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IXL Learning, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

		Case No.: 3:17-cv-02979-VC
U.S. EQUAL EMPLOYMENT OPPORTUNITY	:	
COMMISSION,	:	Hon. Vince Chhabria
	:	Courtroom: 4, 17 th Floor
Plaintiff,	:	Hearing Date: October 15, 2018
	:	Hearing Time: 10:00 AM
and	:	
	:	
ADRIAN SCOTT DUANE,	:	DEFENDANT’S NOTICE OF MOTION
	:	AND MOTION IN LIMINE NO. 1 RE:
Plaintiff-Intervenor,	:	DISCRIMINATION NOT COMPLAINED OF
	:	IN OPPOSITION ACTIVITY
v.	:	_____
	:	
IXL LEARNING, INC.,	:	
	:	
Defendant.	:	

1 **TO ALL PARTIES AND THEIR ATTORNEY(S) OF RECORD:**

2 Please take notice that on October 15, 2018 at 10:00 AM, or as soon thereafter as may be heard in
3 Courtroom 4 of the United States District Court, Northern District of California, Defendant IXL Learning,
4 Inc. (“Defendant”), will and hereby does, move this Court, pursuant to Federal Rules of Evidence 401 and
5 403, hereby submits its Motion *in Limine* to exclude evidence pertaining to discrimination that was not
6 previously complained of and Memorandum of Law in Support.

7 This motion is supported by the Memorandum of Law in Support of Motion *in Limine* filed
8 concurrently herewith, and the pleadings, records and files of the within action, and upon such further
9 evidence and argument as may be submitted at the time of hearing.

10
11 Dated: September 26, 2018

Respectfully submitted,

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By: /s/ Eddie D. Woodworth

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NORTHERN DISTRICT OF CALIFORNIA

		Case No.: 3:17-cv-02979-VC
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	:	Hon. Vince Chhabria
Plaintiff,	:	Courtroom: 4, 17 th Floor
and	:	Hearing Date: October 15, 2018
	:	Hearing Time: 10:00 AM
ADRIAN SCOTT DUANE,	:	
Plaintiff-Intervenor,	:	MEMORANDUM OF POINTS
v.	:	AND AUTHORITIES IN SUPPORT OF
IXL LEARNING, INC.,	:	DEFENDANT’S MOTION IN LIMINE NO. 1
Defendant.	:	RE: DISCRIMINATION NOT
	:	COMPLAINED OF IN OPPOSITION
	:	ACTIVITY
	:	_____

1 **I. INTRODUCTION/BACKGROUND**

2 Pursuant to Federal Rules of Evidence 401 and 403, Defendant IXL Learning, Inc. (“IXL” or
3 “Defendant”) hereby moves this Court for an Order *in limine* to preclude evidence at trial of alleged
4 instances of gender and disability discrimination at IXL, or comments between co-workers at IXL, to
5 prove that Duane’s alleged opposition activity was based on his objectively reasonable and good faith
6 belief that IXL violated Title VII or the ADA. In support of the Motion, IXL states as follows:

7 The salient facts have been documented throughout the record and will not be restated herein.
8 Plaintiffs allege that Duane engaged in protected opposition activity by “publicly posting on a website his
9 opposition to discrimination at IXL in violation of Title VII and ADA retaliation provisions.” ECF 1, ¶
10 38. The alleged opposition activity, therefore, is Duane’s December 30, 2014 review posted on
11 Glassdoor.com (the “Post”), which stated:

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

13 **Pros**

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

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

18 **Cons**

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

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

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

27 **Advice to Management**

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

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

2 DE 70-1 at 10. Duane also checked the following: “Doesn’t recommend,” Neutral Outlook,” and
3 “Disapproves of CEO.”

4 The Post contains many false accusations against IXL and its CEO that do not oppose any actions
5 made unlawful by Title VII or the ADA. The paragraph beginning with the words “There are no politics
6 if you fit in...” purports to describe differential treatment at IXL based on race (“white or Asian”) and
7 sexual orientation (“straight or mainstream gay”). The Post does not include any claims of gender or
8 disability discrimination, nor any allegations that the author was personally discriminated against.¹ The
9 generalized references to differential treatment based on race and sexual orientation (treatment “seems to run
10 right along these characteristics”) is the only opposition activity purportedly engaged in by Duane.²

11 In discovery, Duane struggled to explain his good faith reasonable belief for making the race and
12 sexual orientation allegations in the Post. In fact, most of his reasons had nothing to do with alleged
13 disparate treatment of people who were not white, Asian, straight or mainstream gay. For example, Duane
14 testified that employee Isidora Milin (a white female) had a video project taken from her “without too much
15 explanation and acknowledgment of the hard work that she had already done on it.” DE 70-1 at 20 (*citing*
16 Duane Tr. at 182:13-22). This allegation is a garden-variety workplace gripe, not a discrimination complaint.

17 Duane additionally alleged that that his former supervisor, Keyes, should not have been promoted over
18 Milin because Duane thought her work was good and she was smart. DE 70-1 at 21 (*citing* Duane Tr. at
19 179:22-180:12). Keyes and Milin are white employees, and Duane’s belief is that this is evidence of gender
20 discrimination. The Post, of course, does not mention gender discrimination. Accordingly, these allegations
21 cannot support a finding that Duane’s belief was objectively reasonable and is entirely irrelevant to his false
22 claim regarding white, Asian, straight, or mainstream gay employees.

23 Duane also identified the pay disparity between Nemo Curiel and Jessica Morse as the basis for
24 alleging disparate treatment regarding pay raises, claiming that “the male employee [Curiel, a Latino male]
25 was making \$10,000 more than the female employee [Morse, a white female] for the same job.” DE 70-1 at
26

27 ¹ Duane admits that the Post does not mention disability discrimination. *See e.g.* DE 70-1 at 10 (*citing* Duane Tr. at 71:15-
72:24).

28 ² In their summary judgment briefs, Plaintiffs have made untimely attempts to expand the number of alleged opposition
activities beyond the Glassdoor.com post. These novel theories are the subject of a contemporaneous motion.

1 21 (*citing* Duane Tr. at 179:3-20). This assertion *defeats*, not supports, his allegation. IXL paying a non-white
2 employee more than a white employee is the opposite of what Duane claimed in the Post. Duane asserted this
3 was an example of gender discrimination. DE 70-1 at 21 (*citing* Duane Tr. at 181:22-25). But again, these
4 allegations are irrelevant to Duane’s claims regarding white, Asian, straight, or mainstream gay employees.

5 Duane may argue that he was discriminated against because of a “temporary disability” in connection
6 with his confirmation surgery. *See, e.g.*, DE 71-6 at 71 of 256 (Duane Tr. at 69:1-7). The Post does not make
7 any reference to differential treatment of employees with disabilities.

8 Lastly, Duane alleges that some of his non-managerial coworkers “queried Duane about being gay”,
9 “gossiped” about whether Duane “used to be a girl”, asked whether chest scars were connected to his
10 confirmation surgeries, and asked him whether a female date was the first time Duane dated a woman. DE 76
11 at 15. Duane makes the paper-thin assertion that he believed these comments constituted sexual orientation or
12 gender identity hostile work environment harassment that IXL permitted to occur. *Id.* Whether or not any
13 reasonable person would have such a belief in good faith, Duane does not complain of hostile work
14 environment harassment based on sexual orientation or gender identity in his Post.

15 **II. LEGAL STANDARD/ARGUMENT**

16 Per the Federal Rules of Evidence, relevant evidence (evidence that has a tendency to make a fact
17 more or less probable than it would be without the evidence; and the fact is of consequence in determining
18 the action) is admissible unless otherwise provided. FRE 401; 402. However, “The court may exclude
19 relevant evidence if its probative value is substantially outweighed by a danger of one or more of the
20 following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or
21 needlessly presenting cumulative evidence.” FRE 403.

22 Duane must prove that his opposition activity was the “but-for” cause of his termination, i.e. that the
23 “unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the
24 employer.” *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013). He must show that his opposition
25 activity was based on a good-faith and reasonable belief that IXL engaged in an unlawful employment practice.
26 *Moyo v. Gomez*, 32 F.3d 1382, 1385 (9th Cir.), amended, 40 F.3d 982 (9th Cir. 1994) (citation omitted).
27 The reasonableness of Duane’s belief that an unlawful employment practice occurred “must be assessed
28 according to an objective standard.” *Id.* Further, “the opposition must be directed at an unlawful employment

1 practice of an employer, not an act of discrimination by a private individual.” *Folkerson v. Circus Enterprises,*
2 *Inc.*, 107 F.3d 754, 755 (9th Cir. 1997) (citation omitted).

3 In proving his objectively reasonable belief that IXL engaged in race and sexual orientation
4 discrimination, Duane should be precluded from offer evidence of alleged gender discrimination between two
5 straight, white employees (e.g., promoting Keyes over Milin), gender discrimination between one Latino male
6 employee and one white female employee (e.g., paying Nemo Curiel more than Jessica Morse), disability
7 discrimination (not immediately approving his remote work request to accommodate his “temporary
8 disability”), or comments by non-managerial coworkers that allegedly show a hostile work environment. None
9 of this evidence tends to establish that he had an objectively reasonable good faith belief for his Glassdoor.com
10 post complaining of discrimination in favor of white, Asian, straight, or “mainstream gay” individuals.
11 Moreover, the evidence is unfairly prejudicial to IXL and tends to confuse the issues of what types of
12 discrimination are at issue in this case and should thus be excluded under FRE 401 and 403.

13 **III. CONCLUSION**

14 Wherefore, Plaintiffs should not be permitted to present evidence or testimony related to alleged
15 gender or disability discrimination or purported hostile work environment due to a few questions or
16 comments by non-managerial coworkers.

17 Respectfully submitted,

18 Dated: September 26, 2018

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27 UNITED STATES DISTRICT COURT
 28 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

**PLAINTIFFS' OPPOSITION TO
 DEFENDANT IXL'S MOTION *IN LIMINE*
 NO. 1 RE: DISCRIMINATION NOT
 COMPLAINED OF IN OPPOSITION
 ACTIVITY**

Pretrial Date: October 15, 2018
 Time: 10:00 am
 Courtroom: 4, 17th Floor
 Judge: Hon. Vince Chhabria

Trial Date: October 22, 2018

1 Plaintiff Equal Employment Opportunity Commission (EEOC) and Plaintiff-Intervenor
2 Adrian Scott Duane (Duane) oppose Defendant IXL Learning, Inc. (IXL)'s Motion *in Limine* No. 1
3 to preclude evidence that supports Mr. Duane's reasonable good faith belief that he was opposing
4 discrimination at IXL.

5 I. INTRODUCTION

6 Despite the Court's denial of Defendant's motion for summary judgment, Defendant now
7 reasserts the unsuccessful arguments it advanced in its Reply brief [ECF No. 79] in an effort to
8 exclude relevant evidence of workplace incidents that framed Mr. Duane's perceptions of gender,
9 race, national origin and disability discrimination at IXL. Defendant's motion ignores the law and
10 the court's summary judgment ruling. At trial, Plaintiffs must prove that Mr. Duane acted with a
11 reasonable good faith belief that he was opposing unlawful activity when he posted his message on
12 Glassdoor. Plaintiffs need not prove the factual or legal accuracy of his perceptions. Mr. Duane's
13 background, personal experiences and observations are unquestionably relevant to the jury's
14 consideration of the totality of circumstances giving rise to his good faith beliefs.

15 II. RELEVANT FACTS

16 Plaintiffs allege that IXL would not have terminated Mr. Duane on January 8, 2015, but for
17 his December 30, 2014 internet post about discrimination. In the two weeks leading up to the
18 Glassdoor post, Mr. Duane advocated for a reasonable accommodation of working remotely for half
19 the day to heal from his post-operative complication. By the time IXL discovered his post on
20 January 7, 2015, IXL knew that Mr. Duane: had sought a recent reasonable accommodation and
21 objected to IXL's response to the request; had sought the counsel of an employment attorney
22 regarding his rights under the ADA; and had voiced other discrimination complaints to his direct
23 supervisor. It is unsurprising therefore, that within minutes of discovering the December 30, 2014
24 Glassdoor post on January 7, 2015, IXL suspected Mr. Duane was the poster. [ECF No. 12 (Def.
25 Answer), at ¶ 33.] Additionally, Mr. Duane's personal experiences involving invasive questions
26 about his body, sexual orientation, and gender identity by co-workers and managers as well as his
27 observations of perceived pay and promotion gender discrimination during his tenure at IXL
28 informed his belief that that IXL's workplace environment was discriminatory. [See ECF 70-1

1 (Plaintiffs’ Opp to Def. Mot. Summ. J. and Reply to Plaintiffs’ Mot. Summ. J.), at pp.2-5.]

2 **III. ARGUMENT**

3 **A. The plain language of the post constitutes opposition activity.**

4 The plain language of the post voices opposition to discrimination. *See Crawford v.*
 5 *Metropolitan Gov’t of Nashville & Davidson County*, 555 U.S. 271, 276 (2009) (“When an
 6 employee communicates to [his] employer a belief that the employer has engaged in . . . a form of
 7 employment discrimination, that communication ‘virtually always constitutes the employee’s
 8 *opposition* to the activity.’”). Nevertheless, IXL has resurrected its attempt to parse the language in
 9 the post to justify exclusion of evidence not explicitly mentioned in the post. The law simply does
 10 not demand that victims of retaliation identify all incidents of discriminatory behavior that triggered
 11 their protected activity, nor does it render unmentioned incidents irrelevant. *See EEOC v. Go Daddy*
 12 *Software, Inc.*, 581 F.3d 951, 964 (9th Cir. 2009) (holding that employees need not complain of
 13 every incident of discriminatory behavior because “a complaint about one or more of the comments
 14 is protected behavior”).

15 **B. IXL was on notice of Duane’s opposition to discrimination.**

16 When analyzing whether an employee’s expression of opposition is protected by the law ,
 17 courts consider whether the employee’s language put the employer on notice of complaints of
 18 discrimination. Courts do not impose a “rigorous requirement of specificity in determining whether
 19 an act constitutes opposition.” *EEOC v. Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983)
 20 (citations omitted).¹ Here, Mr. Duane’s complaints of discrimination are featured prominently in his
 21 Glassdoor post and extend beyond the one sentence Defendant fixates on. Taken in its totality, the
 22 post lists protected bases for favored groups, describes employment actions Mr. Duane deemed
 23 discriminatory, including the grant of flexible hours, and identifies management and HR as having
 24 engaged in or condoned discrimination. And, Mr. Duane posted on the heels of protesting IXL’s
 25 denial of a request to accommodate a disability. Indeed, the timing of the post enabled IXL to
 26 discern its author. Upon reading the anonymous post, IXL knew it was Mr. Duane who complained,

27 ¹ See ECF No. 76 (Plaintiffs’ Joint Memorandum in Opposition to Defendant IXL’s Motion for
 28 Summary Judgment and Reply in Support of Plaintiff’s Partial Motion for Summary Judgment) at p.
 13.

1 knew at least in part what his complaints were, and thus, was undoubtedly on notice of the
2 opposition activity.

3 **C. The language of the post does not restrict what evidence is relevant to**
4 **demonstrate Duane’s reasonable belief.**

5 Whether activity is protected under the retaliation provisions of Title VII and the ADA
6 depends, in part, on resolving whether Mr. Duane had a reasonable good faith belief that he was
7 opposing discrimination at IXL. *Trent v. Valley Elec. Ass’n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994).
8 Defendant is free to try to discredit or call into question Mr. Duane’s testimony about perceived
9 discrimination. It is inappropriate to resolve the inevitable factual dispute by excluding evidence
10 through a motion *in limine*. *Nehara v. California*, No. 1:10-cv-00491 JLT, 2013 U.S. Dist. LEXIS
11 42993, at *5 (E.D. Cal. Mar. 26, 2013) *citing C & E Services, Inc. v. Ashland Inc.*, 539 F. Supp. 2d
12 316, 323 (D. D.C. 2008). The jury must render a decision after weighing and considering all the
13 evidence. *See Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150 (2000).

14 Defendant argues for the exclusion of evidence that is not expressly mentioned in the
15 Glassdoor post. Defendant has not cited a single case in support of this proposition. To the
16 contrary, in *EEOC v. Go Daddy, Inc.*, the Ninth Circuit affirmed the trial court’s decision to admit
17 the EEOC’s evidence of unreported allegations of national origin and race discrimination as proof of
18 the employee’s reasonable belief that he was opposing unlawful employment activity. *EEOC v. Go*
19 *Daddy*, 581 F.3d at 964 (“looking at all the circumstances requires [the court] to take note not only
20 of the [opposition activity comments] but also the context in which they were made.”). The Ninth
21 Circuit stressed the relevance of unreported behavior: “if a person has been subjected to more than
22 one comment, and if those comments, taken together, would be considered by a reasonable person to
23 violate Title VII, that person need not complain specifically about all of the comments to which he
24 or she has been subjected. ***Unreported comments, in other words, are relevant to the inquiry***
25 ***concerning the reasonableness of the belief that a violation has occurred.*** In such circumstances, a
26 complaint about one or more of these comments is protected behavior.” *Id.* (emphasis added).
27 Similarly, Mr. Duane’s personal experiences and observations provide context for his reasonable
28 belief that IXL engaged in unlawful behavior under Title VII and the ADA.

1 **D. A jury must consider evidence of Mr. Duane’s experiences and observations to**
2 **determine the reasonableness of his perceptions of discrimination.**

3 Whether Mr. Duane was legally or factually accurate about the discrimination he believed
4 that he or others at IXL experienced is irrelevant to the question of whether he suffered retaliation
5 for opposing such conduct. *Crown Zellerbach; Sias v. City Demonstration Agency*, 588 F.2d 692,
6 695 (9th Cir. 1978) (retaliation possible despite factual inaccuracies). To hold otherwise would run
7 afoul of the broad interpretation generally afforded to opposition activities. *Crawford*, 555 U.S. at
8 276; *see also* EEOC Directive No. 915.004, *EEOC Enforcement Guidance on Retaliation and*
9 *Related Issues*, at pp. 10-12 (Aug. 25, 2016). Thus, IXL’s argument that Duane incorrectly
10 concluded that IXL discriminated when it denied his remote work arrangement, or that IXL engaged
11 in gender discrimination when it promoted Mr. Keyes over Ms. Milin is an argument about
12 reasonableness for the jury to consider; it is not cause to exclude the evidence. The jury can also
13 weigh Mr. Duane’s testimony that he perceived Ms. Milin to be a woman of color who was an
14 immigrant against IXL’s perception that Ms. Milin is white. Similarly, it is for the jury to determine
15 whether Duane reasonably believed that IXL engaged in gender discrimination based on the
16 evidence that IXL paid Mr. Curiel, a Latinx employee, more than a female, white comparator.
17 Finally, Defendant can present evidence or arguments to try to counter Mr. Duane’s assertions that
18 he reasonably believed offensive comments regarding his gender identity and sexual orientation
19 were discriminatory.

20 The totality of Mr. Duane’s experiences and perceptions formed his beliefs and thus are
21 highly probative of an essential element of his Title VII and ADA retaliation claims, that his beliefs
22 were reasonable. As a result, a balancing test under Fed. R. Evid. 403 would also show that
23 excluding the evidence is far more prejudicial to Plaintiffs than Defendant.

24 **IV. CONCLUSION**

25 The court should deny Defendant’s Motion *in limine* No. 1 because Mr. Duane’s experiences
26 and perceptions leading to the Glassdoor post are relevant to his reasonable, good faith belief that he
27

28 ///

1 was opposing unlawful employment activity at IXL. It would be improper to restrict Plaintiffs'
2 evidence and testimony to the complaints explicitly referenced in the post.

3
4 Respectfully submitted,

5 Dated: October 3, 2018

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

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

10 Dated: October 3, 2018

THE MAREK LAW FIRM

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

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

15 I, Eddie Woodworth, am the ECF User whose ID and password are being used to file
16 Plaintiffs' Opposition to Defendant's Motion *in limine* No.1 in accordance with Judge Chhabria's
17 Standing Order for Civil Trials. In compliance with Local Rule 5-1(i)(3), I hereby attest that Ami
18 Sanghvi and David Marek concurred in Defendant filing this brief.

19 Dated: October 4, 2018

/s/ Eddie Woodworth
EDDIE R. WOODWORTH, Attorney

