

IMAI, TADLOCK, KEENEY & CORDERY, LLP
R. RANDY WERTZ

rrwertz@itkc.com
220 Montgomery Street, Suite 301
San Francisco, California 94104
Telephone: (415) 675-7000
Facsimile: (415) 675-7008

YOUNG BASILE HANLON & MACFARLANE, P.C.

JEFFREY D. WILSON (PRO HAC VICE)

wilson@youngbasile.com

EDDIE D. WOODWORTH (PRO HAC VICE)

woodworth@youngbasile.com
3001 W. Big Beaver Road, Suite 624
Troy, Michigan 48084
Telephone: (248) 649-3333
Facsimile: (248) 649-3338

Attorneys for Defendants
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. 4 RE:
Plaintiff-Intervenor,	:	SUBSEQUENT REMEDIAL MEASURES
	:	
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 and Federal Rule of Evidence 401-
5 403 and 407, hereby submits its Motion *in Limine* to preclude Plaintiffs from introducing evidence of any
6 activity at IXL that occurred subsequent to Duane’s termination 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,

YOUNG BASILE HANLON & MACFARLANE, P.C.

By: /s/ Eddie D. Woodworth

Jeffrey D. Wilson (Pro Hac Vice)

wilson@youngbasile.com

Eddie D. Woodworth (Pro Hac Vice)

woodworth@youngbasile.com

16 -and-

IMAI, RADLOCK, KEENEY & CORDERY, LLP

R. Randy Wertz

rrwerts@itkc.com

Attorneys for Defendant

IXL Learning, Inc.

IMAI, TADLOCK, KEENEY & CORDERY, LLP
R. RANDY WERTZ

rrwertz@itkc.com
220 Montgomery Street, Suite 301
San Francisco, California 94104
Telephone: (415) 675-7000
Facsimile: (415) 675-7008

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JEFFREY D. WILSON (PRO HAC VICE)

wilson@youngbasile.com

EDDIE D. WOODWORTH (PRO HAC VICE)

woodworth@youngbasile.com
3001 W. Big Beaver Road, Suite 624
Troy, Michigan 48084
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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,	:	MEMORANDUM OF POINTS
	:	AND AUTHORITIES IN SUPPORT OF
Plaintiff-Intervenor,	:	DEFENDANT’S MOTION IN LIMINE NO. 4
	:	RE: SUBSEQUENT REMEDIAL
v.	:	MEASURES
	:	
IXL LEARNING, INC.,	:	
	:	
Defendant.	:	

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-and-

IMAI, RADLOCK, KEENEY & CORDERY, LLP
R. Randy Wertz
rrwerts@itkc.com

Attorneys for Defendant
IXL Learning, Inc.

1 ROBERTA L. STEELE, SBN 188198 (CA)
2 MARCIA L. MITCHELL, SBN 18122 (WA)
3 AMI SANGHVI, SBN 4407672 (NY)
4 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
5 San Francisco District Office
6 450 Golden Gate Ave., 5th Floor West
7 P.O. Box 36025
8 San Francisco, CA 94102
9 Telephone No. (415) 522-3071
10 Fax No. (415) 522-3425
11 ami.sanghvi@eeoc.gov

12 DAMIEN A. LEE, SBN 430135 (WASH. D.C.)
13 Seattle Field Office
14 909 First Ave., Ste. 400
15 Seattle, WA 98104
16 Telephone No. (206) 220-6915
17 Fax No. (206) 220-6911
18 damien.lee@eeoc.gov

19 *Attorneys for Plaintiff EEOC*

20 DAVID MAREK, 290686 (CA)
21 THE MAREK LAW FIRM, INC.
22 228 Hamilton Avenue
23 Palo Alto, CA 94301
24 Telephone No. (917) 721-5042
25 david@marekfirm.com

26 *Attorney for Plaintiff-Intervenor Duane*

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

**PLAINTIFF EEOC'S OPPOSITION TO
DEFENDANT IXL'S MOTION *IN LIMINE*
NO. 4 RE: SUBSEQUENT REMEDIAL
MEASURES.**

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) jointly oppose Defendant IXL Learning, Inc. (IXL)'s Motion *in Limine*
3 No. 4, purportedly brought under FRE 407. This motion *in limine* is overbroad and will exclude
4 unspecified evidence and specified evidence relating to any investigation or follow-up to Mr.
5 Duane's discrimination complaints, as well as evidence relating to IXL's commitment to identify
6 and correct discriminatory practices. This affects the EEOC's ability to establish pretext and support
7 its claim for punitive damages. Finally, such evidence is also relevant to Plaintiffs' request for
8 injunctive relief. Thus, Plaintiffs request that this Court deny IXL's Motion *in limine* No. 4.

9 **I. RELEVANT FACTS**

10 Defendant's Motion *in Limine* No. 4 seeks to preclude evidence after January 8, 2015,
11 including (1) IXL's human resources personnel, their training, and policies in effect; (2) complaints
12 of discrimination; or (3) any changes or developments at IXL that occurred after January 8, 2015.
13 [Def. Mot. *in Limine* No. 4, at p.2.] Plaintiffs sought clarification as to the scope of this motion in an
14 effort to reach a stipulation with Defendant and avoid unnecessary motion practice. Plaintiffs
15 offered to stipulate that the parties not present evidence of HR policy changes or training after Mr.
16 Duane's January 8, 2015 termination to the jury, but that the parties retain the ability to present
17 evidence of such remedial measures to the Court for purposes of injunctive relief, if necessary.¹ [See
18 Declaration of Ami Sanghvi in Support of Plaintiffs' Opposition to Motion in limine No. 4 (Sanghvi
19 Decl.) at ¶2.] In response, Defendant clarified that it wanted the proposed stipulation to cover
20 complaints of discrimination at IXL after January 8, 2015. [Sanghvi Decl. at ¶ 3.] Given the broad
21 language in the motion *in limine* and the request, the EEOC indicated that it was willing to stipulate
22 to exclude HR policies and trainings after January 8, 2015, during the liability phase, but could not
23 agree to more absent clarification of the terms "other discrimination complaints" and "any changes
24 or developments at IXL that occurred after January 8, 2015." [Sanghvi Decl. at ¶¶ 4-5.] Defendant
25 responded by providing examples of questions that EEOC counsel asked IXL CEO Paul Mishkin at
26 his March 7, 2018 deposition that sought information reaching beyond January 8, 2015. [Sanghvi
27

28 ¹ Plaintiff EEOC will seek this Court's preference as to the procedure for a motion for post-trial
injunctive relief in the event that Plaintiffs prevail at trial.

1 Decl. at ¶ 6.] IXL explained that it sought to prevent questions relating to “complaints, allegations,
2 charges, investigations, *etc.* that occurred after January 8, 2015,” subsequent to Mr. Duane’s
3 termination. [Sanghvi Decl. at ¶ 7.] The EEOC informed IXL that this description did not satisfy
4 the EEOC’s concerns about overbreadth. [Sanghvi Decl. at ¶ 8.] Plaintiffs remain willing to
5 stipulate to avoid offering evidence of HR policy changes or training after Mr. Duane’s January 8,
6 2015 termination to the jury, and to presentation of evidence of post-termination remedial measures
7 to the Court. However, the ongoing ambiguity as to the precise scope of Defendant’s Motion *in*
8 *Limine* No. 4, and the deadline to oppose this motion, make this opposition necessary.

9 **II. ARGUMENT**

10 **A. IXL’s Motion *in Limine* No. 4 is Overbroad.**

11 The Ninth Circuit noted that while FRE 407 is most frequently discussed in product liability
12 suits, “in the employment discrimination context, however, post-occurrence remediation is part and
13 parcel of the legal framework” for purposes of determining liability for a harassment claim and for
14 determining a plaintiff’s entitlement to punitive damages. *Swinton v. Potomac Corp.*, 270 F.3d 794,
15 814-15 (9th Cir. 2001) (affirming limited exclusion of post termination remediation and finding no
16 error in allowing human resource manager testimony about post-charge investigation into
17 allegations”).

18 Defendant’s motion is not justified by FRE 407. For example, Defendant indicated that MIL
19 No. 4 was intended to exclude, *inter alia*, the following questions from EEOC counsel: (1) “Since
20 July 2013 to present, has IXL conducted any workplace investigations relating to employees’ or ex-
21 employees’ allegations of harassment?”; (2) “Since July 2013 to present, has IXL needed to conduct
22 any workplace investigations relating to employees’ or ex-employees’ allegations of retaliation?”;
23 (3) “Has IXL ever had a female employee complain that she was not paid equal to a male peer?”; (4)
24 “Has IXL ever had a female employee suggest that the company do more to retain female staff?”; (5)
25 “Has IXL ever had an employee complain about harassment of any kind?”; (6) “Has any employee
26 ever complained about discrimination at IXL?”; and, (7) “Is IXL aware of any other claims on
27 Glassdoor.com about otherwise discriminatory behavior at IXL?”. Defendant does not contest that
28 the responses to these questions for the period before January 8, 2015, are relevant. In addition,

1 IXL's efforts (or lack thereof) to investigate Mr. Duane's discrimination complaints are relevant to
 2 pretext even if they occurred after January 8, 2015. Similarly, IXL's post-termination indifference
 3 to Mr. Duane's discrimination complaints is relevant to the question of whether IXL acted with
 4 reckless disregard to Mr. Duane's federally protected rights when Mr. Mishkin terminated him for
 5 his Glassdoor post. The lack of any meaningful remedial efforts by IXL is antithetical to FRE 407
 6 and is not shielded by that evidentiary rule.

7 **B. The parties agree that IXL EEO policy changes and EEO training after January**
 8 **8, 2015, are relevant to the issue of appropriate injunctive relief, but unnecessary**
 9 **to present to a jury.**

10 The EEOC requested the following injunctive relief in its complaint:

- 11 A. Issue a permanent injunction prohibiting IXL, its officers, agents, servants, employees,
 12 attorneys, and all persons in active concert or participation with them from retaliating
 13 against employees who have reasonably engaged in activities protected by Title VII
 14 based on a reasonable and good faith belief that the conduct opposed is, or could become,
 15 unlawful.
- 16 B. Issue a permanent injunction prohibiting IXL, its officers, agents, servants, employees,
 17 attorneys, and all persons in active concert or participation with them from retaliating
 18 against employees who have reasonably engaged in activities protected by the ADA
 19 based on a reasonable and good faith belief that the conduct opposed is, or could become
 20 unlawful.
- 21 C. Order IXL to institute and carry out policies, practices, and programs which allow employees
 22 to engage in protected activity, and which eradicate the effects of its past and present
 23 unlawful employment practices

24 [ECF No. 1, EEOC's Complaint ¶¶ A-C ("Prayer for Relief")]. IXL's steps to improve its anti-
 25 discrimination policy and practices after Mr. Duane was fired on January 8, 2015, will be directly
 26 relevant to whether and what injunctive relief is necessary to prevent retaliation against any other
 27 IXL employee for raising a discrimination complaint or concern in the future. The relief would
 28 include improving the knowledge of IXL HR staff, managers and supervisors about their duties and
 responsibilities under Title VII and the ADA, their duties to prohibit retaliation against any IXL
 applicant, employee or former employee for raising a concern about perceived discrimination, and
 the steps they must take to respond to and remedy such a discrimination complaint. Since the parties
 have agreed to bifurcate the trial, the EEOC remains willing to enter into the following stipulations:

- The parties agree that evidence or testimony about changes to IXL's Human Resources policies occurring after January 8, 2015 will not be presented to the jury, but can be

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presented to the Court for purposes of determining whether to order injunctive relief, if necessary.

- The parties agree that evidence or testimony about any employment discrimination or harassment training IXL provided or IXL employees received after January 8, 2015, will not be presented to the jury, but can be presented to the Court for purposes of determining whether to order injunctive relief, if necessary.

III. CONCLUSION

For the foregoing reasons, Plaintiffs request that this court deny Defendant’s MIL No. 4 as overbroad and unsupported by the law or facts.

Respectfully submitted,

Dated: October 3, 2018

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

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

Dated: October 3, 2018

THE MAREK LAW FIRM

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

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

I, Eddie Woodworth, am the ECF User whose ID and password are being used to file Plaintiffs’ Opposition to Defendant’s Motion *in Limine* No.4 in accordance with Judge Chhabria’s Standing Order for Civil Trials. In compliance with Local Rule 5-1(i)(3), I hereby attest that Ami Sanghvi and David Marek concurred in Defendant filing this brief.

Dated: October 4, 2018

/s/ Eddie Woodworth
EDDIE R. WOODWORTH, Attorney

1 ROBERTA L. STEELE, SBN 188198 (CA)
 2 MARCIA L. MITCHELL, SBN 18122 (WA)
 3 AMI SANGHVI, SBN 4407672 (NY)
 4 DAMIEN A. LEE SBN 430135 (WASH. D.C.)
 5 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
 6 San Francisco District Office
 7 450 Golden Gate Ave., 5th Floor West
 8 P.O. Box 36025
 9 San Francisco, CA 94102
 10 Telephone No. (415) 522-3071
 11 Fax No. (415) 522-3425
 12 ami.sanghvi@eeoc.gov

13 DAMIEN A. LEE, SBN 430135 (WASH. D.C.)
 14 Seattle Field Office
 15 909 First Ave., Ste. 400
 16 Seattle, WA 98104
 17 Telephone No. (206) 220-6915
 18 Fax No. (206) 220-6911
 19 damien.lee@eeoc.gov

20 *Attorneys for Plaintiff EEOC*

21 DAVID MAREK, SBN 290686 (CA)
 22 THE MAREK LAW FIRM, INC.
 23 228 Hamilton Avenue
 24 Palo Alto, CA 94301
 25 Telephone No. (917) 721-5042
 26 david@marekfirm.com

27 *Attorney for Plaintiff-Intervenor Duane*

28 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

DECLARATION OF AMI SANGHVI IN SUPPORT OF PLAINTIFFS' OPPOSITION TO IXL'S MOTION IN LIMINE NO.4 RE: SUBSEQUENT REMEDIAL MEASURES.

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

Trial Date: October 22, 2018

1 I, Ami Sanghvi, declare as follows:

2 1. I am an attorney for the plaintiff in this action, the U.S. Equal Employment Opportunity
3 Commission (EEOC). I am the lead attorney responsible for the litigation of the above-caption case.

4 2. I emailed IXL opposing counsel on September 28, 2018, proposing a stipulation that
5 excluded evidence of HR policies and training after January 8, 2015, from the jury but reserved the
6 ability to present that evidence to the Court in support of any post-trial injunctive relief.

7 3. In response, Mr. Wilson clarified whether the proposed stipulation covered IXL's
8 "request to preclude any complaints of discrimination at IXL after January 8, 2015."

9 4. I responded that the EEOC was willing to provide the two stipulations about HR
10 policies and trainings after January 8, 2015, but that it could not agree to more absent clarification of
11 the scope of "other discrimination complaints" and "any changes or developments at IXL that
12 occurred after January 8, 2015."

13 5. The stipulations I indicated the Plaintiffs were willing to stipulate to are:

14 (1) The parties agree that evidence or testimony about Human Resource related
15 policy changes occurring after January 8, 2015, will not be presented to the
16 jury but can be presented to the Court for purposes of injunctive relief if
necessary.

17 (2) The parties agree that evidence or testimony about any employment
18 discrimination or harassment training occurring after January 8, 2015, will not
19 be presented to the jury but can be presented to the Court for purposes of
injunctive relief if necessary.

20 6. Mr. Wilson responded with examples of questions that EEOC counsel asked of IXL
21 CEO Paul Mishkin at his March 7, 2018 deposition that sought information reaching beyond January
22 8, 2015, including: "(1) Since July 2013 to present, has IXL conducted any workplace investigations
23 relating to employees' or ex-employees' allegations of harassment?"; (2) "Since July 2013 to
24 present, has IXL needed to conduct any workplace investigations relating to employees' or ex-
25 employees' allegations of retaliation?"; (3) "Has IXL ever had a female employee complain that she
26 was not paid equal to a male peer?"; (4) "Has IXL ever had a female employee suggest that the
27 company do more to retain female staff?"; (5) "Has IXL ever had an employee complain about
28 harassment of any kind?"; (6) "Has any employee ever complained about discrimination at IXL?";

1 and, (7) “Is IXL aware of any other claims on Glassdoor.com about otherwise discriminatory
2 behavior at IXL?”.

3 7. Mr. Wilson also clarified that it sought to prevent questions relating to “complaints,
4 allegations, charges, investigations, *etc.*, that occurred after January 8, 2015,” subsequent to Mr.
5 Duane’s termination.

6 8. Earlier today, my co-counsel, Damien Lee, emailed Mr. Wilson, copying me, to inform
7 him that the EEOC could not agree with the proposed rephrasing of “any activity at IXL that occurred
8 subsequent to Duane’s termination” because it left too much for interpretation, particularly when
9 certain evidence that extends past January 8, 2015, nonetheless remains relevant for liability
10 purposes. Mr. Lee informed IXL counsel that the EEOC would draft an opposition and note the
11 places where the parties appeared to have reached agreement.

12 I declare under penalty of perjury under the laws of the United States that the foregoing is
13 true and correct and that this declaration was executed on October 3, 2018, in San Francisco,
14 California.

15
16 /s/ Ami Sanghvi
17 AMI SANGHVI
18 Senior Trial Attorney
19 Equal Employment Opportunity Commission
20 450 Golden Gate Avenue, 5th Fl. W., POB 36025
21 San Francisco, CA 94102
22 (415) 522-3071
23
24
25
26
27
28

