct you on the law that applies to this case.

A copy of these instructions will be sent to the jury room for you to consult during your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.4.

Stipulated Instruction No. 23 Re: BURDEN OF PROOF – PREPONDERANCE OF THE EVIDENCE

When a party has the burden of proving any claim [or affirmative defense] by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim [or affirmative defense] is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.6.

Stipulated Instruction No. 24 Re WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits that are admitted into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I ~~may instruct~~ **have instructed** you to accept as proved.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.9, as modified.

Stipulated Instruction No. 25 Re WHAT IS NOT EVIDENCE

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

- (1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they ~~may say~~ ~~have said~~ in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
- (2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.
- (3) Testimony that is excluded or stricken, or that you ~~are~~ ~~have been~~ instructed to disregard, is not evidence and must not be considered. In addition some evidence ~~may be~~ ~~was~~ received only for a limited purpose; when I ~~instruct~~ ~~have instructed~~ you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.
- (4) Anything you may ~~see or hear~~ ~~have seen or heard~~ when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.10, as modified.

Stipulated Instruction No. 26 Re DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.12.

Stipulated Instruction No. 27 Re CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 1.14.

Disputed Instruction No. 28 Re: CORPORATE REPRESENTATIVE TESTIMONY Offered by Plaintiffs

Evidence was presented to you in the form of testimony from a Civil Rule 30(b)(6) witness. When a party to a lawsuit is a corporation, the other party may seek testimony under Rule of Civil Procedure 30(b)(6), requiring the corporation to designate one or more officers, directors, or managing agents to testify on its behalf on matters known or reasonably available to the corporation.

A 30(b)(6) witness testifies as a representative of the corporation. His or her answers bind the corporation and he or she is responsible for providing all the relevant information known or reasonably available to the corporation.

The person designated by the corporation must be prepared in advance so that the person designated may give complete and knowledgeable answers on behalf of the corporation.

Source: Fed. R. Civ. P. 30(b)(6).

Plaintiffs' Justification for Disputed Instruction No. 28 Re CORPORATE REPRESENTATIVE TESTIMONY Offered by Plaintiffs

Plaintiffs may elect to call Pau Mishkin or Jennifer Gu as witnesses in their capacities as corporate representatives. The jury is entitled to understand that in Rule 30(b)(6) witnesses speak for and bind the corporation. The Rule 30(b)(6) witness presents the corporation's position on noticed topics and "must testify about information known or reasonably available to the organization." *Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534, 538 (D. Nev. 2008). "One of the purposes of Rule 30(b)(6) is to curb any temptation a corporation might have to shunt a discovering party from 'pillar to post' by presenting deponents who each disclaims knowledge of facts clearly known to someone in the organization." *Great Am. Ins.*, 251 F.R.D. 534, 538 (D. Nev. 2008) By commissioning the designee as the voice of the corporation, the Rule obligates a corporate party to prepare its designee to be able to give **binding** answers on its behalf. Fed. R. Civ. Pro. Rule 30(b)(6); *Great Am. Ins.*, 251 F.R.D. at 538 (internal citation omitted) (emphasis added). "[A]im[ing] to prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case," Rule 30(b)(6) prohibits a party that states it has no knowledge or position as to a set of alleged facts or areas of inquiry at a Rule 30(b)(6) deposition from arguing for a contrary position at trial. *Rainey v. American Forest and Paper Ass'n*, 26 F. Supp. 2d 82, 95 (D.D.C. 1998). Plaintiffs' proposed instruction will ensure that Rule 30(b)(6) witness testimony is afforded the weight it is due and that the jury understands that such testimony is binding on IXL.

Defendant's Objection to Disputed Instruction No. 28 Re CORPORATE REPRESENTATIVE TESTIMONY Offered by Plaintiffs

Defendant disputes this instruction because it is confusing to the jury and unnecessary. The proposed instruction is not a pattern jury instruction promulgated by the Ninth Circuit. The proposed instruction also contains mistakes of law. Rule 30(b)(6) testimony is only binding with respect to the topics for which the witness is designated. This instruction is also partially duplicative of Stipulated Instruction re: Liability of Corporations. To the extent that Plaintiffs desire to inform the jury that a corporation has testified on an issue through a 30(b)(6) designee, they are certainly free to make the argument, but the jury should not be so instructed.

Stipulated Instruction No. 29 Re: STIPULATIONS OF FACT

The parties have agreed to certain facts [to be placed in evidence as Exhibit __] ~~that will be read to you~~. You must therefore treat these facts as having been proved.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction 2.2.

Stipulated Instruction No. 30 Re CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE

Certain charts and summaries not admitted into evidence ~~[may be]~~ [have been] shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction 2.14.

Stipulated Instruction No. 31 Re CHARTS AND SUMMARIES RECEIVED IN EVIDENCE

Certain charts and summaries ~~[may be]~~ [have been] admitted into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the testimony or other admitted evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 2.15.

Stipulated Instruction No. 32 Re DUTY TO DELIBERATE

Before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not be unwilling to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 3.1.

Stipulated Instruction No. 33 Re CONSIDERATION OF EVIDENCE – CONDUCT OF THE JURY

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, via text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it, although I have no information that there will be news reports about this case]; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any information through improper communications, then your verdict may be

influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction 3.2.

Stipulated Instruction No. 34 Re: COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the [clerk] [bailiff], signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing. I will not communicate with any member of the jury on anything concerning the case except in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including the court—how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 3.3.

Stipulated Instruction No. 35 Re: TRANSCRIPT OF TRIAL NOT AVAILABLE

You will not have a transcript of the trial in the jury room. If during your deliberations, you determine that you want to review the testimony of a witness again, you can request to have that witness's testimony read back to you in the courtroom, with all of us present. It is up to me whether to permit a readback, and I may require that the entirety of the witness's testimony be read back into the record, rather than just the portion of your request. *The readback could contain errors.* This readback will not reflect the witness's demeanor, tone of voice, and other aspects of the live testimony. The way you remember and understand the live testimony controls. *Finally, in your exercise of judgment, the testimony read cannot be considered in isolation, but must be considered in the context of all the evidence presented.*

Source: In accordance with Judge Chhabria's Standing Order for Civil Trials, the parties referred to past jury instructions given by this Court, with modifications from the Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 3.4; *see also id.* at Comment.

Stipulated Instruction No. 36 Re LIABILITY OF CORPORATIONS – SCOPE OF AUTHORITY NOT IN ISSUE

Under the law, a corporation is considered to be a person. It can only act through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 4.2.

Disputed Instruction No. 37 Re ELEMENTS OF RETALIATION Offered By Plaintiffs

Plaintiffs claim that IXL retaliated against Mr. Duane in violation of Title VII and/or the Americans with Disabilities Act (ADA). Both the ADA and Title VII prohibit an employer from retaliating against an employee because that employee complained about discrimination.

Plaintiffs seek damages against the defendant for retaliation. The plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence:

1. *Mr. Duane engaged in an activity protected under the ADA and/or Title VII; and*
2. *IXL fired Mr. Duane; and*
3. *Mr. Duane was fired because of his opposition to behavior he reasonably believed to be an unlawful under the ADA and/or Title VII.*

Regarding the first element, the plaintiffs assert that Mr. Duane engaged in protected activity when he used Glassdoor to post complaints about discrimination at IXL. “Protected activity” is defined broadly to include conduct where a person explicitly or implicitly communicates his belief that the matter complained of is, or could become, harassment or other discrimination. Calling public attention to alleged discrimination can be protected if the opposition is connected to alleged violations of Title VII and the ADA and if it does not significantly disrupt the workplace or hinder job performance, even if it threatened the company with economic harm.

Mr. Duane’s post is protected under the law if it was based on his good faith, reasonable belief that IXL discriminated against him and others because of race, sex, gender identity, sexual orientation, and/or disability. Mr. Duane had a “good faith” belief if he honestly believed that comments or behavior directed toward him or others violated Title VII and/or the ADA. Mr. Duane had a “reasonable” belief if, given the totality of circumstances, a reasonable person would believe that IXL discriminated against him and others based on race, sex, gender identity, sexual orientation and/or disability. Plaintiffs do not have to prove that IXL actually discriminated against him or others - only that Mr. Duane had a good faith reasonable belief that IXL did so.

Regarding the second element, IXL does not dispute that it fired Mr. Duane the day after discovering the Glassdoor post, so you are instructed that Plaintiffs have established this element.

For the third element, you must decide whether IXL fired Mr. Duane because of his discrimination complaints on Glassdoor. The Glassdoor post need not be the only reason IXL fired Mr. Duane. Plaintiffs must prove however that IXL would not have terminated Mr. Duane in the absence of – that is to say, but for – Mr. Duane’s complaints of discrimination in the Glassdoor post. Proof of a causal link between the post and the termination may be inferred from circumstantial evidence such as the fact that IXL terminated Mr. Duane the day after discovering the Glassdoor post.

If you find that the plaintiffs have proven all three of these elements, your verdict should be for the plaintiffs. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

Source: Adapted from the Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction 10.8; *see also* EEOC Directive No. 915.004, EEOC Enforcement Guidance on Retaliation and Related Issues, at pp. 10-12; *EEOC v. Crown Zellerbach*, 720 F.2d 1008, 1015 (9th Cir. 1983); *Sias v. City Demonstration Agency*, 588 F.2d 6992, 695-96 (9th Cir. 1978); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)

Disputed Instruction No. 37 Re: ELEMENTS OF RETALIATION Offered By Defendant

Plaintiffs seek damages against the defendant for retaliation. The Plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence:

1. Mr. Duane opposed an unlawful employment practice, that is *he complained of discrimination in a Glassdoor.com review of Defendant*; and
2. *IXL fired Mr. Duane*; and
3. Mr. Duane was fired because of his opposition to an unlawful employment practice.

A plaintiff is *fired* because of his opposition to an unlawful employment practice if his termination would not have occurred but for that opposition.

If you find that the Plaintiffs have proved all three of these elements, your verdict should be for the Plaintiffs. If, on the other hand, the Plaintiffs have failed to prove any of these elements, your verdict should be for Defendant.

Plaintiffs allege retaliation under Title VII and the ADA. Therefore, to prove the first element, Mr. Duane must have opposed employment practices made unlawful by those two employment laws, or have an objectively reasonable, good faith belief that he was doing so. Under this standard, Mr. Duane could be mistaken that an unlawful employment practice had occurred and still be protected if Plaintiffs prove the mistake was made in good faith, so long as his opposition to an unlawful employment practice was based on a reasonable belief and carried out in a reasonable manner. On the other hand, opposition activity motivated by bad faith is not protected, and the activity must be reasonable in view of the employer's interest in maintaining a harmonious and efficient operation and not unjustifiably detrimental to the employer's interests.

Therefore, Mr. Duane had a "good faith" belief if he honestly believed that employment practices he opposed in his Glassdoor post violated Title VII or the ADA. But, generalized complaints about a lack of diversity or civility in the workplace are not protected opposition activities. Title VII and the ADA protect particularized statements targeting discrete past events.

Also, to be protected, the opposition must be directed at an unlawful employment practice of an employer or agent of an employer, not an act of discrimination by a private individual such as a co-worker.

The parties have stipulated to the second element, so you are instructed that Plaintiffs have established this element.

For the third element, you must decide whether IXL fired Mr. Duane because of his alleged opposition activity in his Glassdoor post. For this element, Plaintiffs must prove that Mr. Duane’s opposition activity was the “but-for” cause of his termination. That means the Plaintiffs must prove that IXL would not have fired him had he not complained of discrimination in his Glassdoor review.

If you find that the plaintiffs have proven all three of these elements, your verdict should be for the plaintiffs. If, on the other hand, Plaintiffs have failed to prove any of these elements, your verdict should be for the defendant.

Source: Adapted from the Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction 10.8; *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013); *Buchanan v. Genentech, Inc.*, No. 09-01454 CW, 2010 WL 3448583 at *4 (N.D. Cal. Aug. 31, 2010); *Folkerson v. Circus Enterprises, Inc.*, 107 F.3d 754, 755 (9th Cir. 1997) (citation omitted); *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996); *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1145 (5th Cir. 1981); *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012 (9th Cir. 1983); *Wrighten v. Metro. Hosps., Inc.*, 726 F.2d 1346, 1355 (9th Cir. 1984); *Denny v. Union Pac. R. Co.*, 173 F. App’x 549, 551 (9th Cir. 2006). *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 43 Fair Empl. Prac. Cas. (BNA) 870, 42 Empl. Prac. Dec. (CCH) ¶ 36960, 106 Lab. Cas. (CCH) ¶ 12310 (9th Cir. 1987) (opposition for personal reasons and not to oppose discrimination is not protected); *Pool v. VanRheen*, 297 F.3d 899, 910-11 (9th Cir. 2002) (plaintiff who was demoted for accusations about employer in public letter, which included some statements opposing sex and race discrimination, did

not prove causal connection between those comments and demotion); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal . 4th 1028 (2005); *Husman v. Toyota Motor Credit Corp.*, 12 Cal. App. 5th 1168 (2017) *citing Hood v. Pfizer, Inc.*, 322 Fed. Appx. 124 (3rd Cir. 2009) (generalized complaint of diversity falls short of particularized complaint of discrete past events to constitute protected opposition activity).

Plaintiffs' Justification for Disputed Instruction No. 37 Re: ELEMENTS OF RETALIATION Offered By Plaintiffs

Litigants are entitled to instructions that “fairly and adequately cover the issues presented, correctly state the law, and are not misleading.” *Mockler v. Multnomah Cty.*, 140 F.3d 808, 812 (9th Cir. 1998)(citations omitted). Plaintiffs’ proposed instruction accurately reflects the law in the Ninth Circuit and EEOC Guidance as applied to publicly expressed protected activity. *See e.g., Nilsson v. City of Mesa*, 503 F.3d 947, 953, n.3 (9th Cir. 2007)(according deference to EEOC guidance regarding the scope of Title VII’s retaliation provision, citing *Chevron USA Inc. v Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

The instruction is tailored to the facts in this case, which involve a public protestation of discrimination. Absent instruction, a jury could easily and erroneously believe that a public post is never protected under the law. The model instruction is silent as to whether an employee’s public opposition can constitute protected activity; however, the Ninth Circuit has spoken and stated clearly that such protestations can be covered. *EEOC v. Crown Zellerbach*, 720 F.2d 1008, 1015 (9th Cir. 1983); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695-96 (9th Cir. 1978). The law as articulated in *Zellerbach* and *Sias* is not self-evident. Given the centrality of the issue to this case, it would be both inaccurate and misleading to omit language instructing the jury on the Ninth Circuit standard for public opposition activity. The instruction also explains that the jury must consider the totality of the circumstances leading up to the post and surrounding Mr. Duane’s termination. *EEOC v. GoDaddy Software, Inc.*, 581 F.3d 951, 963 (9th Cir. 2009)(citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001)). The instruction also describes the specific protected bases at issue in the case.

Defendant’s proposed instruction is derived from cases with unique circumstances that are factually distinguishable from the instant case. It also misstates the law to the extent that it suggests that Mr. Duane’s had to “oppose actions by the employer that are unlawful”. Finally, the instruction is misleading: it pushes the jury to ignore the totality of the circumstances by focusing only on language in Mr. Duane’s post despite Supreme Court and Ninth Circuit precedent to the contrary.

Defendant's Justification for Disputed Instruction No. 37 Re ELEMENTS OF RETALIATION Offered By Defendant

Defendant used the Model Jury Instruction for Title VII Retaliation (Civil Jury Instruction 10.8) without any substantive change, and added instructions based on well-established case law that fairly instruct the jury whether Duane must oppose employment practices made unlawful by Title VII and the ADA and/or reasonably believe in good faith that the practices are unlawful. This instruction also provides the jury with an understanding that generalized complaints about diversity or civility are not protected opposition activity, which is an accurate statement of the law. The instruction also clearly and accurately describes the correct causation standard for retaliation claims under both Title VII and the ADA, based on Supreme Court precedent. Defendant objects to Plaintiffs' instructions that are premised in whole or in part on the EEOC's interpretations of Title VII and the ADA. The EEOC should be required to prove its case based on controlling law and precedent and not its own broad interpretations of the scope of the law it is claiming Defendant violated.

Disputed Instruction No. 38 Re: PRETEXT Offered by Plaintiffs

In determining whether retaliation was a reason for IXL's decision to fire Mr. Duane you should consider whether the reasons offered by the defendant are credible. If you find that the explanations offered by the defendant are not believable, then you may determine that retaliation was the true reason for the discharge and find for the Plaintiffs. This conclusion may be based solely upon your determination that the defendant's explanations are not believable, or upon other factors that convince you that, more likely than not retaliation was the true reason for the decision to terminate Mr. Duane's employment. This conclusion need not be based upon direct evidence of discrimination.

Source: *Texas Dep't of Cnty. Affairs v. Burdine*, 450 U.S. 248 (1981). *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133 (2000).

Plaintiffs' Justification for Disputed Instruction No. 38 Re: PRETEXT Offered by Plaintiffs

Retaliation cases follow the burden of proof from *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *U.S. Equal Employment Opportunity Comm'n v. Wynn Las Vegas, LLC*, No. 2:16-CV-02187-RFB-PAL, 2018 WL 3381400, at *8 (D. Nev. July 10, 2018). Therefore, plaintiffs must prove pretext. Because the jury will be tasked with determining whether Defendant's proffered reason for firing Mr. Duane is a pretext for retaliation, the jury must be instructed as to the appropriate standard to evaluate pretext. Plaintiffs' proposed instruction tracks the standard set forth by the Supreme Court. *Texas Dep't of Cnty. Affairs v. Burdine*, 450 U.S. 248 (1981). *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133 (2000). Therefore, it should be given to the jury.

Defendant's Objection to Disputed Instruction No. 38 Re PRETEXT Offered by Plaintiffs

Defendant objects to this instruction and submits it should not be given at all. This is not a discrimination case but a retaliation case with a different standard of causation. This instruction is confusing to the jury in light of the thorough explanation of the elements and standard of causation in the ELEMENTS OF RETALIATION instruction. The instruction adds nothing to the jury's duties, which already include weighing the credibility of witnesses called by all parties. This instruction unfairly emphasizes, and thus calls into question, whether IXL is believable, and thereby improperly influence jurors. A reasonable juror might ask, "why did the judge not instruct us on what we may determine if we find the plaintiff unbelievable?" If the Court considers giving this instruction, Defendant requests that corrective language be added to remind the jury that Plaintiffs bear the burden of proving by a preponderance of the evidence that IXL would not have terminated Mr. Duane but for his complaint of discrimination in his Glassdoor post. Moreover, a corrective instruction should be added that the instruction itself is not intended to cast a negative light on the defendant's credibility.

Disputed Modified Instruction No. 39 Re: DAMAGES – PROOF¹²; MEASURES OF TYPES OF DAMAGES¹³ Offered by Plaintiffs

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiffs, you must determine Mr. Duane's damages. The plaintiffs have the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate **Mr. Duane** for any injury you find was caused by the defendant. *There are four types of damages available in this case are: (1) lost earnings and benefits; (2) out-of-pocket expenses; (3) compensation for Mr. Duane's emotional pain and suffering; and (4) punitive damages.*

I will provide you with instructions for determining whether to award punitive damages separately but, in determining the measure of damages for the first three categories of damages, you should consider:

- The nature and extent of the injuries;
- *Any emotional pain and suffering, mental anguish, depression, anxiety, loss of companionship, and loss of enjoyment of life that Mr. Duane experienced as a consequence of Defendant IXL's alleged unlawful act. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard to fixing the compensation to be awarded for these elements of damage. No medical testimony is necessary to prove these damages. The testimony of Mr. Duane is enough.*

¹² 9th Circuit Model Civil Jury Instructions No. 5.1.

¹³ 9th Circuit Model Civil Jury Instructions No. 5.2, modified.

- *The reasonable value of lost wages, earnings, and benefits lost from January 8, 2015 to December 31, 2015.*¹⁴
- *The reasonable value of necessary out-of-pocket expenses incurred for a job search from January 8, 2015 to December 31, 2015.*

It is for you to determine what damages, if any, have been proved. Your award must be based upon evidence and not upon speculation, guesswork or conjecture. ***The law does not require that Plaintiffs prove the amount of Mr. Duane's losses with mathematical precision.***

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instructions Nos. 5.1, 5.2, as modified; 3C Fed. Jury Prac. & Instr. § 172:70 (6th ed.)

¹⁴ The parties anticipate stipulating to the amount of Mr. Duane's lost salary, employee contributions to his 401(k), and the cost of health insurance for the period of January 8, 2015 – December 31, 2015. To the extent that the parties are unable to reach this stipulation, Plaintiffs will ask that the Court provide this portion of the instruction.

Disputed Modified Instruction No. 39 Re DAMAGES – PROOF¹⁵; MEASURES OF TYPES OF DAMAGES¹⁶ Offered by Defendant

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiffs, you must determine Mr. Duane's damages. The plaintiffs have the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate *Mr. Duane* for any injury you find was caused by the defendant. *There are four types of damages available in this case are: (1) lost earnings and benefits; (2) out-of-pocket expenses; (3) compensation for Mr. Duane's emotional pain and suffering; and (4) punitive damages. The 3rd and 4th types of damages (compensatory and punitive damages) are not available under the Americans with Disabilities Act retaliation claim brought by Plaintiffs. This will be made clear on the verdict form.*

I will provide you with instructions for determining whether to award punitive damages separately but, in determining the measure of damages for the first three categories of damages, you should consider:

- The nature and extent of the injuries;
- *Any emotional pain and suffering, mental anguish, depression, anxiety, loss of companionship, and loss of enjoyment of life that Mr. Duane experienced as a consequence of Defendant IXL's alleged unlawful act.*

¹⁵ 9th Circuit Model Civil Jury Instructions No. 5.1.

¹⁶ 9th Circuit Model Civil Jury Instructions No. 5.2, modified.

- *The reasonable value of lost wages, earnings, and benefits lost from January 8, 2015 to December 31, 2015.*¹⁷
- *The reasonable value of necessary out-of-pocket expenses incurred for a job search from January 8, 2015 to December 31, 2015.*

It is for you to determine what damages, if any, have been proved. Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instructions Nos. 5.1, 5.2, as modified

¹⁷ The parties anticipate stipulating to the amount of Mr. Duane's lost salary, employee contributions to his 401(k), and the cost of health insurance for the period of January 8, 2015 – December 31, 2015. To the extent that the parties are unable to reach this stipulation, Plaintiffs will ask that the Court provide this portion of the instruction.

Plaintiffs' Justification of Disputed Modified Instruction No. 39 Re: DAMAGES – PROOF¹⁸; MEASURES OF TYPES OF DAMAGES¹⁹ Offered by Plaintiffs

Plaintiffs propose a jury instruction that is intended to assist the jury in understanding its responsibilities in the calculation of emotional distress damages. Contrary to Defendant's assertion, the Plaintiffs are not trying to bolster weaknesses in their case, but are advising the jury about aspects of the that might be confusing. It is well-settled in the Ninth Circuit that an employee's testimony alone provides a sufficient basis on which to award compensatory damages for emotional pain and suffering. *See Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir.1985) (upholding emotional damages based solely on testimony); *Johnson v. Hale*, 13 F.3d 1351, 1352 (9th Cir.1994) (noting that emotional damages may be awarded based on testimony alone or appropriate inference from circumstances); *Carey v. Piphus*, 435 U.S. 247, 264 n. 20, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (noting that emotional distress damages are "essentially subjective" and may be proven by reference to injured party's conduct and observations by others). It's also important for the jurors to understand that the law recognizes that emotional distress damages are intangible and that common sense can guide their calculation of a damages award.

¹⁸ 9th Circuit Model Civil Jury Instructions No. 5.1.

¹⁹ 9th Circuit Model Civil Jury Instructions No. 5.2, modified.

Defendant's Justification for Disputed Modified Instruction No. 39 Re DAMAGES – PROOF; MEASURES OF TYPES OF DAMAGES Offered by Defendant

Defendant has attempted to utilize the Model Jury Instruction for Damages (Civil Jury Instruction 5.1, 5.2) with minimal substantive changes. Defendant objects to Plaintiffs' unnecessary, repetitive, and unsupported additions to the Model Jury Instructions to bolster potential evidentiary weaknesses in their damages presentation. Multiple instructions by the Court that Plaintiffs do not need to be exact, precise, etc is unfair to Defendant IXL and amounts to the Court vouching for Plaintiffs' lack of corroborating medical or economic expert testimony or other damages evidence. Defendant submits that the Model Language is sufficient.

Stipulated Modified Instruction No. 40 Re: PUNITIVE DAMAGES

If you find for the plaintiffs, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff.

The plaintiffs have the burden of proving by a preponderance of the evidence that punitive damages should be awarded and, if so, the amount of any such damages.

You may award punitive damages only if you find that the defendant's conduct that harmed the plaintiff was malicious, oppressive or in reckless disregard of *Mr. Duane's* rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring *Mr. Duane*. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to *Mr. Duane's* safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate *Mr. Duane's* rights under federal law. An act or omission is oppressive if the defendant injures or damages or otherwise violates the rights of *Mr. Duane* with unnecessary harshness or severity, such as by misusing or abusing authority or power or by taking advantage of some weakness or disability or misfortune of the plaintiff.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of the defendant's conduct.

Source: Manual of Model Jury Instructions for the District Courts of the Ninth Circuit, 2017 Edition, last updated June 2018, Civil Jury Instruction No. 5.5, as modified.

