

SACRAMENTO

400 Capitol Mall, 27th Floor
Sacramento, CA 95814
T: 916.321.4500
F: 916.321.4555

BAKERSFIELD

1675 Chester Ave., Ste. 320
Bakersfield, CA 93301
T: 661.864.3800
F: 661.864.3810

SAN LUIS OBISPO

1432 Higuera Street
San Luis Obispo, CA 93401
T: 805.786.4302
F: 805.786.4319

WWW.KMTG.COM

Please visit the firm's
website for a searchable
database of Legal Alerts.

RELATED AREAS OF PRACTICE

[Education Law](#)
[Labor and Employment Law](#)

Legal Alerts are published by Kronick Moskowitz Tiedemann & Girard as a timely reporting service to alert clients and other friends of recent changes in case law, opinions or codes. This alert does not represent the legal opinion of the firm or any member of the firm on the issues described, and the information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult.

Faculty Member Failed To Show That His Disability Was The Reason His Employer Reduced His Workload So That He Was Classified As A Part-Time Employee

In *Scotch v. The Art Institute of California-Orange County, Inc.*, (--- Cal.Rptr.3d ---, Cal.App. 4 Dist., May 6, 2009), a California Court of Appeal considered whether a faculty member, who is HIV-positive, stated claims for violations of the California Fair Employment and Housing Act ("FEHA") in regard to the circumstances under which his employer dropped the number of classes he was to teach so that he was no longer considered a full-time employee. The Court of Appeal held that the employee failed to show that his employer violated the FEHA.

Facts

Carmine Scotch ("Scotch") worked for the Art Institute of California-Orange County, Inc. ("Art Institute"), as an instructor. Art Institute offers bachelor's and associate's degrees in media arts, animation, game arts, design, and interior design. Art Institute is accredited by, and subject to the accreditation standards of, the Accrediting Council for Independent Colleges and Schools ("ACICA"). Scotch previously taught five courses per term, which is the minimum to be considered a full-time faculty member. Full-time faculty members at Art Institute receive benefits such as life and health insurance.

In 2004, Art Institute complied with a request by Scotch not to schedule him to teach morning classes because he was taking medication that made it difficult for him to drive in the morning. Scotch, however, did not tell Art Institute why he was taking medication. Scotch later revealed to one Art Institute employee that he was HIV-positive, but she did not disclose that fact to any else at Art Institute.

Scotch does not have a master's degree. ACICS accreditation standards require faculty members who teach upper division courses to hold either a graduate or professional degree, or a bachelor's degree and professional

certification. When Art Institute started to prepare for ACICS's next on-site accreditation visit, it offered to pay tuition for faculty members to obtain advanced degrees. Art Institute offered to work with Scotch so that he could obtain his master's degree, but he never enrolled in a program while working for Art Institute. Scotch received a low score on his performance review, in part, because of his failure to enroll in a master's degree program.

Scotch taught four lower division courses and one upper division course in the spring of 2006. In between the spring and summer terms in 2006, Art Institute changed ten full-time faculty members to part-time status and asked another seven faculty members to leave because they failed to enroll in a master's degree program. Art Institute notified Scotch that he would no longer be able to teach upper division classes until he received a master's degree and then scheduled him to teach only three courses for the summer term, which changed Scotch's status to part time. In June 2006, Scotch notified Art Institute that he believed that he was being treated unfairly because he was HIV-positive. In July 2006, Scotch notified Art Institute that he would not return to his position.

Scotch filed a lawsuit against Art Institute and several of its employees alleging the following FEHA violations: disability discrimination, failure to maintain a discrimination-free workplace, failure to engage in the interactive process, failure to accommodate, and retaliation. He also alleged causes of actions for wrongful termination in violation of public policy and intentional infliction of emotional distress. The trial court granted summary judgment in favor of Art Institute and its employees.

Decision

The Court of Appeal affirmed the judgment of

SACRAMENTO

400 Capitol Mall, 27th Floor
Sacramento, CA 95814
T: 916.321.4500
F: 916.321.4555

BAKERSFIELD

1675 Chester Ave., Ste. 320
Bakersfield, CA 93301
T: 661.864.3800
F: 661.864.3810

SAN LUIS OBISPO

1432 Higuera Street
San Luis Obispo, CA 93401
T: 805.786.4302
F: 805.786.4319

WWW.KMTG.COM

Please visit the firm's
website for a searchable
database of Legal Alerts.

RELATED AREAS OF PRACTICE

[Education Law](#)
[Labor and Employment Law](#)

Legal Alerts are published by Kronick Moskowitz Tiedemann & Girard as a timely reporting service to alert clients and other friends of recent changes in case law, opinions or codes. This alert does not represent the legal opinion of the firm or any member of the firm on the issues described, and the information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult.

the trial court. The court held that Scotch failed to state a cause of action for disability discrimination under the FEHA. Government Code section 12940, subdivision (a), provides that an employer cannot discharge or discriminate against an employee because of a physical or mental disability, or because of a medical condition. This subdivision, however, "does not prohibit an employer from discharging an employee with a physical or mental disability . . . where the employee . . . is unable to perform his or her essential duties even with reasonable accommodations."

When asserting a claim of disability discrimination, the employee has the initial burden of establishing a prima facie case of discrimination by showing that "the employer took actions from which, if unexplained, it can be inferred that it is more likely than not that such actions were based on a prohibited discriminatory criterion." If the employee meets this burden, a presumption of discrimination arises and the burden shifts to the employer to show that "it took its actions for a legitimate, nondiscriminatory reason." If the employer offers a legitimate, nondiscriminatory reason for its decision, the employee "must challenge the employer's proffered reasons as pretexts for discrimination or offer other evidence of a discriminatory motive."

Here, Art Institute presented evidence that Scotch received a low performance review rating, he did not have a master's degree, and he failed to enroll in a master's program, even though accreditation standards required an advanced degree or professional certification for faculty members teaching upper level courses. Although Scotch established that he had a physical disability because he was HIV-positive and that he suffered from an adverse employment action, he failed to show that Art Institute's stated reason for reducing his class schedule was false or pretextual or that there was a causal link between the adverse employment decision and Scotch's revelation that he was HIV-positive.

Scotch also failed to state a claim for failure to make a reasonable accommodation under section 12940, subdivision (m). The elements

of a failure to accommodate claim are (1) the employee has a disability within the meaning of the FEHA, (2) the employee "is qualified to perform the essential functions of the position," and (3) the employer failed to reasonably accommodate the employee's disability. A reasonable accommodation is "a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." Art Institute offered to allow Scotch to pursue a three-year degree program rather than the two-year program, and also offered to allow him to substitute the time spent working towards the degree in place of other professional development requirements. Instead, Scotch proposed that Art Institute offer him priority in teaching assignments to ensure the he maintained a full-time employment status. Art Institute was not required to provide a guarantee of full-time employment.

Scotch also failed to state a claim for failure to engage in the interactive process as required by Government Code section 12940, subdivision (n). The "interactive process" under the FEHA "is an informal process with the employee or employee's representative, to attempt to identify a reasonable accommodation that will enable the employee to perform the job effectively." This process places a burden on both the employee and employer. The employee must initiate the process, unless his or her disability is obvious. If the disability is not obvious, the burden rests upon the employee to identify his or her disability and limitations and suggest reasonable accommodations. The employer then has an obligation to engage in the interactive process in good faith.

The court reconciled previous case law addressing the failure to engage in the interactive process and concluded that "the employee must identify a reasonable accommodation that was available at the time the interactive process should have occurred." The court recognized "that during the interactive process itself the employee does not have the same access to information about possible accommodations as the employer does." However, after discovery occurs during the litigation process "the employee must be

SACRAMENTO

400 Capitol Mall, 27th Floor
Sacramento, CA 95814
T: 916.321.4500
F: 916.321.4555

BAKERSFIELD

1675 Chester Ave., Ste. 320
Bakersfield, CA 93301
T: 661.864.3800
F: 661.864.3810

SAN LUIS OBISPO

1432 Higuera Street
San Luis Obispo, CA 93401
T: 805.786.4302
F: 805.786.4319

WWW.KMTG.COM

Please visit the firm's
[website](#) for a searchable
database of Legal Alerts.

RELATED AREAS OF PRACTICE

[Education Law](#)
[Labor and Employment Law](#)

Legal Alerts are published by Kronick Moskowitz Tiedemann & Girard as a timely reporting service to alert clients and other friends of recent changes in case law, opinions or codes. This alert does not represent the legal opinion of the firm or any member of the firm on the issues described, and the information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult.

able to identify a reasonable accommodation that would have been available during the interactive process.” Here, Scotch only proposed an accommodation that was not reasonable, and he therefore cannot recover under section 12940, subdivision (n).

The court further found that the trial court properly granted summary judgment on Scotch’s remaining causes of action. Accordingly, the Court of Appeal affirmed the decision of the trial court.

Questions

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

Diana Halpenny, Bruce Scheidt, Laura Izon
Powell or David Tyra | 916.321.4500