

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

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.))	Friday
)	October 26, 2018
Defendant.))	8:00 a.m.
)	

EXCERPT OF JURY TRIAL PROCEEDINGS
TESTIMONY OF DAVID KEYES

APPEARANCES:

For Plaintiff: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
450 Golden Gate Avenue
Fifth Floor West
San Francisco, California 94102
BY: AMI SANGHVI, ESQ.

For Plaintiff THE MAREK LAW FIRM
Intervenor: 228 Hamilton Avenue
Palo Alto, California 94301
BY: DAVID M. MAREK, ESQ.

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR
Official Reporter - US District Court
Computerized Transcription By Eclipse

1 APPEARANCES: (CONTINUED)

2 **For Defendant:** YOUNG BASILE HANLON & MACFARLANE, P.C.
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4 Suite 624
5 Troy, Michigan 48084
6 **BY: JEFFREY D. WILSON, ESQ.**
7 **EDDIE DEAN WOODWORTH, ESQ.**

8 - - -

1 Friday - October 26, 2018

8:09 a.m.

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

3 ---000---

4 **THE COURT:** Good morning. I'm going to hand you
5 copies of a draft verdict form and copies of a revised
6 instruction ten, instruction on retaliation. I spent some time
7 with it last night creating what I think -- what I hope is a
8 somewhat better and more streamlined version of that, the
9 retaliation instruction, and we can talk about that this
10 afternoon.

11 Anything else you all want to talk about?

12 **MR. WILSON:** No.

13 **MS. SANGHVI:** No, your Honor.

14 **MR. WILSON:** Nothing from the defendant.

15 **THE COURT:** No?

16 **MR. WILSON:** No.

17 **THE COURT:** What's the situation with Ms. -- I can't
18 remember her name any more, Mandis or something?

19 **MS. SANGHVI:** We will not be recalling her, your
20 Honor.

21 **THE COURT:** Okay. So are we sort of on the same plan
22 that we discussed yesterday, which is that we will have
23 Mr. Keyes, you said you have about a half hour, 45 minutes with
24 Keyes.

25 **MR. WILSON:** That's right.

1 **THE COURT:** And you have cross. How long do you
2 anticipate that being, roughly?

3 **MS. SANGHVI:** I think less than an hour, your Honor.

4 **THE COURT:** Okay. And then so I'm guessing we'll get
5 through Keyes before our morning break or maybe shortly after
6 our morning break. And then remind me the name of the next
7 witness again.

8 **MR. WILSON:** Jeremy Murphy.

9 **THE COURT:** Jeremy Murphy. And you said he was
10 short.

11 **MR. WILSON:** Very, yes.

12 **THE COURT:** Do you --

13 **MS. SANGHVI:** Very short.

14 **THE COURT:** Okay. And then that's it?

15 **MR. WILSON:** That's it for defendant.

16 **THE COURT:** Okay. And then any rebuttal witnesses?

17 **MS. SANGHVI:** No, your Honor.

18 **THE COURT:** No? Wow. So we're going -- they are
19 only going to spend, like, an hour or so here today, it seems
20 like.

21 **MR. WILSON:** Probably more like two hours, two and a
22 half hours, combined between Keyes and Murphy and cross, and
23 maybe, possibly a redirect.

24 **THE COURT:** Right, right.

25 **MR. WILSON:** If I need to.

1 **THE COURT:** Okay.

2 **MR. WILSON:** I think it's a little bit more than
3 that.

4 **THE COURT:** All right. Very good.
5 So I'll be back out at 8:30.

6 **THE CLERK:** Court is in recess.
7 (Whereupon there was a recess in the proceedings
8 from 8:12 a.m. until 8:32 a.m.)

9 **THE CLERK:** Please be seated.

10 **THE COURT:** Good morning, everyone. Let me give you
11 a little update on the scheduling. It's pretty much the same
12 thing that I told you yesterday.

13 So we continue to be ahead of schedule. We will likely be
14 done with the evidence presentation before lunch today and you
15 will then be free to go. You can rush home. You can go out to
16 eat lunch at the food trucks in front of City Hall. There are
17 a bunch of food trucks on Friday, every Friday, in front of
18 City Hall. And then -- but you won't have to come back after
19 lunch, most likely. And then Monday morning I will give you --
20 I would read you my post-trial instructions. You'll have a
21 copy those, each of you will have a copy of those in the jury
22 room as well, and then you'll hear closing arguments from the
23 lawyers and you can begin your deliberations. So that's where
24 we are.

25 And now we will go ahead and resume with Mr. Keyes.

1 DAVID KEYES,

2 called as a witness for the Defendant herein, having been
3 previously sworn, resumed the stand and testified further as
4 follows:

5 DIRECT EXAMINATION RESUMED

6 **BY MR. WILSON**

7 **Q.** Good morning, Mr. Keyes.

8 **A.** Hi.

9 **Q.** Yesterday before we ended I had asked you about the
10 meeting that you had on December 30 with Mr. Duane, which was
11 his first day back to work from his medical leave, and that's
12 where I would like to pick up from today. Okay?

13 **A.** Okay.

14 **Q.** So just to sort of bring us up to speed, that was the 30th
15 of December, 2014; right?

16 **A.** Yes.

17 **Q.** And that was Mr. Duane's first day back from his medical
18 leave; right?

19 **A.** Yes.

20 **Q.** Did you meet with him in that morning?

21 **A.** Yes.

22 **Q.** Do you recall what time you met with him?

23 **A.** 9:00 or 10:00.

24 **Q.** The original meeting was proposed to you to be, like,
25 maybe 10:00 or 11:00. It was somewhere around that time?

1 A. Yes.

2 Q. Where did you meet with him that day?

3 A. In my office.

4 Q. Where is your office located? Is it in the IXL building?

5 A. Yes.

6 Q. In San Mateo?

7 A. Yes.

8 Q. When you met with Mr. Duane on the 30th, his first day
9 back, who started the meeting? Who said the first things other
10 than greetings? Do you recall?

11 A. Yes.

12 Q. What did you say?

13 A. I said I wanted to catch him up on all the stuff that had
14 happened when he was out, and we went over everything that had
15 happened based on his projects, et cetera.

16 Q. What was his demeanor at the beginning of the meeting?

17 A. Fairly non-communicative. Curt.

18 Q. Hurt? What do you mean by that?

19 A. Not hurt, curt.

20 Q. Oh, curt, I'm sorry.

21 When you met with him on that day and you brought him up
22 to speed, when did the topic of the remote working come up?

23 A. I don't remember at which point in the meeting. I think
24 maybe we did at the end but I don't remember.

25 Q. Did you talk at all in that meeting, either before the

1 remote work or during the remote work discussion, about the
2 emails that you had exchanged with him in December?

3 A. Not that I remember.

4 Q. Okay. Did he explain to you about the emails that you
5 sent him in December?

6 A. No.

7 Q. I'd like to show you the exhibit, the Remote Work Plan.
8 I'd like to show you Exhibit 124, which has been admitted and
9 ask you if you have --

10 (Document displayed)

11 Q. First of all, the first page. Have you seen that -- I
12 think everybody can see that. Can you tell me what that first
13 page is?

14 A. It looks like a -- I emailed the plan to Scott.

15 Q. On December 30?

16 A. Yes.

17 Q. Do you think you emailed it at had 10:35?

18 A. Yes.

19 Q. It says:

20 "Hi Scott. Here is the plan we just discussed."

21 Do you recall whether that is a discussion you had in the
22 meeting or you were sending it before the meeting?

23 A. No, I'm pretty sure I sent it after the meeting.

24 Q. So when you were in the meeting with him, did you and he
25 have the actual document in front of you?

1 A. Yes.

2 Q. Okay. So if we can go to the next page?

3 (Document displayed)

4 Q. And it's titled "Scott Duane Working Remotely Plan." Do
5 you see that?

6 A. Yes.

7 Q. Who drafted that?

8 A. I did.

9 Q. Did you show him that document in that meeting?

10 A. Yes.

11 Q. And if you can't see the whole thing, could --

12 MR. WILSON: Is there a way to show him the entire
13 document? The entire page?

14 Yeah.

15 (Document displayed)

16 BY MR. WILSON

17 Q. We'll zoom in when we talk about some of the specifics,
18 but this is a Remote Working Plan and there are sections:
19 Working Schedule, Weekly Work Plan, and there is some Task To
20 Goals, so forth. The last section is General Goals.

21 Did you write all of that?

22 A. Yes.

23 Q. And when you showed him this document in your office that
24 morning, was all of this language on there?

25 A. Yes.

1 Q. Okay. Was all of this language on there as it is in this
2 document you emailed him or were there changes made?

3 A. No. There weren't changes.

4 Q. Okay. You prepared the document before the meeting
5 started; is that right?

6 A. Yes.

7 Q. Okay. You had it in -- on a piece of paper that you
8 talked about it with him; right?

9 A. Yes.

10 Q. And then you emailed him the electronic version of it,
11 which was not changed at all in the meeting; right?

12 A. Yes. So, actually, I think we looked at it on my computer
13 screen together and then I emailed him the attachment.

14 Q. Thanks for that. Okay.

15 But just for clarity, what you wrote before the meeting is
16 the same thing that you emailed him after the meeting --

17 A. Yes.

18 Q. -- is that right? Okay.

19 So if we could look at the beginning section of that.

20 (Document displayed)

21 MR. WILSON: Thank you, Ed.

22 BY MR. WILSON

23 Q. Actually, the title "Working Schedule," what was the
24 purpose of that?

25 A. The purpose was to set hours for which he would be in the

1 office versus at home.

2 Q. And Monday is one thing and Tuesday, Friday that's a
3 different set of bullet points. What's the reason for that?

4 A. Yeah. So I believe Scott had suggested that he could be
5 in in the mornings. So I was definitely on board with that,
6 but our team meeting was Monday afternoons. So I preferred
7 that he be in the afternoon on Monday so he could attend the
8 team meeting in person.

9 Q. In parentheses it says "exact hours up for discussion, but
10 consistency is required." Did you write that?

11 A. Yes.

12 Q. What was the purpose of writing that?

13 A. I wanted to, I guess, let him know that if these precise
14 hours didn't work for him, that they were flexible, but I was
15 looking for consistency across the week just so I would not
16 have to keep track of what day it was and know what -- you
17 know, on which hour and which day he was supposed to be in the
18 office.

19 Q. In 2014 when a PA working for you, product analyst working
20 for worked remotely, was there any requirement that they be
21 reachable or accessible electronically?

22 A. Yeah. There was an implicit requirement that they would
23 be on chat, accessible via email.

24 Q. Did the math department in 2014 and the first week of 2015
25 communicate mostly by phone or by instant messaging slash email

1 or in person when they were discussing work matters, if there
2 is sort of uniformity there?

3 **A.** Most conversations started over instant messenger.
4 Sometimes if they turn into bigger conversations, they would
5 require either video chat or in-person chat.

6 **Q.** Okay. Did Mr. Duane propose any different hours?

7 **A.** No.

8 **Q.** Did he complain about those hours?

9 **A.** No.

10 **Q.** Okay. If you go down a little bit further, there is this
11 Weekly Work Plan, and you created that; is that right?

12 **A.** Yes.

13 **Q.** Where you list, "Here is an example (tasks are listed in
14 order of priority.)"

15 Why did you do that?

16 **A.** Because then it would be clear to me what the most
17 important things to finish were so I could track those more
18 closely versus the, say, like number four, number three.

19 **Q.** But why did you give him examples in this document?

20 **A.** Oh, I was trying to be, like, as transparent as possible
21 as to what I was expecting.

22 **Q.** Okay. Did you discuss these examples with him at that
23 meeting?

24 **A.** I don't remember.

25 **Q.** Did Mr. Duane complain about the examples that you had

1 placed in this document?

2 **A.** No.

3 **Q.** If you go down a little bit further, there is "Maintenance
4 Tasks." Were these examples or were these requirements that
5 you had sort of set in stone?

6 **A.** These were examples, things that would come up mid week
7 that Scott wouldn't necessarily know about on Friday, for
8 example.

9 **Q.** In the "General Goals" section, what was the purpose of
10 that?

11 **A.** It was to give some -- so the previous section was like --
12 almost like a mini case study, like here is how I'm expecting
13 this to look. And then the "General Goals" is here is what I'm
14 expecting overall.

15 **Q.** You wrote in the last line of this document, I believe
16 it's the last line, but it says:

17 "If goals are not being met, other accommodations
18 will need to be considered, such as going back on
19 disability leave or being in the office more."

20 Did you write that?

21 **A.** Yes.

22 **Q.** And why did you write that?

23 **A.** Because in our previous communication over the emails, you
24 know, part of our agreement was that we would have these sorts
25 of metrics in place. So I wanted to make sure that the -- if

1 the metrics were not working, that then we would consider other
2 options.

3 Q. Were you attempting to intimidate him with this line?

4 A. No.

5 Q. Did he complain at all about that line to you?

6 A. No.

7 Q. Okay. In this meeting on the 30th did you talk to him at
8 all about Gina Bland?

9 A. Yes, I believe she came up.

10 Q. Do you know what you talked about?

11 A. I mentioned that she had done her three months in the
12 office and was now 50 percent time at home, 50 percent in the
13 office.

14 Q. Why did you tell him that?

15 A. I think it came up actually in the context of talking
16 about Matt Bleecher.

17 Q. Okay.

18 A. Because Scott was involved in recruiting and we had made
19 an offer to Matt and so I was giving him a recruiting update.
20 Told him about Matt and then I think Gina came up as part of
21 that.

22 Q. So then let's talk about Matt. Matt -- I think I've said
23 Bleecher, maybe. It's Bleecher?

24 A. Yeah.

25 Q. Okay. And he's the employee hired who lived in Louisiana?

1 A. Yes.

2 Q. Okay. You brought that up with Scott Duane at that
3 meeting because of his involvement in recruiting; is that what
4 you said?

5 A. Yes.

6 Q. And what did you tell him specifically, to the best of
7 your recollection, about what Mr. Bleecher would be doing and
8 where he would be working?

9 A. Yeah. I said that he had initially declined our offer
10 because he couldn't relocate at that time and so we decided to
11 try him out as a full-time remote project analyst and he was
12 starting at the end of January.

13 Q. So Mr. Duane knew in that meeting that Mr. Bleecher had
14 denied the offer because he couldn't work remotely at the
15 start; is that what you told him?

16 A. Because he couldn't relocate to California.

17 Q. And so then as a way to get him to accept the offer, you
18 allowed him to work out of his home state at that point?

19 A. Yes.

20 Q. Okay. And you told all those things to Scott Duane?

21 A. Yes.

22 Q. And then how did Ms. Bland come up?

23 A. Well, Scott knew Gina because she was in the office before
24 he went on leave, but she was in the office less so now because
25 she had done her initial three months stay. So I wanted to let

1 him know that she would be in 50 percent of the time.

2 Q. Did you talk about -- or did either of you talk about why
3 she was allowed to work 50 percent somewhere and 50 percent in
4 the office?

5 A. I don't remember.

6 Q. Did Mr. Duane in that meeting complain to you about the
7 fact that both of those employees had some form of remote work
8 arrangement?

9 A. No.

10 Q. Did Scott work the rest of that week?

11 A. Yes.

12 Q. And did he come in to the office in the mornings per the
13 arrangement that you had with him?

14 A. Uh-huh. Yes.

15 Q. And did you have any -- any chance to observe his demeanor
16 during that week?

17 A. Yes. He was visibly upset with me.

18 Q. When did you first notice that he was visibly upset with
19 you?

20 A. This meeting that we were just talking about.

21 Q. Did he tell you what he was -- I'm sorry. Did you ask
22 him, sorry, why he was visibly upset?

23 A. No, I didn't.

24 Q. Did he tell you why he was visibly upset?

25 A. No.

1 Q. When -- how long did it last or how long did you notice
2 him being sort of visibly upset with you in the office?

3 A. That week. Yeah.

4 Q. And did you do anything about that?

5 A. Yes. I scheduled a meeting with him the following week
6 to, you know, ask him about that and try and move past it.

7 Q. Where -- just so we get caught up. Where was it that Gina
8 Bland was working 50 percent of the time outside the office?

9 A. Washington, D.C.

10 Q. Okay. So the 50 percent at home, 50 percent at work, it
11 was not half a day at home, half a day at the office; right?

12 A. Correct. It was about two weeks at a time in each
13 location.

14 Q. Sorry. I'm going to bring you now back to the 6th of
15 January. And you called him in for a meeting; right?

16 A. Yes.

17 Q. Who started the meeting and who said what at the beginning
18 of the meeting?

19 A. Sure. I started the meeting. I said that I notice that
20 since he came back he's been upset. Is there anything I can do
21 to help.

22 Q. What did he say?

23 A. He said that we had discriminated against him based on how
24 we handled his disability leave. He was really upset at that.
25 Yeah. It was -- yeah. That was, like, the core focus of the

1 conversation.

2 Q. Did you ask him any questions after he said that?

3 A. I don't recall asking questions.

4 Q. Did you say anything in response to that?

5 A. Yes. I told him that I did not think we had discriminated
6 against him; that I'm sorry he felt that way. What can we do
7 to move forward? What can I do? Trying to move past it.

8 Q. Were you mad at him?

9 A. No. I was upset that he was making those serious
10 allegations.

11 Q. Were you emotional?

12 A. A little.

13 Q. Do you mind, can you describe how that manifested? What
14 you -- what kind of emotion you were having?

15 A. Yeah. I took -- I strongly did not believe in what he was
16 telling me that I had done, and I took those allegations very
17 seriously, and I did not appreciate that he was saying those
18 things.

19 At the same time I understood that he was upset and, as
20 his manager, I was trying to, I don't know, alleviate the
21 situation, trying to help fix it.

22 Q. You don't deny that he actually believed what he was
23 saying? You don't deny that; right?

24 A. No.

25 Q. All right. But did you tell him anything about his -- the

1 trust between the two of you?

2 **A.** I -- yeah. I said, I want to repair the trust between the
3 two of us, and I'm sorry if that has been broken, and what can
4 we do to repair it.

5 **Q.** And did he respond at all to you saying, I'm sorry about
6 the -- I'd like to repair the trust between us and what can I
7 do about it? Did he say anything back?

8 **A.** Yes. It became pretty clear throughout the course of the
9 conversation that the next action to take was for me to go to
10 HR and escalate the issue and see if Scott could talk to them
11 or Paul and see if that would help.

12 **Q.** Did you have any impression of whether he was accepting
13 your explanation of how you felt about your two or three emails
14 in December?

15 **A.** I'm not sure about acceptance of that piece, but he
16 definitely at the end of the meeting was in a lot better
17 spirits about me taking this issue up with HR.

18 **Q.** Did he complain about anything else in that meeting on the
19 6th?

20 **A.** No, not to my recollection.

21 **Q.** How long was the meeting?

22 **A.** Between half hour and an hour.

23 **Q.** At the end you -- if I understand you correctly, you and
24 he both knew that you were going to go talk to someone in HR;
25 is that right?

1 A. Yes.

2 Q. Did he say whether he wanted you to do that or not wanted
3 you to do that?

4 A. Oh, I think, yeah, he wanted me to do it.

5 Q. Did you tell him you were going to escalate the concern to
6 the CEO?

7 A. Yeah. I said I would be his advocate for him in HR and
8 getting him a meeting with Paul.

9 Q. Did you use that word "I'll be your advocate"?

10 A. Yeah.

11 Q. And so after that meeting -- well, did anything else
12 happen in that meeting before it ended?

13 A. No.

14 Q. Okay. And you said Scott's demeanor was different at the
15 end of the meeting?

16 A. Yes. It was -- we had made some progress. It was better.

17 Q. Okay. Who did you talk to at IXL about what Mr. Duane had
18 just communicated to you in that meeting?

19 A. Lenore, Maricela and Paul.

20 Q. And did you describe to them accurately what he told you
21 in the meeting?

22 A. Yes.

23 Q. Okay. Did you tell Mr. Mishkin that -- did you say to
24 Mr. Mishkin "You should have a meeting," or how did that go?

25 A. Yes. I -- I asked Paul to have a meeting with Scott,

1 yeah.

2 Q. And what was his response?

3 A. He said he would be up for that. It sounds like a good
4 idea.

5 Q. And was that on the 6th, the same day that Scott had made
6 the complaint to you?

7 A. Yes. It was right after that meeting.

8 Q. Was Mr. Mishkin mad?

9 A. No.

10 Q. Did you talk any more on the 7th, the next day, with Scott
11 at all about the complaint he had made?

12 A. No.

13 Q. Did you talk to Lenore, Maricela or Paul on the 7th about
14 what had happened on the 6th?

15 A. We met on the 7th, but it was about the post, not the
16 meeting on the 6th.

17 Q. On the 7th you talked to those people about Scott's post
18 from December 30?

19 A. Yes, the Glassdoor post.

20 Q. When was the first time that you saw that post?

21 A. Wednesday, the 7th.

22 Q. So who called that meeting that you were at, that you just
23 described about the post?

24 A. It was either Maricela or Paul. I'm not sure.

25 Q. Do you recall what was said at that meeting between --

1 well, first of all, you were there, right?

2 A. Yes.

3 Q. Okay. And do you recall what was discussed?

4 A. Yes. At the beginning Paul asked if, you know, are we
5 sure that this is Scott, like this is actually Scott's post,
6 and we were sure.

7 Q. Did you see the post when it was forwarded by email?

8 A. Yes.

9 Q. Did you actually read it?

10 A. Yes.

11 Q. What was your impression or reaction when you read the
12 post?

13 A. I was disappointed.

14 Q. I'd like you to take a look at Exhibit 203, which has not
15 been admitted.

16 (Witness complied.)

17 Q. And do you see the emails on that page?

18 A. Yes.

19 Q. Okay. The top email is between you and Kate Mattison
20 dated June 2, 2014; correct?

21 A. Yes.

22 Q. Did you write that email?

23 A. Yes.

24 Q. And the email below it from Scott Duane, did you receive
25 that email?

1 **A.** Yes.

2 **MR. WILSON:** I move for the admission of Exhibit 203.

3 **MS. SANGHVI:** No objection.

4 **THE COURT:** Admitted.

5 (Trial Exhibit 203 received in evidence)

6 (Document displayed)

7 **BY MR. WILSON**

8 **Q.** First I'd like to direct your attention to the bottom
9 email on June 2, 2014, and it's from Scott Duane to
10 MathPA@IXL.com; right?

11 **A.** Yes.

12 **Q.** What does that mean?

13 **A.** That was our team email list.

14 **Q.** And it says.

15 "I'll be working remotely today and Wednesday.

16 I will be on email and chat except for medical
17 appointments in the middle of the day. I'll be around
18 all day Tuesday."

19 What did you understand Scott's working situation to be at
20 that point in time in June?

21 **A.** That he would be remote on the days he had his
22 appointments.

23 **Q.** And did you approve those days?

24 **A.** Yeah.

25 **Q.** Now if we scroll up and we look at the email above it, is

1 this you forwarding that email to Kate Mattison?

2 A. Yes.

3 Q. Kate Mattison was who?

4 A. My boss.

5 Q. You mention in here -- well, first of all, why did you
6 forward this to Kate Mattison?

7 A. She's on the MathPA email list, so I just wanted to let
8 her know that I was monitoring Scott on his work remote days
9 and making sure that he was doing the tasks that I was
10 expecting him to do.

11 Q. You write in that second line that you felt recently he
12 may be slipping back into old habits of lower productivity and
13 you're keeping an eye on the situation.

14 Did you mean it when you wrote it?

15 A. Yes.

16 Q. Was that true?

17 A. Yes.

18 Q. Why were you bringing that up to Kate Mattison on
19 June 2nd, 2014?

20 A. Well, Scott used to report directly to Kate and I just
21 wanted to let her know that I was on top of it.

22 Q. And did you have obligations to Kate to keep the team
23 productive?

24 A. Yes.

25 Q. Did you know that Mister -- did you know anything about

1 Mr. Duane's gender identity on June 2nd, 2004 [sic]?

2 A. No.

3 Q. Did you know anything differently about his gender
4 identity in December and January, up to January 8, 2015?

5 A. No.

6 MR. WILSON: I have nothing further, Judge. Thank
7 you.

8 THE COURT: Okay. Any cross?

9 MS. SANGHVI: Yes, your Honor.

10 CROSS EXAMINATION

11 BY MS. SANGHVI

12 Q. Good morning.

13 A. Hi.

14 Q. I'm going to start again at the December 30th meeting.

15 A. Okay.

16 Q. Scott returns to work on December 30th; correct?

17 A. Yes.

18 Q. And at that meeting you told him about two personnel
19 changes at the math department; is that correct?

20 A. Yes.

21 Q. Okay. You mentioned Mr. Bleacher and you indicated to him
22 that Mr. Bleacher was working remotely due to a family
23 situation or a situation with his wife; correct?

24 A. Yes.

25 Q. And you also indicated that Ms. Bland would be working

1 remotely 50 percent of the time from D.C. due to a situation
2 with her husband; correct?

3 A. Yes.

4 Q. As of December 30th when you shared the Remote Work Plan
5 with Scott, it was the first time that you had created this
6 type of detailed document for an employee; correct?

7 A. Yes.

8 Q. And at this meeting Scott was clearly upset, from the
9 email exchange, concerning his return to work; correct?

10 A. Yes.

11 Q. And your interaction was very one sided; right?

12 A. That's right.

13 Q. He didn't speak that much you said; correct?

14 A. Correct.

15 Q. He had his arms crossed, his body language was indicating
16 that he was upset; correct?

17 A. That's right.

18 Q. And then for the whole week, really, it was pretty
19 difficult to work with him; right?

20 A. Yes.

21 Q. And, in fact, he had been acting upset since the very
22 first day that he returned; right?

23 A. Yes.

24 Q. You had even observed him sulking in the back of meetings;
25 correct?

1 A. Yes, our team meeting.

2 Q. So much so that you had called Ms. Mattison to seek
3 guidance on how to handle it; correct?

4 A. That's right.

5 Q. And Ms. Mattison had given you the guidance on calling a
6 meeting with Mr. Duane to help resolve the problem; is that
7 correct?

8 A. That's right.

9 Q. And that's why you scheduled the January 6th meeting;
10 correct?

11 A. Yes.

12 Q. You wanted to clear the air and resolve the conflict;
13 right?

14 A. Yes.

15 Q. And I think you just testified that you had started the
16 meeting saying, "I notice you have been upset. Is there
17 anything I can do to help." Right?

18 A. Yes.

19 Q. And Scott communicated pretty clearly to you at that time
20 that he felt that IXL had discriminated against him; correct?

21 A. Yes.

22 Q. And even in this meeting you could tell that he was upset
23 from his tone and his hand gestures; correct?

24 A. Yes.

25 Q. Scott said to you at this meeting that IXL had to provide

1 him with a reasonable accommodation and that you said that you
2 had engaged in a conversation about reasonable accommodations,
3 but he didn't really believe you; is that right?

4 **A.** I'm not sure what he believed.

5 **Q.** Okay. Did you -- was it your understanding that he didn't
6 accept what you were saying?

7 **A.** Yeah.

8 **Q.** And Scott also said that IXL did not provide a reasonable
9 accommodation and that's discrimination; correct?

10 **A.** Yes.

11 **Q.** So after that meeting, you met with Maricela Prado and
12 Lenore Ockerberg; correct?

13 **A.** Yes, and Paul.

14 **Q.** And when you met with them, you conveyed the feeling that
15 Scott was convinced that IXL discriminated against him;
16 correct?

17 **A.** Yes.

18 **Q.** At this meeting I think you indicated that Mr. Mishkin did
19 not appear mad; correct?

20 **A.** That's right.

21 **Q.** This was not the first time that Mr. Mishkin had learned
22 about Scott invoking the Americans with Disabilities Act or the
23 reasonable accommodation; correct?

24 **A.** Right. We had discussed it. We had discussed the emails
25 together before.

1 Q. Right. And, in fact, Mr. Mishkin had sort of been
2 involved in the December 19th through December 24th or -5th
3 email exchange with Mr. Duane about the reasonable
4 accommodation; correct?

5 A. Yeah. He was forwarded that email chain, yeah.

6 Q. And he had reviewed the email response; correct?

7 A. That's right.

8 Q. This wasn't new information necessarily for Mr. Mishkin,
9 was it?

10 A. No.

11 Q. And the very next day is the day that you learn about the
12 Glassdoor post; correct?

13 A. That's right.

14 Q. I'm going to draw your attention in the book of exhibits
15 in front of you to Exhibit 29.

16 You received the email from Ms. Prado forwarding Scott's
17 post at 11:04 a.m. on January 7th; right?

18 A. Yeah.

19 Q. And based on his attitude, everything you observed thus
20 far and the language in this post, you immediately thought that
21 Scott wrote the post; right?

22 A. That's right.

23 Q. And you were in the meeting with Mr. Mishkin, Ms.
24 Ockerberg and Ms. Prado to discuss the post on January 7th;
25 correct?

1 A. Yes.

2 Q. And during this meeting, Mr. Mishkin confirmed that,
3 "You're sure it was Scott who wrote the post;" right?

4 A. That's right.

5 Q. And you confirmed that information; correct?

6 A. Yes.

7 Q. And then Paul immediately said, "We're going to terminate
8 Mr. Duane for the post;" correct?

9 A. That's right.

10 Q. And it was pretty quick; right? You confirmed it was
11 Scott and Mr. Mishkin said that Scott will be terminated;
12 right?

13 A. Yes. He said the post showed poor judgment.

14 Q. And Mr. Mishkin didn't tell anyone at that meeting to
15 contact Glassdoor and try to take it down; right?

16 A. I don't remember that.

17 Q. During the meeting, you didn't talk about how you felt
18 about the post; correct?

19 A. No, I don't think so.

20 Q. And you didn't talk about how Mr. Mishkin felt about the
21 post; correct?

22 A. Well, he said it showed poor judgment and it was an attack
23 on the company.

24 Q. But you didn't have any discussions about how Mr. Mishkin
25 felt; correct?

1 A. Correct.

2 Q. And am I correct that at this meeting no one really even
3 seemed upset about the post; right?

4 A. No.

5 Q. No one seemed upset?

6 A. Correct.

7 Q. And after Mr. Mishkin said that he was going to fire
8 Scott, he said that the reason was that the post was
9 slanderous, and Mr. Mishkin said specifically that the post
10 claims discrimination which is untrue; correct?

11 A. The post does claim discrimination. It claims some other
12 things as well, also untrue.

13 Q. And Mr. Mishkin specifically stated that it was untrue;
14 correct?

15 A. That the post was unlikely true, yes.

16 Q. And that was it; right? So the next step was the
17 logistics on how to clean out the cubicle and handle the end
18 of -- or the termination paperwork; correct?

19 A. That's right.

20 Q. And because Mr. Duane and Mr. Mishkin had already had a
21 meeting scheduled for the next day, it was decided that
22 Mr. Mishkin would fire him at that meeting and while the
23 meeting was going on, operations would clean out his
24 possessions; is that correct?

25 A. That's right.

1 Q. And that's what happened on January 7th at that meeting
2 between you, Mr. Mishkin, Ms. Ockerberg and Ms. Prado; correct?

3 A. Yes.

4 Q. And you had Mr. Duane's 2014 annual review scheduled for
5 January 8th; correct?

6 A. That's right.

7 Q. If you can turn in your binder to Exhibit 156, please?
8 (Witness complied.)

9 A. I'm there.

10 Q. You are, okay. Do you recognize this document?

11 A. The emails? Yes.

12 Q. So what is it? Can you just describe it?

13 A. It's me rescheduling the annual review.

14 Q. Okay. And on Wednesday, January 7th at 7:30 p.m. you had
15 already had the meeting with Ms. Prado and Ms. Ockerberg,
16 Mr. Mishkin; correct?

17 A. Yes.

18 Q. The decision had already been made to fire Mr. Duane;
19 correct?

20 A. That's right.

21 Q. So you told Scott that you had to reschedule his annual
22 review meeting until Friday January 9th; right?

23 A. That's right.

24 Q. And that was because you knew that he would already be
25 fired by that point; correct?

1 A. Yeah. It didn't make sense to do an annual review.

2 Q. So you led Scott to believe that the meeting was still
3 going to happen though, even though you knew it wouldn't
4 happen; correct?

5 A. Yeah. I didn't see any other way to do it.

6 Q. Just so I understand, in this email "Parker" refers to
7 your son?

8 A. Daughter.

9 Q. Daughter, sorry.

10 A. That's okay.

11 Q. Okay. And if you could now turn your attention to
12 Exhibit 11?

13 (Witness complied.)

14 Q. So in 2014 you were responsible for reviewing Mr. Duane's
15 performance; correct?

16 A. Yes.

17 Q. Do you recognize this document?

18 A. Yes.

19 Q. What is it?

20 A. Around this time of year we send notes on everyone who
21 reports to us to our supervisor about what type of raise they
22 deserve at the end of the year.

23 Q. And these are your comments with respect to Mr. Duane; is
24 that correct?

25 A. That's right.

1 Q. Okay.

2 MS. SANGHVI: Move to admit Exhibit 11.

3 MR. WILSON: No objection.

4 THE COURT: Admitted.

5 (Trial Exhibit 11 received in evidence).

6 (Document displayed)

7 BY MS. SANGHVI

8 Q. So on November 20th, 2014 you were providing feedback to
9 Ms. Mattison about your direct reports eligible for raises you
10 said; correct?

11 A. That's right.

12 Q. And so in November of 2014 you told Kate Mattison that
13 Scott is one of the more productive members of the team in a
14 variety of ways; correct?

15 A. That's right.

16 Q. You thought he was productive with respect to specs, phone
17 interviews, mobile testing and QA; correct?

18 A. Yes.

19 Q. "QA" is quality assurance; right?

20 A. That's right.

21 Q. And "specs" refers to the specifications that engineers
22 write so that they can develop code for the problem that Scott
23 creates?

24 A. Yes. My team writes them, yeah.

25 Q. And you also thought that Mr. Duane had a good visual

1 sense and works well with the UI designers; correct?

2 A. Yes.

3 Q. And "UI" is user interface?

4 A. That's right.

5 Q. However, you can look at the bottom bullet point and the
6 document from November 20th, 2014, before Scott returned from
7 leave, indicates that his specs take more rounds of review
8 before handing off than others; correct?

9 A. That's right.

10 Q. So I am correct that Scott's specs typically require ten
11 rounds of review, but they should have generally been more five
12 to seven; is that correct?

13 A. Yes. They should have gone through review faster.

14 Q. So this was a situation that you had recognized prior to
15 Scott's return from leave; correct?

16 A. That's right.

17 Q. And although you gave Scott a positive performance review,
18 you thought that this was a problem that you had sort of
19 identified throughout 2014; correct?

20 A. Yes. Can you define -- by "positive" -- I said "average
21 raise." So some positive, some negative, balances out.

22 Q. Okay. Why don't we turn your attention then to
23 Exhibit 39?

24 (Witness complied.)

25 Q. Do you recognize this document?

1 A. Yes.

2 Q. What is it?

3 A. It's my annual review notes for Scott.

4 MS. SANGHVI: Move to admit 39.

5 MR. WILSON: No objection.

6 THE COURT: Admitted.

7 (Trial Exhibit 39 received in evidence).

8 BY MS. SANGHVI

9 Q. So in terms of -- you were responsible and you ultimately
10 prepared this annual review for Mr. Duane's performance from
11 January, 2014 through the end of the year of 2014; correct?

12 A. That's right.

13 Q. Okay. And in this review for Scott that you did you
14 indicated that:

15 "He consistently completes his standard alignment
16 reviews and stays on top of these items in his queue."

17 Correct?

18 A. Yes.

19 Q. You also said that:

20 "Scott wrote some of the more complicated and
21 technical pre-calc specs in terms of grading, logic
22 and explanation cases."

23 Correct?

24 A. Yes.

25 Q. And you had received from feedback from Scott's peers in

1 preparing this review; correct?

2 A. Yes.

3 Q. If you can turn to Exhibit 42, please?

4 (Witness complied.)

5 Q. Do you recognize this document?

6 A. The emails with Andy? Yes.

7 Q. And these are emails with Andrew Lenox with regards to a
8 peer review of Scott Duane; correct?

9 A. That's right.

10 MS. SANGHVI: Move to admit 42.

11 MR. WILSON: No objection.

12 THE COURT: Admitted.

13 (Trial Exhibit 42 received in evidence)

14 BY MS. SANGHVI

15 Q. Who is Andrew Lenox?

16 A. He was an engineer.

17 Q. Did he have occasion to work with Mr. Duane?

18 A. Yes.

19 Q. He provided his positive assessment of Mr. Duane's work in
20 2014; correct?

21 A. That's right.

22 Q. If you can just move to Exhibit 43, the next one in your
23 binder?

24 (Witness complied.)

25 Q. Do you recognize this document?

1 A. Yes.

2 Q. What is it?

3 A. Email thread between myself and Juyang.

4 MS. SANGHVI: Move to admit 43.

5 MR. WILSON: No objection.

6 THE COURT: Admitted.

7 (Trial Exhibit 43 received in evidence)

8 (Document displayed)

9 BY MS. SANGHVI

10 Q. And you also got positive feedback from another colleague;
11 correct?

12 A. That's right.

13 Q. Okay. If you can move your attention now to Exhibit 143?
14 (Witness complied.)

15 Q. I'm shifting back in time a little bit for you to the
16 period of time in which you were interacting with Mr. Duane
17 over email at the end of December of 2014. Okay?

18 A. Okay.

19 Q. And you had -- do you recognize this document?

20 A. Yes.

21 Q. What is it?

22 A. It's like an email thread between myself and Lenore and
23 Kate and Maricela.

24 MS. SANGHVI: Move to admit 143.

25 MR. WILSON: No objection.

1 **THE COURT:** Admitted.

2 (Trial Exhibit 143 received in evidence).

3 **BY MS. SANGHVI**

4 **Q.** So in your response you had -- to Mr. Duane you had
5 indicated that you would prefer that Mr. Duane "be in the
6 office for hours when you come back since you are more
7 productive here;" correct?

8 **A.** That's right.

9 **Q.** And would you agree with me that some people are not more
10 productive working remotely and some are more productive in the
11 office?

12 **A.** Yes.

13 **Q.** Okay. And this likely depends on what else they are doing
14 and what they are doing working remotely; correct?

15 **A.** Yeah.

16 **Q.** When you're referring to Scott's productivity when he
17 worked remotely in the fall and the summer, you're referring to
18 the time that he was attending pre-operative appointments;
19 correct?

20 **A.** That's right.

21 **Q.** And based on that concern, you were not comfortable with
22 Scott working remotely for four hours every day for a few
23 weeks; correct?

24 **A.** That's right.

25 **Q.** But you were aware that he wasn't going to be attending

1 appointments, correct, when he returned to work as of
2 December 30th, 2014?

3 A. Yes.

4 Q. And you see here that Ms. Ockerberg described your email
5 as:

6 "Perfect, because it shows that you were willing
7 to accommodate him, but working from home is really
8 not an option."

9 Correct?

10 A. Yes. I see that.

11 Q. Because as of December 22nd, you were not willing to allow
12 Mr. Duane to work remotely; correct?

13 A. I preferred him to be in the office.

14 Q. And just prior to this exchange with Mr. Duane, you had
15 approved -- I think you testified you had approved every
16 request Mr. Duane had made for sick leave or to work remotely;
17 is that correct?

18 A. That's correct.

19 Q. And, in fact, prior to this, he just would tell you that
20 he was taking time off, and there was never really an issue;
21 correct?

22 A. That occurred a couple times, yes.

23 Q. Let's turn your attention to Exhibit 12, please.

24 (Witness complied.)

25 A. I'm there.

1 Q. Okay. Do you recognize this document, sir?

2 A. Yes.

3 Q. What is it?

4 A. Scott sending me an email about his surgery in February.

5 Q. Okay.

6 MS. SANGHVI: Move to admit 12.

7 MR. WOODWORTH: No objection.

8 THE COURT: Admitted.

9 (Trial Exhibit 12 received in evidence).

10 BY MS. SANGHVI

11 Q. This is an email from Mr. Duane to you and Kate Mattison;
12 correct?

13 A. Yes.

14 Q. And it's dated December 17th, 2013; correct?

15 A. Yes.

16 Q. All right. And in this email Scott just gives you a
17 heads-up that, "I'll be out for a week in early February for a
18 surgery;" correct?

19 A. Yes.

20 Q. And you didn't ask for any further explanation; correct?

21 A. No.

22 Q. And at that time, just to be clear, you had been --
23 Scott's performance had been a bit worse than it was in 2014;
24 correct?

25 A. Yes.

1 Q. If you can move your attention to Exhibit 119?

2 (Witness complied.)

3 Q. Do you recognize this document, sir?

4 A. This one is a little harder to -- can I have a minute
5 to --

6 Q. Of course.

7 A. There are no line spaces.

8 (Brief pause.)

9 A. Yes.

10 Q. This is a -- excuse me. What is this document?

11 A. I believe it is an email thread or an IM thread between
12 Scott and myself about him coming back after his February
13 surgery.

14 Q. Okay.

15 MS. SANGHVI: Move to admit.

16 MR. WOODWORTH: No objection.

17 THE COURT: Admitted.

18 (Trial Exhibit 119 received in evidence)

19 BY MS. SANGHVI

20 Q. And this is a conversation between you and Mr. Duane from
21 February 10th, 2014 where he tells you that his surgeon pushed
22 back his second post op from Tuesday to Wednesday, a week from
23 today, and would like me to stay off my feet til then. Hope
24 that's okay.

25 Do you see that?

1 A. Yes.

2 Q. And you had no issue at that time; correct?

3 A. That's right.

4 Q. And you agreed that he could work remotely for a week;
5 correct?

6 A. Yes of.

7 MS. SANGHVI: Just one moment. Thank you for your
8 patience.

9 (Brief pause.)

10 BY MS. SANGHVI

11 Q. I just want to go back to one point at the start of our
12 discussion.

13 You've described Mr. Duane's return to work on
14 December 30th and his behavior basically up until the meeting
15 you had with him on January 6th as him being very upset and
16 that was pretty clear from his behavior; correct?

17 A. That's right.

18 Q. Okay. And did you believe that his behavior in those two
19 instances, on December 30th and in the meeting with you on
20 January 6th, was related to the email chain regarding his
21 request for an accommodation?

22 A. The email chain in late December, 2014?

23 Q. Yes.

24 A. Yes.

25 Q. Okay. And his behavior, you believed, was pretty

1 consistent with the tone of that email chain; correct?

2 **A.** Starting with the third email in it. His first email was
3 very different.

4 **Q.** And you're referring to the email that he begins with,
5 "I'm attempting to not be combative and hostile;" correct?

6 **A.** That's what I meant by the third email.

7 **MS. SANGHVI:** Nothing further at this time -- or
8 nothing further, your Honor.

9 **THE COURT:** Any redirect?

10 **MR. WILSON:** No redirect.

11 **THE COURT:** Thank you, Mr. Keyes. You can step down.

12 (Witness excused.)

13 (Further proceedings held herein, reported
14 but not transcribed.)

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I N D E X

Friday, October 26, 2018 - Volume 1

DEFENDANT'S WITNESSES

PAGE VOL.

KEYES, DAVID

(PREVIOUSLY SWORN)	6	1
Direct Examination Resumed by Mr. Wilson	6	1
Cross Examination Ms. Sanghvi	25	1

- - -

E X H I B I T S

TRIAL EXHIBITS

IDEN EVID VOL.

11		34	1
12		41	1
39		36	1
42		37	1
43		38	1
119		42	1
143		39	1
203		23	1

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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

Friday, October 26, 2018