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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

and

ADRIAN SCOTT DUANE,

Plaintiff Intervenor,

vs.

IXL Learning, Inc.,

Defendant.

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

**JOINT PRETRIAL CONFERENCE
STATEMENT**

Date: October 15, 2018

Time: 10:00 am

Courtroom: 4, 17th Floor

Judge: Hon. Vince Chhabria

Trial Date: October 22, 2018

Pursuant to this Court's Standing Order for Civil Trials, No. 2, and Minute Entry Setting CMC Dates (ECF No. 86) the parties hereby submit their Joint Pretrial Conference Statement.

I. BRIEF DESCRIPTION OF ALL CLAIMS AND DEFENSES

A. Claims

1. Whether IXL retaliated against Mr. Duane because Mr. Duane publicly aired his discrimination complaints about IXL. (JURY)
2. Whether and how much Mr. Duane is entitled to in compensatory and punitive damages. (JURY)
3. Equitable Relief (assuming a liability finding in Stage I)
 - Amount of backpay (JURY)
 - Entitlement to and amount of past pecuniary damages (JURY)
 - Entitlement to and scope of injunctive relief (COURT)

B. Defenses

1. Duane's online posting was not opposition activity under Title VII or ADA. (JURY)
2. To the extent that Duane engaged in opposition activity, such opposition activity was not the but-for cause of termination. (JURY)
3. Plaintiffs cannot and will not prove any of their claims for relief. (JURY)

II. STATEMENT OF RELEVANT STIPULATED/UNDISPUTED FACTS¹

1. This Court has jurisdiction pursuant to 28 USC §§451, 1331, 1337, 1343, and 1345.
2. IXL Learning, Inc., an educational technology company, is headquartered in San Mateo, CA and has another office in North Carolina. IXL meets the Title VII and ADA definitions of employer.
3. Plaintiff Equal Employment Opportunity Commission is the federal agency charged with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964 and Title I of the Americans with Disabilities Act, and is expressly authorized to bring this action

¹ The parties submit this list of facts with the understanding that a subset of this list would be read to the jury. The parties will include in the proposed jury instructions a set of facts that will be read to the jury.

pursuant to 42 U.S.C. § 2000e-5(f)(1) and (3) and 42 U.S.C. § 12117(a) (incorporating by reference Section 706(f)(1) and (3) of Title VII.)

4. IXL hired Adrian Scott Duane as a Product Analyst starting on July 10, 2013.
5. Mr. Duane is a transgender man.
6. Kate Mattison was Mr. Duane's direct supervisor from July 10, 2013, to January 2014. Ms. Mattison is currently the Vice President of Curriculum at IXL.
7. David Keyes was Mr. Duane's immediate supervisor from January 2014 until January 8, 2015. Mr. Keyes is currently a Senior Program Manager at IXL.
8. Maricela Prado worked for IXL from December 1, 2010, until June 13, 2017. Her job titles during that tenure were Operations Coordinator, Human Resources Coordinator, Human Resources Manager, and Human Resources Generalist. The employment relationship ended because she resigned.
9. Karen Penner worked for IXL from September 4, 2012, until April 6, 2017. Her job titles during that tenure were Recruiter and Recruiting Manager. The employment relationship ended because IXL eliminated her position.
10. Brad Marshall worked for IXL from January 2, 2014, until September 23, 2014. His job title during that tenure was Human Resources Manager. IXL terminated his employment for performance reasons.
11. Lenore Ockerberg worked for IXL from April 19, 2004, until April 28, 2015. Her job titles during that tenure were Human Resources Manager, Office Manager and Operations Manager. IXL terminated her employment because of her conduct.
12. Charla Rodney worked for IXL from January 26, 2015, until February 11, 2016. Her job title during that tenure was Human Resources Manager. The employment relationship ended because she resigned.
13. During Mr. Duane's employment period, IXL provided employees with unlimited sick leave as a benefit of employment.
14. In July 2014 Mr. Duane notified his supervisor, Mr. Keyes, that he needed

approximately 6-8 weeks of leave for a surgery in November, with an expected return date of December 30, 2014.

15. Prior to his leave IXL permitted Mr. Duane to work remotely one day per week in September/October so Duane could attend pre-operative appointments.

16. Mr. Duane's last day of work before starting his leave for surgery was October 30, 2014.

17. On December 30, 2014, Mr. Duane returned to work.

18. The evening of December 30, 2014, Mr. Duane posted a review on Glassdoor, entitled "Micromanaged and Problematic."

19. Mr. Duane met with Mr. Keyes on January 6, 2015. Mr. Duane told Mr. Keyes that he was upset at how IXL handled his return from disability leave and his disability accommodation and he felt that IXL had discriminated against him.

20. Mr. Keyes discussed Mr. Duane's discrimination complaints with Mr. Mishkin on January 6, 2015.

21. On January 7, 2015 Mr. Mishkin scheduled a meeting with Mr. Duane for January 8, 2015.

22. On January 7, 2015, HR Manager Maricela Prado discovered Mr. Duane's Glassdoor post and forwarded it to Mr. Mishkin. Although the posting was anonymous, IXL suspected that Mr. Duane had written it.

23. Mr. Mishkin decided to fire Mr. Duane due to the Glassdoor post on January 7, 2015.

24. Mr. Mishkin met with Mr. Duane at the pre-scheduled appointment time on January 8, 2015.

25. On January 8, 2015, Mr. Mishkin fired Mr. Duane due to the Glassdoor post.

26. Mr. Duane's anticipated salary for calendar year 2015 was \$92,000.00.

III. SETTLEMENT EFFORTS

Mr. Duane tried to resolve this case with IXL before he filed the EEOC Charge. Mr. Duane further tried to resolve this case with IXL before he filed his lawsuit against IXL. These attempts

were unsuccessful.

As a condition precedent to this action, the EEOC, IXL and Mr. Duane attempted to conciliate Mr. Duane's charge of discrimination. Those efforts were not successful. The parties are prohibited by law from making public the conciliation discussions. 42 U.S.C. §2000e-5(b); *see also* 42 U.S.C. § 12117(a) (incorporating by reference Section 706(b)).

The parties later engaged in a one-day mediation with court appointed mediator, Patricia Prince, on October 27, 2017. Those mediation efforts were unsuccessful.

The EEOC and Mr. Duane believe that settlement might be possible if the case is referred to a Magistrate Judge.

IXL does not believe further settlement discussions are worthwhile and is prepared to proceed to trial.

IV. LISTS OF WITNESSES

A. Plaintiffs' Witnesses

No.	Witness	Substance of Testimony	Time
1.	Adrian Scott Duane	<ul style="list-style-type: none"> - Employment with IXL and experiences therein; - Facts supporting his reasonable belief that he was opposing unlawful employment practices at IXL, - Advocacy for a reasonable accommodation; - His Glassdoor post, - His meetings with Keyes and Mishkin to voice discrimination complaints; and - Damages he suffered because IXL fired him. 	Direct: 4 hours Cross: 4 hours Re-direct: 45 minutes
2.	David Keyes	<ul style="list-style-type: none"> - Supervising Mr. Duane, his requests for accommodations; - Mr. Duane's complaints of discrimination; The Glassdoor post; - The decision to terminate Mr. Duane's employment. 	Direct: 2 hours Cross: 2 hours Re-direct: 30 minutes
3.	Isidora Milin (if necessary)	<ul style="list-style-type: none"> - Personal and professional experiences with Mr. Duane at IXL. 	Direct: 20 minutes Cross: 1 hour Re-direct: 5 minutes
4.	Jennifer Gu (if necessary)	<ul style="list-style-type: none"> - IXL structure and operations - IXL's Glassdoor subscription and 	Direct: 1 hour Cross: 1 hour

		recruitment efforts	Re-direct: 30 minutes
5.	Jenna Mandis	<ul style="list-style-type: none"> - Mr. Duane's experiences at IXL; - Her observations and recollection of the December 2014 holiday party she attended with Mr. Duane; - Observations of Mr. Duane's emotional distress after he was fired. 	Direct: 30 minutes Cross: 30 minutes Re-direct: 15 minutes
6.	Jeremy Murphy (if necessary)	<ul style="list-style-type: none"> - Personal and professional experiences with Mr. Duane at IXL. 	Direct: 20 minutes Cross: 1 hour Re-direct: 5 minutes
7.	Lenore Ockerberg (if necessary)	<ul style="list-style-type: none"> - Her employment experiences at IXL in both an operations and HR role; - IXL's decisions regarding Mr. Duane's reasonable accommodation request in December 2014; - IXL's subsequent decision to terminate Mr. Duane's employment; and - Personal observations of Mr. Duane in the workplace. 	Direct: 30 minutes Cross: 1 hour Re-direct: 15 minutes
8.	Maricela Prado	<ul style="list-style-type: none"> - Employment experiences at IXL, including her interactions with Mr. Duane in both an operations and HR role; - Providing orientation for new employees, including the orientation scavenger hunt at the beginning of Mr. Duane's employment; - IXL's decisions regarding Mr. Duane's reasonable accommodation request in December 2014; - IXL's subsequent decision to terminate Mr. Duane's employment; and - Personal observations of Mr. Duane in the workplace. 	Direct: 1 hour Cross: 1 hour Re-direct: 15 minutes
9.	Nemo Curiel	<ul style="list-style-type: none"> - His employment experiences at IXL; - His discussions with Mr. Duane about the work environment and IXL's employment practices; - His personal observations of Mr. Duane in the workplace; and - Mr. Duane's distress after being terminated. 	Direct: 30 minutes Cross: 30 minutes Re-direct: 15 minutes
10.	Nina Wu	<ul style="list-style-type: none"> - Her employment experiences at IXL; - Her discussions with Mr. Duane about the work environment and IXL's employment practices; and - Her personal observations about Mr. Duane in the workplace and Mr. Duane's distress after being terminated. 	Direct: 30 minutes Cross: 30 minutes Re-direct: 15 minutes
11.	Paul Mishkin	<ul style="list-style-type: none"> - IXL and its structure and operations; 	Direct: 2 hours

		<ul style="list-style-type: none"> - Mr. Duane's accommodation requests; - Mr. Duane's complaints of discrimination; - The Glassdoor post; and - IXL's ultimate decision to fire Mr. Duane. 	Cross: 4 hours Re-direct: 30 minutes
12.	TBD – Authenticating witnesses	<ul style="list-style-type: none"> - Authentication of certain documents 	Direct: 10 minutes Cross: 10 minutes Re-direct: 5 minutes
12.	Witnesses listed by Defendant	<ul style="list-style-type: none"> - To the extent not called by Defendant in their case in chief, may call for rebuttal purposes. 	TBD

B. Defendant's Witnesses

No.	Witness	Substance of Testimony	Time
1.	Paul Mishkin	<ul style="list-style-type: none"> - IXL's history, services, management, operations, recruiting efforts, workplace culture; - IXL's treatment of Duane including flexible scheduling, leaves, remote work, accommodations; - Duane's false accusations in the Glassdoor post; and - IXL's termination of Duane's employment. 	Direct: 4 hours Cross: 2 hours Re-direct: 90 minutes
2.	David Keyes	<ul style="list-style-type: none"> - Supervising Duane, scheduling and leaves of absence, accommodations, etc.; - Nature of Duane's work, challenging and creative assignments, treatment of employees on his team; - Meetings and communications with Duane about his medical leave, remote work, productivity during remote work days; - Duane's false accusations in the Glassdoor post; - Termination of Duane's employment. 	Direct: 2 hours Cross: 1 hour Re-direct: 60 minutes
3.	Kate Mattison	<ul style="list-style-type: none"> - Supervising Mr. Duane, his requests for accommodations; - Nature of Duane's work, treatment of employees on her team; remote work assignments for other IXL employees; - Duane's false accusations in the Glassdoor post. 	Direct: 1 hour Cross: 1 hour Re-direct: 30 minutes
4.	Isidora Milin	<ul style="list-style-type: none"> - Personal and professional experiences with Mr. Duane at IXL; - Responses to Duane's allegations about her treatment at IXL, her ethnicity, discussions with Duane. 	Direct: 1 hour Cross: 30 minutes Re-direct: 30 minutes
5.	Jeremy	<ul style="list-style-type: none"> - Personal and professional experiences with 	Direct: 1 hour

	Murphy	Mr. Duane at IXL; - Duane's false accusations in the Glassdoor post; - Duane's treatment of Murphy due to his heterosexuality and manner of dress	Cross: 30 minutes Re-direct: 30 minutes
6.	Charla Rodney	- <i>May call</i> witness: Her experiences while Human Resources manager at IXL	Direct: 30 minutes Cross: 30 minutes Re-direct: 15 minutes
7.	Gary Yee (if necessary)	- Response to allegations by Duane re: interactions with Yee; - Duane's use of IXL computer system for personal reasons.	Direct: 30 minutes Cross: 30 minutes Re-direct: 15 minutes
8.	Michael Pi (if necessary)	- Response to allegations re: interactions with or comments about Duane.	Direct: 30 minutes Cross: 30 minutes Re-direct: 15 minutes
9.	Nemo Curiel (if necessary)	- Employment at IXL in 2013-14; - Reasons for leaving IXL; - Use of IXL sick leave policy; - Communications with Duane during and after employment.	Direct: 1 hour Cross: 15 minutes Re-direct: 15 minutes
10	Jennifer Gu	- <i>May call</i> witness: Respond to assertions or representations regarding her role with or prior testimony for IXL.	TBD
11	Karen Penner	- <i>May call</i> witness: Respond to assertions, if any, regarding her interactions with Duane.	TBD
12.	Others Witnesses listed by Plaintiffs	- To the extent not called by Plaintiffs in their case in chief.	TBD
13.	Authentication witnesses	- TBD depending on stipulation of documents	TBD

C. WITNESS STIPULATIONS

1. IXL counsel agrees to accept service of a trial subpoena for each of the following potential witnesses:

- i. Paul Mishkin
- ii. David Keyes
- iii. Isidora Milin
- iv. Jeremy Murphy
- v. Jennifer Gu

2. The parties agree to notify the other parties of its intention to call witnesses 48 hours in advance.

3. To minimize the burden on a witness to appear for trial unnecessarily, IXL counsel agrees to produce the following witnesses for trial on the specified date(s) when provided with 48-hour notice:

- i. Paul Mishkin
- ii. David Keyes
- iii. Isidora Milin
- iv. Jeremy Murphy
- v. Jennifer Gu

V. MISCELLANEOUS STIPULATIONS

1. The parties agree not to refer to, introduce evidence regarding, or elicit testimony in the presence of the jury relating to the limitations on damages contained in 42 U.S.C. § 1981a.

2. The parties agree not to refer to, introduce evidence regarding, or elicit testimony in the presence of the jury that Mr. Duane sought therapy because of his termination.

3. The parties agree not to refer to, introduce evidence regarding, or elicit testimony in the presence of the jury about any prior rulings by this Court on dispositive motions, discovery motions, and the motion to intervene.

4. The parties agree not refer to, introduce evidence regarding, or elicit testimony in the presence of the jury about Mr. Duane's previously filed and dismissed federal action, *Duane v. IXL Learning, Inc.*, 17-cv-00048 WHA.

5. The parties agree not refer to, introduce evidence regarding, or elicit testimony in the presence of the jury about previously pled but later abandoned or dismissed claims or defenses.

6. The parties agree to advise all counsel and witnesses that they may not refer to, testify about, or present evidence excluded pursuant to a stipulation or order by this Court.

7. The parties agree to redact exhibits, as necessary, to comply with these stipulations or any order by this Court excluding evidence.

VI. ESTIMATED LENGTH OF TRIAL

The parties anticipate that trial will take approximately 5 to 7 court days, depending on the issues remaining in the case by the trial date. The EEOC requested a jury trial.

Respectfully submitted,

Dated: September 26, 2018

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

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

Dated: September 26, 2018

THE MAREK LAW FIRM

By: /s/ David Marek
DAVID MAREK
Attorney for Plaintiff-Intervenor Duane

Dated: September 26, 2018

YOUNG BASILE HANDLON & MACFARLANE, PC

By: /s/ Jeffrey D. Wilson
JEFFREY D. WILSON
Attorney for Defendant

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

I, Ami Sanghvi, am the ECF User whose ID and password are being used to file the Joint Pretrial Statement. In compliance with Local Rule 5-1(i)(3), I hereby attest that David Marek and Jeffrey Wilson concurred in this filing

Dated: September 26, 2018

/s/ Ami Sanghvi
AMI SANGHVI, Senior Trial Attorney