

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,))	San Francisco, California
vs.))	
)	Monday
IXL LEARNING, INC.))	October 29, 2018
)	8:00 a.m.
Defendant.))	

EXCERPT OF JURY TRIAL PROCEEDINGS
CLOSING ARGUMENTS

APPEARANCES:

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

For Plaintiff Intervenor: THE MAREK LAW FIRM
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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
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6 **BY: JEFFREY D. WILSON, ESQ.**
7 **EDDIE DEAN WOODWORTH, ESQ.**

8 - - -

1 Monday - October 29, 2018

8:19 a.m..m.

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

3 ---000---

4 (Proceedings held in open court, outside
5 the presence and hearing of the jury.)

6 **THE COURT:** Okay. So I have the stip. It looks fine
7 to me.

8 So do you just want to -- I can't remember what you all
9 decided on Friday. Do you want to just admit this into
10 evidence now and have it as an exhibit and not move for its
11 admission in front of the jury and read it to the jury? Is
12 that what you all decided?

13 **MR. WOODWORTH:** I think that's fine, your Honor.

14 **MS. SANGHVI:** That's fine.

15 **THE COURT:** Okay. Since you all are stipulating to
16 include this in the record and without having read it --
17 without reading it to the jury, that's fine. This will be
18 admitted and it will go in as Exhibit 167.

19 (Trial Exhibit 167 received in evidence).

20 Okay. And anything else to discuss?

21 **MR. WOODWORTH:** Not at this time, your Honor.

22 **MS. SANGHVI:** No, your Honor. Just to confirm you
23 accepted the changes on Friday?

24 **THE COURT:** Yes. The changes that everybody -- that
25 both sides submitted seemed good to me. So I have accepted

1 those.

2 I will read them to the jury and then often when I read
3 them, I find -- you know, I find one or two typos or something,
4 so I will correct those in the written form before preparing
5 the absolute final Jury Instructions to be handed to the jury
6 in the jury room.

7 Does that make sense what I just said?

8 **MR. WOODWORTH:** Yes.

9 **MS. SANGHVI:** Yes.

10 **THE COURT:** All right. So see at 8:30.

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

12 (Whereupon there was a recess in the proceedings

13 from 8:21 a.m. until 8:34 a.m.)

14 (Jury enters the courtroom at 8:34 a.m.)

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

16 **THE COURT:** Okay. Good morning, everyone. I hope
17 you had a nice weekend. We continue to be on the same schedule
18 that I discussed with you on Friday.

19 So now I will read you the closing instructions. There
20 will be some repetition from the instructions I read you at the
21 beginning of the trial.

22 After that, we will proceed with the closing argument from
23 the plaintiffs. After that, we'll probably take a short break
24 and then we'll hear from the defendants. And then the
25 plaintiffs will have an opportunity to give rebuttal closing

1 argument.

2 That should take us, I would expect, until roughly 10:30,
3 10:30-ish, and then you'll be ready to begin your
4 deliberations.

5 So here are your instructions.

6 **FINAL JURY INSTRUCTIONS**

7 **THE COURT:** It's your duty to find the facts from all
8 the evidence in the case. To those facts you will apply the
9 law as I give it to you. You must follow the law as I give it
10 to you whether you agree with it or not, and you must not be
11 influenced by any personal likes or dislikes, opinions,
12 prejudices, biases, stereotypes or sympathy. That means that
13 you must decide the case solely on the evidence before you.
14 You will recall that you took an oath at the beginning of this
15 trial to do so.

16 You must follow all these instructions and not single out
17 some and ignore others. They are all important.

18 Please do not read into these instructions or anything
19 that I may say or do or may have said or done as suggesting
20 that I have an opinion regarding the evidence or what you think
21 the verdict should be. That decision is up to you.

22 The standard of proof in this case, as we discussed
23 earlier, is called a preponderance of the evidence. When a
24 party has the burden of proving any claim or defense by a
25 preponderance of the evidence, that means you must be persuaded

1 by the evidence that the claim or defense is more probably true
2 than not true.

3 The plaintiffs have the burden of proving their claims by
4 a preponderance of the evidence. And, remember, there is an
5 ADA claim, an Americans with Disabilities Act claim, and a
6 Title VII claim. And you'll hear more about that in a second.
7 But there are two claims. And the plaintiffs have the burden
8 of proving each of these claims by a preponderance of the
9 evidence. You should base your decision on all the evidence
10 regardless of which party presented it.

11 The evidence you are to consider in deciding the facts --
12 deciding what the facts are consist of:

13 One, sworn testimony of any witness.

14 Two, the exhibits that are admitted into evidence.

15 Three, any facts to which the lawyers have agreed. And
16 there are, in fact, a couple of facts that the lawyers have
17 agreed to and you'll hear about those in closing arguments.

18 What is not evidence? In reaching your verdict you may
19 consider only the testimony and exhibits received into
20 evidence. Certain things are not evidence and you may not
21 consider them in deciding what the facts are. And I will list
22 them for you.

23 One, arguments and statements by lawyers are not evidence.
24 The lawyers are not witnesses. What they have said in their
25 opening statements, what they will say in their closing

1 arguments, and what they've said at other times is intended to
2 help you interpret the evidence, but it is not evidence. If
3 the facts as you remember them differ from the way the lawyers
4 have stated them, your memory controls.

5 Two, questions and objections by lawyers are not evidence.
6 Attorneys have a duty to their clients to object when they
7 believe a question is improper under the Rules of Evidence.
8 You should not be influenced by the objection or my ruling on
9 it.

10 I'm not sure if -- I don't recall if there was any
11 evidence or testimony that was stricken, but if I'm
12 misremembering and if there was any evidence that was stricken
13 or testimony that was stricken, that is not evidence and you
14 should -- you should not consider it.

15 Four, anything you may have seen or heard when the Court
16 was not in session is not evidence. You're to decide the case
17 solely based on the evidence that was received at trial.

18 Now, again -- I'll give you the instruction again on the
19 difference between direct and circumstantial evidence.

20 Evidence may be direct or circumstantial. Direct evidence
21 is direct proof of a fact, such as testimony by a witness about
22 what that witness personally saw or heard or did.

23 Circumstantial evidence is proof of one or more facts from
24 which you could find another fact. And, again, you should
25 think about the example I gave you before trial about raining

1 at night and the difference between seeing it or hearing it
2 rain in the middle of the night and waking up in the morning
3 and seeing the ground was wet.

4 You should consider both kinds of evidence, direct and
5 circumstantial. The law makes no distinction between the
6 weight to be given either to direct or circumstantial evidence.
7 It's for you to decide how much weight to give any particular
8 evidence.

9 In deciding the facts of this case you may have to decide
10 which testimony to believe and which testimony not to believe.
11 You may believe everything a witness says, or part of it, or
12 none of it. In considering the testimony of any witness you
13 may take into account:

14 The opportunity and ability of the witness to see or hear
15 or know the things testified to;

16 The witness's memory;

17 The witness' manner while testifying. Although keep in
18 mind that different people react differently to testifying in
19 court.

20 The witness's interest in the outcome of the case, if any;

21 The witness's bias or prejudice, if any;

22 Whether other evidence contradicted the witness's
23 testimony;

24 The reasonableness of the witness's testimony in light of
25 all the evidence;

1 And any other factors that bear on believability.

2 Sometimes a witness may say something that is not
3 consistent with something else he or she said. Sometimes
4 different witnesses will give different interpretations --
5 different versions of what happened. People often forget
6 things or make mistakes in what they remember. Also, two
7 people may see the same event but remember it differently. You
8 may consider these differences, but do not decide that
9 testimony is untrue just because it differs from other
10 testimony. However, if you decide that a witness has
11 deliberately testified untruthfully about something important,
12 you may choose not to believe anything that witness said.

13 On the other hand, if you think the witness testified
14 untruthfully about some things but told the truth about others,
15 you may accept the part you think is true and ignore the rest.

16 The weight of the evidence as to a fact does not
17 necessarily depend on the number of witnesses who testify.
18 What is important is how believable the witnesses were and how
19 much weight you think their testimony deserves.

20 As I mentioned, the parties have agreed to certain facts
21 to be placed in evidence. Those have been placed in evidence
22 at Exhibit 167. You must, therefore, treat these facts as
23 having been proved.

24 Certain charts and summaries have been shown to you and
25 perhaps will be shown to you during closing arguments to help

1 explain the contents of records, documents, or other evidence
2 in the case. Charts and summaries are only as good as the
3 underlying evidence that supports them. You should, therefore,
4 give them only such weight as you think the underlying evidence
5 deserves.

6 Now, we're going to get to the substantive law. A
7 description of what the plaintiffs are required to prove to
8 prevail on their ADA claim and a description of what the
9 plaintiffs are required to prove to prevail on their Title VII
10 claim.

11 So I will start with the ADA retaliation claim. Both of
12 these are retaliation claims, and both claims have three
13 elements that the plaintiffs are required to prove. So let me
14 start with the ADA retaliation claim.

15 The plaintiffs allege that IXL retaliated against
16 Mr. Duane in violation of the ADA -- that is the Americans with
17 Disabilities Act -- for complaining in the Glassdoor post about
18 disability discrimination in the workplace. The plaintiffs
19 have the burden of proving each of these three elements -- each
20 of the following three elements by a preponderance of the
21 evidence.

22 One, Mr. Duane complained about disability discrimination
23 in the Glassdoor post.

24 Two, Mr. Duane's complaints in the Glassdoor post were
25 made in a reasonable manner and were based on a reasonable and

1 good faith belief that IXL did, in fact, discriminate on the
2 basis of disability, even if his beliefs were mistaken. A
3 complaint is not automatically unreasonable because it is
4 public or because it would harm the company.

5 Number three, Mr. Duane was fired because of his
6 complaints about disability discrimination in the Glassdoor
7 post. Disability discrimination complaints need not be the
8 only reason why IXL fired Mr. Duane, but the plaintiffs must
9 prove by a preponderance of the evidence that IXL would not
10 have fired Mr. Duane if he had not complained about disability
11 discrimination in the Glassdoor post.

12 If you find that the plaintiffs have proved all three of
13 these elements, your verdict should be for the plaintiffs on
14 their ADA claim. If, on the other hand, you find that the
15 plaintiffs have failed to prove one or more of these elements,
16 your verdict should be for IXL on the ADA claim.

17 Now, I'll talk to you about the Title VII claim, which
18 prohibits -- that deals with other types of discrimination.
19 The elements are very similar. The only difference is that
20 we're talking about other types of discrimination here, not
21 disability discrimination.

22 The plaintiffs allege that IXL retaliated against
23 Mr. Duane in violation of Title VII of the Civil Rights Act for
24 complaining in the Glassdoor post about discrimination on the
25 basis of race, sex, gender, gender identity, and/or sexual

1 orientation.

2 The plaintiffs have the burden of proving each of these
3 three elements by a preponderance of the evidence.

4 One, Mr. Duane complained about discrimination on the
5 basis of race, sex, gender, gender identity, and/or sexual
6 orientation in the Glassdoor post.

7 Two, Mr. Duane's complaints in the Glassdoor post were
8 made in a reasonable manner and were based on a reasonable and
9 good faith belief that IXL did, in fact, discriminate on the
10 basis of race, gender, gender identity, and/or sexual
11 orientation, even if his beliefs were mistaken. Again, a
12 complaint is not automatically unreasonable just because it is
13 public or because it would harm the company.

14 And, three, the third element that the plaintiffs have to
15 prove is that Mr. Duane was fired because of his complaints
16 about discrimination on the basis of race, sex, gender, gender
17 identity, and/or sexual orientation in the Glassdoor post.

18 And, again, the discrimination complaints need not be the
19 only reason why IXL fired Mr. Duane, but the plaintiffs must
20 prove by a preponderance of the evidence that IXL would not
21 have fired Mr. Duane if he had not complained about the
22 discrimination prohibited by Title VII in the Glassdoor post.

23 If you find that the plaintiffs have proved all three of
24 these elements, your verdict should be for the plaintiffs on
25 their Title VII claim. If, on the other hand, you find that

1 the plaintiffs have failed to prove any of these elements, your
2 verdict should be for IXL on the Title VII claim.

3 It is also my duty to instruct you about the measure of
4 damages. By instructing you on damages, I do not mean to
5 suggest which side should win, but if you find for the
6 plaintiffs, you must determine Mr. Duane's damages. Damages
7 means the amount of money that will reasonably and fairly
8 compensate Mr. Duane for any injury you find was caused by the
9 defendant.

10 The plaintiffs have the burden of proving damages by a
11 preponderance of the evidence. There are four types of damages
12 available in this case: Lost earnings and benefits,
13 out-of-pocket expenses, compensation for any emotional pain and
14 suffering by Mr. Duane, and punitive damages. The third and
15 fourth categories of damages are not available for Mr. Duane's
16 ADA claim. They are only available for Mr. Duane's Title VII
17 claim.

18 In determining the amount of damages, you should consider
19 any emotional pain and suffering, mental anguish, depression,
20 anxiety, and loss of enjoyment of life that Mr. Duane
21 experienced as a consequence of IXL's alleged retaliatory
22 firing. The reasonable value of wages, earnings and benefits
23 Mr. Duane lost from January 8th, 2015 to December 31st, 2015 --
24 and the parties have stipulated to this amount, the reasonable
25 value of wages, earnings and benefits during this time period,

1 and the amount they have stipulated to is \$101,808.04.

2 And then the other issue you should consider is the
3 reasonable value of necessary out-of-pocket expenses Mr. Duane
4 incurred for a job search from January 8th, 2015 to
5 December 31st, 2015.

6 It is for you to determine what damages, if any, have been
7 proved. Your award must be based on evidence and not upon
8 speculation, guesswork or conjecture. However, the law does
9 not require that plaintiffs prove the amount of Mr. Duane's
10 losses with mathematical precision.

11 Now, punitive damages. If you find for the plaintiffs on
12 the Title VII claim, you may, but are not required to, award
13 punitive damages. The purposes of punitive damages are to
14 punish a defendant and deter similar acts in the future.
15 Punitive damages may not be awarded to compensate a plaintiff.

16 The plaintiffs have the burden of proving by a
17 preponderance of the evidence that punitive damages should be
18 awarded and, if so, the amount of any such damages. You may
19 award punitive damages only if you find that the conduct by IXL
20 that harmed the plaintiff, that harmed Mr. Duane, was
21 malicious, oppressive or in reckless disregard of Mr. Duane's
22 rights.

23 Conduct is malicious if it is accompanied by ill-will or
24 spite or if it is for the purpose of injuring Mr. Duane.

25 Conduct is in reckless disregard of Mr. Duane's rights if,

1 under the circumstances, it reflects complete indifference to
2 Mr. Duane's well-being or rights, or if IXL acted in the face
3 of a perceived risk that its actions would violate Mr. Duane's
4 rights under federal law.

5 And act or omission is oppressive if IXL violated
6 Mr. Duane's rights with unnecessary harshness or severity, such
7 as by misusing or abusing authority or power or by taking
8 advantage of some weakness or disability or misfortune of
9 Mr. Duane.

10 If you find that punitive damages are appropriate, you
11 must use reason in setting the amount. Punitive damages, if
12 any, should be in an amount sufficient to fulfill their
13 purpose, their purposes, but should not reflect bias, prejudice
14 or sympathy towards any party. In considering the amount of
15 any punitive damages, consider the degree of reprehensibility
16 of IXL's conduct.

17 Now, your duty to deliberate. Before just -- just a few
18 more instructions about the process of your deliberations and
19 then we'll be ready to proceed with closing arguments.

20 Before you begin your deliberations, elect one person of
21 the jury as your presiding juror. The presiding juror will
22 preside over the deliberations and serve as the spokesperson
23 for the jury in court. You shall diligently strive to reach
24 agreement with all the other jurors, if you can do so. Your
25 verdict must be unanimous.

1 Each of you must decide the case for yourself, but you
2 should only do so after you have considered all the evidence,
3 discussed it fully with the other jurors, and listened to their
4 views. It is important that you attempt to reach a unanimous
5 verdict, but, of course, only if each of you can do so after
6 having made your own conscientious decision. Do not be
7 unwilling to change your opinion if the discussion persuades
8 you that you should, but do not come to a decision simply
9 because other jurors think it is right or -- and do not change
10 an honest belief about the weight and effect of the evidence
11 simply to reach a verdict.

12 Now, I have this long instruction on the conduct of the
13 jury and I've told you this so many times that I'm not going to
14 read the long instruction, but I am going to repeat to you that
15 it is very important that you not communicate with anybody,
16 other than each other, about the trial. Now that you're about
17 to start deliberating, you can, of course, start talking with
18 each other about the trial and the evidence, but you may not
19 communicate with anybody else about the trial until after I've
20 discharged you.

21 You may also not conduct any outside research. Don't look
22 anything up on the internet, not even something small, like the
23 definition of a term or something like that. Don't do any kind
24 of outside research.

25 If you are exposed to any outside information or if

1 somebody has spoken with you or you have spoken with somebody
2 about -- other than your fellow jurors about the case, about
3 the trial, please let Kristen or me know immediately.

4 If it comes to your attention that another juror has done
5 any outside research, no matter how small, or had any
6 communications with somebody about the subject matter of this
7 trial, please let Kristen or me know immediately.

8 This is very -- these instructions are very important and
9 the failure to follow them could result in a mistrial and could
10 require this entire process to start over.

11 You will not have a transcript of the trial in the jury
12 room. You will have written copies of these instructions and
13 you will have copies of all the exhibits that have been
14 admitted into evidence, but you will not have a transcript of
15 the trial.

16 If during your deliberations you determine that you want
17 to review the testimony of a witness again, you can request to
18 have that witness's testimony read back to you in the
19 courtroom, or a portion of that witness's testimony, with all
20 of us present. It's up to me whether to permit a read-back and
21 even if you request a portion of a witness's testimony to be
22 read back, I may require that the entirety of the witness's
23 testimony be read back into the record just for completeness
24 and context's sake. So keep that in mind.

25 Also, keep in mind that the read-back could contain

1 errors, although errors are unusual with this particular court
2 reporter. There are sometimes errors in court transcripts.

3 So the read-back will also not reflect the witness's
4 demeanor, tone of voice and other aspects of the live
5 testimony. So the way that you remember and understand the
6 live testimony controls.

7 Finally, in your exercise of judgment any testimony read
8 back cannot be considered in isolation, but must be considered
9 in the context of all the evidence presented through all the
10 witnesses.

11 If it becomes necessary during your deliberations to
12 communicate with me, you may send a note through the Courtroom
13 Deputy, Kristen, signed by any one or more of you. No member
14 of the jury should ever attempt to communicate with me except
15 by a signed writing. I will not communicate with any member of
16 the jury on anything concerning the case except in writing or
17 here in open court.

18 If you send out a question, I will consult with the
19 lawyers before answering the question, which may take some
20 time. You may continue your deliberations while waiting for
21 the answer to any question. Remember that you are not to tell
22 anyone, including me or Kristen, how the jury stands, whether
23 in terms of vote count or otherwise, until after you have
24 reached a unanimous verdict or have been discharged.

25 Now, with respect to your verdict, a verdict form has been

1 prepared for you. It has a series of questions that you'll be
2 asked to answer and write down in the verdict form. After you
3 have reached unanimous agreement on a verdict, your foreperson
4 should complete the verdict form, according to your
5 deliberations, sign and date it and advise the Courtroom Deputy
6 that you are ready to return to the courtroom, but, again,
7 without giving her the verdict form and without telling her
8 what your verdict is.

9 So with that, those are your instructions. We'll have a
10 written version for each of you in the jury room. With that,
11 I'll turn it over to the plaintiffs for closing argument.

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

13 **CLOSING ARGUMENT**

14 **MS. SANGHVI:** Members of the jury, first and
15 foremost, on behalf of our trial team, thank you. Thank you
16 for your attention. Thank you for your patience throughout
17 this week.

18 I have appreciated all of your attention throughout the
19 week and I'm now excited to walk you through the evidence so
20 you can go back to the jury room and begin your deliberations
21 and ultimately provide Mr. Duane with the dignity that he so
22 deserved in 2015.

23 The facts of this case have always been simple. And,
24 please, don't lose sight of that throughout these arguments.

25 One, Scott Duane is a transgender man who posted

1 discrimination complaints on Glassdoor after returning from a
2 two-month leave of absence for gender confirmation surgery.

3 Two, he had a reasonable belief to make these complaints.

4 Three, he made these complaints in a reasonable manner and
5 by utilizing the very forum that IXL encouraged employees to
6 use to post about the company.

7 And, four, IXL fired Mr. Duane for the discrimination
8 complaints in that post.

9 These facts lead us to one conclusion: IXL unlawfully
10 retaliated against Scott.

11 I will walk you through the evidence so that you can base
12 your decision based on all of that evidence.

13 I am hopeful that you will be able to remind IXL that the
14 rules do apply to them and that the law demands more of them
15 than what they gave to Scott.

16 We have brought two retaliation claims, as you've heard.
17 One for a violation of the ADA and one for a violation of
18 Title VII. Although both arise out of the same set of facts,
19 you will be asked to consider each of them separately. So for
20 each claim, you have to decide the following issues.

21 First, did Scott complain about discrimination in his
22 post? For the ADA claim the question is whether Scott
23 complained about disability discrimination in his post. Here,
24 you will need to consider the language of the post, as well as
25 the context in which he makes that post.

1 For the Title VII claim the question is whether Scott
2 complained of discrimination on the basis of sex, gender,
3 sexual orientation or sexual identity in the post. Here
4 looking at the plain language of the post will be sufficient.

5 Then you will need to consider whether Scott's complaints
6 were made in a reasonable manner and if they were based on a
7 reasonable, good faith belief that IXL did, in fact,
8 discriminate on those bases.

9 Finally, you must decide if IXL fired Scott because of his
10 complaints of discrimination in the post.

11 I'll go through each of these one at a time and highlight
12 some important evidence and testimony that you have heard over
13 the past week.

14 So let's move first to the first question. Did Scott
15 complain about discrimination in the post? The easy answer to
16 this question is yes. Yes, he did. Look at the post. He says
17 the word "discrimination."

18 Throughout my presentation we're going to put up certain
19 slides. Some of them will be smaller. Some of them will be
20 bigger. You'll see the language throughout. We are always
21 going to direct you to the exhibit and you'll have that back in
22 the jury room.

23 He says:

24 "There are no politics if you fit in. If you
25 don't, that is, if you're not a family-oriented, white

1 or Asian, straight or mainstream gay person with 1.7
2 kids who really like softball, then you're likely to
3 find yourself on the outside.

4 "Treatment in the workplace in terms of who gets
5 flexible hours, interesting projects, praise,
6 promotions and a big yearly raise is different and
7 seems to run right along these characteristics."

8 He says:

9 "Most management doesn't know what the word
10 discrimination means."

11 He says:

12 "Build a culture that respects people of all
13 walks of life."

14 So you should be thinking, of course, he's complaining
15 about discrimination. So what's actually at issue here?

16 Now, the defendant is going to argue that notwithstanding
17 this language and all the emails that you saw that led up to
18 this post, Scott was not complaining about ADA or disability
19 discrimination in the post. But why will they say that?
20 Because Scott did not explicitly say "disability
21 discrimination" in the post? You don't need to look at the
22 post in a vacuum. In fact, you must consider the context of
23 the post.

24 IXL knew that the post was always about disability
25 discrimination. When IXL finds this post on January 7th, they

1 know immediately, immediately that Scott was the author. How
2 do they know that? That Scott, one of, like, 184 employees, is
3 the author of this post? Because of the context.

4 Maricela Prado, the HR representative, attaches the post
5 to emails that she compiled for Paul Mishkin about Scott's
6 disability leave. Look at Exhibit 234. That will show
7 you that Scott was asserting his rights -- 243, excuse me, that
8 Scott was asserting his rights under the Americans with
9 Disabilities Act.

10 Other exhibits will show you -- Exhibit 165 will show you
11 that IXL had been warned by their own head of HR that they
12 could be sued for not providing the accommodation.

13 Consider Keyes' testimony, that on Scott's very first day
14 back at work, that same day that he wrote the post,
15 December 30th, he interpreted Scott's body language as Scott
16 still being upset about the email thread, about the
17 accommodation. Scott didn't have to tell him. David Keyes
18 just knew.

19 And moreover, IXL already -- had already known about
20 Scott's disability discrimination complaints that he made to
21 Keyes the day before on January 6th, which led to setting the
22 meeting with Mr. Mishkin. And in Exhibit 68 you will see
23 Mr. Mishkin setting that meeting with Scott.

24 So when they read the accusation that some people get
25 flexible hours over others, they could easily attribute Scott's

1 work at home request. When they read the line in the post that
2 "most management doesn't even know what the word discrimination
3 means," they drew on their knowledge that Scott had just told
4 David Keyes that he believed the initial denial of
5 accommodation constituted disability discrimination.

6 So given this context, even without the post, explicitly
7 saying disability discrimination, IXL knew that this was Scott
8 and that this was Scott complaining in his December 30th post.

9 Obviously, the plain language of the post demonstrates a
10 Title VII complaint and the language refers specifically to
11 race, sexual orientation and gender identity.

12 And, remember, complaints are protected even if Scott was
13 complaining that IXL was discriminating against him, as well as
14 others.

15 Now, I'm going to move to the second issue that you will
16 have to decide. Whether Scott's post was reasonable. To
17 understand why it was reasonable for Scott to post on
18 Glassdoor, please consider the following.

19 IXL cannot argue to you that it was unreasonable to post
20 on Glassdoor when they actively encouraged employees to post
21 reviews. In fact, a complaint is not even automatically
22 unreasonable because it's public or because it would harm the
23 company.

24 In addition, the evidence demonstrates that Scott had a
25 reason not to trust HR. He couldn't go to them. You heard

1 Scott explain his reactions to Maricela Prado skipping an
2 important disability-related information slide because she
3 assumed, I'm just talking to young healthy guys. She made
4 facial assumptions about the people she was talking to.

5 You heard about the misinformation that he received from
6 the fired HR manager Brad Marshall.

7 You heard his concerns that the head of recruiting, Karen
8 Penner, was disclosing confidential medical details of her
9 employee with lupus.

10 You also heard from Isidora Milin, Jeremy Murphy and Scott
11 himself that none of them received any training relating to
12 retaliation specifically and that they didn't know if IXL had
13 policies that prohibited retaliation.

14 Scott did not feel comfortable on December 30th to go to
15 his manager, who he had just had to advocate with to get the
16 work remote arrangement and who had just imposed a very strict
17 work plan on Scott.

18 So IXL will argue that because Glassdoor was the
19 centerpiece, the centerpiece of their recruitment strategy, the
20 potential harm to the company from this negative post was so
21 great that it made it unreasonable for him to voice a
22 discrimination complaint there. This argument makes no sense
23 and it is just not supported by the record. There is no
24 evidence in the record of any candidates that they actually
25 received through Glassdoor.

1 In fact, the testimony of Isidora Milin, as read by my
2 colleague, indicated that no one had specifically brought up
3 Glassdoor posts to her while she was interviewing candidates
4 for IXL. There is only evidence of a few invoices showing that
5 IXL paid a subscription fee. A subscription fee that, by the
6 way, is a fraction of the company's net income to enhance its
7 landing page on Glassdoor.

8 Mr. Mishkin was clear that he knew IXL, despite this
9 subscription, could not control the content of the posts that
10 employees placed on Glassdoor. In fact, by virtue of its
11 contract with Glassdoor, IXL was accepting the central purpose
12 of Glassdoor, which was to increase workplace transparency.

13 IXL knew that it would receive positive and negative
14 reviews, in part because they accepted that every review posted
15 on the site had to, had to include pros and cons.

16 When you're in the jury room take a look at Exhibit 115.
17 It sort of lays out the employee engagement plan that IXL used,
18 and it will tell you that they had to put pros and cons in
19 every post.

20 Also worth noting that both Scott and Jeremy Murphy joined
21 IXL despite seeing negative reviews.

22 Finally, and perhaps most importantly, that Scott posted
23 his opinions about the company doesn't constitutional malicious
24 intent to harm the company, as they would have you believe. He
25 told you that these were his opinions, his beliefs. For all of

1 these reasons, Scott's discrimination complaints were posted in
2 a reasonable manner.

3 Next, let's turn to the question of whether Scott had a
4 reasonable good faith belief that he was opposing
5 discrimination. I'm going to stop here a minute and remind you
6 of a very important issue in this case.

7 We are not -- the plaintiffs are not required to prove
8 that Scott was, in fact, discriminated against. This is only a
9 retaliation case. So your job is to consider the evidence and
10 determine whether Scott had a reasonable good faith belief that
11 he was opposing discrimination.

12 So let's consider the facts. Let's look back to late
13 December of 2014. Scott is right about to return from gender
14 reassignment surgery and he suspects that the company might be
15 aware of his transgender status and the nature of that surgery.

16 So what leads him to think that? You heard Scott explain
17 how difficult coming out as trans was in 2013 and 2014. He
18 described to you, very openly and candidly, how over time
19 people became more aware of trans-related issues, which made it
20 actually harder to be private about being trans. And given
21 this evolution, it wasn't unreasonable for Scott to believe
22 that he was far more exposed as a transgender man in December
23 of 2014 than he actually had been previously.

24 He had just -- in late December he had just brought his
25 gender non-conforming female partner to the company holiday

1 party, a partner who he described is often read as a masculine
2 lesbian. He is at this point already been asked about scars on
3 his body, and he's learned from his friend Nina Wu that at
4 least one employee has asked Scott -- or has asked about Scott,
5 whether Scott used to be a girl.

6 Now, this is not an unreasonable conclusion either because
7 you heard Lenore Ockerberg tell you that after seeing the scars
8 on Scott's chest from a photograph at a company event, that led
9 her to conclude that he was transgender.

10 As he prepares to return to work in late December, he
11 develops a fistula, making it challenging to be out of the
12 house for long periods of time.

13 Now, Scott had previously always been able to casually
14 request a day off or make a request to work remotely. And
15 Duane sends a quick update to David Keyes to finalize his plan
16 for returning to work, and he checks in to see if Keyes would
17 be open to working half days in the office and half days at
18 home for the first few weeks.

19 Now, remember, that Scott made this request in the context
20 of never having experienced a problem with such a request in
21 the past. In the context of knowing how common it was for
22 these requests, he certainly did not anticipate a problem when
23 he was seeking it for purposes of healing from a medical
24 condition.

25 There is no debate that prior to Scott, they granted every

1 request for medical leave and every request for working from
2 home. And consider by way of examples how differently Scott
3 was treated when he was asking to be out of the office
4 entirely, when Scott asks to take a week of leave for his
5 February pre-operative surgery. Look at Exhibit 12. Keyes
6 told you his response was, "Yeah, that will be fine."

7 And then when Scott asks for an additional week on top of
8 that, he emails and says, "I will need to stay off my feet.
9 Hope that's okay." "Yeah."

10 So then what happens? Keyes responds and for the first
11 time in a year and a half resists. You heard Lenore Ockerberg
12 describe what Keyes was doing. He was telling him no without
13 saying no.

14 You can also look at Exhibit 143, where Ockerberg
15 congratulates Keyes on writing a perfect email because it says
16 that they are willing to accommodate Scott, but working from
17 home is really not an option.

18 IXL will argue that Keyes did not know the details of the
19 urethral fistula, and that's correct. But you have to wonder
20 if David Keyes really did not know what it was, why not take
21 the time to research it or to ask Scott directly? This is
22 something a reasonable, responsible manager would do to assess
23 the need of an accommodation. Rather, the only inquiry Keyes
24 makes was to ask Lenore Ockerberg and Maricela Prado how he
25 could deny his request to work from home because it really

1 wasn't an option.

2 They were not concerned with what Scott was telling them
3 about it being difficult to be out of the house for long
4 periods of time. They were not concerned that in order for
5 Scott to be in the office, in San Mateo, for a full eight-hour
6 day, that meant that he would have to be out of his house in
7 Oakland for basically ten hours every day. They were not
8 concerned with that option of remaining on disability leave
9 because that would require him to continue to receive reduced
10 pay.

11 It's worth noting that IXL's reason for refusing to allow
12 Scott to work from home was irrational. Keyes tells you that
13 Scott could not work from home upon his return because of
14 previous issues working outside of the office when he had
15 medical appointments in 2014. The obvious difference between
16 working from home on the one hand and working while attending a
17 medical appointment on the other hand suggested to Scott that
18 Keyes' reason for denying his request just couldn't be the real
19 reason.

20 In addition, Scott knew, and Keyes admitted to you, that
21 Scott's performance in 2014 was actually better than his
22 performance had been in 2013. And, yet, it was in 2013 and
23 early 2014 that Keyes easily, without any objections, approved
24 both of Scott's medical leaves and work from home requests.

25 Again, this all suggested to Scott that Keyes had

1 concocted a somewhat misleading justification for denying
2 Scott's request.

3 So then Scott is put in a really difficult position. He's
4 got to self-advocate with his immediate supervisor, but he does
5 it. He cites to the Americans with Disabilities Act. He
6 copies human resources, all so that he could get the
7 accommodation from working at home 50 percent of the time.

8 Think for a moment how difficult this must have been for
9 Scott. He needed something from his boss that he just never
10 thought would be such a big ask. And then in order to get it,
11 he had to assert his rights under the law, which he knew would
12 be seen as combative or hostile, and it was seen that way.

13 Having received nearly the same information about Scott's
14 medical complication on December 22nd as they did in the
15 original email on December 19th, IXL agrees to set up a
16 part-time working remote situation. Scott then returns to work
17 on December 30th. And you heard Keyes say that when he
18 returned, he was still upset over the email exchange related to
19 his return. Scott was still upset.

20 You also heard that in his first meeting back with Keyes
21 Scott learns two important things. These are important.
22 Number one, Scott learns about two other math team members that
23 Keyes tells him about during his first day back. Keyes
24 confirms that he updates Scott about Matt Bleacher's hire as a
25 100 percent remote employee from New Orleans because of a

1 situation related to his wife. Keyes also confirms that Gina
2 Bland was moving to a 50 percent working arrangement -- work
3 arrangement from D.C. to be closer to her husband.

4 Defendant provides no evidence that these were granted
5 because of -- that these were granted because they were
6 accommodations for disability. Obviously, if they were, you
7 would have heard evidence about it.

8 The other piece of information that Scott learns is that
9 IXL is imposing a very strict Remote Work Plan on him that he
10 has never been subject to and that Keyes has told you that he
11 has never used before. Scott has seen the general goals
12 outlined in this document about spec reviews before, but it's
13 never actually been connected to a threat.

14 So throughout 2014, even when he was in the office
15 100 percent of the time, Keyes had identified this goal of
16 reducing the number of rounds of review of his specifications
17 from ten down to seven and, yet, on December 30th, 2014 this
18 became one of the conditions of his ability to work from home.
19 And now something that he had worked on achieving all year
20 would be the determining factor -- one of the determining
21 factors on whether he could continue to receive this necessary
22 accommodation.

23 So let me stop for a minute and just recap what I've
24 outlined because I realize that was a lot of information.

25 Scott requests a routine work from home arrangement that

1 had never been denied or seriously questioned before. When
2 Keyes denies the request for the first time ever, Scott begins
3 to think it was because he was trans or that his surgery was
4 related to being trans. So he asserts his rights. He says,
5 "Under the ADA I'm entitled to an accommodation." IXL agrees,
6 which further suggests to Scott that there was never a genuine
7 reason not to agree in the first place, but when he returns to
8 work on the 30th and Keyes tells him about the preferential
9 treatment that two of his colleagues were receiving and gives
10 him the work plan that's unlike anything he has seen, Scott
11 believes that IXL has discriminated against him in violation of
12 both Title VII and the ADA.

13 I will say it again, because it's important. He does not
14 have to be right to be reasonable.

15 You also heard Scott tell you about some of the other
16 things that went through his mind right before he makes this
17 post on December 30th. You heard Scott say that he also
18 considered the demographic makeup of the office.

19 Scott tells you about the conversation with his friend,
20 one of the few Latino employees at IXL. And the exhibit shows
21 you that these perceptions were warranted. 161 of 184 total
22 employees were white and Asian in 2014. Scott also said that
23 almost all of the managers were white and that most were men.
24 The EEO-1 data reflects that as well.

25 This is further evidence when you consider Isidora Milin's

1 testimony, as read by my colleague. She described a similar
2 situation where the two men reporting to Keyes supervise a
3 total of 20 to 25 people, while no one reports to her and no
4 one reports to the other woman on the team.

5 You even heard Mr. Mishkin provide one of the more
6 shocking and revealing moments of testimony when he tried to
7 explain why IXL had this lack of diversity. Here, while
8 arguing that Scott had no basis for his belief that IXL
9 discriminated against certain minorities, Mr. Mishkin ended up
10 saying that in 2014 there wasn't as much awareness of
11 discrimination against black and brown workers in the tech
12 industry and there were issues with applicant pools.

13 This shines a light on Mr. Mishkin's personal beliefs.
14 Maybe he did not intentionally discriminate, but he also did
15 not believe he had any responsibility to taking steps to
16 address the lack of diversity at his company. This mindset,
17 whether it was in 2014 or whether it's today, is not what we
18 want from our Silicon Valley corporate leaders. And it
19 suggests that IXL leaders may actually not know what
20 discrimination means.

21 But perhaps, most importantly, it shows you that Scott was
22 not unreasonable in his perception. Scott was not wrong to
23 perceive that IXL was not a place that was trying to change its
24 demographics.

25 So let's get to the issue of why. IXL fired Scott because

1 of his complaints about discrimination. The question that you
2 will have to decide is why did they fire him? What is unique
3 in this case is that IXL -- they tell you why. They admit that
4 they fired him because of the post.

5 So what is it that you have to decide? IXL will argue
6 that Mr. Mishkin parsed the post and made the termination
7 decision based on the portions of the post that don't allege
8 discrimination. The evidence I'm about to lay out tells you
9 why you should not believe this explanation.

10 Before I do that, let me say a word about credibility. In
11 assessing credibility, you heard that you will have to consider
12 whether the witness has an interest in the outcome, whether
13 other evidence contradicts the witness's testimony, and the
14 reasonableness of the witness's testimony in light of all of
15 the evidence.

16 So let's talk about the evidence. IXL cannot seriously
17 ask you to accept that it both encourages its employees to post
18 reviews on Glassdoor, a site that requires reviews with both
19 pros and cons, but then it fires those when those reviews are
20 critical of the company. That defies any notion of fairness,
21 and it's just unsupported by the evidence.

22 So when you go back to the jury room, take a look at some
23 of the Glassdoor posts that are in evidence. They are at
24 Exhibits 103, 104, 102. You will see positive reviews, as well
25 as negative reviews.

1 Take a look at Exhibit 103, the review entitled
2 "Interesting and Rewarding Work." It's a positive review by a
3 current employee and, yet, it does criticize the company for
4 not having a lot of business experience in upper management.

5 You can take a look at the review entitled "Realistic
6 Review From a Real Employee." Now, this is a current employee
7 with a lot of critiques, some of which were actually pretty
8 similar to Scott's.

9 In fact, even Scott posted a review about IXL early in his
10 employment that was positive, but he noted that the product is
11 designed for a mainstream audience and, in fact, failed to
12 address concerns relating to certain populations of children.

13 Scott told that you IXL management knew that he authored
14 that post. He wasn't fired for it.

15 And remember, this is really critical, IXL admits that the
16 only person ever fired for a Glassdoor post is Scott. And the
17 only person who ever made a complaint about discrimination was
18 Scott.

19 So in July of 2013 IXL learned of two very critical posts
20 on Glassdoor entitled "New Low" and "Fed Up." They were
21 written by a current employee at the time. These posts are so
22 negative that Mr. Mishkin describes the author as a person with
23 a vendetta, a vendetta against IXL. And it's noteworthy that
24 Mishkin made clear that these posts, they did not include
25 allegations of discrimination, because Mishkin told you that

1 Scott was the only person who had ever accused the company of
2 discrimination.

3 Mr. Mishkin's testimony on that, that he didn't know who
4 wrote the vendetta posts, was simply not credible. In his own
5 email in July of 2013 he writes, "I know who this person with a
6 vendetta is."

7 On the witness stand he said he did not know who the
8 person was and, moreover, could not even figure out who the
9 person was. That testimony is not credible because it was
10 contradicted by his own email, which is far more reliable. It
11 was written closer in time to the events and not in a moment
12 when he was trying to defend himself from wrongdoing in this
13 lawsuit.

14 And even when he knew the author of the incendiary posts,
15 he did nothing. And, yet, when he knew Scott to be the author,
16 he summarily fired him. The difference is that Scott
17 complained of discrimination in his post.

18 In addition to the inconsistency in Mishkin's testimony
19 concerning the vendetta posts, Mishkin has also offered
20 testimony about the way he reached the decision to fire Scott,
21 which is inconsistent with Keyes' more credible testimony.

22 Mr. Mishkin wanted you to believe that he was extremely upset
23 because he thought the post was clearly meant to hurt the
24 company. And as a result, it was treacherous he said.

25 But Mr. Keyes offered a very different version of these

1 events. He told you that no one was mad about the post when
2 they read about it. No one discussed contacting Glassdoor to
3 get it removed. And Mishkin almost instantly said, eh, let's
4 fire Scott.

5 They calmly then moved on to the logistics of how to erase
6 Scott from the company. Mr. Mishkin never bothered to take the
7 time to protect his own company by investigating Scott's
8 allegations despite having had knowledge of them for many
9 weeks.

10 Mr. Mishkin wants you to believe his version because it is
11 more consistent with his lawyer's argument that IXL fired Scott
12 because of the portions of the post that are critical about IXL
13 and not about discrimination. But once again, Mishkin's
14 credibility is called into question. It's not credible that
15 Mr. Mishkin did not consider Scott's post a discrimination
16 complaint.

17 By January 7th he had been hearing about and dealing with
18 Scott's repeated complaints from the December 22nd email, from
19 Ms. Ockerberg's warning, from Keyes' notification that Scott
20 complained to Keyes on January 6th. Simply not credible.

21 So now we have reviewed the claims. I'd like to go
22 through the verdict form with you. You're going to be given a
23 verdict form, as the Court indicated, at the end of these
24 arguments. I have it here and I'm going to go over the
25 questions with you because I think they are very important.

1 Before we get to the questions themselves, please keep in
2 mind that plaintiffs have two claims, like I said. Both of the
3 claims are for retaliation. One is for retaliation under the
4 ADA, the other is for retaliation under Title VII. The claims
5 are similar, except more types of damages are available for the
6 Title VII claim, and I'll explain that as we go through the
7 verdict form.

8 So the first question says:

9 "Did the plaintiffs prove by a preponderance of
10 the evidence that IXL retaliated against Mr. Duane in
11 violation of the ADA?"

12 It gives you the option of "yes" or "no." We ask you to
13 check "yes."

14 Question number two, it asks:

15 "Did the plaintiffs prove by a preponderance of
16 the evidence that IXL retaliated against Mr. Duane in
17 violation of Title VII?"

18 The answer to number two is "yes."

19 And we've shown you that the answer to these two questions
20 is "yes" because Scott explained of discrimination under both
21 the ADA and Title VII. He made those complaints in his post
22 and IXL fired him for those complaints.

23 So then you move on to question number three. After
24 finding retaliation for either Title VII and/or ADA retaliation
25 or both, question three asks you:

1 "Did plaintiffs proved by a preponderance of the
2 evidence that Mr. Duane incurred damages as a result
3 of unlawful retaliation (regardless of which
4 statute)?"

5 The answer to this question is also clearly "yes."

6 Scott suffered two kinds of harm, monetary, financial harm
7 from the loss of his income, the loss of his benefits, and
8 out-of-pocket expenses to help him find a new job. He also
9 experienced damages to his person, due to the emotional
10 upheaval caused by being fired. And we'll talk about each of
11 these separately.

12 So then you move on to question number four. And this is
13 where you award money for the financial harm that he
14 experienced. As indicated, the parties actually stipulate that
15 Scott's lost earnings and benefits for that one year when he
16 was out of work totals \$101,808.04. You can look at
17 Exhibit 167 in the jury room for those stipulations.

18 And above that, you must also decide whether to reimburse
19 Scott for out-of-pocket expenses. We're asking you to
20 reimburse Scott for the 18,000 that he had to pay to attend App
21 Academy.

22 You've heard that Scott was unemployed for about a year.
23 He testified that while unsuccessfully searching and searching
24 for a job, he discovered that he didn't have the right skill
25 set. Even though he has a lot of education for the field that

1 he was trying to get a job in, he was underqualified. And so
2 after six months, he decided to get additional education
3 through App Academy. And that decision paid off, because he
4 eventually gets a job there at the end of the year.

5 The defendant will say this expense wasn't necessary, but,
6 remember, you need to base your decisions based on the evidence
7 and there is no evidence in this record to contradict what
8 Scott said. You should put \$18,000 here.

9 Now, this is where you need to be careful. You will
10 answer the next set of questions only if you check "yes" to
11 number two. That is, you go on to questions five and six if
12 you found that IXL retaliated against Scott in violation of
13 Title VII.

14 So for question number five, if you find that IXL
15 retaliated against Scott because he opposed discrimination,
16 then you must decide what is fair compensation for those
17 damages. You must answer what damages Scott should receive for
18 that Title VII violation.

19 Now, this is a hard task, because you have to put a number
20 on damages to a person. And Scott still hasn't been made
21 whole. You can't undo the stress, the frustration and the
22 humiliation of being terminated. The best that you can do is
23 what the law requires that you do. And you can try to come up
24 with an amount of money that can fairly compensate him for that
25 harm, which was very real.

1 In order to do that, you need to try to understand what
2 happened to Scott after he was fired. Consider what a job
3 means to somebody. How work gives a person dignity and how it
4 gives people an opportunity to feel good about themselves. So
5 there is no exact standard for fixing the amount of damages to
6 be awarded, and you should be guided by common sense.

7 So when he was fired, he went into a year with no wages,
8 no way to support himself, and didn't know when he would get
9 the next job or what it would pay. He and his former partner
10 Jenna Mandis shared with you the stress that these financial
11 difficulties had on their relationship. Ms. Mandis told you
12 that Scott was very depressed.

13 And when you've taken a moment to really think about that
14 experience, we ask you to do your very best and come up with an
15 amount that is fair to compensate him for that harm. A
16 reasonable guidepost is to award a multiple of Mr. Duane's lost
17 wages and benefits, which the parties have stipulated to, as I
18 said, as \$101,808.04. So we ask that you award two times the
19 amount of the lost wages and benefits to compensate Mr. Duane
20 for his emotional distress, which gets us to \$203,616.08.

21 Now, the last question you will be asked is number six.
22 It's whether we proved by a preponderance of the evidence that
23 IXL's conduct was malicious, oppressive or in reckless
24 disregard of Mr. Duane's federally protected rights. The
25 answer to this question is decidedly yes. You may award

1 punitive damages. And the purpose of punitive damages to
2 punish IXL and deter similar conduct in the future. Punitive
3 damages serves the public's purpose of educating other
4 employers that retaliation in the workplace will not be
5 tolerated.

6 Here we have evidence that the CEO of IXL personally
7 retaliated against Scott for opposing discrimination. When the
8 CEO of a company ignores his HR advisor's warning that the
9 termination could violate the law, this is willful
10 discrimination or, at the very least, a reckless disregard of
11 the advice not to fire him.

12 Mr. Mishkin's firing of Mr. Duane reflects complete
13 indifference to Mr. Duane's well-being and his rights. He
14 acted in the face of perceived risk that the termination would
15 violate federal law. Indeed, he was warned. He didn't heed
16 that warning.

17 In determining the amount of punitive damages, you should
18 consider the degree of reprehensibility of IXL's conduct.
19 Consider the wealth of IXL in determining the appropriate
20 amount that would punish it for retaliating against Mr. Duane.
21 And the parties have stipulated, again, in Exhibit 167 that
22 IXL's net profits in 2017 was more than \$16 million.

23 We ask you to send a strong message to IXL that
24 retaliation is against the law in order to deter such conduct
25 in the future. Assess punitive damages in the amount of

1 \$509,000, which is five times the amount of Mr. Duane's lost
2 wage and benefits, to which the parties have stipulated.

3 We respectfully ask you to fill out the verdict form
4 answering "yes" to the questions and award Mr. Duane the
5 compensation that he deserves.

6 Thank you.

7 **THE COURT:** Okay. Thank you.

8 Now is a good time for our morning break. We will break
9 for about 20 minutes and resume at about five minutes to 10:00.
10 Thank you very much.

11 **THE CLERK:** All rise.

12 (Jury exits the courtroom at 9:36 a.m.)

13 **THE COURT:** Okay. Have a seat.

14 A couple quick things. Number one, Kristen handed me a
15 note during Ms. Sanghvi's closing. Ms. Sanghvi mentioned
16 Exhibit 102 and Kristen noted that Exhibit 102 has not been
17 admitted into evidence. So I'll let you ponder that and decide
18 between you whether that is a significant issue or not.

19 Number two, Ms. Sanghvi -- you know, normally I don't ask
20 questions of the lawyers about whether the evidence backed up
21 what they asserted in their closing argument, but this was
22 significant enough that I wanted to ask you about it.

23 Where is the evidence -- was there evidence that -- that
24 Mr. Mishkin was warned that firing Mr. Duane would violate the
25 law? I don't recall seeing any such evidence.

1 **MS. SANGHVI:** Your Honor, I am referring to the email
2 from Lenore Ockerberg.

3 **THE COURT:** And that email said -- I mean, I don't
4 have it in front of me, but I certainly don't recall that email
5 as warning Mr. Mishkin that firing Mr. Duane would violate the
6 law.

7 **MR. WILSON:** That's correct, your Honor.

8 **THE COURT:** I don't recall it being even close to
9 that.

10 **MR. WILSON:** And that's what I dealt with on cross
11 examination of Ms. Ockerberg. I put that up. It was on the
12 23rd. And it was about whether or not an accommodation had to
13 be provided as requested on the 19th. And, in fact, it was.
14 Three weeks -- two and a half weeks later is when termination
15 occurred.

16 **MS. SANGHVI:** She says:

17 "Be very careful here in moving forward as he's
18 one of the only employees we've had that actually has
19 done their research and is ready and willing to sue us
20 if he needs to."

21 **THE COURT:** That is what you interpret as her warning
22 Mr. Mishkin that firing him would violate the law?

23 **MS. SANGHVI:** And that she advised against
24 terminating him in that meeting, is what she testifies to.

25 **THE COURT:** That she -- she testified that she

1 advised against terminating Duane in the meeting.

2 **MS. SANGHVI:** Yes.

3 **THE COURT:** Okay. Well, I'm not sure -- you know,
4 obviously, you can address it in your -- do you have a -- if
5 you have a request for something curative, I will consider it.
6 I'll go back and look at Ockerberg's testimony. I obviously
7 don't have that in front of me right now.

8 **MR. WILSON:** Right.

9 **THE COURT:** Give me the citation to her testimony
10 that you believe stands for the proposition that she advised
11 Mr. Mishkin that it would violate the law to fire Mr. Duane.

12 **MS. SANGHVI:** I believe it's Page 41 at Lines 12
13 through 14, where the question is:

14 **"QUESTION:** And did you also tell him at that meeting
15 that there was -- was the possibility of litigation if
16 he fired Mr. Duane?

17 **"ANSWER:** Yes. I advised against terminating him in
18 that meeting."

19 **THE COURT:** Okay. And that -- that's the language
20 that you interpret as -- and that's from her trial testimony?

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

22 **THE COURT:** Okay. And that's the language that you
23 interpret as firing him would violate the law?

24 **MS. SANGHVI:** Could constitute --

25 **THE COURT:** Because that's what you said in your

1 closing, I believe.

2 **MS. SANGHVI:** And I believe she also indicated that
3 he was in a protected class. And so she had warned -- or given
4 him that information as well. So, yes.

5 **THE COURT:** Okay. Well, I'll let you -- I'm going to
6 go take a break. I will go look at that testimony.

7 You can think about whether you want to make a request as
8 to a -- of a curative instruction on that or just deal with it
9 in your closing argument, which is usually what lawyers do.
10 But I thought it was a significant enough potential
11 misrepresentation of the evidence that I should raise it. I'll
12 leave it at that.

13 Okay. Be back in about 20 minutes.

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

15 (Whereupon there was a recess in the proceedings
16 from 9:41 a.m. until 10:01 a.m.)

17 **THE COURT:** Okay. Mr. Wilson, do you want to -- is
18 there anything you want to request with respect to that?

19 **MR. WILSON:** Yes, Judge. Having looked at the
20 transcript as well, I do believe a curative instruction is
21 warranted because the -- I believe the part that they are
22 talking about does not say she warned Mr. Mishkin that firing
23 him would violate the law. Obviously, that's an argument
24 that's made for a very specific purpose because of the request
25 for punitive damages, and the jury should be instructed that

1 that's not what the evidence showed.

2 **THE COURT:** Well, I -- I understand. I do understand
3 what you're saying and I think it was a pretty significant
4 misrepresentation.

5 I would add -- I mean, there was another one that I found
6 quite -- there was another representation in the closing
7 argument that I found quite startling. I assume you're
8 prepared to deal with it in your closing argument. Perhaps
9 it would be -- you could consider it a gift to you. But when
10 Ms. Sanghvi said that Mr. Keyes should have asked questions of
11 Mr. Duane about the fistula. But I assume you're going to
12 address that in your closing argument.

13 I think you can address this in your closing argument as
14 well. I think it -- it is to the detriment of the plaintiffs
15 that those misrepresentations were made, but I think they are
16 easy enough for you, as the lawyer, to cure that I don't --
17 that I don't think it is necessary for me to give a curative
18 instruction at this time.

19 **MR. WILSON:** I would only say that with -- I agree
20 with you with respect to Mr. Keyes, but I do fear that it will
21 appear as though I'm quibbling about something that they don't
22 have a transcript in front of them about, as opposed to your
23 Honor saying, With respect to this one representation of the
24 facts, that's not what was put in the record on testimony from
25 Ms. Ockerberg.

1 I have that concern because it will sound like I am
2 saying, Oh, you know, don't take what --

3 **THE COURT:** I mean, the issue is -- like, that
4 happens in closing arguments all the time, where you have to
5 respond to something that somebody else said in closing about
6 the --

7 **MR. WILSON:** Sure.

8 **THE COURT:** And I understand what you're saying. I
9 do believe that this is -- this misstatement by the plaintiffs
10 about the evidence is of more significance than your typical
11 misstatement or slanting of the evidence at a closing argument.

12 And I will give it some more thought during your closing
13 argument, but you should operate on the assumption that I am
14 not going to give a curative instruction on that. Okay?

15 **MR. WILSON:** Yes.

16 **THE COURT:** All right. You can bring them in.

17 (Jury enters the courtroom at 10:05 a.m.)

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

19 **THE COURT:** Okay. Thank you.

20 Mr. Wilson you can proceed.

21 **CLOSING ARGUMENT**

22 **MR. WILSON:** Ladies and gentlemen, thank you very
23 much. Thank you for being patient and diligent and for your
24 attention for the jury selection process, disclosing what you
25 disclosed. And thank you for listening to all of us lawyers

1 present the case to you. And thank you for your civic duty,
2 for listening, and listening to the judge's instructions, and
3 coming up with eventually what will be your verdict. I thank
4 you on behalf of IXL and on behalf of my colleague Ed, and on
5 behalf of my colleague Hind, who couldn't be here today. We
6 want to thank you for your service.

7 I'd like to ask your indulgence for a little bit longer.
8 I don't intend to go all day with this closing, but it's
9 important and I need to address some of the very specific
10 things that were said in the closing argument for the
11 government and I need to discuss some of the evidence with you.

12 I think I'm going to start with what is the allegation in
13 this case? What are the plaintiffs alleging? You all may be
14 scratching your heads saying: This isn't a transgender
15 discrimination case? What was all of the discussion in the
16 jury selection process and what was all this discussion all
17 week last week about transgender discrimination when, in fact,
18 they are not alleging transgender discrimination. They are not
19 alleging sexual orientation discrimination. They are not
20 alleging disability discrimination. They are not alleging a
21 failure to accommodate a disability. They are not alleging
22 anything other than two counts of retaliation under the ADA and
23 under Title VII.

24 And let's talk about what they are not alleging. They are
25 not alleging, importantly, that Mr. Duane was retaliated

1 against because he and David Keyes had an email exchange in
2 December, 2014 where Mr. Duane stood on his ADA rights and
3 said, I want the request that I made initially and that you
4 have to give to me with some of these metrics in place. They
5 are not alleging that he was terminated in retaliation for
6 having done that.

7 They are not alleging that we retaliated against Mr. Duane
8 because of his complaint directly to David Keyes on January 6th
9 at that meeting that he had.

10 They are not alleging that that complaint, which was a
11 complaint of discrimination directly to Mr. Keyes where he
12 said, "I feel that you've discriminated against me," they are
13 not saying to you in this case that he was fired for making
14 that complaint.

15 What they are alleging is only that he was retaliated
16 against for what they call complaints of discrimination in that
17 Glassdoor post and that's the only type of retaliation that
18 they are alleging in this case.

19 But for a week of testimony and documents, we've heard a
20 lot of insinuations and accusations that are implied, even
21 though they are not actual complaints in this case. We've
22 heard about who knew when about Mr. Duane's gender. Whether
23 Paul and whether David knew, and when they knew, and how they
24 might know. And whether Mr. Keyes or Mr. Mishkin may have got
25 on the internet and Googled his physician and looked onto his

1 web page and looked to see the kind of surgeries that he
2 performs and then made a conclusion that Mr. Keyes --
3 Mr. Duane, who they worked with for a year and a half, was
4 actually transgender. And then also that they then changed
5 their entire way of doing business with Mr. Duane because of
6 that knowledge that they have implied that Mr. Keyes and
7 Mr. Duane had -- I'm sorry, Mr. Mishkin had about Mr. Duane.

8 But they are not alleging transgender discrimination.
9 They are not alleging in this case that, hey, they found out
10 through internet sleuthing or they found out because of the
11 person that Mr. Duane brought to the holiday party and then --
12 and because Jenna was female, they then changed their
13 perception of his -- of Mr. Duane's gender identity and then
14 treated him differently. They are not alleging that in this
15 case. I know you've heard that, but this is not -- that would
16 be transgender discrimination. They are not alleging that.

17 They are alleging only that he complained of
18 discrimination in the Glassdoor post and that he was fired
19 because of those complaints of discrimination in the Glassdoor
20 post.

21 So I want to talk about the Glassdoor post. They are not
22 alleging that terminating him for the Glassdoor post is the
23 same thing as terminating him for what they have pulled out of
24 that Glassdoor post and put before you in, for instance, their
25 opening statement, as if these were the only things in that

1 Glassdoor post, and said these three excerpts are complaints of
2 discrimination, and you fired him for those as if the rest of
3 it really doesn't matter. But that's what they are alleging
4 and that's what they have to prove.

5 The judge has instructed you on what the burden of proof
6 is and what it means and what it doesn't mean and who has it
7 and that there are these elements of the burden of proof that
8 they have to prove each claim of retaliation. I'm going to go
9 through those in a minute, but what they were required to prove
10 they did not prove to you.

11 They proved a lot of things -- I'll talk about some of the
12 things they proved -- but they didn't prove the elements of
13 their case. And because of that, you don't get to damages.
14 You don't get to punitive damages. You -- you mark an "X"
15 on -- or a check on the word "no" on each of the first two
16 questions on the verdict form, which I'll show you, and the
17 case is over. And the reason is that they didn't prove their
18 case.

19 And by the way, I apologize for this cold and what you
20 have been through with this cold all week and my coughing, and
21 I'm going to try to not do that as much right now.

22 Let's first talk about this insinuation that has been made
23 throughout the whole week of this trial; that Mr. Mishkin,
24 Mr. Keyes and others, possibly, knew while he was employed that
25 Mr. Duane was transgender. Mr. Mishkin, Mr. Keyes, Mr. Murphy,

1 Ms. Prado, Ms. Milin through her testimony that was read, all
2 said they did not know, and they all said that credibly.

3 Jeremy Murphy was his cube mate, worked with him for a
4 year. Mr. Duane has never alleged that Jeremy Murphy knew that
5 I was transgender.

6 Mr. Duane isn't actually alleging in this case that they
7 knew he was transgender. He's alleging that I suspected it
8 because of the internet and what might have been on the
9 doctor's website, which you never saw. You didn't see any
10 evidence of that. Because of conversations that happened at
11 the holiday party, which you didn't really get any of that
12 information. You heard that there was a party and that he
13 brought Jenna. Nobody said, "Hey, what's going on? I thought
14 that you were a gay male. What's happening?" No one said
15 that.

16 So there is not an allegation here that the company knew
17 about it. And even if they did, there is no allegation in this
18 case that they discriminated against him because of it.

19 And I submit to you that they have testified and shown you
20 that they could not care less if Mr. Duane is transgender, is
21 mainstream gay, is not mainstream gay. They could not care
22 less.

23 Also, there is an insinuation, and it was made several
24 times. And the insinuation is because top managers in this
25 company got together and tried to figure out the right way to

1 respond to Mr. Duane in December and how to respond when he
2 complained directly to David Keyes of discrimination on
3 January 6th, because they all got together, there is something
4 suspicious about that. But that's what managers do. That's
5 what managers do. They get together. Like Mr. Keyes told you
6 credibly, "I wanted to make sure I responded correctly." And
7 the insinuation here is they got together and plotted against
8 Mr. Duane somehow.

9 And the emails about Lenore Ockerberg saying, "You have to
10 be careful here." That's what managers do. Now, she was
11 overly dramatic and you heard about the reprimand from
12 Mr. Mishkin because the top manager is saying -- using things
13 like "he's cornered us" on a very straightforward request, that
14 Mr. Keyes initially didn't want to have happen because of the
15 productivity concerns, which they admit. But you don't say in
16 an email, like, "he's cornered us" and we're -- you know,
17 that's what Mr. Mishkin talked to Ms. Ockerberg about.

18 But they still needed to talk to each other and figure out
19 how do we address this request? How do we address this email
20 we got back saying, Hey, the ADA requires you to give me
21 exactly what I want. That's what managers do. Like any good
22 carpenter, they measure twice and cut once; right? That's what
23 they were doing.

24 That's not what the Government has insinuated, as some
25 sort of plot or some sort of improper activity. If they had

1 not gotten together and talked to each other to figure out the
2 right way to respond, you know what the allegation would be in
3 this case? It would be that you guys aren't taking this
4 seriously and, therefore, you at IXL, you are not being good
5 managers. But because they did, no good deed goes unpunished.
6 Because they did, that's somehow improper. That's an
7 insinuation.

8 There is no claim in this case that they aren't allowed to
9 do that and they shouldn't have done that. That's not an
10 allegation. That was in December. That was after January 6th,
11 that the managers were talking to each other. Those are not
12 the actions of managers who are recklessly indifferent about
13 someone's rights.

14 You saw Mr. Keyes testify. He was credible, direct. He
15 answered every question without evading, without trying to
16 reword the answers, without adding a bunch of extra information
17 each time. He credibly told you that, I was concerned because
18 when I did give Scott Duane a lengthy period of remote work,
19 there were productivity concerns. You know that's true now
20 because we showed you an email back in June when that's, in
21 fact, what he and his manager who he had to -- obligations to,
22 what they discussed.

23 He brought up those productivity concerns and said, Can we
24 make some accommodation -- what can we do so that you can work
25 in the office? And in response to that, Mr. Duane, who said he

1 didn't want to be combative or hostile, stood on his ADA
2 rights, and then he offered all of those suggestions for
3 metrics and productivity reports and exactly what David Keyes
4 ended up doing, at his suggestion.

5 And David Keyes talked to Lenore Ockerberg, talked to
6 Maricela Prado, talked to Paul Mishkin and said, How about this
7 response? And what was that response? It was, That sounds
8 like a reasonable accommodation to me.

9 Mr. Duane has come in here and testified that he had to
10 push and struggle to get them to change their denial of his
11 rights. You saw those emails from December 19 to December 24.
12 You saw the back-and-forth. And you can make your own
13 judgments, and I know you will, about whether that was someone
14 who was denied and who had been facing an illegal act by an
15 employer then who only relented after a struggle, or was that
16 just a discussion that you have with your manager to try to
17 come to a reasonable accommodation?

18 They are not alleging in this case that what David Keyes
19 did was wrong. They are not alleging that. They are
20 insinuating it. But that's not a claim in this case.

21 When you sweat, your fingerprint doesn't work...

22 You saw and heard that Mr. Mishkin before he made the
23 decision to terminate Mr. Duane, he talked to his managers and
24 he said, "Are you sure that this post is by him?" And they
25 said, "Yes, we're certain."

1 You saw Mr. Mishkin, upon hearing that Mr. Duane was
2 saying there is an ADA violation in December, he went online
3 and he researched the ADA to determine what's going on.

4 You saw that he got a string of emails from Maricela Prado
5 in HR so that he could understand and meet with Mr. Duane about
6 that complaint directly made to Mr. Keyes. He looked both ways
7 before he crossed the street. And what they are claiming is
8 that that somehow is inappropriate, but that's a manager who is
9 taking it seriously.

10 So what do they have to prove on these two counts of
11 retaliation under two different laws? You heard the Court give
12 you the instruction on the elements. I'm going to talk to you
13 about those elements, each one, as quickly as I can because
14 it's important, because they have the burden of proving every
15 one of those elements, and we submit that they did not.

16 What are some of the things they did prove? Well, they
17 put their case on and with their witnesses they proved that
18 Mr. Duane received every single request for accommodation, time
19 off, remote work, leave of absence, flexible schedule, raise,
20 ergonomic mouse, ergonomic office equipment. Every single one
21 from IXL, without exception, and was never denied, ever. And
22 without ever demanding from him medical information, without
23 demanding from him specifics about his condition, every time.
24 They proved that in their case.

25 They proved that IXL did, in fact, make Glassdoor.com a

1 centerpiece of their recruiting platform in 2013. They proved
2 that IXL was encouraging new hires to go out and post on
3 Glassdoor. They proved that Mr. Mishkin was upset when he saw
4 what he thought was a gaming of that system, where one person
5 posted two reviews, which you're not allowed to do, and while
6 the -- and in their closing argument they said he was certain
7 about he knew the employee. He testified. He testified to you
8 about that. And you saw this email. They don't highlight the
9 part where he says, "I'm almost certain that is the same person
10 and I know who that is." They don't want to talk about that
11 first clause of that.

12 And you heard Mr. Mishkin say the same thing. He said, "I
13 wasn't certain. I thought I knew who it was, but then I talked
14 to some managers and they convinced me that I didn't and
15 because of that, I couldn't really do much more."

16 But the fact that that's happening is actually
17 corroborating information for what happened in January, 2015.
18 This isn't a CEO of a company that doesn't really care what
19 people are saying about it. This isn't a CEO who doesn't care
20 about ethics in the workplace.

21 You heard why he terminated Lenore Ockerberg. He felt
22 that she wasn't acting professionally. He reprimanded her for
23 not being professional.

24 These things corroborate. They don't contradict the fact
25 that Mr. Mishkin terminated Mr. Duane for making a whole slew

1 of non-discrimination related accusations about the company
2 online.

3 They proved through Maricela Prado that she was trying to
4 get people to post and -- because they were looking for the
5 best candidates. They were looking for the Jeremy Murphys.
6 They were looking for the top people. And they knew that the
7 top people, as I talked to you about in my opening, did their
8 homework and looked on Glassdoor. They proved that. That was
9 part of our case, and that's exactly why this mattered to IXL.

10 If Mr. Mishkin were discriminatory and retaliatory because
11 of someone complaining about discrimination, he had an
12 employee, Mr. Duane, who had complained directly about the ADA
13 in writing in December and he knew about it. It was brought to
14 his attention. He said, "Seemed straightforward and I thought
15 it was a fine accommodation." He would have fired him then if
16 that was the problem.

17 He had Mr. Duane complaining directly to David Keyes
18 unreasonably, as I will talk about, that, I have been
19 discriminated against on the basis of my disability. He
20 specifically said, "you discriminated against me." That's a
21 complaint of discrimination. He wasn't fired for that. They
22 don't allege -- they don't even allege he was fired for that.
23 That is not in this case. That's corroborating information.
24 That's consistent. That doesn't contradict our defense.

25 They proved through Isidora Milin that she disagrees with

1 the picture painted by Scott Duane of IXL in that post. She
2 disagrees with what he was saying in there. She disagreed that
3 she was discriminated against.

4 Again, they are not alleging that they -- they actually
5 aren't alleging and have the burden of proving that Isidora
6 Milin was discriminated against because of her gender, but they
7 have insinuated that. And she said, "No, I wasn't."

8 Who is not credible and who is credible who came before
9 you and testified? I'm going to pull out a few things I want
10 you to focus on, if you could.

11 First thing is I want to talk about the credibility of
12 Mr. Duane. In his prepared testimony on direct examination
13 from his lawyers that they prepared for, he was asked that
14 question that you see on your slide.

15 **"QUESTION:** Let me ask you, before you were fired on
16 January 8th, 2015, had you started looking around for
17 another job?

18 **"ANSWER:** I hadn't started looking for jobs, but I had
19 started thinking about what my next career step would
20 be."

21 That was prepared testimony and that was a question asked
22 and an answer directly given on their direct.

23 He said, "I didn't even start looking around before the
24 8th." But then you saw that that is not true.

25 You saw Exhibit 209. You saw on December 23rd, several

1 weeks earlier, he's talking with his coworker Jessica Morse
2 about, "I'm so done with IXL as soon as possible." And she
3 says, "Well, yeah. How is that job hunt going?"

4 And I asked him, "Well, you didn't correct her. You
5 didn't say, What job hunt? I'm not hunting for jobs. I'm not
6 even looking for a job right now. I'm not even thinking about
7 that," like he testified to.

8 No, he said -- when I confronted him with it, he said,
9 "Oh, yeah, I had actually forgotten about these, right."

10 **"QUESTION:** And so did you reply to jobs in December;
11 right?

12 **"ANSWER:** Yeah. I guess I was mistaken yesterday.
13 Yeah, I totally forgot about those."

14 This wasn't an off the cuff question and answer. This was
15 part of their prepared testimony.

16 Also, you saw on December 31, in case you think it was an
17 honest mistake about, "I forgot about those text messages." He
18 tells Nina Wu on December 31, a full week or more after -- or
19 before being terminated:

20 "Yeah, IXL is so ridiculous. I've started
21 applying to other things. I'm eagerly looking for the
22 next step. Now that I'm committed to moving on from
23 IXL. And If Mind" -- a company she works for -- "is
24 still hiring mathematicians, I'm going to apply."

25 That is an email written on the 31st of December by

1 someone who came in here and told you that he hadn't even
2 started looking before January 8.

3 Now, am I quibbling? Is this about an immaterial fact?
4 No, it's very material. It's substantially important. Why?
5 Because it goes to multiple parts of their case. It goes to
6 whether he was -- whether he was getting ready while he was on
7 surgery leave, whether he was getting ready to leave the
8 company and had made a decision to leave. It has an impact on
9 whether he acted in a reasonable manner by posting that
10 Glassdoor post.

11 It has a big impact on his reasonable good faith beliefs;
12 right? He acted in good faith.

13 It has an impact on his request for damages and his
14 testimony about how this was humiliating and shocking and, I
15 was prepared -- I didn't know I was going to get fired. I
16 thought things were getting better and I was going to stay
17 here. Words to that effect.

18 That's why that's an important fact that they discussed
19 because that goes to multiple parts of their case. So it's not
20 some misstatement, you know, in -- you know, off the cuff and
21 not part of -- and doesn't have really any impact here.

22 In fact, as the Court instructed you, if you decide that a
23 witness has deliberately testified untruthfully about something
24 important, you may choose not to believe anything that witness
25 said. Well, this witness was important, and this was prepped

1 testimony, and it was wrong.

2 Also, you heard how Mr. Duane forwarded just, you know,
3 part of his emails with David Keyes to Nina Wu, who wasn't in
4 the company any more. And he forwarded -- he forwarded those
5 and then he said in that email on the 31st of December, you
6 know, that, David had insisted I provide a note. And I talked
7 to him about that on cross and he said, "Yeah, I think I
8 mischaracterized that. I think I mischaracterized that."

9 In a case like this where Mr. Duane's writings, his
10 written accusations are the centerpiece of this whole case, in
11 that kind of a case it should speak volumes to you that he had
12 repeatedly admitted that he didn't mean what he wrote. That he
13 was, Well, I didn't really mean that. I was being diplomatic,
14 or I was being sarcastic, or something. Or that he wrote
15 things about IXL that were false to make them look bad. Just
16 like that. He knew it was not true.

17 He offered to provide a doctor's note, but he wanted Nina
18 to think IXL forced him to and he wanted them to look bad and
19 so he shaded what he wrote. This is a case about what he's
20 accusing IXL of and whether he's being reasonable. And you saw
21 that repeatedly when I asked him, "Did you mean what you wrote?
22 Did you mean what you wrote?" Many times he would say, you
23 know, "I don't know. It depends on how you are interpreting
24 what I wrote."

25 No, it doesn't. It doesn't -- nothing -- whether or not I

1 meant what I wrote doesn't have anything to do with how you
2 might interpret it. It's how I meant. I did or I did not mean
3 what I put on paper. You heard that testimony time and again
4 during my cross examination.

5 And you know that Scott Duane did not like IXL. He
6 didn't. He didn't like it, even though everything you heard
7 about IXL and every accommodation, he had three weeks of
8 vacation, unlimited sick leave. He got medical benefits with
9 zero co-premiums that covered exactly what he needed to cover.
10 He didn't like IXL. Fine. You don't have to like IXL; right?
11 You don't have to like your job.

12 And in those times when you don't like the work and you
13 don't like what you're doing or you don't like the people
14 you're around, you vote with your feet and you go get another
15 job.

16 You don't go on the internet and write 14 accusations
17 about the product, the managers, the CEO, whether the -- there
18 is a bait and switch going with job candidates.

19 And, in fact, you saw that Mr. Duane was going to vote
20 with his feet. He was leaving. He had one foot out the door
21 basically when he posted that Glassdoor post.

22 And you'll know that when I say that he didn't share with
23 Nina the whole story between him and David and those emails,
24 back and forth and back and forth between the 19th and the
25 24th, you know that because if he had shared the rest of the

1 story, he wouldn't be able to mischaracterize to her that
2 "David insisted that I provide a doctor's note" and make IXL
3 look bad. Because that discussion was on the 31st, and he had
4 emailed that on the 23rd. And he's still talking to her about,
5 you know, what happened on the 23rd in the emails that he
6 forwarded.

7 I want to talk about the credibility of Lenore Ockerberg.
8 Now, she came in here with prepared testimony. She met with
9 the lawyers on the Friday before the trial. She talked about
10 the trial, her testimony. She prepared. This wasn't someone
11 who was called in by me and then they cross examined her. She
12 was prepared and she came in and based on that direct
13 testimony, before I got up and cross examined her, you would
14 have believed that she left IXL voluntarily. When did you
15 leave? When did you leave IXL?

16 You would have believed that she was in a meeting with
17 Paul on January 7 where he decided to fire Scott and she said
18 right then and there that he was a litigation risk and you
19 shouldn't fire him.

20 You would believe they both knew at the time that Scott
21 was transgender. That's -- that's the impression that she gave
22 you. In fact, she said almost unprompted at one point, Yeah,
23 I -- I told him that he was a litigation risk and he was fired
24 the next day.

25 And then I got up and I said, Well, wait a minute. Let's

1 back up. On cross examination I showed her that you were
2 talking about a litigation risk on the 23rd of December in the
3 email that she sent to Paul. And she said, "Well, you know, I
4 was confusing the timeline." Right?

5 But this was her coming in and talking to you, their
6 witness, about whether or not she had told Mr. Mishkin this is
7 a litigation risk; that you heard Ms. Sanghvi say she told him,
8 I believe she said that, "If you fire him, that will violate
9 the law." She never said that. She never said anything like
10 that. She said, I was against it or I warned against it, and
11 he's a litigation risk.

12 But she came to you. Ms. Sanghvi said to you that Ms.
13 Ockerberg said, "I told Paul that firing him was a violation of
14 the law." Right? That's not what -- that's not what they
15 said. That's not what she said. That's not -- Paul Mishkin
16 didn't say that.

17 And I mention it, but you learned that she was fired. You
18 wouldn't have known that from the direct examination, only when
19 I cross examined her.

20 You learned that she testified, Well, this -- the
21 discussion I'm talking about with Paul, that was after the
22 decision was made. When he came to my office to say, Start the
23 off boarding process. That's what you learned on my cross, not
24 what she said in her direct examination.

25 Being confused is fine, but not when it's prepared

1 testimony about launching an accusation to help Mr. Duane in
2 this case. You've got to be -- you've got to be right on the
3 money or you're not credible.

4 And you learned about this knowledge of Mr. Duane's gender
5 that she talked about. All she said was, "I believe Paul
6 knew." They didn't ask her how you know that, or how you
7 believe that, or why you believe that. She never said, I told
8 him anything. Nothing. All she said was, "I believe he knew."

9 And, in fact, her knowledge that she described was an
10 assumption she made because she saw a picture of him bowling
11 and saw scars on his chest. But she did not testify that I
12 disclosed that to anybody else.

13 So what you might have thought Lenore was saying in her
14 direct turned out to be quite different. And that is part of
15 your credibility determinations as jurors. And I would ask you
16 to focus on those things in making those determinations.

17 Also, you didn't have the chance to determine the
18 credibility of the three main people Scott Duane continually
19 talked about as corroborating his "IXL Micro Managed and
20 Problematic" post on Glassdoor; that the three people he relied
21 on repeatedly for what they say is a reasonable belief that IXL
22 is discriminatory, that's Nemo Curiel, Nina Wu and Jessica
23 Morse. They didn't call any of those coworkers to the stand to
24 tell you, yes, this all happened.

25 Instead, he -- Mr. Duane got up and told you, They told me

1 all these things. Where were the coworkers? This is their
2 case. They didn't call any of them to come in and say, That's
3 right. That's exactly what I said. They didn't call any of
4 them to the stand to say, I read that post and, yep, that's the
5 IXL I knew. They didn't -- where were those people?

6 So the judge talked to you about the elements of ADA
7 retaliation; right? He talked to you about how they have the
8 burden of proving each and every one of these -- of the
9 elements that he listed for you. I want to talk about some of
10 the specifics in that.

11 One, they have to prove that Mr. Duane complained about
12 disability discrimination in that Glassdoor post. That's the
13 very first thing they have to prove to you. He did not
14 complain about disability discrimination in that Glassdoor
15 post. He didn't even mention it. He didn't complain about
16 accommodations or disability discrimination. He didn't mention
17 it at all. And how do we know that? Well, we can read the
18 post. But he also agreed on the stand, Yeah, I did not discuss
19 disability in the post.

20 Yet, they are here saying that retaliation for a Glassdoor
21 post, which is the only retaliation they are claiming, is
22 somehow a -- contains a disability discrimination claim, when
23 it doesn't. They don't get past first base on this.

24 They have to also prove to you -- we don't have to
25 disprove. They have to prove that he acted in a reasonable

1 manner.

2 They have to prove that his complaints -- if they were
3 made in the Glassdoor post, that his complaints were based on
4 an objective reasonable good faith belief. And we're talking
5 about objective reasonableness. Like, what would a reasonable
6 person think viewing all these facts and circumstances.

7 It's not, did he himself actually believe that? We don't
8 challenge that. It's whether or not a reasonable person would.

9 And that IXL fired him because of his complaints about
10 disability discrimination in that post. That's their burden to
11 prove that. And I'm going to describe for you what that means.

12 That is what we call a causation standard. It means
13 cause. You have to prove that something was the cause of
14 another thing. And that causation standard is stated
15 differently what I put in here.

16 They have to prove that IXL would not have fired Mr. Duane
17 if he had not included those excerpts, the EEOC excerpts, if he
18 had not included those in the post. They have not proven that.
19 They didn't prove that. Mr. Mishkin got up and testified,
20 credibly, directly, unequivocally, Yes, I absolutely would
21 have. I would have terminated him for all of the things that
22 he said in that post. We don't have to prove that he would.
23 They have to prove that he wouldn't have.

24 So like I said, complaints about disability discrimination
25 in the post. You saw his testimony. You can read the post.

1 You can read it ten times. As he said, "That's correct, I did
2 not say anything about disability discrimination or failure to
3 accommodate a disability in that post."

4 Now, I want to make a note before I go on about
5 discrimination. What is -- what discrimination are we talking
6 about?

7 This morning I discriminated when I picked the tie I was
8 going to wear. Probably, you know, a bad decision, but it was
9 my discriminating choice. I chose between two things. That is
10 discrimination. But it's not unlawful discrimination, the kind
11 that we're talking about here.

12 Treating a new employee who is brand new on the job is not
13 the discrimination we're talking about here. All right?
14 That's treating someone differently. Treating someone
15 differently because you don't like their personality, that's
16 treating someone differently. That's maybe discrimination, but
17 it's not unlawful discrimination based on those protected
18 categories that your Honor told you about, disability, race,
19 sex, gender, national origin, religion; right? So I -- I want
20 to make sure we're talking about the same thing.

21 It's about -- when we talk about complaints of
22 discrimination in the post, we're talking about complaints of
23 discrimination made unlawful by the ADA or Title VII. Okay.

24 Now, the Title VII retaliation count, it's a separate
25 claim in this case, but it has the same, almost the same exact

1 analysis that you'll go through, which is Mr. Duane complained
2 about race, sex, gender, gender identity or sexual orientation,
3 discrimination in that Glassdoor post.

4 We'll talk about that in a second, but -- and then the
5 rest is the same as the ADA; that he complained -- it was done
6 in a reasonable manner, that he had a reasonable good faith
7 belief. Again, objective reasonable good faith belief. Not
8 subjectively believed it.

9 We don't even argue that he didn't subjectively believe
10 the things that he, you know, views as unfair or improper
11 treatment. We're not saying that. We're saying no reasonable
12 person would have looked at what he came in and described to
13 you and said, That is a discriminatory practice and that we
14 fired him because of those complaints of -- I have disability,
15 that's my mistake, that Title VII discrimination.

16 And that, in other words, again, plaintiffs must prove
17 that IXL would not have fired Mr. Duane if he had not
18 complained about race, sex, gender, gender identity, sexual
19 orientation, discrimination in the Glassdoor post.

20 So about Title VII. He must complain in that Glassdoor
21 post about Title VII type discrimination. He admits, first
22 off, that he does not mention gender or sex at all. Just like
23 the disability discrimination allegation that I just mentioned
24 to you, he testified right there on the stand on the second day
25 of trial:

1 **"QUESTION:** You don't say anything in here about
2 gender discrimination; correct?

3 **"ANSWER:** Yes. I didn't really give a complete list
4 here of the groups that I was talking about. I didn't
5 really give a complete list in the Glassdoor post."
6 Well, okay.

7 **"QUESTION:** You don't say this company discriminates
8 on the basis of sex?

9 **"ANSWER:** I did not say that directly, no."

10 Okay. So, first off, what is he complaining of and what
11 is he not complaining of? And those two things are pretty
12 important because we know when -- when they tried to prove that
13 he had a reasonable belief of gender and sex discrimination,
14 well, he didn't even complain about those things in the
15 Glassdoor post.

16 But, okay. What was your reasonable good faith belief
17 about discrimination? Title VII discrimination generally.
18 Well, I can point to Isidora Milin and David Keyes, a white
19 straight female and a white straight male. Two people who he
20 believes were treated differently; that David Keyes was
21 promoted instead of Isidora Milin.

22 First off, Isidora Milin told you, through the person who
23 read her testimony, that she doesn't believe that.

24 And secondly, how in the world does that even address or
25 support what he complained of in the Glassdoor post about white

1 straight -- sorry, white, Asian, straight or mainstream gay
2 people being mistreated? How does comparing those two people
3 form a reasonable belief about Title VII discrimination that he
4 is complaining about here?

5 Secondly, he said Nemo Curiel made more than Jessica
6 Morse. He doesn't have to be right. He could be wrong about
7 whether one is paid more than the other. Okay? And that's the
8 part where you'll see about, well, he can be mistaken. It's
9 what he reasonably believed; right? Objectively.

10 And when he's complaining of discrimination, white, Asian,
11 straight, mainstream gay, family oriented, plays softball, has
12 1.7 kids, he's comparing a Latino male and a white female and
13 he's saying the Latino male was treated differently. That not
14 only doesn't support his accusation, it contradicts his
15 accusation. That alone is evidence in his mind -- I mean,
16 according to what he perceived, that's evidence of a Latino
17 male being treated better than a white female.

18 And he said, well, that's gender discrimination. But he
19 doesn't complain about gender discrimination in the post. So
20 how is IXL supposed to infer that that's what you're
21 complaining about in the post when you don't mention it?

22 The complaints in the post, even in the excerpts that the
23 EEOC pulled out and put on that screen at the beginning, even
24 those excerpts, those are mostly gripes about not fitting in
25 socially and friends with -- having friends, being on the

1 outside socially. About not liking the HR staff, thinking that
2 they are -- there is really no staff. "They don't know what
3 they are doing." That's not discrimination.

4 "Managers don't appear to know what the word
5 discrimination means or seem to care." Well, it has the
6 word "discrimination" in it. So they said it has the word
7 "discrimination," therefore, it's a complaint about
8 discrimination. Well, you be the judge of that. You be the
9 judge of whether that comment is even a complaint of
10 discrimination, much less whether he had a reasonable basis to
11 say it.

12 He said, "Treatment in the workplace seems to run along
13 these characteristics." That's about as close as you get to
14 actual discrimination complaints.

15 People being treated differently with flexible schedules,
16 raises, promotions, praise. Those things, he says, are
17 treated -- people are treated differently based on their
18 characteristics that he listed. Not that he knows it. He says
19 it seems to be.

20 Okay. All right. So we'll address that. That's -- that
21 actually gets closest to a complaint of discrimination. It's
22 in the ballpark. But I will submit to you that he did not have
23 a reasonable belief objectively that -- to support that
24 accusation. Because I asked him about it. I said, "Tell us
25 everything that you're basing that on."

1 And as far as this, "Manager don't seem to know the word
2 discrimination, don't seem to care." He had one manager at the
3 relevant period of time. Really, in terms of what he says was
4 discrimination. One manager, David Keyes. He came before you,
5 David Keyes, and I submit that he was highly credible. And
6 that is not a person who does not care what "discrimination"
7 means.

8 I submit that you will -- you watched him and you -- it's
9 your decision, but you will conclude, I believe, that that is
10 someone who does care about his employees, about if he's being
11 unfair. And what happened? Scott mocked him for it.
12 Immediately got out of that office and sent Jessica a text
13 saying, "Oh, my God, I almost made David cry." And then he
14 said, "I'll make everybody feel terrible and they will cave to
15 me."

16 He must complain in a reasonable manner. Even if he's got
17 a reasonable discrimination complaint in that Glassdoor post or
18 Title VII disability discrimination complaint in that Glassdoor
19 post, he's got to do it in a reasonable manner. And there was
20 nothing reasonable about how Mr. Duane went on to IXL, the one
21 website he knew, the one website he knew would hurt them the
22 most in their recruiting efforts, and while he had one foot out
23 the door practically.

24 And then the complaints that they -- the excerpts that
25 they call complaints of discrimination, he buried those in

1 complaints that were -- Paul Mishkin, when he read them, said
2 those are untrue. He's attacking the work as being easy and
3 unchallenging and those things.

4 And notice that in terms of whether he was acting in a
5 reasonable manner, notice when you read that post, if you go
6 back and read it, and you'll see it again quickly in a couple
7 minutes, he's not accusing the company in that post of treating
8 him discriminatorily. He's not accusing the company of all
9 those things. It's not, this is what happened to me. He's
10 making a broad accusation, 14 of them, about this is what the
11 company does to everybody. And what is reasonable about that?

12 How could it be reasonable for Mr. Duane after a year and
13 a half of employment, where he was given every single
14 accommodation he requested -- and he took 25 to 30 days off and
15 worked at home and was given excellent benefits, was given a
16 raise, three weeks vacation -- how could he stand in judgment
17 of everybody here, you know, speaking in broad terms, you come
18 here, you are going to -- you're going to have boring, menial
19 work fills your day. And that's -- I ask you to consider that
20 when trying -- when deciding whether this was done in a
21 reasonable manner. Just the nature of it.

22 As opposed to the complaint to David Keyes on January 6,
23 which was direct, which was face-to-face and which was about
24 him and what he said you did to me. That was a complaint of
25 discrimination. And that's not what they are alleging IXL

1 terminated him for.

2 Ms. Sanghvi said in the closing argument, she said when
3 David Keyes got that December 19 email and it said there is a
4 fistula, complication of a fistula that has occurred, he said
5 it happened the day after the party. He said other places that
6 it was before the party. But he said in that email, This is
7 not very serious, but it's a complication and I would like this
8 remote work.

9 She said to you, Why didn't, you know, Mr. Keyes even ask
10 him, well, what is it? Describe it for me? Right? Can you
11 imagine what would be alleged if he had had the temerity and
12 the audacity to say, Tell me what a fistula is and what does
13 that mean? We would be here for another week talking about
14 that, talking about how that manager invaded his privacy.

15 You know, this is a catch 22. You can't complain that
16 people invaded my privacy by asking about, Hey, a wrap. Hey,
17 what happened to your arm? And then say, Why didn't -- why
18 didn't his direct manager ask more questions about what a
19 fistula was and how it was hurting him? That doesn't make any
20 sense. And that's -- that can't be a bind. That can't be a
21 bind that you put the employers in.

22 And then lastly on this, what the Government seems to be
23 saying is that because IXL treated him so well for a year and a
24 half, because they gave him everything without question,
25 without asking any questions, without imposing any

1 restrictions, because they did that, it's reasonable to accuse
2 them of being a horrible company when they, for the first time,
3 actually stated a preference that doesn't exactly agree with
4 what you're asking for.

5 I also want to point out that, you know, they are saying
6 that these -- the demographics of this company prove, like,
7 what Scott was saying. The fact that there are -- first of
8 all, there aren't far more men managing this company than
9 women. You have the numbers. It's about a 50/50 split between
10 men and women managing this company.

11 But as far as the demographics, the composition of this
12 work force being mostly white and Asian, does that mean they
13 discriminate against who they hire? Does that mean that they
14 aren't doing what they should? Does that mean that that --
15 just the fact that you have white and Asian professional
16 employees in your tech company in Silicon Valley means that you
17 are discriminating against. And that -- that shows exactly
18 what kind of company they are.

19 They didn't prove that. They didn't put any kind of
20 statistics in here about Silicon Valley tech companies are
21 actually, you know, overrepresented in certain minority
22 employment statistics or employees. They didn't put in any
23 information to say that IXL's demographics are far worse than
24 most every other company in this tech -- in the Silicon Valley.
25 They didn't do any of that. But they want you to think that

1 IXL discriminates on the basis of race because of the fact that
2 Asian and white people are predominantly who work in their
3 professional jobs. That's not -- they didn't prove why you
4 should leap to the conclusion that IXL is a discriminatory
5 workplace.

6 So in terms of whether he acted in a reasonable manner --
7 I know I talk a lot, but he -- he complained about this on
8 Glassdoor when he was committed to leaving. He knew what
9 Glassdoor meant to their recruiting efforts. He knew what
10 Glassdoor meant to job seekers, because he looked at it as
11 well. And he unleashed this rant that was almost entirely
12 unrelated to any discrimination at all.

13 Why? Believe people when they tell you who they are. In
14 an unguarded moment that isn't in court, he said that to his
15 friend, "I shall just make everyone feel terrible and they will
16 cave."

17 Now, I'm going to pick this up because I probably have
18 gone on way too long.

19 Reasonable good faith belief. I just want you to
20 remember, it's an objective reasonable belief. Not subjective.
21 Not did he really believe those things? We're not challenging
22 that. We're saying that not whether he actually believed it,
23 but what would a reasonable person believe. Knowing everything
24 that he said supports why he made these accusations, what would
25 a reasonable person think?

1 And it's because of discrimination. Now, this is
2 important, because this is the causation thing I talked about,
3 the causation standard. And because of discrimination means
4 they have to prove IXL would not have fired him if he only had
5 accused them of all these things, "Micro managed and
6 problematic."

7 "Easy unchallenging work."

8 "Company not going anywhere."

9 And, "Plays to the traditional classroom."

10 And, "Profits are not expected to be passed on to you."

11 And, "Don't expect a challenge working here."

12 And, "This is going to be boring, menial work to fill your
13 day."

14 And, "The CEO is overly involved in everything."

15 And, "They do a bait and switch on employees who can do
16 way better than this company."

17 They have to prove that Mr. Paul Mishkin, reading those
18 allegations in that Glassdoor post, even if it had been
19 stripped away of what they excerpted out of it and said this is
20 the EEOC content. This is the -- these are the complaints of
21 discrimination. They have to prove that he would not have
22 fired him had he read those things on that day, on January 7.

23 He testified unequivocally he would have. They haven't
24 proved that he wouldn't have. If they don't prove that, and
25 they didn't, case is over. Period. End of discussion. That's

1 it. That's the whole case, because they haven't proved
2 causation.

3 So in other words, that Glassdoor post, which they showed
4 you, right, and they pulled those -- those particular parts
5 out, these parts in red, which they don't even allege are
6 discrimination complaints. They don't allege are protected
7 accusations, nothing like that. If Mr. Duane had posted this
8 right in front of you and that -- if that were it, on
9 December 30, 2014 and Paul saw that on January 7, if they
10 didn't prove that Paul would have fired Mr. Duane for that in
11 front of you right now, case is over. They haven't proved
12 their case.

13 **THE COURT:** Your time is up. If you want to take a
14 couple more minutes just to wrap up, you can go ahead.

15 **MR. WILSON:** Thank you.

16 Really wrapping up. This is the verdict form. Really
17 simple. We just ask you to say "no" to number one and number
18 two.

19 If you get to number three, we ask you to say "no." They
20 did not prove damages, asking you about multiples and things
21 like that. They didn't prove that he was damaged when he
22 was -- had one foot out of door.

23 We ask you, punitive damages? This is not a company that
24 acted maliciously, oppressively, reckless disregard for rights.
25 This is a company who looked both ways before it crossed the

1 street each time and then made a decision. And if you get to
2 number six, we ask that you -- that you say "no."

3 Thank you very much.

4 **THE COURT:** Okay. Thank you. Plaintiffs will
5 have -- I'm sorry, we got a little behind schedule. It was my
6 fault. I gave you a bad estimate of when we would be wrapped
7 up. It's not their fault. It's my fault.

8 But the plaintiffs will have 20 more minutes to wrap up on
9 rebuttal and the case will be yours.

10 **REBUTTAL ARGUMENT**

11 **MS. SANGHVI:** First, let me start with a place -- at
12 one place that I recognize I had misspoken. So just because I
13 want to make sure that I set the record clean, counsel pointed
14 out that I had said that Lenore Ockerberg warned that the
15 termination -- that Scott's termination violated the law. If I
16 had said that, I apologize.

17 What I had -- what I should have said was that her warning
18 was that the termination could violate the law. Go back. You
19 can look at the exhibits. I think that her --

20 **MR. WILSON:** Your Honor, I'm sorry.

21 **THE COURT:** Let's do a quick sidebar.

22 (Side bar held off the record.)

23 **THE COURT:** Okay. Ladies and gentlemen of the jury,
24 I'm going to give you a curative instruction right now.

25 First of all, I will remind you of the instruction I've

1 already given you, which is that lawyer arguments are not
2 evidence. Lawyer arguments are not evidence. And if the
3 evidence is different from how -- if you remember the evidence
4 differently from how a lawyer characterizes it, your memory
5 controls.

6 We had a discussion during the break about Ms. Sanghvi's
7 characterization of Ms. Ockerberg's testimony and Ms. Sanghvi
8 has attempted to correct her characterization of Ms.
9 Ockerberg's testimony to you, but she has, again,
10 mischaracterized the testimony that Ms. Ockerberg gave. So I'm
11 going to instruct you to disregard Ms. Sanghvi's
12 characterization of Ms. Ockerberg's testimony.

13 And just remember generally as to the arguments made by
14 both sides, by both lawyers, that arguments by lawyers are not
15 evidence and it's your memory of the evidence that controls.

16 You can continue.

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

18 So let me start actually here. It's not bad faith that
19 Mr. Duane was looking for a job at the end of his employment.
20 IXL has argued to you that because he made preliminary efforts
21 to look for a job, then that means that his post was made in
22 bad faith, but it's just -- that's not what happened.

23 Scott was clear that while he had begun to look for and
24 think about next career steps, he wasn't going to leave IXL
25 without another job. This is an individual who was just

1 returning from medical leave. He explained that he wouldn't
2 have left without a secure job. He explained he didn't have a
3 job lined up. He needed his health insurance and he wouldn't
4 have just left.

5 It's also impossible for IXL to claim that he made the
6 post in bad faith once you listened to David Keyes, who I think
7 both sides would agree, he was credible. He was clear that
8 Scott believed the discrimination claims that he made.
9 Mr. Keyes told you, yeah, he was upset. I could -- I
10 understood that. I understood him to be upset. I believed
11 that he thought that discrimination occurred.

12 They both discussed that emotional meeting that they had
13 on January 6, and the meeting made it clear that Scott made his
14 complaints of discrimination in good faith.

15 And so the fact that he had started looking for a new job,
16 it doesn't change that. It doesn't change what he was feeling.
17 And in some ways it could arguably even just support the fact
18 that he thought that there were problems at IXL and he needed
19 to consider what his next steps were.

20 It's been said a few times about this vendetta email. So
21 I just -- I would ask you to just look at it in the jury room.
22 Look at the language in the email. Mr. Mishkin says very
23 clearly in that email that he knows who the individual is.
24 Just look at that language.

25 There is a distinction, I think, that is worth making when

1 you consider the testimony of the individuals that you've
2 heard. You've heard from David Keyes and you've heard from
3 Paul Mishkin. Even their testimony together is somewhat
4 contradictory at times. Mr. Keyes tells you that the meeting
5 at which they discussed Scott's termination, nobody was upset.
6 There was no discussion about taking down the Glassdoor post.

7 And then Mr. Mishkin would have you believe that he was so
8 upset and that it was so treacherous. Consider that
9 discrepancy. Consider who you should believe.

10 Now, look at the post. Remember what Scott told you.
11 Read what he wrote. Read it. Also, pull out some of the other
12 exhibits that are in your exhibit binder. Compare what Scott
13 wrote in his post.

14 First of all, what I'll ask you to do is look, there is a
15 section of pros. So there are things that Scott testified to
16 that were actual pros, that he saw as a pro. He testified
17 about that. You heard him tell you that there are certain
18 things that he wrote as a pro. IXL might have heard them
19 differently, but he meant them as a pro .

20 And then look at the cons. And he had negative things to
21 say about the company, that's true. But look at the other
22 posts. There were plenty of other posts where employees said
23 negative things about the company. The company knew that this
24 was a place where they get positive and negative reviews. They
25 had to expect that.

1 And so they did. So to say now, to parse the post in this
2 way that, oh, it was this sentence and that sentence, it's
3 just -- it's not credible. That's not the reason they fired
4 him. His -- his complaint on Glassdoor was different because
5 it had the language of discrimination in it. That was
6 upsetting to IXL.

7 Look at Scott's words in the post. These aren't
8 treacherous words. These are one person's opinion in a review
9 on a review platform. One person's opinion on a review
10 platform.

11 There has been a lot of -- defense counsel made a few
12 points about how Mr. Keyes looked five times before crossing
13 the street. It's a busy and complicated street. I'm glad he
14 looked five times. That's a good thing. But the fact of the
15 matter is in 2013 and 2014 it was all fine. It was okay. Need
16 a week? No problem. Need another week? No problem. And then
17 all of a sudden something shifts. And that shift marked a
18 moment in time for Mr. Duane. And that was reasonable for him.

19 There are a few things -- one comment that was made
20 about -- there were a few comments made about prepared
21 testimony. Just to be clear, Ms. Ockerberg told you that
22 neither myself nor Mr. Marek instructed her on what to say. I
23 share no attorney-client privilege with her. She came here
24 willingly and she testified. You heard her words. We did not
25 instruct her on what to say. So there was no preparation. We

1 met with her, absolutely. That came out. We did not prepare
2 her on what to say.

3 There was another question about where are the coworkers?
4 Where are Scott's coworkers? I will remind you that this is
5 not a discrimination case. This is a retaliation case.
6 Obviously, it's all under the EEOC's anti-discrimination work,
7 but it's a retaliation case.

8 In a discrimination case it would make much more sense to
9 bring up many other coworkers and to explain all of their
10 perceptions. Here we brought to you Mr. Duane, his testimony,
11 and other key testimony, so as to not spend too much time on
12 points that are really not that relevant and I don't want to
13 waste anyone's time.

14 Now, I'll ask you ultimately to consider the testimony of
15 Ms. Ockerberg, her role in this case, and what she did
16 throughout the case. You've heard her characterized as
17 impulsive, motivated to lie because she was fired; that she
18 wasn't out for revenge. This is a woman who was employed at
19 IXL for almost 11 years. You heard Mr. Mishkin admit that he
20 didn't even ask her directly what the rumors were about her and
21 if they were true. He just rashly fired her.

22 Even still, she didn't hold a grudge. She learned he had
23 a baby and congratulated him with a text. Ms. Ockerberg came
24 here for one reason. She came here to tell the truth. She
25 told you the truth when she cautioned IXL. She told the truth,

1 and that is why she came here.

2 Now critically, her testimony about Scott, what she
3 perceived Scott to be, who he was, that was all very credible
4 testimony. She has no reason to lie to you. She has no reason
5 to come into a federal court and tell untruths.

6 What Scott said is important here. What Scott said in the
7 post is important. He complained of discrimination, and he got
8 fired for it. That's what this case is about. It's pretty
9 simple at the end of the day. He complained about
10 discrimination in a post. Look at the language in the post.
11 Consider the timing of it all. Consider the late December time
12 period. Consider the emails that are happening back and forth.
13 Consider what he is going through as he returns from a
14 two-month leave of absence for gender confirmation surgery.
15 And understand that the decision that was made without any
16 investigation, without any concern was to fire him.

17 Members of the jury, retaliation claims, they are
18 important. They are important to creating a
19 discrimination-free workplace. They allow employees to -- the
20 freedom to voice reasonably held complaints of decision and
21 they ensure that employers don't act rashly in response.

22 No one likes being accused of discrimination. It's just
23 that the law, they didn't -- the law demands that we do more
24 than strike back at the accuser.

25 Thank you so much for your time.

1 **THE COURT:** Okay. Thank you.

2 So ladies and gentlemen of the jury, the case is yours.
3 There will -- should also be lunch back there that you can --
4 or will be coming shortly that you can enjoy during your
5 deliberations.

6 Let me remind you of one other instruction that I've
7 already given you, which is please don't take anything that I
8 have said or done during this case as an indication of what I
9 think you should do. My role here is simply to direct traffic,
10 to continue the metaphor that the parties were using in their
11 closing arguments. But please don't take anything that I've
12 said or done or how I've ruled on objections or anything like
13 that as an indication of how I think the case should go. You
14 can begin your deliberations now.

15 Thank you.

16 **THE CLERK:** All rise.

17 (Jury exits the courtroom at 11:21 a.m.)

18 **THE COURT:** Okay. So have a seat. Let's briefly put
19 on the record the discussion that we just had at sidebar.

20 Ms. Sanghvi characterized Ockerberg as testifying that
21 when -- during Ms. Sanghvi's rebuttal, she -- she apologized
22 for mischaracterizing Ockerberg's testimony in her initial
23 closing argument, and then recharacterized Ockerberg's
24 testimony as having told the company that firing Mr. Duane
25 could violate the law.

1 There was an objection on the ground that that, too, was a
2 mischaracterization of Ockerberg's testimony. We had a
3 sidebar.

4 I asked Ms. Sanghvi at that sidebar, I said, Do you have
5 any other testimony that you can point to other than the
6 testimony from her redirect examination that we already
7 discussed that would support your assertion that Ockerberg
8 testified at trial that she warned IXL that firing Duane could
9 violate the law? She did not point me to any other testimony.
10 And, therefore, I told Ms. Sanghvi that I would give a curative
11 instruction. And that just, for the record, is why I gave the
12 curative instruction that I gave.

13 Is there -- do either of the lawyers quibble with my
14 description for purposes of the record of what -- of the
15 discussion that happened at sidebar? Did I forget anything?

16 **MR. WILSON:** No.

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

18 **THE COURT:** Okay. All right. So stay close. I
19 assume you all have exchanged -- you've given Kristen cell
20 numbers and everything. So you can -- after I leave, you can
21 give Kristen your cell number. Stay within, you know, a couple
22 of minutes. In the event that any notes come out or verdict
23 comes back, I want you here promptly. So stay within a couple
24 minutes and we'll see you when we next here from the jury.

25 Thank you.

1 (Whereupon at 11:23 a.m. proceedings were adjourned
2 pending jury verdict.)

3 (Further proceedings held herein, reported
4 but not transcribed.)

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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, November 12, 2018