

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE VINCE CHHABRIA

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| U.S. EQUAL EMPLOYMENT OPPORTUNITY) | |
| COMMISSION,) | |
|) | |
|) | |
| Plaintiff,) | |
|) | |
| and) | |
|) | |
| ADRIAN SCOTT DUANE,) | |
|) | No. C 17-2979 VC |
| Plaintiff Intervenor,) | |
|) | |
| vs.) | San Francisco, California |
|) | |
| IXL LEARNING, INC.) | Monday |
|) | October 14, 2018 |
| Defendant.) | 10:30 a.m. |
|) | |

TRANSCRIPT OF PROCEEDINGS

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(APPEARANCES CONTINUED ON FOLLOWING PAGE)

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1 Monday - October 15, 2018

10:39 a.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Calling Case No. 17-CV-2979, U.S. Equal
5 Employment Opportunity Commission versus IXL Learning, Inc.
6 Counsel, please step forward and state your appearances
7 for the record.

8 **MS. SANGHVI:** Ami Sanghvi for the Equal Employment
9 Opportunity Commission.

10 **THE COURT:** Good morning.

11 **MS. SANGHVI:** Good morning.

12 **MR. LEE:** Damien Lee for the United States Equal
13 Employment Opportunity Commission.

14 **THE COURT:** Good morning.

15 **MR. MAREK:** David Marek for Adrian Scott Duane.

16 **MR. WILSON:** Jeff Wilson on behalf of the defendant
17 IXL Learning. Good morning.

18 **THE COURT:** Good morning.

19 Okay. So we should talk about scheduling. We should talk
20 about the Motions in Limine. Jury Instructions, I would like
21 to leave most of it for mid trial, but I think at a minimum we
22 should talk about the sexual orientation issue because that
23 will affect, I presume, how you present your cases.

24 If there is any other dispute in the Jury Instructions
25 that will actually affect the way had you present your case,

1 your opening statements or whatever, let me know and we can
2 make sure to resolve that beforehand, too. But for the most
3 part I'd like to leave Jury Instructions to the middle of
4 trial.

5 We can talk about voir dire. I'll sort of run through the
6 process for how we do it and answer any questions you have
7 about that.

8 What else should we be discussing today? Anything else on
9 your agendas?

10 **MS. SANGHVI:** I wasn't sure if your Honor wanted to
11 discuss anything about the exhibits or the Exhibit List.

12 **THE COURT:** If there is anything that's worth
13 discussing today, we could do that. I did flip through the
14 Exhibit List and it seemed like there wasn't any -- there
15 wasn't anything too significant on there. But happy to discuss
16 anything regarding exhibits if you want.

17 Anything else?

18 **MS. SANGHVI:** We weren't sure if you wanted to
19 discuss the verdict form.

20 **THE COURT:** Oh, we can -- we'll look at that when we
21 look at Jury Instructions in the middle of the trial.

22 **MS. SANGHVI:** Okay.

23 **MR. WILSON:** We have a witness who is unavailable and
24 who has a deposition transcript, an employee of IXL. So when
25 we prepare or read that to the jury, is there something in

1 particular that you don't like or do like about how we
2 designate transcript pages?

3 **THE COURT:** No. I mean, I think that -- I mean,
4 usually the way people do it is they will put somebody up on
5 the stand and they will -- you know, they will do an actual
6 reenactment, and that's fine. That's fine with me. If you
7 have some other way you prefer to do it, I'm open to that as
8 well.

9 **MR. WILSON:** That's how we plan to do it.

10 **THE COURT:** Okay.

11 **MR. WILSON:** Thanks.

12 **MS. SANGHVI:** Sorry, your Honor.

13 Just with regards to designations, is it the Court's
14 preference -- we need to file those today as per your order,
15 and we intend to, but just want to understand the format. The
16 plan of putting it in perhaps as a spreadsheet, if you will,
17 with designations, any objections and any potential counter
18 designations, is that --

19 **THE COURT:** That sounds fine. I mean, usually I
20 don't really get involved -- I mean, the way it tends to work
21 in the trials, at least in my experience, is that there are
22 over-designations and excessive objections and it really starts
23 to whittle down the closer and closer you get to trial.

24 So to be honest, I'm not going to engage meaningfully on
25 that until we're sort of on the eve of trial or even in the

1 middle of trial and you've managed to whittle down your
2 designations and objections to them and counter designations
3 and all that kind of stuff. So the way you're proposing to
4 file it today sounds good.

5 **MR. WILSON:** One question about designations. Just
6 it is different in different courtrooms I have been in.

7 **THE COURT:** Before you -- hold that thought. I just
8 want to make sure I don't forget to say this while it's on my
9 mind.

10 I always expect the lawyers to know this, but they often
11 don't, so let me say it now. You know, if you are going to
12 impeach somebody with their prior deposition testimony, please
13 have a copy of the deposition -- have a copy of the transcript
14 ready to give to them, have a copy of the transcript ready to
15 give to me, and announce which pages or line numbers you would
16 like to read in response to the answer that the witness gave on
17 the stand. Give me a chance and your opposing counsel a chance
18 to look at it and see if opposing counsel has any objection or
19 wishes any additional lines, wishes to request that any
20 additional lines be read for completeness. And then -- and
21 wait until I rule on it before you read the -- before you read
22 the deposition testimony.

23 **MR. WILSON:** Does the same thing go for playing
24 deposition transcript synced video of the deposition?

25 **THE COURT:** Yes, same thing. So in other words,

1 there should be -- so you should say, I would like to play, you
2 know, Page 6, Lines 2 through 20 of the deposition. Hand me a
3 transcript, if I haven't already been handed one, or if you
4 want to -- for any witnesses who are going to be testifying
5 that day if you want to get the depo transcripts up here in
6 advance, that's fine, too. Either way. Give me a chance to
7 look at it.

8 I will sometimes just look at you and say, That's not
9 inconsistent. And then there will -- there will be no playing
10 of the deposition testimony. But at a minimum I'll look at it
11 and I'll give the other side a chance to object or to ask for
12 additional testimony to be played.

13 **MR. WILSON:** Okay.

14 **MS. SANGHVI:** Your Honor, we also have a trial
15 presentation software that we use sometimes to put up the
16 deposition transcript, but you prefer the hard copy; is that
17 accurate?

18 **THE COURT:** Well, to put it up for the jury, you
19 mean?

20 **MS. SANGHVI:** I'm sorry. Just for the witness and
21 for the Court.

22 **THE COURT:** I think usually -- I think it's better to
23 give the witness a copy of the entire deposition transcript so
24 that the witness -- because sometimes the witness will look at
25 it and say, Well, yeah, I said that here, but as I explained

1 two pages earlier, you know...

2 So I think it's good to hand the witness the whole
3 transcript.

4 **MR. WILSON:** And still use the video, still use the
5 courtroom presentation software, obviously, but have that --

6 **THE COURT:** Yeah.

7 **MR. WILSON:** You and the witness both will have the
8 hard copy to leaf through.

9 **THE COURT:** Yeah.

10 **MR. WILSON:** I did have a question that I was going
11 to ask you.

12 With respect to deposition designations, the one thing I'm
13 unclear on in different courts is in my opening I may refer to
14 testimony from Mr. Duane as permitted by Rule 32, you know.
15 You'll hear that Mr. said so-and-so, and maybe play an excerpt
16 of his deposition.

17 **THE COURT:** His deposition testimony is not
18 admissible unless you're using it to impeach him on his live
19 testimony. So you shouldn't be presenting his deposition in
20 your opening statement.

21 **MR. WILSON:** Well, he's a party and you can use it at
22 trial for any purpose, and I usually do, when it's, again, a
23 party's deposition and --

24 **THE COURT:** Right, but he's going to be taking the
25 stand.

1 **MR. WILSON:** Right.

2 **THE COURT:** And you can ask him the questions. And
3 if he testifies differently from how he testified in his
4 deposition, you can play the deposition testimony. But we're
5 not going to just have a trial where you're just playing his
6 deposition testimony.

7 **MR. WILSON:** No. But, again, I just -- I want to
8 make sure I'm not misstating it, and I might be.

9 FRCP 32 permits you to use a party's, only a party's,
10 deposition testimony for any purpose. And I typically do say
11 this, You will hear him say something -- and I might even play
12 a clip of him giving an answer and say, This is the kind of
13 evidence you're going to see.

14 I've never not been able to do that because of --

15 **THE COURT:** Do you have any objection to that?

16 **MS. SANGHVI:** I do have an objection to that, your
17 Honor.

18 **THE COURT:** What is it?

19 **MS. SANGHVI:** For starters, the EEOC is also a party
20 here. It's not just Mr. Duane. And that's one issue.

21 But as you've --

22 **THE COURT:** How does that affect the ability to play
23 deposition testimony of a party?

24 **MS. SANGHVI:** Mr. Duane is a live witness that will
25 be put on the stand and any -- any inconsistencies with his

1 prior deposition testimony or any prior sworn testimony can be
2 brought out through his live testimony through impeachment.

3 It's not appropriate to have counsel tell the story from
4 Mr. Duane's perspective.

5 **THE COURT:** Hold on a second. I'm pulling up the
6 rule.

7 **MR. WILSON:** It's 32(a)(3), if you're looking.
8 (Brief pause.)

9 **MS. SANGHVI:** I'll add, your Honor, that --

10 **THE COURT:** This is for 30(b)6 witnesses; right?

11 **MR. WILSON:** No. It is for an adverse party may use
12 for any purpose the deposition of a party and --

13 **THE COURT:** Or anyone who... Okay.

14 **MR. WILSON:** Yeah. And so, likewise, they can do the
15 same thing. And part of -- we all know that Mr. Duane is a
16 party. He is a plaintiff intervenor in this case,
17 co-plaintiff.

18 Anyway, that is -- it doesn't have to be for impeachment.
19 Witnesses have to be unavailable. That is standard operating
20 procedure.

21 **THE COURT:** Okay. I'll have to be honest with you.
22 I've never had this issue come up before because I've never had
23 anybody try to use deposition testimony of a party in a civil
24 case other than to impeach.

25 So I'm happy to -- I mean, is there -- you know, as a

1 matter of sort of common sense and good trial practice, my gut
2 reaction would be to say that, no, you're going to have them on
3 the stand and you cross examine them and if they say anything
4 that's different from what they said in their deposition, then
5 you can play -- you can play their deposition.

6 But -- but if the -- obviously, if the rules allow you to
7 play Mr. Duane's deposition testimony during your opening
8 statement and to play it regardless of whether he's on the
9 stand or, you know, whatever, then that's fine, too.

10 So what's your -- I guess, let me -- you know, I'll spend
11 a little time looking at this, but, Ms. Sanghvi, what's your
12 position on whether he's allowed to do it or not? Under the
13 text of the rule it seems like he is allowed to do it.

14 **MS. SANGHVI:** Your Honor, I would ask two things.
15 Number one, the opening statement is not evidence. It's not a
16 presentation of evidence. It's just argument. So I think it's
17 an inappropriate use of evidence in --

18 **THE COURT:** Yeah, but people play recordings and
19 stuff during opening statements all the time.

20 **MS. SANGHVI:** I agree. This strikes me as something
21 different and I would appreciate the opportunity -- since it is
22 also, I will admit, new to me as well, I would appreciate the
23 ability to brief it for, your Honor, as well.

24 **THE COURT:** Sure. Why don't you go ahead and file a
25 letter brief by close of business today.

1 **MS. SANGHVI:** Thank you, your Honor.

2 **THE COURT:** Okay. Any other? So I've got on my
3 less, scheduling, Motions in Limine, Jury Instruction number
4 one, voir dire, exhibits. Anything else?

5 **MS. SANGHVI:** Does scheduling include the time that
6 you will be allotting us?

7 **THE COURT:** Yeah.

8 **MS. SANGHVI:** And just with regards to the
9 designation, we were talking also today you have -- we have due
10 discovery designations.

11 Similarly, we were just going to just indicate document,
12 interrogatory, RFA number, any objections. And then, I
13 imagine, similarly we would whittle that down when it's time to
14 read that into the record.

15 **THE COURT:** Sounds good.

16 **MR. WILSON:** Do I understand Thursdays are closed for
17 trial? There are no trial days on Thursdays?

18 **THE COURT:** Typically Thursdays are dark.

19 **MR. WILSON:** Okay.

20 **THE COURT:** And let me see what we were -- we were
21 planning for Thursday, the 25th, to be dark; right?

22 **THE CLERK:** No.

23 **THE COURT:** We were planning to have a trial day?

24 (Discussion held off the record between the Court and
25 the Courtroom Deputy.)

1 **THE COURT:** So why don't we plan on being in trial on
2 Thursday, the 25th, at least.

3 **MR. WILSON:** Okay.

4 **THE COURT:** Now, on scheduling -- we will get to time
5 limits in a second, but -- or maybe towards the end of our
6 conference here.

7 But in terms of scheduling, I wanted to let you know that
8 this is one of those rare occasions where we had two trials
9 scheduled for next week and neither of them has settled, which
10 is very unusual. The other is a criminal case.

11 As I sit here right now, my plan is to have your trial go
12 first, so that you will, in fact, start on the 22nd. But it's
13 possible that that will -- that -- I have the pretrial
14 conference in the other case this afternoon. And it's possible
15 that that will change. And, you know, criminal cases, you
16 know, generally to take precedent over civil cases.

17 So we will let you know as soon as possible if you're
18 going to be trailing that case, but I think it's likely that
19 you will go first. So that we will do jury selection on that
20 Monday morning, and I think after jury selection on Monday
21 morning, that will be it. And then we'll do -- then we'll do
22 opening statements on Tuesday morning.

23 So that way usually we have a jury picked by about lunch
24 time and then the jurors can go home and rearrange -- you know,
25 they have the afternoon to rearrange their affairs and whatnot,

1 and then we can start where opening statements on Tuesday.

2 We usually go -- while I'm on the topic, we usually -- we
3 start at 8:30 sharp. That includes the day we're doing jury
4 selection. I ask the lawyers to be here at 8:00 o'clock every
5 day. I'll be here by 8:00 o'clock every day. The purpose of
6 that is to make sure that we have time to hash out any
7 anticipated evidentiary objections or issues, issues relating
8 to exhibits that we haven't talked about today, so that we're
9 not having sidebars during trial. In trials, in my trials we
10 almost never do sidebars. Every once in awhile it is -- you
11 know, it's unavoidable.

12 You are expected to have anticipated everything that you
13 can reasonably anticipate so that we -- in terms of evidentiary
14 issues and the like and to tee those up with me either the
15 afternoon before or the morning of so that we're not wasting
16 the jury's time. And if it's something that you could have
17 reasonably anticipated but didn't reasonably anticipate, then
18 you will lose on that issue by virtue of that alone.

19 So you should be communicating with each other and
20 coordinating with each other on anticipated disputes that you
21 may have about the admissibility of certain documents or
22 testimony or lines of questioning or whatever.

23 And then we'll go -- so we start at 8:30 sharp. One or
24 two breaks in the morning. I think usually we do two. You
25 know, we do two quick morning breaks and then we usually break

1 for lunch about 11:45. We usually have about a 45-minute lunch
2 break. And then we -- so we usually come back at around 12:30.
3 Then we usually have one break in the afternoon and wrap up
4 sometime between 2:00 and 2:30 in the afternoon.

5 What I tell the jury is that I'll never keep you here past
6 2:30, so you can bank on that for dealing with your affairs.
7 But it will be sometime between 2:00 and 2:30, depending on
8 when a good break point is.

9 And the exception to that is when they are deliberating.
10 Of course, they can stay after 2:30 to deliberate if they want.

11 That reminds me of one other thing I want to put on the
12 list of things to discuss, but I think we'll do it a little bit
13 later, is bifurcation.

14 But for now why don't we turn to the Motions in Limine.

15 **MS. SANGHVI:** Your Honor, if I might just add one
16 thing to your agenda, is I just wanted to ask about the Court's
17 practice for demonstrative exhibits during opening and closing.
18 It's been my practice in the past to exchange them or give
19 defendant --

20 **THE COURT:** Yeah.

21 **MS. SANGHVI:** -- a copy.

22 **THE COURT:** I think my standing order says something
23 about that, but if it doesn't, yes, you should exchange any
24 demonstratives that you use in closings or openings 24 hours in
25 advance.

1 Okay. Let's go through the Motions in Limine. Okay.
2 Let's start with the EEOC's motions. I think that at a minimum
3 under Rule 403 the evidence of the -- of the prior government
4 proceedings very likely should not come in. I think it's
5 confusing. It's, you know, the jury -- it's the jury's
6 decision. The jury doesn't have -- doesn't defer to anything.
7 There is no level of deference to any decision that any
8 government official has previously made.

9 I found some of the language of the NLRB -- is it an NLRB
10 judge?

11 **MR. WILSON:** ALJD, ALJ decision.

12 **THE COURT:** I found some of that language troubling.
13 Kind of weirdly hostile. And so for all those reasons I
14 don't -- I don't really see any reason for it to come in.

15 I think it's easy to understand how its probative value is
16 fairly limited and how its prejudicial effect would -- its
17 unfair prejudicial affect would be quite high for the
18 plaintiffs.

19 How are you prejudiced by that not -- how is your client
20 prejudiced by that not coming in?

21 **MR. WILSON:** That's fine.

22 **THE COURT:** Okay. So that motion will be granted.

23 **MR. WILSON:** Well, I'm sorry. As to the NLRB you
24 asked me.

25 **THE COURT:** Okay.

1 **MR. WILSON:** Yeah. There's -- but there's a part of
2 this motion that is not about the NLRB. It's about their
3 letter of determination.

4 **THE COURT:** Right.

5 **MR. WILSON:** That is something we very much disagree
6 on.

7 **THE COURT:** Okay.

8 **MR. WILSON:** And if your Honor would permit, the --
9 the charging party, Mr. Duane, filed a charge of
10 discrimination, which alleged multiple --

11 **THE COURT:** But the problem with that is that -- and
12 I'm sorry to interrupt you, but I know what your argument is.

13 **MR. WILSON:** Okay.

14 **THE COURT:** The problem is there are all sorts of
15 reasons why the EEOC may decide not to charge certain things.
16 And, you know, the -- it may be that they thought he had a
17 weaker case on some of his other claims. It may be that they
18 wanted to streamline this. I don't know.

19 But it seems we would have to then have a mini trial
20 about -- about, you know, the reasons why EEOC chose to pursue
21 certain claims and chose not to pursue other claims.

22 So, you know --

23 **MR. WILSON:** If I may though, your Honor.

24 **THE COURT:** Sure.

25 **MR. WILSON:** In a vacuum without what I know is the

1 -- the intent here of the EEOC in their trial presentation, I
2 would agree; that it doesn't add a lot for the reasons you just
3 said.

4 But here the EEOC is lopping onto this retaliation claim
5 allegations of gender discrimination, disability
6 discrimination --

7 **THE COURT:** Well, we'll get to that. We'll get to
8 that in a second.

9 **MR. WILSON:** All right.

10 **THE COURT:** Right? But -- and my inclination, and we
11 can talk about it more in a second, is that the -- the way the
12 plaintiffs have teed up this case is that they are -- they are
13 making a claim that IXL fired Duane in retaliation for making
14 that post.

15 And, of course, there will still be -- there will still be
16 litigation on, you know, whether Duane had a reasonable basis
17 for -- to believe that there was discrimination at IXL, the
18 stuff that he complained about in the post. And so it's not
19 that all that stuff would -- would not be in evidence.

20 But the case that they have brought, as I understand it,
21 and as I've always understood it, is that IXL fired him in
22 retaliation for making that post.

23 **MR. WILSON:** And that post is not alleged. The types
24 of claims that he brought to the EEOC, that the EEOC did not
25 bring to this Court, and now if --

1 **THE COURT:** Right. But what I'm saying is, assuming
2 that it continues to be a trial about whether IXL fired him in
3 retaliation for the post, then what is the point of bringing in
4 the charges that he made with the EEOC and EEOC's decision
5 regarding which charges to pursue and the reasons why it may
6 have chosen to pursue some and not the others.

7 **MR. WILSON:** Well, it is -- that is the point though.
8 And maybe it's just that this dovetails with our Motion in
9 Limine and -- and maybe it gets all cleared out in the wash.
10 But it really is derivative of that larger argument now that
11 goes beyond a Glassdoor post, publicly filed, retaliation for
12 filing it, and represent to these other --

13 **THE COURT:** Right, right. And you make a fair point
14 on that because -- and I think probably even though it relates
15 to -- not specifically to this Motion in Limine, it's worth
16 talking about this issue now.

17 Because you make a fair point that some of your briefs I
18 found cause me to scratch my head a little bit. Because I got
19 the sense from reading some of your papers, some of your Motion
20 in Limine papers, that you were trying to expand this case and
21 that you -- and that you have always teed it up as a case about
22 whether IXL fired Mr. Duane in retaliation for this post and
23 now there are various points in your briefs where you seem to
24 be suggesting that he was also retaliated against for some of
25 the other complaints that he made.

1 And so -- and my reaction to that was no, no, no. This is
2 and always has been a case, as you framed it, about whether he
3 was fired because of the post. And to the extent that other
4 stuff is relevant, to the extent his other complaints are
5 relevant to the case, they are relevant to whether he had a
6 reasonable belief -- whether his belief that IXL discriminated
7 was reasonable, but not relevant to the argument that he was --
8 it was not part of an argument that he was retaliated because
9 of those other complaints.

10 Have I stated your case correctly?

11 **MS. SANGHVI:** You have, your Honor.

12 **THE COURT:** The case that you've brought?

13 **MS. SANGHVI:** I believe we have been extremely clear
14 from the absolute onset of this case --

15 **THE COURT:** So, did I -- sorry. Did I state it
16 correctly?

17 **MS. SANGHVI:** Yes, your Honor.

18 **THE COURT:** I did just describe it correctly?

19 **MS. SANGHVI:** Yes, your Honor.

20 **THE COURT:** Okay.

21 **MS. SANGHVI:** We have alleged retaliation because of
22 the public airing of discrimination in the Glassdoor post.

23 We believe the evidence that we are referring to all goes
24 to a totality of the circumstances that provides a context for
25 the development of Mr. Duane's reasonable belief.

1 **THE COURT:** Right. Okay. All right. So that --
2 that helps.

3 So in light of that -- and now I -- I understand that
4 there is a -- there is an argument that the EEOC's decision not
5 to pursue claims on Mr. Duane's behalf about discrimination
6 could have some marginal degree of relevance to the
7 reasonableness of his belief that he was the victim of that
8 sort of discrimination, but I think that it's -- I think under
9 403 it can't come in because it's too speculative why the EEOC
10 decided to bring certain charges and decided not to bring other
11 charges.

12 So Motion in Limine number one is granted. Obviously, you
13 can explain in your opening statements and whatever why EEOC is
14 here. You can explain that in jury selection; that EEOC
15 decided to -- you know, got a complaint and decided to bring
16 this retaliation claim on his behalf.

17 But I don't think you need -- I don't think there is any
18 need and neither side should get into whether -- get into the
19 fact that Mr. Duane brought other claims to the EEOC and that
20 the EEOC decided not to pursue those other claims. That's --
21 that is not admissible as of now under Rule 403.

22 Of course, you know, as with every Motion in Limine
23 ruling, it's subject to revisitation at trial. If Mr. Duane
24 takes the stand and says something that opens the door to -- to
25 bringing that information in, it can be revisited.

1 **MS. SANGHVI:** Your Honor, if I might just clarify the
2 ruling. For the NLRB decision, I understand the decision
3 itself does not come in --

4 **THE COURT:** I don't think there is any need to
5 mention the proceedings at all.

6 **MS. SANGHVI:** Thank you.

7 **THE COURT:** So those are excluded.

8 Okay. Number two --

9 **MS. SANGHVI:** I'm sorry, your Honor. The third part
10 of the first motion was also the unemployment insurance
11 benefits application and proceedings.

12 **THE COURT:** Yeah. All right. All that is out.

13 **MS. SANGHVI:** Thank you.

14 **THE COURT:** Let me remind myself what your second
15 Motion in Limine was about.

16 Oh, yeah. That -- that's denied. I don't need to hear
17 argument on that. EEOC's second Motion in Limine is denied.

18 I'm going to IXL's motions. Now, this gets into how we
19 interpret the post and whether we interpret the post narrowly
20 to involve only a complaint about discrimination against people
21 who are not white or Asian or mainstream gay or can it be
22 interpreted more broadly as a complaint about discrimination?

23 I think the answer is it clearly can be interpreted more
24 broadly as a complaint about discrimination. The next
25 paragraph talks about how they don't seem to know or care

1 anything about discrimination.

2 So the Complaint is that IXL discriminates. And one sort
3 of concrete example of that was the sentence about white people
4 and Asian people and mainstream gays, but that -- it was not
5 limited to that. It was a more generalized complaint about
6 discrimination.

7 So I don't see -- I don't know how helpful to his case
8 some of Mr. Duane's complaints are going to be. I think I
9 commented to that effect at the summary judgment hearing. But
10 I don't -- I don't understand how his complaints about
11 instances of discrimination can be excluded.

12 I will say that at some point I could imagine it dragging
13 on so long that it becomes a 403 issue in the sense that it's
14 just duplicative and a waste of time. There will be time
15 limits that will be imposed on you and so you're going to have
16 to make your own decisions about how much time to spend on the
17 reasonableness of Duane's beliefs that -- that IXL
18 discriminated and didn't care about discrimination and didn't
19 know about discrimination. But I don't see how I can exclude
20 it based on your cramped reading of his post.

21 **MR. WILSON:** Your Honor, it's his post, and it's not
22 my --

23 **THE COURT:** It's your cramped reading of his post.

24 **MR. WILSON:** I would disagree with you. And I would
25 say I put those questions to Mr. Duane. And I said, Did you

1 complain about disability discrimination anywhere in this post?

2 And there is no disability discrimination complaint, for
3 instance, in the post. Yet, an overriding basis it seems for
4 what they are claiming is a reasonable basis is somehow
5 disability discrimination is what he was motivated by or what
6 his belief was primarily motivated by.

7 So the reason that this is important to IXL, it should be
8 important frankly to the EEOC, is that retaliation --
9 opposition activity, retaliation is activity that reasonably
10 appraises the employer that -- that the employee is challenging
11 or complaining about an act made unlawful or reasonably
12 believed to be made unlawful so that they can do something
13 about it.

14 And if you can say -- there are no politics if you're
15 white, Asian, straight, mainstream gay. Characteristics like
16 that seem to appear to have a pay and benefits and raises and
17 so on. How does the employer take that, whether it was cramped
18 or not?

19 **THE COURT:** Wait a minute.

20 **MR. WILSON:** And how do they understand that this is
21 a complaint of disability discrimination perhaps?

22 **THE COURT:** But it's in the context of him wanting to
23 get accommodated. I mean, he makes the Complaint just after --
24 or in the middle of this dispute that he's having with his
25 employer about getting accommodated.

1 **MR. WILSON:** And -- and this is where we come back to
2 they initially had an allegation that he was retaliated against
3 for that complaint to his supervisor. They withdrew that.
4 Said the discovery --

5 **THE COURT:** That doesn't mean that he wasn't -- that
6 doesn't mean that in the Glassdoor post he wasn't complaining
7 that he was being discriminated against in that way.

8 **MR. WILSON:** Okay, I'm sorry. But he did not make
9 that complaint at all in the Glass Door post and this is the
10 problem.

11 **THE COURT:** That's your -- I think -- I'm sorry. But
12 I think you've got -- you've just -- you've got blinders and
13 you've developed this very narrow, artificially narrow
14 interpretation of the post that is designed to fit your, you
15 know, litigation position in the case. But it's just -- as a
16 matter of common sense, it's just wrong. And so that -- so
17 that motion is denied.

18 I think in light of the discussion we've had, I think the
19 second Motion in Limine probably should be granted, as long as
20 we're clear about what we're saying.

21 To the extent that Motion in Limine number two is to
22 preclude the plaintiffs from asserting that he was fired for
23 any opposition activity other than the post, I think that
24 should be granted based on the way the plaintiffs have teed up
25 the case.

1 To the extent the Motion in Limine is to exclude evidence
2 of that stuff of his prior complaints and his allegations that
3 he was discriminated against in furtherance of his claim that
4 his belief was a reasonable one, that the beliefs behind the
5 Glass Door post were reasonable, to the extent you're asking to
6 exclude that evidence for that purpose, it should be denied.

7 But I -- I take this motion as seeking to exclude evidence
8 or argument that he was fired for opposition activity other
9 than the Glassdoor post. And to the extent that that's what it
10 is, I think it should be granted.

11 **MR. WILSON:** Correct.

12 **THE COURT:** So with that clarification about the
13 scope of the motion, do you agree? It sounds like you would
14 agree that it should be granted.

15 **MS. SANGHVI:** I -- I think I would require additional
16 clarification as to the scope of the motion because the motion
17 itself --

18 **THE COURT:** Okay. Well, I'm describing the motion --
19 I'm construing the motion as a motion to preclude evidence or
20 argument that he was fired for opposition -- in retaliation for
21 opposition activity other than the Glassdoor post.

22 I think given the way you've teed up the case and given
23 what you've said to me just a second ago, I would assume that
24 you would agree with that motion.

25 **MS. SANGHVI:** I do agree with that, as long as I am

1 permitted, and I am not in violation of that motion, to make
2 any -- to present any evidence or make any argument that he did
3 make complaints to Mr. Keyes; that he did seek counsel of an
4 attorney; that he did all those other things that we classify a
5 term, whether it's the right term, as opposition --

6 **THE COURT:** Bookmark the attorney part for a second.

7 **MS. SANGHVI:** Okay. I'm sorry. Yes.

8 **THE COURT:** But other than that, yes. I mean, that's
9 that --

10 **MS. SANGHVI:** That goes to his reasonable belief.

11 **THE COURT:** Because that goes to the reasonableness
12 of his belief that there was discrimination at IXL.

13 **MS. SANGHVI:** Okay. Yes. As you construe it, that
14 is fine. That does not match the language of defendant's
15 Motion in Limine.

16 **THE COURT:** That may be, but I found the language of
17 both -- in the briefing from both sides to be sort of hard to
18 follow in that regard. It was sort of hard to understand where
19 the line was. That's the line that I'm drawing on that.

20 Okay. So now we'll get to number three, which is the
21 lawyers. I guess my -- I gather that what you are saying is
22 that you don't want to put in at trial the substance of
23 Mr. Duane's communications with his lawyers. You just want to
24 put in the fact that he consulted with a lawyer --

25 **MS. SANGHVI:** Absolutely.

1 **THE COURT:** -- is that right?

2 **MS. SANGHVI:** It is our position that the substance
3 of that communication is, in fact, privileged and that
4 privilege hasn't been waived and, therefore, it's just the fact
5 that he felt the need to consult an attorney that is further
6 evidence of his reasonable belief that he was feeling
7 discriminated.

8 **THE COURT:** So there would be no implications about
9 what the lawyer told him or the lawyer's reaction to any of
10 this.

11 **MS. SANGHVI:** The context of that communication is
12 not at issue here.

13 **THE COURT:** It's just the fact that he decided to
14 consult a lawyer.

15 **MS. SANGHVI:** I'm sorry. I misspoke. I meant the
16 content. I said the context, but I meant the content of that
17 communication.

18 **THE COURT:** Okay. Now, I assume that there are --
19 that people decide to consult with lawyers even when they
20 have -- even when their belief that they have a claim is
21 totally unreasonable; right? People call lawyers all the time
22 and say, I want to sue so-and-so. The lawyer tells them, Well,
23 you can't because you don't have a claim, or I'm not taking
24 that case.

25 So I guess I'm not quite sure why the fact that he decided

1 to consult a lawyer -- I mean, this is an objective test;
2 right? It's not a subjective test. Nobody disputes that he
3 did actually believe that IXL discriminated; right?

4 **MS. SANGHVI:** I believe IXL disputes that, your
5 Honor.

6 **THE COURT:** Well, maybe it does. But it's an
7 objective test; right? It's that it -- his belief has to be
8 reasonable; right?

9 **MS. SANGHVI:** Yes.

10 **THE COURT:** And so I guess I'm not quite clear on how
11 the fact of calling a lawyer makes it more likely that your
12 claim is reasonable or that your belief is reasonable.

13 I think it -- it makes it more likely that he believed in
14 his claim; right? It makes it more likely that he believed in
15 it.

16 But why does calling a lawyer make it more likely that the
17 claim is believable? Excuse me, that the claim is reasonable?

18 **MS. SANGHVI:** I believe it goes to two things
19 importantly.

20 Number one, this is an employee who's communicating with
21 his supervisor. There is a power imbalance there. And I think
22 the context of feeling the need to -- you know, one of the
23 allegations is you couldn't possibly have seen this email as a
24 denial of an accommodation or you couldn't possibly have seen
25 it as Mr. Keyes saying, no, you can't get this accommodation.

1 And Mr. Duane, his assertion is, yes, I reasonably did
2 believe that this was a denial of an accommodation so much so
3 that I felt the need to go and consult an attorney to say, Am I
4 within my rights here? Am I within the ADA to --

5 **THE COURT:** But it seems to me the only thing that
6 would help show that Mr. Duane's belief was reasonable was --
7 would be his lawyer's response to that, which is, yeah, you've
8 got a claim here. Of course, you know, letting you work from
9 home half the time is -- falls within the range of reasonable
10 accommodations; right? That would help show -- you could still
11 have an argument about whether the lawyer's advice was correct,
12 but that would help show that his belief was reasonable.

13 But the fact that he went to a lawyer -- again, people get
14 fired from their jobs and go to lawyers all the time. And the
15 fact that they went to a lawyer doesn't necessarily say
16 anything about the reasonableness of their position vis-a-vis
17 their employer.

18 **MS. SANGHVI:** Your Honor, Mr. Duane went to a lawyer
19 because he -- in order for us to be able to demonstrate that he
20 had a reasonable belief that he was opposing what he believed
21 to be discriminatory behavior, the content of what the lawyer
22 tells him -- the lawyer could have been right or wrong. That
23 doesn't matter. The content of what the lawyer tells him is
24 irrelevant for purposes of the reasonable belief --

25 **THE COURT:** And if we're not hearing what the lawyer

1 told him, then I don't -- I think that to the extent it's
2 relevant, it's very, very marginally so. I'm not even sure
3 it's relevant at all.

4 **MS. SANGHVI:** He -- I mean, it goes to the fact that
5 he believed he was being denied an accommodation; that he
6 believed he needed to consult an attorney to understand his
7 legal rights --

8 **THE COURT:** I know, but you're talking about his
9 subjective belief. You're not talking about the objective
10 reasonableness of his belief.

11 Do you have any other argument?

12 **MS. SANGHVI:** I believe that the jury should be able
13 to consider both his subjective belief as well as the objective
14 reasonableness of his behavior.

15 **THE COURT:** Well, I think that if -- if his
16 subjective belief is called into question, if IXL does
17 something at trial that suggests -- that implies or suggests or
18 argues that he never actually believed it himself, then they've
19 opened the door for that to come in.

20 No, in fact, we -- he did believe it. He actually went to
21 consult a lawyer about it. And then maybe he would want to --
22 and then maybe the contents of the discussions could be
23 relevant to the extent -- either they are not privileged or he
24 wants to waive the privilege or to the extent he hasn't already
25 waived the privilege.

1 I think I saw a communication between Duane and some
2 coworker in which he described what his lawyer told him, so I
3 would assume he's actually waived the privilege.

4 **MS. SANGHVI:** It has been our argument, and we made
5 this argument to Magistrate Illman that it wasn't -- he didn't
6 communicate the specific advice. He communicated generally,
7 yes, I saw a lawyer and the lawyer told me I have a good case.
8 That does not constitute the --

9 **THE COURT:** Well, that can't possibly come in
10 without -- it seems to me that that can't possibly come in --
11 unless they open the door to it, that can't come in unless
12 you've disclosed more about the communications from the lawyer
13 to Mr. Duane.

14 **MS. SANGHVI:** Your Honor, I mean, the way I've read
15 every single piece of writing from defendants on this case is
16 they absolutely question Mr. Duane's subjective understanding
17 of whether or not -- I mean, they consistently have said, even
18 today, that he couldn't possibly have thought that there was
19 discrimination here. That is questioning his subjective
20 understanding of reasonable --

21 **THE COURT:** At trial are you going to dispute whether
22 he subjectively believed that he was being discriminated
23 against?

24 **MR. WILSON:** No.

25 **THE COURT:** Okay. Then the motion is denied --

1 sorry. The motion is granted.

2 And, obviously, it's without -- you know, the door --
3 depending on the case that IXL puts on, the door could be
4 opened to that coming in.

5 **MS. SANGHVI:** Your Honor?

6 **MR. MAREK:** Your Honor, could I be heard on that for
7 one second?

8 **THE COURT:** Briefly.

9 **MR. MAREK:** I understood that the gist of their
10 argument was that he was fired because he lied. And the lies
11 that are pointed to by Mr. Mishkin, among many, are that he
12 lied when he said there was discrimination.

13 If they are saying he lied, that seems like it is directly
14 challenging his --

15 **THE COURT:** Well, as I said, if -- if they put on
16 anything at trial that implies or argues that Duane did not
17 actually believe -- did not actually have a subjective belief
18 that he was discriminated against, then that -- that opens the
19 door for this evidence, that he consulted a lawyer.

20 **MR. MAREK:** Okay. And that would include this notion
21 that he lied?

22 **THE COURT:** I don't know. I don't fully understand
23 what you're saying. We'll see how the evidence comes in.

24 As it stands now, because IXL has made clear that they do
25 not intend to call into question Duane's subjective belief that

1 he was discriminated against, the motion is granted.

2 **MR. MAREK:** Okay. Thank you, your Honor.

3 **THE COURT:** Now, number four was a motion that -- I
4 guess it wasn't totally clear to me what subsequent conduct the
5 plaintiffs want to bring in and why the subsequent conduct
6 would be relevant. So I would need a little better
7 articulation from you on that.

8 **MR. LEE:** Yes. Thank you, your Honor.

9 So the EEOC's position is that defense Motion in Limine
10 number four was overbroad because when you look at the language
11 "IXL human resource personnel, their training, policies in
12 effect, complaints of discrimination or any changes or
13 developments at IXL that occurred after January 8, 2015,"
14 that's overbroad.

15 So, for example, number one --

16 **THE COURT:** My question that I'm asking you is what
17 do you want to put in at trial about what happened at IXL
18 afterwards?

19 **MR. LEE:** Right. Thank you, your Honor.

20 So the first thing we want to do is we want to be able to
21 provide evidence, offer evidence of what Mr. Mishkin did after
22 Mr. Duane was fired in terms of Mr. Duane's discrimination
23 complaints. Whether or not Mr. Mishkin actually, in effect --
24 in effect, made reasonable inquiry, asked his HR people to look
25 into the allegations raised by Mr. Duane --

1 **THE COURT:** So your position is that the evidence
2 will show that Mr. Mishkin didn't make any serious inquiry into
3 Mr. Duane's allegations of discrimination.

4 **MR. LEE:** That's correct. And we think that goes
5 directly to the evidence of pretext, whether his non -- alleged
6 non-discriminatory reason that Mr. Duane had lied in his
7 Glassdoor post about claims of discrimination had any basis.
8 And we believe that that's evidence of pretext.

9 We think also, your Honor, post January 8th, 2015 --

10 **THE COURT:** So in other words -- could I put a little
11 flesh on that? So in other words, your argument is, look, if
12 IXL were telling the truth that the -- you know, they weren't
13 firing Duane because of his -- because of the protected
14 activity. And instead they were firing him for his other
15 complaints about the other parts of the post; right?

16 Because that's been their argument, right, is that there
17 is this post and some of it is complaining -- some of it is --
18 some of the post is protected activity and other parts of the
19 post are just general complaints about the company that aren't
20 protected; right? And they fired him for the aspects of the
21 post that are not protected.

22 Do I have that right? Am I remembering that right?

23 **MR. WILSON:** That's very well stated.

24 **THE COURT:** Okay. And so what your response is,
25 well, if that were true, then they would -- they would have

1 fired him, but at least then they would have looked into
2 whether his complaints about discrimination were true and
3 looked into whether they ought to do anything about that? Is
4 that your argument?

5 **MR. LEE:** I think that is the first part, your Honor.

6 I think that what the testimony -- excuse me, what the
7 evidence already shows is Mr. Mishkin indicated at his
8 deposition under oath that he decided to fire Mr. Duane the day
9 before he met actually with Mr. Duane, because all the
10 allegations in the Glassdoor post were demonstrably false,
11 maliciously so.

12 **THE COURT:** Okay.

13 **MR. LEE:** And then I think we've also established
14 that he did nothing to actually investigate those claims of
15 discrimination in the Glassdoor post or the ones that Mr. Duane
16 raised with Mr. Keyes before he fired him on January 8th. And
17 we think that his steps after --

18 **THE COURT:** Say that -- back up and repeat that last
19 point.

20 **MR. LEE:** The last point was Mr. Mishkin did not do
21 anything to investigate the claims of discrimination in
22 Mr. Duane's Glassdoor post or the allegations that Mr. Duane
23 had raised with Mr. Keyes in the meeting which led to
24 Mr. Mishkin scheduling this meeting on January 8th, 2015 with
25 Mr. Duane. He didn't do anything to look behind those -- those

1 complaints. He just concluded himself that they were
2 demonstrably false.

3 And we think that that, coupled with the evidence of what
4 he did or didn't do after January 8th, 2015, is equally
5 probative of the evidence of protection.

6 **THE COURT:** So he didn't look into -- he didn't look
7 into Duane's claims after firing Duane. Is there any other
8 post firing conduct that you believe should come in?

9 **MR. LEE:** Well, we think that that evidence also
10 leads to a couple of other relevant considerations, your Honor.

11 If I may, we think that that type of evidence and what
12 Mister -- excuse me, what IXL did in response to EEO complaints
13 is relevant to the -- our entitlement to punitive damages. We
14 also think that what they did or didn't do in terms of
15 training their HR staff to investigate complaints, remedial
16 steps, et cetera, is also relevant to the EEOC's claim for
17 injunctive relief.

18 **THE COURT:** Well, the injunctive relief stuff is not
19 going to be in front of the jury; right?

20 **MR. LEE:** Correct.

21 **THE COURT:** So let's limit ourselves to what is going
22 to be -- what's going to be in front of the jury and what needs
23 to go before the jury.

24 **MR. LEE:** Okay. And the last piece, your Honor --

25 **THE COURT:** So number one is evidence that Mishkin

1 didn't look into Duane's claims after -- of discrimination
2 after firing him.

3 What was the second -- the point relevant to punitive
4 damages is what?

5 **MR. LEE:** Whether or not -- any action in response to
6 Mr. Duane's complaints of discrimination demonstrated a
7 reckless indifference to his federally protected rights; that
8 being free from discrimination or retaliation.

9 **THE COURT:** Okay.

10 **MR. LEE:** We also believe --

11 **THE COURT:** What other piece of evidence, other than
12 failure to look into his discrimination claims after firing
13 him, what other post firing piece of evidence, if any, do you
14 want in?

15 **MR. LEE:** The other piece, your Honor, is I think my
16 understanding is Mr. Mishkin has claimed that Mr. Duane's
17 Glassdoor post was malicious, was designed to hurt the
18 company's ability to recruit new employees.

19 We want to be able to present evidence that IXL doubled in
20 size after Mr. Duane's firing on January 8th, 2015 and so,
21 therefore, it didn't harm IXL's ability to recruit talent.

22 **THE COURT:** What does that have to do with whether he
23 was terminated in retaliation for the protected part of the
24 Glassdoor post?

25 **MS. SANGHVI:** Your Honor, part of whether or not it's

1 protected, IXL has argued that it's both not borne of a
2 reasonable belief, but also that it's -- it was done in an
3 unreasonable manner by having posted on Glassdoor because it
4 harms the recruitment, to demonstrate that there -- it wasn't
5 an unreasonable manner because it didn't harm their recruitment
6 because they doubled in size and had no difficulty recruiting,
7 which is what Mr. Mishkin admits to.

8 **THE COURT:** That evidence, I think, will -- under 403
9 that evidence does not come in.

10 I mean, and again, it may be -- depending on what people
11 say at trial, it might become more relevant than it seems now,
12 but it -- it seems clearly tangentially relevant now to what
13 this trial is about. So that evidence -- that evidence as of
14 now is not coming in under 403.

15 **MS. SANGHVI:** Just so I understand correctly when you
16 say it might become relevant, if Mr. Mishkin were to testify
17 that this was so harmful because Glassdoor is our main way of
18 recruiting employees and this was a very harmful way of hurting
19 the company, are we not allowed to then -- doesn't that open
20 the door?

21 **THE COURT:** I think probably not. I mean, because
22 the -- then you're getting into a discussion of, well, how
23 many -- how many people would IXL have been able to recruit
24 absent the post.

25 I mean, I think you -- you all are starting to dance on

1 the head of a pin here a little bit about an unimportant issue.

2 I mean, Duane criticized the company on Glassdoor. The
3 company doesn't like it. Obviously, the company doesn't like
4 it. Obviously, the company is going to believe that it's going
5 to hurt the company to be criticized on Glassdoor. End of
6 story. We don't need to talk about it any more than that.
7 That's going to be upsetting for the company.

8 We're not going to have a trial about just how harmful is
9 it to post negative information about a company on Glassdoor.
10 That's just too tangential from what this case is about. So
11 that -- that does not -- that will not come in.

12 I mean, again, it's all subject to the door opening,
13 depending on what comes in at trial. But based on what I'm
14 sensing is going to come in at trial, that's not -- that's not
15 relevant.

16 So let me ask you again. Other than the idea that Mishkin
17 didn't look into Duane's claims after Duane got fired, which I
18 understand you're arguing that that's -- that has relevance to,
19 I guess, punitive damages, if nothing else, what else? Any
20 other post firing evidence that we need to talk about?

21 **MR. LEE:** Well, your Honor, I think I understand that
22 after Mr. Duane was fired, there were a number of different
23 conversations between Mr. Mishkin and amongst the HR personnel
24 as to the legality of what had just happened. And we would
25 like to elicit evidence --

1 **THE COURT:** I thought you just said he didn't do
2 anything.

3 **MS. SANGHVI:** Sorry, your Honor. Just to be clear.
4 Their Motion in Limine, part of the problem is I think there
5 was -- it was a Motion in Limine that was hard for us to be
6 able to understand which elements or which pieces of evidence
7 they were trying to exclude.

8 **THE COURT:** Right. Which is why I'm trying to find
9 out from you now. Because you are the ones who are wanting to
10 put in evidence of post firing conduct, and I want to get a
11 list from you about what that evidence is so we can talk about
12 whether it's admissible.

13 **MS. SANGHVI:** I think the changes in HR personnel.
14 So they had multiple changes in HR personnel prior to
15 January 8th, 2015.

16 **THE COURT:** That was the date that Mr. Duane was
17 fired?

18 **MS. SANGHVI:** Yes, your Honor.

19 **THE COURT:** Okay. So that's -- okay. And you're
20 going to tell a story about how HR was a disaster and the
21 company wasn't serious about protecting the rights of workers
22 and stuff. I get that. That seems like it's all fair game.
23 I'm not even sure they've moved to exclude that.

24 But -- but -- so it sounds like that was mostly before
25 January 8th?

1 **MS. SANGHVI:** Right. And some of it does happen
2 after as well.

3 **THE COURT:** Okay. What happened after? Tell me
4 the -- in actual descriptive words what is the evidence that
5 you want to get in? Don't characterize it. Tell me what is
6 the evidence you want to get in about something that happened
7 post firing.

8 **MS. SANGHVI:** Number one, Lenore Ockerberg was --

9 **THE COURT:** Sorry. Who?

10 **MS. SANGHVI:** Lenore Ockerberg was involved in
11 operations and HR. She later gets fired, but she played a role
12 in the events that gave rise to Mr. Duane's termination.

13 **THE COURT:** So she played a role in the events that
14 gave rise to his termination and she got fired sometime after
15 January 8th?

16 **MS. SANGHVI:** Correct.

17 **THE COURT:** Why did she get fired?

18 **MS. SANGHVI:** IXL alleges that it was some ethical
19 violation.

20 **THE COURT:** Okay. And do we know what that was?

21 **MS. SANGHVI:** They've alleged that she used company
22 software for personal use and that she told people that she was
23 hoping to get a big severance package.

24 **THE COURT:** Okay. And so she wasn't fired for any --
25 there is no evidence that she was fired for any -- for reasons

1 that relate to Mr. Duane's termination.

2 **MS. SANGHVI:** There is no evidence of that, your
3 Honor.

4 **THE COURT:** There is no evidence of that. Okay.

5 **MS. SANGHVI:** Just to be clear, she might be called
6 as a witness here. So to be able to give some context, I don't
7 want to be in a situation where I have a witness on the stand
8 and I can't say sort of the end of her employment with IXL.

9 Similar with Maricela Prado, another witness that was an
10 HR representative, who is very integral to all of the events
11 giving rise to Mr. Duane's termination. She then leaves.

12 In terms of just telling an accurate and full story to the
13 jury, I don't want to have to just stop talking after
14 January 8th, 2015.

15 **MR. WILSON:** We haven't moved for preclusion of dates
16 of employment and things like that.

17 And Ms. Ockerberg, Ms. Prado, she left to take a director
18 of HR position somewhere else. We're not moving to preclude
19 that.

20 We're moving to preclude post termination allegations that
21 we changed our HR policies to prevent discrimination in the
22 future, which I would assume that that's something that the
23 EEOC would not be bothered by, but it is a subsequent remedial
24 measure. Any future complaints by any employee --

25 **THE COURT:** But this is why I'm trying to pin them

1 down on what they want to -- what evidence they want to
2 present; right?

3 So I -- I don't think -- I mean, if somebody from HR who
4 was involved in Duane's firing was terminated sometime down the
5 line for something unrelated to Duane's firing or something
6 unrelated to their sort of generally doing a bad job at
7 policing discrimination, you know, I don't think that is
8 relevant to this trial.

9 **MS. SANGHVI:** Your Honor, if I may just make one sort
10 of general point.

11 I think we are somewhat disadvantaged here in that we are
12 responding to -- it's defendant's Motion in Limine.

13 **THE COURT:** I know, but that's why -- this is your
14 case. This is your lawsuit that you've brought on -- brought.
15 This is your case. We're a week from trial and you should know
16 by now what evidence you want to put on at trial.

17 So I'm asking you what evidence of post firing conduct you
18 want to put on so we can rule on whether you can put it on.
19 You should know that by now.

20 So the reason for Ockerberg's firing, it doesn't -- it
21 does not seem -- that should be excluded under 403.

22 So the only thing you have right now is the -- the only
23 thing you have been able to list for me so far, and we've
24 now -- it feels like we've now spent a half hour with me asking
25 you to identify the evidence that you want to put in, is the

1 idea that Mishkin didn't look into Duane's claims after firing
2 him.

3 **MS. SANGHVI:** I will also add there is the general
4 category of complaints of discrimination. And I think that
5 Glassdoor's awareness of -- excuse me. IXL's awareness of
6 Glassdoor complaints that come in after January 8th, 2015 can
7 be relevant both to punitive damages -- well, mainly to
8 punitive damages. To the extent that Mr. Mishkin testifies
9 we've never had to investigate any -- we've never received any
10 complaints of discrimination. We've never had any concerns
11 with discrimination at all in our company. Then Glassdoor --

12 **THE COURT:** Did he say that at his deposition?

13 **MS. SANGHVI:** I believe he did, yes.

14 **THE COURT:** Where?

15 **MS. SANGHVI:** I'm sorry, your Honor. I don't have
16 the transcript with me.

17 **THE COURT:** You know, this really is not -- what we
18 should not be doing here is speculating about various things
19 that he might say and reserving the right to put in things --
20 evidence that would respond to things that he might or might
21 not say.

22 The purpose of this is to sort of -- there will at trial
23 be evidentiary issues. Evidentiary issues will come up. Maybe
24 he'll say something so stupid like that at trial that would
25 open the door to other complaints of discrimination about IXL

1 on Glassdoor and elsewhere. I'm sort of doubting that he will.
2 And if he didn't say it in his deposition, then, you know --
3 then you have to think of another theory of relevance.

4 But right now for your case-in-chief do you have anything
5 other than Mishkin didn't look into claims after firing Duane,
6 for your case-in-chief?

7 **MS. SANGHVI:** And that's assuming that any Glassdoor
8 complaints after January 2015 would not come in unless he opens
9 the door to them.

10 **THE COURT:** Well, if you have a theory for
11 admissibility of other Glassdoor complaints, other than
12 Mr. Mishkin might say that there has never been a complaint of
13 discrimination against Glassdoor, if you have a theory for
14 their admissibility, now is the time to tell me what it is.

15 **MS. SANGHVI:** No, your Honor, then.

16 **THE COURT:** Okay. So then the evidence that you want
17 to put -- include in your case-in-chief is this evidence that
18 Mishkin didn't look into his claims -- look into Duane's claims
19 after firing him, and you believe that that is -- helps show
20 that IXL does not -- has not taken -- did not take
21 discrimination related claims seriously, which would be
22 relevant to punitive damages. Is that -- that's the theory of
23 admissibility.

24 **MR. LEE:** It would also be relevant to the evidence
25 of pretext, your Honor, as to whether or not

1 Mr. Mishkin actually believed or had a basis to believe that
2 Mr. Duane had maliciously lied in the Glassdoor post. We think
3 that's evidence of pretext.

4 **THE COURT:** Well, his not investigating it would be
5 consistent with his belief that he maliciously lied, I guess;
6 right?

7 **MR. LEE:** It's actually a balance. It's
8 Mr. Mishkin's failure to look into the actual substance of
9 Mr. Duane's --

10 **THE COURT:** Before concluding that he maliciously
11 lied.

12 **MR. LEE:** Correct.

13 **THE COURT:** Okay. I understand.

14 **MR. WILSON:** Your Honor, if they are disputing -- if
15 their theory is that Mr. Mishkin did not believe the Glassdoor
16 post was malicious and, therefore, didn't fire him for it, then
17 we're done here. I don't understand this pretext argument.

18 I don't understand how you can say --

19 **THE COURT:** What they are saying is they never
20 investigated it.

21 **MR. WILSON:** Pre-firing.

22 **THE COURT:** Pre-firing or post firing.

23 **MR. WILSON:** Well --

24 **THE COURT:** Right? Because part of your argument is
25 we didn't fire him because he was complaining about

1 discrimination. We take discrimination seriously at IXL. And
2 that's not why we fired him. We fired him because of this
3 other stuff.

4 And then so the question is, Oh, well, did you ever do an
5 investigation to see if his complaints about discrimination
6 were valid? And if the answer is no, then that undercuts your
7 defense.

8 **MR. WILSON:** He was examined on that. He testified
9 on that. They had brought that up.

10 But, again, this is about whose burden it is. It is not
11 our burden to prove anything that -- or disprove their
12 case-in-chief in that way. It's a but-for causation.

13 I want to make this clear because of what you just said
14 and I don't -- I don't want to --

15 **THE COURT:** Wait. Hold on. Sorry to interrupt.

16 I'm going to ask that we take a five-minute break because
17 I had some lunch plans that I'm going to text people and
18 cancel. Then I'll be back in about five minutes. Okay?

19 **MR. WILSON:** Sure. Thank you, Judge.

20 **MS. SANGHVI:** Thank you, your Honor.

21 **THE CLERK:** Court is in recess.

22 (Whereupon there was a recess in the proceedings
23 from 11:45 a.m. until 11:53 a.m.)

24 **THE COURT:** Okay. So I interrupted you for the
25 break. Do you want to continue whatever you were saying?

1 **MR. WILSON:** No. Thank you, Judge. I thought about
2 it and I think it's clear what I was trying to say has already
3 been said.

4 **THE COURT:** Okay. So this always happens at the
5 pretrial conference. It's like once we flesh out what these
6 motions are really about and what evidence we're really talking
7 about, it becomes hard to know whether to deny or grant the
8 motion as properly understood.

9 But I think for this one it -- you know, unless -- I guess
10 I'll ask you one more time. Any other post trial conduct that
11 you think should be part of your case-in-chief that we should
12 talk about? Because the -- I will allow in the evidence about
13 the -- IXL's efforts or lack of efforts to investigate Duane's
14 claims of discrimination after firing him.

15 Any other post trial -- post firing evidence of IXL's
16 conduct that you believe should be part of your case?

17 **MS. SANGHVI:** As it relates to jury -- the jury trial
18 portion of it, no, your Honor.

19 **THE COURT:** Okay. So then the -- I guess the -- I
20 will say that the motion is denied. I'm sort of construing the
21 motion as a motion to exclude the post firing conduct that the
22 plaintiffs wish to present. And the post firing conduct that
23 they wish to present is the failure to investigate, and that
24 motion is denied. Make sense?

25 **MS. SANGHVI:** Yes, your Honor.

1 **MR. WILSON:** Yes, your Honor, as well. I mean, as
2 long as we're all clear and we're not going to have a change
3 once we get to trial. Frankly, the motion is about all the
4 things that they have just sort of disclaimed or said --

5 **THE COURT:** You're arguing about whether it matters
6 whether your motion is denied or granted?

7 **MR. WILSON:** No.

8 **THE COURT:** Okay.

9 **MR. WILSON:** It matters because a lot of the
10 exhibits, for instance, have post termination discussions or
11 complaints on Glassdoor and I wanted to make sure that --

12 **THE COURT:** By the way, were any of the complaints
13 from people who Duane claimed were discriminated against?

14 **MR. WILSON:** No.

15 **THE COURT:** Okay.

16 **MR. LEE:** Your Honor, could we respond to that? It
17 wasn't a Glassdoor posting, your Honor. But we have deposition
18 testimony from Ms. Milin, who claims she discussed the issue of
19 not being able -- IXL not being able to retain female employees
20 in the organization, and there was a discussion in her
21 deposition.

22 Would we be permitted to offer that?

23 **THE COURT:** Well, I mean, every law firm in the
24 country has difficulty retaining female associates and
25 partners. I mean, so I can't answer that in the abstract.

1 But the mere fact of difficulty retaining female
2 employees, it does not seem to me on its own is supportive of a
3 discrimination claim.

4 **MR. LEE:** But Ms. Milin was in conversations with
5 Mr. Duane throughout his employment and this was one of those
6 issues that they talked about, lack of diversity and those
7 types of issues.

8 **THE COURT:** Is she on the Witness List?

9 **MR. LEE:** She is, your Honor. She's one of the
10 witnesses that we are designating her deposition testimony
11 right now.

12 **MR. WILSON:** Your Honor, I believe counsel is talking
13 about pre-termination discussions. That has nothing to do with
14 post termination complaints of discrimination.

15 Ms. Milin has never complained of discrimination --

16 **THE COURT:** I think they are talking about something
17 different now.

18 **MR. WILSON:** Okay. Okay.

19 **MR. LEE:** We just want to be able to offer that
20 evidence, your Honor, because --

21 **THE COURT:** I don't think I can answer that in the
22 abstract without knowing what her testimony would be.

23 **MR. LEE:** All right.

24 **MS. SANGHVI:** I think we can handle that at
25 designation time.

1 **THE COURT:** Okay. So that's the Motions in Limine.
2 I'll issue a short written ruling describing the rulings.

3 Now, on the issue of Jury Instructions. Is there -- the
4 question is whether -- is how to describe Title VII. And is
5 there any other Jury Instruction issue that needs to be hashed
6 ought before the start of trial?

7 **MS. SANGHVI:** Your Honor, we -- plaintiffs had
8 offered some definitions. To be honest, I don't know for a
9 fact if that would need to be a part of my opening, but to the
10 extent that there is an agreed-upon definition that we're
11 together to use for a term, or it might be even a part of
12 voir dices, that might be an area that has some relevance prior
13 to the start of trial.

14 **THE COURT:** Okay. And there is a dispute about those
15 definitions?

16 **MS. SANGHVI:** Yes, your Honor.

17 **THE COURT:** Okay.

18 (Brief pause.)

19 **THE COURT:** I don't know -- you know, I don't know if
20 this is something -- I don't know if it is appropriate for me
21 to be defining these terms for the jury. I mean, I think
22 that -- and moreover, I think for the most part what matters is
23 what people like Mr. Duane understood himself to be saying when
24 he said "mainstream gay," for example.

25 So I don't -- I mean, we could -- I certainly would not

1 want to define these terms in advance for the jury. And, you
2 know, we can talk towards the end of trial about whether any
3 definitions need to be given, but I don't think there should be
4 any Court -- Court adopted definitions of those terms going
5 into the trial.

6 **MS. SANGHVI:** Could I ask another question, your
7 Honor? I believe on Wednesday we have due to you a joint list
8 of names, acronyms, terms used in the case.

9 **THE COURT:** For the court reporter?

10 **MS. SANGHVI:** Yes. It's for the court reporter. I
11 wasn't sure. And so it's a point of clarification, if any of
12 that gets read to the jury or asked with the jury.

13 **THE COURT:** No. That's just to make the court
14 reporter's job easier.

15 **MS. SANGHVI:** I think that's a great idea.

16 **THE COURT:** So on the -- on Title -- on the issue of
17 Title VII. I have a question I guess for you, Ms. Sanghvi,
18 which is, am I remembering correctly that the Justice
19 Department took the position that sexual orientation was
20 included in Title VII under the Obama administration and
21 recently changed positions under the Trump administration?

22 **MS. SANGHVI:** You are correct, your Honor. The
23 Justice Department is separate and apart from the EEOC --

24 **THE COURT:** I understand. I'm just -- and were
25 those -- were those in briefs to the Supreme Court?

1 **MS. SANGHVI:** Certainly in briefs in *Zarda* to the
2 Second Circuit that dichotomy between the EEOC and the
3 Department of Justice became extraordinarily clear.

4 **THE COURT:** Okay. But the EEOC continues to take the
5 position that sexual orientation is included.

6 **MS. SANGHVI:** The EEOC most certainly continues the
7 position that both sexual orientation and gender identity are
8 covered by Title VII under the rubric of sex discrimination.
9 That has been our longstanding and very publicly held opinion
10 and position.

11 **THE COURT:** Okay. And so the idea is that -- the
12 reason it's important to define what Title VII prohibits is
13 that the retaliation claim can only be based on complaints by
14 Duane about Title VII violations?

15 **MS. SANGHVI:** Title VII or ADA, since this is under
16 both. Yes, your Honor.

17 **THE COURT:** Right, right. So we want to be -- so we
18 need to -- and there is going to be discussion about which
19 aspects of his complaining was -- were complaining about things
20 that violate Title VII and which aspects of his complaining
21 were just generalized sort of, you know, disgruntled worker
22 type complaints.

23 **MS. SANGHVI:** Yes, your Honor.

24 The only thing I would add to that is it is established
25 law that Mr. Duane had to be -- not to beat a point here, but

1 he had to be borne of a reasonable belief. And that reasonable
2 belief could be inaccurate or it could just be based on what he
3 understands the law to be. And often the EEOC's public
4 position informs people's reasonable belief.

5 And so it is not unreasonable -- regardless of if the
6 Supreme Court has not said gender identity and sexual
7 orientation are covered under Title VII pursuant to sex
8 discrimination, that isn't the only measure of whether or not
9 he was reasonable in understanding that this was.

10 **THE COURT:** No, but let me -- I'm not sure I
11 understand what you're saying, because I -- I assume that
12 that -- it's not that Mr. Duane needs to know that the thing
13 that he is complaining of is prescribed by Title VII --

14 **MS. SANGHVI:** Correct.

15 **THE COURT:** -- right?

16 **MS. SANGHVI:** Of course not, right.

17 **THE COURT:** So it doesn't matter whether he knows or
18 doesn't know that the EEOC takes the position that sexual
19 orientation is covered by Title VII; right?

20 **MS. SANGHVI:** That's correct. It's just -- it goes
21 to the reasonableness. If his complaint was that they
22 discriminated against me because I'm short, that might not be a
23 reasonable thing that's covered under Title VII.

24 **THE COURT:** I don't think -- I think you're blurring
25 two different concepts. One is you have to complain of

1 discrimination that's prohibited by Title VII; and, two, is
2 that your belief that that discrimination is happening has to
3 be reasonable.

4 **MS. SANGHVI:** Yes, your Honor.

5 **THE COURT:** It's not an inquiry into whether it was
6 reasonable for somebody to believe that this was prohibited by
7 Title VII.

8 See, I think you're blurring those two concepts in what
9 you're saying. I think he has to be complaining about
10 something that happens to be prohibited by Title VII.

11 **MS. SANGHVI:** I agree with that, your Honor.

12 **THE COURT:** And so he was complaining about a variety
13 of things and we have to decide whether it was prohibited by
14 Title VII. Because if he was complaining about something that
15 wasn't prohibited by Title VII, then it doesn't matter whether
16 his belief was reasonable or not; right?

17 **MS. SANGHVI:** That's correct. But my -- I guess
18 my --

19 **THE COURT:** You discriminated against me because I'm
20 short and I believe that violates the law. I believe that
21 violates Title VII.

22 It doesn't matter whether that belief was reasonable or
23 not. That doesn't matter. All that matters is discriminating
24 against someone because they are short is not a violation of
25 Title VII. Therefore, it was not protected activity.

1 Therefore, there is no retaliation claim; right?

2 Do I understand that right?

3 **MS. SANGHVI:** That is correct for that example.

4 **THE COURT:** Okay.

5 **MS. SANGHVI:** I guess my reaction is to the
6 defendant's position that the fact that --

7 **THE COURT:** Forget about the defendant's position for
8 a second.

9 **MS. SANGHVI:** Okay.

10 **THE COURT:** I think you're getting bolluxed up in
11 worrying too much about what the defendant is saying. I'm just
12 trying to understand with you here what the inquiry is, what
13 the inquiry is for the jury.

14 And the inquiry for the jury is whether Mr. Duane was
15 retaliated against for complaining about something -- about IXL
16 doing something that was prohibited by Title VII.

17 **MS. SANGHVI:** Correct.

18 **THE COURT:** Whether he knew it was prohibited by
19 Title VII or not doesn't matter. But we need to tell the jury:
20 Here are the things that are prohibited by Title VII and it's
21 for you to decide whether Mr. Duane was complaining about those
22 things; and if so, whether he had a reasonable belief in his
23 complaints about those things; and if so, whether IXL fired him
24 because of his complaints about those things; correct?

25 **MS. SANGHVI:** Correct.

1 **THE COURT:** Okay. So we do need to -- we need to
2 define what is prohibited by Title VII for the jury so the jury
3 can sort that out.

4 However, Mr. Duane's -- the EEOC's prior statement, public
5 statements about whether sexual orientation is included within
6 Title VII don't matter; right?

7 I mean, they may matter to the legal question. It may be
8 that I give some deference to EEOC on the legal question, but
9 it doesn't matter for the jury or for Mr. Duane's state of mind
10 whether the EEOC has previously taken the position that sexual
11 orientation is included in Title VII; right?

12 **MS. SANGHVI:** No, your Honor. I believe that
13 Mr. Duane's understanding that this was something that was
14 covered by Title VII, and I am opposing something that is
15 covered by Title VII, does play a role here.

16 **THE COURT:** I don't understand -- I guess I don't
17 understand that. I mean, he -- yeah.

18 So explain that to me. I'm not getting that. Because as
19 a matter of law, it either is or isn't; right?

20 Let's go to the Jury Instructions.

21 **MS. SANGHVI:** I think it is -- the question is
22 whether it was reasonable for Mr. Duane to believe that gender
23 identity and sexual orientation is covered by Title VII. If
24 the argument is --

25 **THE COURT:** I thought -- I thought the question --

1 the reasonable belief inquiry is: Was it reasonable to believe
2 that the employer was actually doing what he is complaining of
3 as a factual matter?

4 **MS. SANGHVI:** Yes. And what -- but what the employer
5 is doing, whether it violates Title VII or ADA, and whether he
6 had a reasonable belief that what the employer was doing was
7 discriminatory is relevant.

8 **THE COURT:** Where is the instruction on -- where is
9 the instruction on reasonable belief?

10 **MR. WILSON:** 37 is -- sets out the parties'
11 respective elements of retaliation. I believe that's the one
12 that discusses how we frame reasonable belief.

13 So there are two sets of number 37. We start on page --

14 **THE COURT:** 27?

15 **MR. WILSON:** Yeah, 27 of the document.

16 **THE COURT:** Okay.

17 (Brief pause.)

18 **THE COURT:** I want to go see -- I want to look up the
19 model Jury Instruction.

20 (Brief pause.)

21 **THE COURT:** 10.8 is the model?

22 **MR. WILSON:** It is -- sorry. It is 10.8, yes.

23 **THE COURT:** Let me pull that up.

24 (Brief pause.)

25 **THE COURT:** So the version of the model instructions

1 that I've pulled up doesn't -- I don't think has a 10.8.

2 **MR. WILSON:** It does in the most recent.

3 **THE COURT:** Maybe I'm not in the most recent then,
4 because the revised version just came out.

5 **MS. SANGHVI:** Yes.

6 **MR. WILSON:** It starts at Page 229 of that document,
7 if you're in the right document.

8 **THE COURT:** I must have -- I must have an outdated
9 version. That's -- Page 229 for me is age discrimination.

10 **MR. WILSON:** I have a copy of it, if you would like
11 to see it, Judge.

12 **THE COURT:** That would be great.

13 **MS. SANGHVI:** Your Honor, also in our proposal to
14 you, any language that is not bold or italicized is derived
15 from the model instructions. I know that's still a little
16 confusing, but...

17 **MR. WILSON:** I'm going to bring you my iPad that
18 has... What page did I say? 227?

19 **MS. SANGHVI:** I didn't hear. Sorry.

20 **MR. WILSON:** Here it is. This and that (indicating).

21 **MS. SANGHVI:** Uh-huh.

22 **THE COURT:** So the part that's bolded -- part of the
23 -- I mean, most of this instruction is bolded and italicized.

24 **MS. SANGHVI:** Yes, your Honor. As to the reasonable
25 belief.

1 (Whereupon an iPad was tendered to the Court.)

2 (Brief pause.)

3 **THE COURT:** Okay. So 10.8 says that:

4 "Plaintiff seeks damages for retaliation.

5 Plaintiff has the burden of proving each of the
6 following elements.

7 "One, the plaintiff opposed an unlawful
8 employment practice.

9 "Two, the employer subjected the plaintiff to an
10 adverse employment action.

11 "And, three, the plaintiff was subjected to the
12 adverse employment action because of opposition to an
13 unlawful employment practice" -- all right? -- "or
14 participation in a protected activity.

15 "Plaintiff is subject to an adverse employment
16 action because of participation in a protected
17 activity if the adverse action would not have occurred
18 but for that participation."

19 Where is the part that defines "protected activity" or
20 "opposition to an unlawful employment practice"? Is there a
21 separate instruction on that?

22 **MR. WILSON:** Not in the Ninth Circuit, to my
23 knowledge.

24 **THE COURT:** Okay.

25 **MR. WILSON:** I didn't see any.

1 **MS. SANGHVI:** Yes, your Honor. There is -- which is
2 why we proposed language, because it is instrumental here.

3 **THE COURT:** Okay. So the Ninth Circuit model
4 instructions don't address this. Let me hand this back to you.
5 Thank you.

6 (Whereupon the iPad was returned to counsel.)

7 **THE COURT:** Let me ask you. This is something, by
8 the way, we won't decide today. I'm going to think more about
9 it, but let's just -- let me give you a hypothetical.

10 Let's say that Mr. Duane was convinced that sexual
11 orientation is not included in Title VII. Because he read the
12 language of the statute. Let's say, he took a simplistic view
13 of it and that's the end of the matter. It's -- it doesn't say
14 "sexual orientation" there. So Title VII does not protect
15 against sexual orientation discrimination.

16 And let's say he complains about sexual orientation
17 discrimination on Glassdoor. And let's say he gets fired for
18 complaining about sexual orientation discrimination. And let's
19 say the EEOC finds out about that and brings a lawsuit
20 against -- against IXL on Mr. Duane's behalf.

21 Would the fact that Mr. Duane was convinced that Title VII
22 does not protect against sexual orientation discrimination,
23 would that matter? Would that -- would that shield IXL from
24 liability under Title VII? Because Mr. Duane did not believe
25 that the conduct was barred by Title VII?

1 **MS. SANGHVI:** I mean, so I think what is important
2 here is that he needs to have opposed employment practices that
3 are either made unlawful by an employment law, Title VII, or
4 that he had an objectively reasonable good faith belief that he
5 was doing so.

6 In the hypothetical that you're providing, you're
7 suggesting -- you're taking out that he had an objectively
8 reasonable good faith belief that this was unlawful under
9 Title VII.

10 **THE COURT:** Well, no. The point I'm trying to make
11 in my hypothetical is that I believe that the objectively
12 reasonable good faith belief on the part of the person who is
13 complaining is talking about an objectively good faith
14 reasonable belief in whether they did it for that reason, not a
15 belief in whether it's actually protected by the law or not.

16 In other words, when we're asking whether the person
17 complaining of discrimination had an objectively reasonable
18 belief that they were being discriminated against, I think what
19 that has to mean is was their belief in the factual matter?
20 Was their belief that IXL was discriminating on the basis of
21 sexual orientation? Was that reasonable as a factual matter?
22 Not was it reasonable to believe that sexual orientation was
23 covered by Title VII.

24 I don't think that's -- I don't think that's -- that can't
25 be what the objective good faith belief test is about. They

1 just have to believe that it happened. It's up to us to decide
2 whether the -- the -- whether something is or is not covered by
3 Title VII. It's up to the person being retaliated against to
4 decide whether his -- before they are retaliated against, it's
5 up to the person complaining to decide whether what they are
6 complaining about actually happened and whether their belief in
7 it was reasonable. But it's a factual question, not a legal
8 question.

9 It can't be -- it can't be that we're asking the jury to
10 decide whether Mr. Duane's belief that sexual orientation was
11 covered by Title VII was a reasonable belief. That can't be
12 what we're asking the jury to decide.

13 **MS. SANGHVI:** I mean, the reason I think that the --
14 whether he believed it was protected, the reason that matters
15 is think of an individual who complains against what they
16 believe to be harassment in the workplace. Now, it doesn't
17 rise to the level of a hostile work environment. So it is not
18 discrimination, technically unlawful. It's not technically sex
19 discrimination under Title VII, because it hasn't risen to the
20 level of a hostile work environment.

21 Now, that woman most certainly is protected when she
22 raises her complaint to the CEO and says --

23 **THE COURT:** That's retaliation.

24 **MS. SANGHVI:** Absolutely. And says, I believe that
25 this thing happened to me. I believe that I have been a victim

1 of a sex discrimination act. And that the CEO says, Nope, not
2 in my company. Don't believe that could possibly have
3 happened. That's my buddy. John over there wouldn't do it.
4 And fires her for it. It can't be that she is not allowed to
5 bring that retaliation claim or -- and it can't be that the
6 only inquiry is whether, in fact, that was sex discrimination.

7 **THE COURT:** That rose to the level of hostile work
8 environment. That makes sense.

9 **MR. WILSON:** That --

10 **THE COURT:** Hold on a second.

11 On the other hand, so let's say -- let's say you have --
12 let's just pretend that the law were settled and that sexual
13 orientation was not covered by Title VII. Let's assume that
14 for this hypothetical.

15 Let's say that somebody complains that they were
16 discriminated against on the basis of sexual orientation.
17 Okay? And they get fired in response to their complaints. And
18 they bring a lawsuit alleging both sexual orientation
19 discrimination -- all right? I was -- I was -- I wasn't paid
20 enough because I'm gay and -- and when I complained about it,
21 they fired me. Both in violation of Title VII.

22 And the Court says, Well, you don't have a claim -- you
23 don't have a discrimination claim, at least under Title VII,
24 because Title VII doesn't cover sexual orientation
25 discrimination.

1 Could the Court then nonetheless say, But you do have a
2 retaliation claim under Title VII because even though Title VII
3 doesn't cover sexual orientation, your complaint about being
4 discriminated against was reasonable, or you had -- you had a
5 reasonable -- you had reason to believe -- it was reasonable
6 for you to believe that the law prohibited sexual orientation
7 discrimination.

8 **MS. SANGHVI:** Yes, your Honor.

9 **THE COURT:** You would say that that retaliation claim
10 could go forward under Title VII?

11 **MS. SANGHVI:** It would, your Honor.

12 **THE COURT:** Okay. And if -- does -- can a Title VII
13 retaliation claim be about -- can it ever be about something --
14 can it ever be about a complaint that you made about conduct
15 that doesn't violate Title VII?

16 So let's say -- let's say I -- I'm discriminated against
17 on the basis of sexual orientation and I know full well that it
18 does -- you know, it doesn't violate Title VII to discriminate
19 on the basis of sexual orientation. So I post something on
20 Glassdoor that says, you know, IXL has discriminated against me
21 on the basis of sexual orientation in violation of California
22 law. Could I then -- and then I get fired for that.

23 Could I then bring a Title VII claim against IXL for
24 retaliating against me for complaining that IXL violated
25 California's non-discrimination laws? Anti-discrimination

1 laws?

2 **MS. SANGHVI:** Yes, because it would be my argument
3 that there is -- in the inquiry of whether or not that
4 individual had an objectively reasonable good faith belief that
5 they were opposing unlawful activity, I believe so.

6 And that's why I was bringing up the point of the EEOC's
7 position often is looked at and does inform individual's
8 reasonable belief.

9 So to the extent that the argument is there is no
10 controlling law by the Supreme Court or the Ninth Circuit on
11 whether or not Title VII covers sexual orientation or gender
12 identity discrimination, that aside, the fact that the EEOC,
13 the federal agency in charge of enforcing these laws, says
14 otherwise, that matters to an individual's determination of --

15 **THE COURT:** Based on your answer to my previous
16 question, it actually doesn't matter; right? Because in
17 California discrimination on the basis of sexual orientation is
18 unlawful.

19 And so even if -- based on your previous answer to my
20 previous question, even if the EEOC had been shouting from the
21 rooftops that sexual orientation is not covered by Title VII,
22 you're saying that there could be a Title VII retaliation claim
23 against IXL because -- based on a complaint about sexual
24 orientation discrimination by Mr. Duane.

25 **MS. SANGHVI:** I don't -- if I said that, then I'm not

1 sure that I am standing by that.

2 Those are not -- I mean, it's -- it's the converse of the
3 facts that we have in the record here, where you have an
4 individual -- you know, the fact in the recorded.

5 **THE COURT:** Yeah. I'm just trying to ask -- go at it
6 from different angles to try to understand how to think about
7 it in the context of this case.

8 **MS. SANGHVI:** And I -- I mean, one thing is, you have
9 mentioned that you're going to continue to think about it. I
10 would -- if you're open to it, your Honor, I would consider
11 reading the EEOC's most recent retaliation guidance put out by
12 the Commission.

13 **THE COURT:** What I think, you know --

14 **MS. SANGHVI:** And I'm also happy to further brief
15 this.

16 **THE COURT:** I think this is probably an important
17 enough issue that I should ask you both to submit further
18 briefing on it.

19 Now, here is what I don't want further briefing on. I
20 don't want further briefing on whether Title VII covers sexual
21 orientation discrimination, okay? That I can read. You know,
22 the -- the briefs that the EEOC has filed in other cases.

23 What I'll ask you to do on that is to point me to, you
24 know, what the recent -- you know, point me to some briefs that
25 the government has filed on -- good briefs that the government

1 has filed on both sides of that issue, right, in the Supreme
2 Court or in the Second Circuit or whatever it is. I don't need
3 you to argue that any more than it's already been argued in
4 those other briefs.

5 But what I do want you to brief is -- let me think about
6 how to put it. I had come into this discussion assuming that
7 when we're asking whether Mr. Duane had a reasonable belief
8 that he was being -- that there was sexual orientation
9 discrimination, what that meant is did he have a reasonable
10 belief as a factual matter that that was happening, not did he
11 have a reasonable belief that that was unlawful.

12 So if it's unlawful --

13 **MS. SANGHVI:** But I think that's -- the inquiry is,
14 did he have an objective good faith belief that he was opposing
15 discriminatory behavior.

16 **THE COURT:** That was unlawful. Because there is lots
17 of discriminatory behavior that's not unlawful; right?

18 **MS. SANGHVI:** Right.

19 **THE COURT:** Does he have to have the belief that it's
20 unlawful or does it have to be unlawful and he has -- has the
21 belief that it's happened? Do you know what I'm saying?

22 **MS. SANGHVI:** If you could say that one more time,
23 your Honor?

24 **THE COURT:** Okay. You could imagine one position
25 being, look, Duane's belief about whether it was lawful or not

1 doesn't matter. Duane's belief about whether sexual
2 orientation is included in Title VII doesn't matter. The only
3 thing that matters about Duane's belief is does he believe that
4 he was -- as a factual matter, that he was being discriminated
5 against on the basis of sexual orientation? And then it's up
6 to us to decide whether sexual orientation is included in
7 Title VII.

8 Or, do Mr. Duane's beliefs about whether sexual
9 orientation discrimination is included in Title VII or --
10 included in Title VII matter.

11 **MR. WILSON:** Judge, can I throw in an important point
12 here that I think is important?

13 **THE COURT:** Uh-huh.

14 **MR. WILSON:** Which is Mr. Duane is not alleging that
15 he opposed sexual orientation discrimination. He's not --

16 **THE COURT:** But you're -- again, you're still stuck
17 on your narrow interpretation of the Glassdoor post.

18 **MR. WILSON:** No, I'm not actually, Judge. I'm trying
19 to explain to you why we've spent quite a bit of time here
20 talking about whether sexual orientation discrimination is
21 within the definition of sex in Title VII.

22 If this were a case where he's even complaining online or
23 he's perceived sexual orientation and that caused him to put
24 something online, okay. This -- that's not this case. He's
25 not saying that IXL discriminates against people because of

1 their sexual orientation. He's being more specific. He's
2 saying it's gender identity. It's gender queer.

3 And so he's actually not complaining of or says he's
4 experienced -- and you can correct me if I'm wrong -- sexual
5 orientation discrimination. He's saying everybody perceived
6 that I was -- well, I think people perceived me as a -- a
7 mainstream gay male.

8 And it was -- in his post he says it's non-mainstream gay
9 employees who are treated differently or -- or are on the
10 outside or words to that effect.

11 So I don't know --

12 **THE COURT:** It raises sort of a philosophical
13 question. I guess I always thought of it at a 10,000-foot
14 level. I always thought of sexual orientation discrimination
15 as discrimination on the basis of LGBT status. Would that --
16 does that -- is that fair?

17 **MR. WILSON:** Well, not LBGBT. Not --

18 **THE COURT:** So if you discriminate against someone --

19 **MR. WILSON:** It's not transgender.

20 **THE COURT:** So if you discriminate against someone
21 for being transgender, that is not sexual orientation
22 discrimination?

23 **MR. WILSON:** I believe what they are saying is that
24 is gender identity discrimination and that is -- he complained
25 of that.

1 **THE COURT:** But it's not sexual -- you don't think
2 that's sexual orientation discrimination? Discriminating
3 against somebody because they are transgender?

4 **MR. WILSON:** No. I think that --

5 **THE COURT:** I'm asking what you think.

6 **MR. WILSON:** What I think is sexual orientation,
7 gender identity are two distinct categories under sex.

8 **THE COURT:** Don't we always -- I feel like typically
9 when we refer to sexual orientation discrimination, we refer to
10 discrimination against LGBT folks.

11 **MR. WILSON:** And I understand that broad category is
12 what we might typically perceive.

13 What I'm saying is, he's making two different claims here.
14 He's claiming if you're straight or mainstream gay, you will
15 fit in and you will receive benefits and promotions and so
16 forth.

17 I don't know what gets us anywhere toward the end zone in
18 this case by instructing the jury, as the Court -- not -- not
19 instructing that the EEOC believes this, but the Court saying
20 the law is sexual orientation and gender identity are covered
21 and prohibited discrimination under Title VII when that's not
22 the controlling law. It might be and maybe it will.

23 **THE COURT:** Put aside the law. Why are you saying it
24 doesn't get us toward the end zone? I mean, he has -- he's
25 flagged -- he's got a generalized complaint about

1 discrimination. He's got a complaint about, you know, if
2 you're not white or Asian or mainstream gay, which suggests
3 that if you're -- if your sexual orientation is something
4 distinct from mainstream gay, you could be discriminated
5 against.

6 Why doesn't it -- when you say it doesn't get us any
7 closer to the end zone, does it mean we don't need to answer
8 the question whether Title VII covers sexual orientation and
9 gender identity?

10 **MR. WILSON:** I'm saying, as I understand Mr. Duane's
11 claims here, are that IXL does not discriminate against people
12 because they are gay or lesbian or bisexual -- I take that
13 back. I don't know. He actually does mention bisexuality as
14 being maybe outside the mainstream gay in his deposition, I
15 believe. I'm going on memory.

16 He's not making the allegation that IXL is hostile to
17 people because they are gay or lesbian. He is saying that if
18 you are outside the mainstream gay or lesbian --

19 **THE COURT:** Right. If you don't have the right
20 sexual orientation.

21 **MR. WILSON:** Gender identity. That is always my
22 understanding of his complaint, is that his gender expression,
23 gender identity, those things are what would put you on the
24 outside.

25 We disagree, but, of course, we're just talking about his

1 claim. That's my understanding of what he put in his Glassdoor
2 post and what he complained about leading up to that that we've
3 already addressed.

4 **THE COURT:** So you're saying that the only thing that
5 we need to worry about is whether gender identity is covered by
6 Title VII, and not sexual orientation?

7 **MR. WILSON:** Well, first of all, I don't think the
8 Court should be instructing the jury on something that's not in
9 Title VII and --

10 **THE COURT:** I'm asking you what we should be worrying
11 about, not what the answer should be.

12 **MR. WILSON:** Transgender discrimination is what we
13 should be --

14 **THE COURT:** We don't need to be worrying about
15 whether Title VII includes sexual orientation. We only need to
16 be worrying about whether Title VII includes gender identity?

17 **MR. WILSON:** I think it doesn't -- and I don't know
18 that Mr. Duane is making that allegation. That's my point, is
19 he's saying, I was discriminated against or treated differently
20 in different times because I'm transgender or they could have
21 learned that I was transgender.

22 **THE COURT:** Okay. Well, what I want is I want
23 further briefing on this instruction, this disputed
24 instruction. And, you know, the question is there's -- he has
25 to have an objective, good faith, reasonable belief, or

1 whatever the language is, and the question is: What does that
2 entail? Does that entail his beliefs about the law or does it
3 merely entail his beliefs about what happened? That's the
4 thing I want you to brief.

5 **MR. WILSON:** May I, for the record, just say in our
6 proposed elements of retaliation instruction, we lay out what
7 good faith reasonable belief means. And as we --

8 **THE COURT:** Okay. But I want further briefing on it.

9 **MR. WILSON:** Judge, okay. I understand.

10 I feel like a bystander on this discussion and I think
11 that there are some points that we don't disagree on.

12 **THE COURT:** Go ahead.

13 **MR. WILSON:** Is I've proposed -- I said under this
14 standard Mr. Duane could be mistaken that an unlawful
15 employment practice had occurred and still be protected if the
16 mistake was made in good faith, so long as his opposition --

17 **THE COURT:** So do you agree that he could be mistaken
18 about whether -- let's just say that he believes there was
19 sexual orientation discrimination. Okay? And he believes he
20 was complaining about sexual orientation discrimination. Okay?
21 Accept that premise for the purpose of my question. Okay?

22 **MR. WILSON:** Uh-huh.

23 **THE COURT:** Now, are you saying that if he -- even if
24 he was wrong that the law precluded sexual orientation
25 discrimination, if he had a reasonable belief that the law

1 precluded sexual orientation discrimination, that's enough.

2 **MR. WILSON:** And I'll say as an officer of the court
3 I have seen cases that said that. Okay? I don't think they
4 were Ninth Circuit cases, but I have seen cases that said that.
5 It's the reasonable reason I did not bring a motion based on
6 that.

7 **THE COURT:** Okay. So you're taking the position now
8 in this case that regardless of whether Title VII precludes
9 sexual orientation discrimination, regardless of whether
10 Title VII precludes gender identity discrimination, if he
11 reasonably believed that Title VII or the law precluded sexual
12 orientation discrimination or gender identity discrimination,
13 that that's enough.

14 And the issue for the jury is whether he reasonably
15 believed that the law precluded sexual orientation
16 discrimination or gender identity discrimination. And, of
17 course, the issue for the jury is whether, in fact -- as a
18 matter of fact, there was any legitimate reason to believe that
19 IXL was discriminating on that basis.

20 **MR. WILSON:** And I will say on behalf of IXL, and as
21 an officer of the court, it is not our argument that -- that he
22 would not be covered if he had an objectively good faith
23 reasonable belief in that, not for any other type of
24 discrimination; short, you know, over --

25 **THE COURT:** But sexual orientation and gender

1 identity discrimination.

2 **MR. WILSON:** And I arrive at that from the research
3 that we've done and it is -- Courts have said within -- within
4 the definition of sex, even if it's -- I don't believe it's
5 controlling law and I don't believe the Court should be
6 instructing on that.

7 But I don't believe that would forfeit or that would be
8 dispositive because reasonable minds can differ. And that's
9 the case law I've seen in other circuits.

10 **THE COURT:** Okay. So it sounds like what you're
11 saying is that we could say to the jury: If you find that
12 Duane was complaining about race discrimination, gender
13 discrimination, sexual orientation discrimination, gender
14 identity discrimination, if you find that he was complaining
15 about those things -- I'll say them again; race, gender, sexual
16 orientation, gender identity, disability discrimination. If
17 you find that he was complaining about any of those things,
18 number one.

19 And number two, if you find that he had a reasonable basis
20 for complaining about any of those things.

21 And number three, if you find that IXL fired him because
22 he was complaining about those things, then you find for the
23 plaintiff.

24 **MR. WILSON:** Right.

25 **THE COURT:** And if you find -- if you find that any

1 one of those three things are not the case, that he didn't
2 prove any one of those three things, then you find for the
3 defendant.

4 **MR. WILSON:** That is my understanding and that's what
5 we've submitted to the Court. So that's what I meant to say --

6 **THE COURT:** No. I appreciate that.

7 **MR. WILSON:** And the truth is, I don't want to have
8 an appeal issue where if we were to get down to it and say
9 because as it stands right now in the Ninth Circuit sexual
10 orientation is not within sex, the term "sex" or "gender
11 identity" isn't, then, therefore, you're foreclosed on an
12 opposition activity.

13 I don't understand that to be and I know that IXL doesn't
14 take that position or we're trying to advance that position in
15 this case.

16 **THE COURT:** Okay. So that is appreciated. So then
17 it makes me wonder why we need to delineate what Title VII --
18 if both sides -- remember, we're presenting this to a jury.
19 Like, we're not answering all questions for -- you know, for
20 all time.

21 We're presenting this to the jury and we're trying to get
22 the jury to focus only on the key questions that they need to
23 answer.

24 So it sounds like we don't need to -- if both sides take
25 the position that IXL can be liable for retaliation so long as

1 Duane had a reasonable belief -- so long as he complained about
2 sexual orientation discrimination, he had a reasonable belief
3 that he was -- that there was sexual orientation discrimination
4 and IXL fired him for that complaint, then why do we need to
5 explain to the jury what Title VII prohibits and doesn't --
6 what types of discrimination Title VII prohibits and what it
7 doesn't prohibit? Why can't we just say: Here are the things
8 you need to find to find that IXL violated Title VII.

9 **MR. WILSON:** Right. And that's -- and that's our
10 only -- we agreed with every other part of that instruction,
11 except I do not believe it's appropriate for the Court to say
12 Title VII covers this as a matter of law when it isn't a matter
13 of law. And it is not the same question as if someone
14 reasonably believes sexual orientation means sex or gender
15 expression.

16 **THE COURT:** And I assume you're not going to come
17 here in front of the jury --

18 **MR. WILSON:** Correct.

19 **THE COURT:** -- and argue that Title VII does not
20 cover sexual orientation discrimination, does not cover gender
21 identity discrimination.

22 You are -- to the extent that is in play in front of the
23 jury, you're going to come here arguing that any belief that
24 Mr. Duane had that IXL discriminates on the basis of sexual
25 orientation or gender identity is unreasonable.

1 **MR. WILSON:** Right.

2 **THE COURT:** And, therefore, you must find in our
3 favor.

4 **MR. WILSON:** Right.

5 **THE COURT:** Okay. All right. Okay.

6 **MR. WILSON:** If --

7 **THE COURT:** So I think --

8 **MR. WILSON:** Just to be clear.

9 **THE COURT:** Sure, go ahead. Go ahead.

10 **MR. WILSON:** If we -- if we were ready and able to
11 make a defense that -- you know, that Title VII doesn't cover
12 those and, therefore, ipso facto -- you know, therefore, per se
13 this can't go any further, then we would have to have these
14 arguments. That is not our intent.

15 **THE COURT:** Okay.

16 **MR. WILSON:** And IXL does not want to be on record
17 making that argument and taking this up further on that
18 argument. I will tell you.

19 **THE COURT:** Okay.

20 **MR. WILSON:** And I, as an officer of the court, I
21 don't believe that necessarily -- I don't know where things
22 will go now on this, but -- but I think that the better part of
23 that argument is whether an employee looking at the EEOC and
24 other things would have a reasonable belief. Under the term
25 sex, not anything.

1 **THE COURT:** But even that's not going to be an issue.
2 An employee looking at EEOC and what EEOC has said, because
3 you're not contesting that.

4 **MR. WILSON:** Correct. And I want to be clear about
5 that.

6 **THE COURT:** So it seems to me that it's going to be
7 very easy to put together some retaliation instructions that
8 just very clearly tell the jury, you know, if he was
9 complaining about this stuff and if his complaints about this
10 stuff were reasonable and if he was fired in response for
11 complaining about this stuff, you find -- you find in his
12 favor. Without saying, here is what Title VII allows and
13 doesn't allow, without even getting into that. I think that
14 will be easy to do actually.

15 **MR. WILSON:** And I would just -- the only caveat is
16 what we put in our -- what we put in our version of 10.8. And
17 it's based on a comment -- and I don't think this matters at
18 all to what we're just talking about, but I just want to be
19 clear -- that an employee complaining of a discriminatory --
20 alleged discriminatory act by one coworker to another isn't
21 attributable to the employer. That's not opposition activity.

22 So, for instance, someone said to someone else, "Didn't
23 Scott used to be a girl?" That would not be a violation of
24 Title VII. And so that's the only difference --

25 **THE COURT:** I cannot imagine that they are going to

1 be basing their case on one employee saying to another -- I
2 know they have included it in their briefs, but when they get
3 to trial and they realize that they are talking to human
4 beings, I don't think they are going to base their case on one
5 employee saying to another, "Didn't Scott used to be a girl?"

6 If they do and if they argue that that is a basis for
7 liability, we can talk about it then, but I would be very
8 surprised if that happened.

9 **MR. WILSON:** Fair enough.

10 **MS. SANGHVI:** Just so I'm clear. Basing our case and
11 yet presenting the evidence, those are two different things;
12 correct?

13 **THE COURT:** Well, I mean, that is an issue that -- I
14 mean, I don't know the context in which one employee said to
15 another "Didn't Scott used to be a girl?" When I read about it
16 in the papers, I thought what on earth is wrong with asking
17 "Didn't Scott used to be a girl?" But it depends on context,
18 of course; right? And I don't know the context. So we'll see
19 how it plays out at trial.

20 **MR. WILSON:** Understood.

21 **MS. SANGHVI:** Your Honor, the one thing I just want
22 to clarify in terms of where we're headed with this, I think
23 for the most part I understand. I agree. I'm not trying to
24 throw a wrench into it.

25 But my concern is that first piece, when you broke it down

1 into sort of three elements of if you find that he was
2 complaining about. One concern that I've had throughout is
3 this notion of parsing the post in a way that --

4 **THE COURT:** That's for the jury. I mean, it's for
5 the jury to decide what he was complaining about. And he can
6 testify what he's complaining about and what he meant.

7 **MS. SANGHVI:** Okay.

8 **THE COURT:** They can testify what they think it
9 meant. That will be for the jury to figure out.

10 **MR. WILSON:** Okay.

11 **MS. SANGHVI:** So just so I understand what you want
12 from us at this point --

13 **THE COURT:** I don't think I need briefing any more.
14 I think that it's been obviated by Mr. Woodworth's comments.

15 **MR. WILSON:** Wilson. Woodward is my other --

16 **THE COURT:** Oh, I'm sorry. What's your last name?

17 **MR. WILSON:** Wilson.

18 **THE COURT:** Wilson, sorry.

19 **MR. WILSON:** He's actually the better lawyer of the
20 two. You'll get to meet him.

21 **MS. SANGHVI:** Would you like a revised set of --

22 **THE COURT:** No. We'll figure it out based on this
23 discussion.

24 What I do with Jury Instructions is I put out the Court's
25 draft Jury Instructions; right? And then it will be your

1 responsibility to look at the Court's draft Jury Instructions,
2 compare it against what you have submitted, figure out what's
3 missing and what's added and what's -- you know, sometimes I
4 give a red line if it's not going to be too messy to give a red
5 line. Sometimes, though, it's too messy to give a red line.

6 So anyway, it's your responsibility at the -- at the
7 charging conference to say, Hey, you know, I notice that this
8 thing that I included is not in there. Was that intentional?
9 And if so, can I try to talk you into, you know, putting it
10 back in.

11 But we'll go -- we'll go through the draft of the Jury
12 Instructions that I put out and we'll go through instruction by
13 instruction and hear any objections or concerns that you have.
14 So I'll -- I think this discussion has been enough to do that.

15 Let's see. Bifurcation. Would it make sense to bifurcate
16 liability from damages?

17 **MS. SANGHVI:** I believe it's a pretty simple
18 calculation, your Honor. So I don't believe so.

19 In terms of bifurcation, I think what we had envisioned
20 was bifurcating out any post trial injunctive relief, should
21 there be a need for such a motion, and that we would raise that
22 with your Honor and you would advise us on whether you would
23 want that through motion or, you know, based on the record in
24 front of the Court.

25 The only thing that we have discussed is since we've

1 agreed that post January 8th, HR trainings and policy changes
2 aren't relevant for jury liability purposes, that we have taken
3 the position that that might still be relevant for injunctive
4 relief.

5 So to the extent that we do any post trial injunctive
6 relief motions, we should not be precluded to the record that
7 was presented to the jury and that we could, if needed,
8 supplement that record with additional evidence.

9 **THE COURT:** That's fine.

10 So, but were you envisioning -- when I read your joint
11 pretrial statement, I thought maybe you were -- I may be
12 misremembering, but were you envisioning the punitive damages
13 issue? The jury reaching a verdict on liability and
14 compensatory damages and whether -- whether IXL was -- would be
15 liable for punitive damages and then have a separate phase to
16 figure out how much that would be?

17 **MS. SANGHVI:** No. That that would be all on the
18 first phase. The punitive damage amount would also.

19 **THE COURT:** So that would include, like, IXL's net
20 worth and things like that?

21 **MS. SANGHVI:** Yes, your Honor.

22 **THE COURT:** And you want to do it that way, too?

23 **MR. WILSON:** Well, we have some disputes over net
24 worth and all of that. But to the extent that they are going
25 to continue looking for punitive damages, that would be part of

1 the main trial.

2 **THE COURT:** Okay, that's fine. If you both want to
3 do it that way, that's fine.

4 **MR. WILSON:** I don't know --

5 **THE COURT:** I mean, every civil trial --

6 **MR. WILSON:** I don't like to do -- I'm sorry.

7 **THE COURT:** Well, I was going to say that every other
8 civil trial that I have had that involved a claim for punitive
9 damages, we've kind of put the punitive damages part off until
10 later.

11 But if both of you want to do that, it sounds like maybe
12 the evidence -- there is not going to be so much additional
13 evidence on, you know, issues relating to how much there should
14 be in punitive damages that you think is worth doing a separate
15 trial; is that right?

16 **MR. WILSON:** Typically I don't like to have a
17 subsequent mini trial on just damages unless it's a major case,
18 and I have had those.

19 Here, I think that -- you know, I think it's absurd that
20 they are even requesting punitive damages when we've talked for
21 an hour about what the law covers and yet, you know, they are
22 going to charge my client with being malicious, oppressive and
23 reprehensible, but that is the kind of evidence and argument
24 they are going to submit in their case-in-chief anyway. So
25 let's just have it all at once.

1 **THE COURT:** Okay. So then -- so we have now -- I
2 mean, you now know that there is a lot of stuff that you were
3 potentially contemplating being part of the case that is
4 probably not going to be part of the case; right? All of the
5 stuff, for example, on the prior proceedings, NLRB proceedings,
6 all that kind of stuff.

7 We now know that we're not going to have to fight it out
8 in front of the jury about whether it was reasonable for Duane
9 to believe that sexual orientation discrimination was covered
10 by Title VII. So in light of that, like, what's your -- what
11 is now your best guess for how long this trial is going to be?

12 **MR. WILSON:** Well, if you're asking for my
13 case-in-chief, I mean, I have four witnesses and one -- one
14 that we are reading the deposition of.

15 I have four witnesses. Those witnesses are -- well, you
16 have shorter days, but they are two days of testimony.

17 **THE COURT:** Who are they? Give me the witnesses.

18 **MR. WILSON:** Sure. Paul Mishkin, CEO. David Keyes,
19 who is his direct supervisor -- was his direct supervisor.

20 **THE COURT:** How do you spell that?

21 **MR. WILSON:** Keyes is K-E-Y-E-S. Like keys, but
22 pronounced Keyes.

23 **THE COURT:** And Keyes was Duane's direct supervisor?

24 **MR. WILSON:** Direct supervisor, yes.

25 **THE COURT:** Okay.

1 **MR. WILSON:** Kate Mattison. Kate Mattison was
2 Mr. Keyes's direct supervisor and is.

3 And then Jeremy Murphy, who is a coworker of Mr. Duane's
4 at the time, and is still at IXL.

5 **THE COURT:** Okay.

6 **MR. WILSON:** That's it.

7 **THE COURT:** I'm gathering you might be calling some
8 of those witnesses as part of your case?

9 **MS. SANGHVI:** I believe we might actually -- given
10 that they are certainly calling Paul Mishkin and David Keyes,
11 we might not call them as a part of our case-in-chief.

12 **THE COURT:** Okay. So who are you going to be
13 calling?

14 **MS. SANGHVI:** Obviously, we will be calling
15 Mr. Duane. We'll be calling Jenna Mandis, who is --

16 **THE COURT:** Jenna who?

17 **MS. SANGHVI:** Mandis. She's number five on our list.

18 **THE COURT:** How do you spell her name again?

19 **MS. SANGHVI:** M-A-N-D-I-S.

20 **THE COURT:** Okay. And who is Mandis again?

21 **MS. SANGHVI:** Mr. Duane's former partner. And she
22 attended the December 2014 holiday party with him and had made
23 observations of his emotional distress.

24 **THE COURT:** Okay. Who else?

25 **MS. SANGHVI:** Lenore Ockerberg.

1 **THE COURT:** She's the HR person?

2 **MS. SANGHVI:** Most likely, yes.

3 Maricela Prado, another HR person.

4 **THE COURT:** Maricela?

5 **MS. SANGHVI:** Prado, P-R-A-D-O.

6 **THE COURT:** Hold on one quick second here.

7 (Brief pause.)

8 **THE COURT:** Okay.

9 **MS. SANGHVI:** And then the following two, Nemo Curiel
10 and Nina Wu, those will be very short, but we are still -- I
11 mean, I would like not to be held to this list definitively,
12 but those two are potentials.

13 **THE COURT:** Probable?

14 **MS. SANGHVI:** Probable.

15 **THE COURT:** Okay. Anyone else?

16 **MS. SANGHVI:** I don't believe so. It had included
17 authenticating witnesses, but I believe we're not going to have
18 any issue around any authenticity issues.

19 **THE COURT:** Okay. So one, two, three, four, five,
20 six, seven, eight, nine, ten, eleven -- sounds like at most
21 eleven witnesses; is that right?

22 Anybody else who falls in the probable category?

23 **MS. SANGHVI:** I think there is -- Jennifer Gu was a
24 30(b)6 deponent and she's the COO. I highly doubt the need for
25 her testimony, but I think there is a small chance.

1 **THE COURT:** So it sounds to me, based on this and
2 based on our discussions here, that this is a case that
3 could -- I'm betting could easily be done in ten hours of air
4 time for each side. So that would be each side gets -- usually
5 we have about four hours of air time per court day. That means
6 four hours of on-the-record time. That includes opening
7 statement and closing argument. And you decide, you know, how
8 long your opening statement and closing argument is going to be
9 within those ten hours. And we put you on a -- put you on a
10 chess clock so when you're examining your own witness, you're
11 on your time. When you're cross examining the other side's
12 witness, you're on your time.

13 And, you know, what I will say is that if -- you know,
14 about a quarter or a third of the way through the trial if it
15 is seeming to me like both sides are using their time
16 efficiently and that I haven't given you enough time, I'm --
17 I'm not adverse to extending the time. But my guess, based on
18 all of our discussions, is that that's -- that's a pretty good
19 amount of time for this trial.

20 **MR. WILSON:** I agree.

21 **MS. SANGHVI:** Your Honor, I might ask that just in
22 doing a rough calculation with ten hours, even if we were to
23 use a half hour for an opening and a closing, that brings us to
24 nine hours of witness questioning. With six witnesses, one of
25 whom is the main person aggrieved here, who needs some time to

1 be able to explain history. So even if we cut his estimated
2 testimony down to -- you know, we have it listed at four hours,
3 which I didn't think was too much of a reach, but if we brought
4 it down to even two hours. And then they have a -- their
5 estimate on cross was the same as our estimate on direct. So I
6 imagine that goes to their time. But two hours for -- two to
7 three hours just for Mr. Duane, then bringing in five other
8 witnesses with the remaining amount of time seems a little
9 short.

10 So I would ask that the Court consider elongating the time
11 by perhaps to 15 hours as a starting point, with the absolute
12 understanding that the parties should endeavor to proceed
13 efficiently.

14 **THE COURT:** That seems -- that just -- 15 hours per
15 side seems like way too much time for this case based on, you
16 know, my -- based on my past experience with civil trials.

17 I mean, I'll give each side 11 hours, but I would be very,
18 very surprised if you needed more than that.

19 **MS. SANGHVI:** Just so I understand, if we're
20 questioning a witness, their direct goes to their time --
21 sorry. Their cross examination of our witness is taken out of
22 their time?

23 **THE COURT:** Correct.

24 Let's see, that reminds me. There are two plaintiffs here
25 really. I believe that may give me the discretion to allow you

1 more peremptory challenges, but I don't see any need to in this
2 case. I don't see any different, neither -- there is no, like,
3 divergent interest here that would require more peremptory
4 challenges for you. So it will be three peremptory challenges
5 for each side.

6 Jury selection. We still have exhibits on the list. I'm
7 wondering if we should skip over that because I -- people need
8 to have a break. We have our other pretrial conference at
9 1:30. And, you know, we can worry about that on -- you know,
10 as -- each morning as we go long. And I'll urge you to
11 meet-and-confer about admissibility of exhibits.

12 **MR. WILSON:** I think almost all -- maybe 80 percent
13 of our objections -- our, defendant's objections -- are
14 resolved by the Glassdoor -- post termination Glassdoor.com
15 post. So that narrows the dispute quite a bit on the
16 exhibits.?

17 **THE COURT:** Okay. So on jury selection, we will -- I
18 have a sheet of, like, ten questions that we pass out to the
19 jurors. So the jurors will come in.

20 How many jurors did we order, Kristen? Do you remember?
21 Somewhere around 30 or something like that, I think it was, 35.
22 I think we ordered a bit more than normal just because of the
23 LGBT issues involved.

24 **THE CLERK:** Forty.

25 **THE COURT:** That sounds good. We ordered 40 jurors.

1 They will come in. They will be lined up. Where Jordan is
2 sitting right there is juror number one. And down the row,
3 Mikah is juror number two. Down to seven. And then juror
4 number eight is here in the front, in front of Jordan. Juror
5 number 14. And then they line up in the rows in numerical
6 order back on this side up to 40.

7 You'll get a list with the names of the jurors in order
8 that they are seated. I'll start by introducing everybody.
9 Telling them a little bit what the case is about. Taking
10 hardship, and then taking hardship requests. I'll talk to them
11 myself about hardship.

12 I'll meet with you maybe at sidebar, maybe back in the
13 jury room, depending on how long I think the discussion is
14 going to be, about hardships. Letting you know who I'm
15 inclined to excuse for hardship. Then I'll excuse people for
16 hardship.

17 People will remain in their seats. Like, they won't
18 shuffle to fill in empty seats. They will always remain in
19 their same seats.

20 And then I will -- I'll have Kristen pass out our sheet
21 with our list of ten or so questions. And we ask them to
22 answer those questions verbally to enable you to start to get a
23 sense of them and to enable me to start to get a sense of them.
24 And it's just -- I think the questionnaire is on our -- the
25 list of questions is on our website, just basic biographical

1 stuff; right?

2 And then often I'll interrupt them as they are answering
3 those questions with follow-up questions, particularly if they
4 say "I'm a lawyer" or something like that. I'll follow up with
5 questions. So we'll go through everybody.

6 Then I will probably -- in this case I will probably ask,
7 kind of some raise-your-hand questions and they will be about
8 sexual orientation and, you know, just sort of the general, you
9 know, this is -- the plaintiff is somebody who is transgender
10 and he is complaining about -- he complained -- he alleges that
11 he complained about discrimination and alleges that he was
12 fired for complaining about discrimination. Is there anything
13 about that that, you know, might interfere with your ability to
14 be a fair juror? Does anybody have any strong feelings about
15 sexual orientation discrimination? Sort of just very general
16 questions like that. I'll start the dialogue with them on
17 that.

18 And then I'll turn it over to you all. You each can
19 have -- I'll give you -- it's depending on how the morning is
20 going, I'll give you somewhere between half hour and 45 minutes
21 to ask questions of the jurors.

22 And I went through the prospective voir dire, the voir
23 dire questions. I don't -- I'm not going to prevent you from
24 asking any of the questions that are in there. Either the ones
25 that you jointly proposed or the ones that you individually

1 proposed. Some of them seem rather far afield and seem like it
2 would be a waste of your precious time to be asking those
3 questions, but I'm going to -- I didn't see anything that was
4 so inappropriate in there that I would preclude you from asking
5 it.

6 So that will be up to you. Of course, if things do start
7 to get inappropriate, I'll jump in and shoot you down. But I'm
8 not anticipating that in this case.

9 And so -- and then we'll do -- then we'll meet back in the
10 jury room and we'll do cause challenges.

11 I will -- I will tell jurors that at the end, that at the
12 end of the process there will be an opportunity to speak with
13 us in private. And if I don't do that, please don't hesitate
14 to remind me to do that or please don't hesitate to tell them
15 yourselves during voir dire that there will be an opportunity
16 to talk to us in private in the jury room if they have
17 something that they are not comfortable sharing with us in open
18 court. So we'll have time for that at the end after you all do
19 your voir dire.

20 And then we'll do cause challenges in the jury room, and
21 you'll do your peremptory challenges in the jury room, and then
22 we'll have our jury. Usually, like I say, around lunch time we
23 have a jury picked in civil cases. Eight jurors unanimous
24 verdict.

25 **MR. WILSON:** Eight jurors, right, not alternates?

1 **THE COURT:** No alternates.

2 **MR. WILSON:** Okay.

3 **MS. SANGHVI:** Your Honor, we had proposed that this
4 might be a case that's appropriate for a jury questionnaire,
5 given your statement that you would allow people to speak in
6 private. Is that your indication that a jury questionnaire is
7 not appropriate in this case?

8 **THE COURT:** I don't think it's necessary. I will try
9 to be very inviting to people and I'll make sure to tell them
10 that there will be an opportunity to speak in private. I find
11 that, especially in civil cases, people open up. People tend
12 not to be very shy.

13 **MS. SANGHVI:** I appreciate that. I think in this
14 case, your Honor, given that we are dealing with some issues
15 that are somewhat heightened in sensitivity, these days
16 particularly, that was our concern; that we give the jurors the
17 opportunity to not have to answer certain questions that will
18 be difficult for them to answer in the presence of others in an
19 open courtroom as part of a public record.

20 There is not that many. We've indicated them on our
21 proposed voir dire.

22 **THE COURT:** Well, I mean, I assume -- if we did
23 something, we could have just, like, a couple of questions
24 really. I mean, we could just say, you know -- we don't even
25 need to have them sit there and fill out their basic

1 biographical information. We could do that in the way that I
2 just described.

3 You just say, you know, this is a case brought by -- you
4 know, the plaintiff is a transgender male and he alleges that
5 he was retaliated against for complaining about discrimination.
6 Is there anything about the nature of this case that gives you
7 concerns about your ability to be a fair juror?

8 Just ask that one question. Have them write down an
9 answer to it.

10 **MR. WILSON:** I mean, that is why we submitted a
11 proposed statement of the case that includes those relevant
12 points; right? I don't see that needs much more than that.

13 **THE COURT:** Should we have them write the answer to
14 that one question up in the jury office? I assume that will
15 not take very long at all; right?

16 **THE CLERK:** We won't be starting until sometime
17 around 9:30. Closer to 9:45 is my guess.

18 **THE COURT:** If we do that, should we order, like, ten
19 extra jurors or something?

20 (Discussion held off the record between the Court and
21 the Court Clerk.)

22 **MS. SANGHVI:** I would add, your Honor, that question,
23 I believe, is an important one. We phrased it as asking if
24 there are any personal, religious or ethical beliefs or values
25 that people would have trouble with.

1 But we also have asked: Have you ever known a person
2 whose gender presentation does not conform to your idea of how
3 a man or woman should look, behave or act?

4 **THE COURT:** Well, I mean, we could think of all sorts
5 of more specific questions that we might ask them and we can
6 create a ten-page questionnaire, I think, with all different
7 sorts of questions.

8 I would propose that we just ask that one question.

9 **MS. SANGHVI:** Okay.

10 **THE COURT:** And that will be a good kind of screening
11 mechanism. Then you're perfectly free to ask the question,
12 that question, during voir dire.

13 **MS. SANGHVI:** Thank you, your Honor.

14 **THE COURT:** So what that will mean is that we'll
15 start jury selection a little bit later and we might even have
16 to take a bit of a lunch break before we have the final jury,
17 but we'll see how it goes.

18 **MS. SANGHVI:** Sorry. Yes, your Honor. We did have
19 one very small point --

20 **THE CLERK:** Hold on. Before we go on, hold on, guys.
21 (Discussion held off the record between the Court and
22 the Court Clerk.)

23 **MR. LEE:** Just a minor housekeeping matter out of
24 respect to the Court and opposing counsel.

25 I want to let the Court know that I will not be in trial

1 October 26 and 29, it's a Friday and Monday, due to a family
2 matter. So I just want to let you know that.

3 **THE COURT:** Okay. No problem.

4 **MS. SANGHVI:** Also, just to get an understanding.
5 Given the jury takes its time to be here, we would like the
6 ability to just make a very short statement, like a sentence
7 like that in our opening. Just to explain to the jury when I
8 introduce this is who I am, this is -- these are the other
9 counsel that are in this case, and just to make a very short
10 statement saying you will not see Mr. Lee here on Friday and
11 Monday for a personal family matter.

12 **THE COURT:** That's fine.

13 **MS. SANGHVI:** Thank you, your Honor.

14 **MR. LEE:** Thank you, your Honor.

15 **THE COURT:** Okay. Thank you. We'll see you on
16 Monday morning.

17 **MR. WILSON:** Thank you, your Honor.

18 **THE CLERK:** Court is adjourned.

19 (Proceedings adjourned.)
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Monday, October 15, 2018