[Cite as *Taylor v. Ohio Dept. of Job & Family Servs.*, 2011-Ohio-6060.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joy Taylor,	:	
Plaintiff-Appellant,	:	No. 11AP-385
v.		(C.C. No. 2008-05974)
	:	
Ohio Department of Job and Family Services,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on November 22, 2011

The Isaac Firm, L.L.C., Kendall D. Isaac, and *Jamaal R. Redman*, for appellant.

Michael DeWine, Attorney General, and *Emily M. Simmons*, for appellee.

APPEAL from the Court of Claims of Ohio.

BROWN, J.

{¶1} Joy Taylor, plaintiff-appellant, appeals from a judgment of the Court of Claims of Ohio, in which the court overruled appellant's objections to the magistrate's decision. In the magistrate's decision, the magistrate recommended judgment in favor of the Ohio Department of Job and Family Services ("ODJFS"), defendant-appellee. ODJFS has also filed a motion to strike the transcript of the magistrate's hearing from the appellate record.

{¶2} Because we herein grant ODJFS's motion to strike the transcript of the magistrate's hearing from the appellate record, our factual summary is based upon those facts as found by the magistrate in his January 25, 2011 decision. Appellant began working for ODJFS on January 7, 2008 as an account clerk. Soon after beginning her employment, appellant experienced anxiety and depression due to her husband's recent deployment to Iraq and her increased personal responsibilities, as well as friction between her and two of her new co-workers, Emily Noble, who was in charge of training her, and Tanya Carter, her supervisor.

{¶3} On January 10, 2008, Carter met with appellant to explain the department's phone usage policy after she observed appellant speaking on the phone with her husband in Iraq during work hours. On January 15, 2008, Carter observed appellant speaking in a harsh and rude tone to Noble, which resulted in Carter conducting a counseling session with appellant on January 16, 2008. In the counseling memoranda from that session, Carter reprimanded appellant for her treatment of Noble; reiterated the phone usage policy because appellant continued to make personal phone calls during work hours; and informed appellant that she would need a physician's note to take future sick leave because her sick leave balance had fallen below a certain level. Carter claimed appellant raised her voice during the session, and a department supervisor, Renee Gossett, had to intervene. Appellant contested this portrayal, claiming she had remained calm and it was Carter who was yelling and pointing a finger at her.

{¶4} At the end of January 2008, appellant contacted the Employee Assistance Program ("EAP"), and discussed her anxiety and depression. As a result of the conversation, appellant met with Antoinette Franklin, a personnel and assistant FMLA

coordinator on February 12, 2008, to discuss her taking leave under the Family and Medical Leave Act ("FMLA"). Franklin gave appellant a certification form to be completed by her and her physician. That same day, appellant's physician completed the form indicating that appellant suffered from depression and anxiety, that she had been prescribed anti-depressant medication, and she would need one to two days off from work per week for four to twelve weeks of counseling.

{¶5} Appellant submitted the certification form to Franklin, but Franklin indicated to her via a telephone call on February 12, 2008, that the form was insufficient because it must specifically indicate which particular days appellant would be absent from work. Franklin claims she informed appellant of this insufficiency and told her that she could not process the FMLA leave until her physician provided the additional information. Appellant claims Franklin informed her that she could only receive one to two hours per week of FMLA, which appellant thought would be insufficient, so appellant considered the request for FMLA leave denied.

{¶6} On February 14, 2008, appellant submitted a written resignation letter to Carter effective February 28, 2008. The same day, Carter delivered a letter to appellant acknowledging her resignation.

{¶7} Appellant decided to seek a union grievance due to the denial of her FMLA request, so she contacted Franklin on February 25, 2008, and requested that Franklin send her a letter formally denying her request for FMLA leave. Franklin responded that her FMLA request had not been denied but, rather, could not be processed until her physician provided more information. On February 26, 2008, appellant filed a grievance concerning her FMLA request which the union subsequently withdrew. Appellant also

filed a grievance indicating that her supervisor had caused her undue stress, which was never pursued after Carter denied the allegation.

{¶8} On May 9, 2008, appellant filed the present complaint with the Court of Claims alleging that ODJFS interfered with her rights under the FMLA, resulting in a constructive discharge in violation of R.C. 4112.03, the Americans with Disabilities Act of 1990 ("ADA"), the Rehabilitation Act of 1973, and the National Labor Relations Act ("NLRA"). The court dismissed the NLRA claim on August 18, 2008. A hearing on liability only was held before a magistrate. On January 25, 2011, the magistrate issued a decision, in which he found appellant failed to prove any of her claims by a preponderance of the evidence and recommended judgment in favor of ODJFS.

{¶9} Appellant filed objections to the magistrate's decision, which the trial court overruled in a March 23, 2011 judgment. In the judgment, the trial court noted that appellant had failed to file a transcript of the magistrate's hearing; thus, she could not contest any of the magistrate's factual findings. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> 1. Judge erred in finding that Defendant did not interfere with Plaintiff's FMLA rights when Defendant refused to accept Plaintiff's intermittent leave request as-is and failed to [p]rovide Plaintiff with proper notice on how to remedy same[.]
>
> 2. Judge erred in finding that Defendant did not fail to reasonably accommodate Plaintiff as required by the ADA, ORC 4112.02, and the Rehabilitation Act of 1973.

{¶10} Before addressing appellant's assignments of error, we must address ODJFS's motion to strike the transcript of the magistrate's hearing from the appellate record. As mentioned, appellant failed to file the transcript with the trial court prior to her objections to the magistrate's decision. After the trial court's judgment and her notice of

appeal had been filed, appellant filed the transcript with the Court of Claims. However, we cannot consider the transcript. Pursuant to Civ.R. 53(D)(3)(b)(iii), an objection to a magistrate's finding must be supported by a transcript of any evidence submitted to the magistrate relevant to that finding, or by affidavit if the transcript is unavailable. If an objecting party fails to provide the trial court with the transcript of the proceedings before the magistrate, the appellate court is precluded from considering the transcript of the magistrate's hearing. *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 1995-Ohio-272; *Livingston v. Graham*, 7th Dist. No. 09 JE 16, 2010-Ohio-1091, ¶14-15 (if the transcript is not provided to the trial court, both the trial court and the appellate court are bound by the magistrate's factual findings). Accordingly, we grant ODJFS's motion to strike, and this court is limited to determining whether the trial court abused its discretion in its application of the law to the facts determined by the magistrate. See *Duncan* at 730.

{¶11} Appellant argues in her first assignment of error that the Court of Claims erred when it found that ODJFS did not interfere with her FMLA rights when ODJFS refused to accept her intermittent leave request and failed to provide appellant with proper notice of remedying the same. In order to substantiate her claim of interference with her application for a FMLA leave, appellant must show all of the following: (1) she was eligible for FMLA protections; (2) her employer was covered by the FMLA; (3) she was entitled to leave under the FMLA; (4) she provided sufficient notice of her intent to take leave; and (5) her employer denied her FMLA benefits to which she was entitled. *Hoge v. Honda of America Mfg., Inc.* (C.A.6, 2004), 384 F.3d 238. Pursuant to 29 USC Sections 2615 and 2617, the FMLA provides employees with a private cause of action to recover damages if

an employer interferes with the employee's exercise of FMLA rights. "Interference" means either that the employer interfered with the employee's right to take medical leave, or the employer failed to reinstate the employee to the same or equivalent position upon return to work. The employer's motivation for interfering is irrelevant. Id.

{¶12} Here, appellant argues that the trial court and magistrate erred when they found that it was reasonable for Franklin to request that appellant provide certification that included her actual or estimated treatment schedule, because her doctor could not reasonably know when appellant would have a flare-up of her psychological conditions that would necessitate counseling. Thus, appellant maintains that her certification from her physician detailing one to two days off per week for four to twelve weeks was sufficiently detailed.

{¶13} We find appellant failed to prove the elements of her FMLA claim. Specifically, appellant has failed to demonstrate that ODJFS denied her FMLA benefits. Appellant maintains that, after she submitted her certification, Franklin told her in a February 12, 2008 telephone call that she would not grant her request for one to two days of leave per week and told her that she would be approved for no more than one to two hours of leave per week. Appellant considered Franklin's statements a denial of her request for FMLA. To the contrary, Franklin testified that she merely informed appellant that she could not process the FMLA leave until appellant's physician provided more details regarding the specific days of the week she would need treatment. The magistrate specifically found Franklin was more credible with regard to what transpired during the February 12, 2008 telephone call. We have no reason to question the magistrate's credibility determination, and appellant presents none. The magistrate, having observed

the live testimony, was in a superior position when compared to this court to judge the credibility of Franklin and appellant. *State v. Gordon*, 10th Dist. No. 10AP-1174, 2011-Ohio-4208, ¶14 (triers of fact were in a much better position to adjudge the credibility of the witnesses given their ability to view the witnesses' live testimony). Our inability to even review the transcript testimony makes it nearly impossible for us to overturn the magistrate's credibility determination. See, e.g., *Elyria v. Rowe* (1997), 121 Ohio App.3d 342, 344 (because of appellant's failure to provide a transcript of the proceedings below, the appellate court could not review the credibility of the witnesses who testified and presumed the trial court's findings were correct); *Murray v. Murray*, 5th Dist. No. 01-CA-00084, 2002-Ohio-2505 (with no transcript of the evidentiary hearing having been filed, we must assume that the trial court properly considered the evidence and credibility of the witnesses). Thus, we agree that, based upon Franklin's testimony, her communication with appellant was not that she would only approve a lesser period of FMLA; it was a request that appellant obtain more specific information from her physician.

{¶14} The federal regulations support Franklin's actions. The federal regulations concerning FMLA were revised subsequent to the events in this case, but former 29 C.F.R. 825.305(d) specifically indicates that an employer must advise an employee whenever the employer finds certification incomplete and provide the employee a reasonable opportunity to cure any deficiency. Former 29 C.F.R. 306(b)(3)(i)(B) provides that an employer may require an employee whose incapacity will be intermittent or will require a reduced leave schedule to obtain a certification that contains an estimate of the probable number and interval between treatments, and the actual or estimated dates of treatment, if known. Also, 29 C.F.R. 825.302(f) provides that an employee must advise

the employer, upon request, of the schedule for treatment, if applicable. Here, Franklin's request in the February 12, 2008 telephone conversation was wholly consistent and in accord with these provisions.

{¶15} Appellant maintains that Franklin's actions on February 12, 2008 did not comply with the FMLA's notice requirements, presumably arguing that Franklin's request for more information, therefore, should be deemed a denial of benefits. Appellant first maintains that former 29 C.F.R. 825.305(c) provides that the employer must provide the employee with seven calendar days to cure any deficiency in the certification. However, here, there is no evidence that Franklin provided appellant a lesser amount of time, and there is no claim that this provision requires the employer to give the employee "notice" of the seven-day cure period. The provision requires only that seven days be provided, which occurred in the present case. Appellant also cites former 29 C.F.R. 825.305(d), which provides that an employer must advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. Here, Franklin testified that she told appellant the consequence of her failure to obtain additional information from her physician for her certification was that her FMLA claim would not be processed, which would naturally result in denial of her leave. Thus, we find ODJFS sufficiently complied with these regulations.

{¶16} Appellant also cites former 29 C.F.R. 825.307(a) for the proposition that ODJFS should have requested additional information from her physician for purposes of clarification and authenticity. However, we find this provision inapplicable to the present circumstances for two reasons. The provision indicates that the employer "may" request additional information directly from a physician; thus, it was not required to do so. Also,

the provision specifically indicates that the employer may contact the healthcare provider for purposes of clarification and authentication of the medical certification only after the employer has given the employee an opportunity to cure any deficiencies as set forth in section 825.305(c). ODJFS, specifically Franklin, gave appellant the opportunity to cure the deficiency, but appellant submitted her resignation letter two days later.

{¶17} Appellant's final contention is that the employer may also require, at its own expense, that the employee obtain a second opinion from a healthcare provider, pursuant to 29 U.S.C. 2613(c); yet, ODJFS never requested a second opinion. However, that provision applies if the employer has reason to doubt the validity of the certification, which is not the case here. Nothing in the record before us indicates that Franklin did not believe the physician's certification was valid. Therefore, this provision is inapplicable. For all of the foregoing reasons, we find the trial court did not err when it concluded that ODJFS did not interfere with appellant's FMLA rights. Accordingly, appellant's first assignment of error is overruled.

{¶18} Appellant argues in her second assignment of error that the trial court erred when it found that ODJFS did not fail to reasonably accommodate appellant, as required by the ADA, R.C. 4112.02, and the Rehabilitation Act. Both the ADA, 42 U.S.C. 12112, and its state law equivalent, R.C. 4112.02, make it an unlawful discriminatory practice for any employer to discharge the employee because of an employee's disability. *Sheridan v. Jackson Twp. Div. Fire,* 10th Dist. No. 08AP-771, 2009-Ohio-1267, ¶4. Similarly, 29 U.S.C. 794(a) of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall be excluded from, denied benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. The ADA, the

Rehabilitation Act, and R.C. 4112.02 are governed by similar standards. See *In re C.W.*, 1st Dist. No. C-110342, 2011-Ohio-4756, ¶39, citing *Bartell v. Lohiser* (C.A.6, 2000), 215 F.3d 550, 560 (similar standards govern ADA and Rehabilitation Act claims); *Rector v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 09AP-812, 2010-Ohio-2104, ¶11, citing *Sheridan*, citing *Shaver v. Wolske & Blue* (2000), 138 Ohio App.3d 653 (the ADA and R.C. 4112.02 are nearly identical, and we may look to cases and regulations interpreting the ADA when interpreting Ohio anti-discrimination statutes).

{¶19} To state a claim of disability discrimination, the party seeking relief must establish: (1) that he or she was handicapped; (2) that an adverse employment action was taken by an employer, at least in part, because the individual was handicapped; and (3) that the person, though handicapped, can safely and substantially perform the essential functions of the job in question. *Bush v. Dictaphone Corp.,* 10th Dist. No. 00AP-1117, 2003-Ohio-883, ¶33, citing *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 571, 1998-Ohio-410, citing *Hazlett v. Martin Chevrolet, Inc.* (1986), 25 Ohio St.3d 279, 281.

{¶20} In the present case, the magistrate found that appellant could establish none of the elements of a prima facie case. Because an employee must prove all three elements in order to establish a prima facie case of disability discrimination, the failure to establish any single element is fatal to a discrimination claim. See *McClain v. Shaker Heights*, 8th Dist. No. 96175, 2011-Ohio-4418; *Betosky v. Abbott Laboratories* (Sept. 19, 1996), 10th Dist. No. 96APE03-373.

{¶21} We will address the second element first, as it is clearly dispositive of appellant's discrimination claim. To establish the second prima facie element of a

discrimination claim, appellant was required to demonstrate that an adverse employment action was taken by ODJFS, at least in part, because she was handicapped. An adverse employment action is a materially adverse change in the terms or conditions of employment because of the employer's conduct. *Kocsis v. Multi-Care Mgmt., Inc.* (C.A.6, 1996), 97 F.3d 876, 885. Here, however, ODJFS took no adverse employment action. As discussed above, appellant failed to demonstrate that ODJFS denied her FMLA benefits. Franklin merely informed appellant that she could not process the FMLA leave until appellant's physician provided more details regarding the specific days of the week she would need treatment, which we have found she had the authority to request under former 29 C.F.R. 825.305(d), 29 C.F.R. 306(b)(3)(i)(B), and 29 C.F.R. 825.302(f).

{¶22} Although appellant presents no argument on this issue in her brief, the magistrate discussed appellant's contention that she was forced to involuntarily resign based upon ODJFS's conduct. Her resignation, she argued, amounted to a constructive discharge and thus qualified as an adverse employment action. Courts generally apply an objective test in determining when an employee was constructively discharged. *Mauzy v. Kelly Servs.*, *Inc*., 75 Ohio St.3d 578, 588-89, 1996-Ohio-265, citing *Clowes v. Allegheny Valley Hosp.* (C.A.3, 1993), 991 F.2d 1159, 1160-61. A court must determine whether the employer's actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign. Id. There is no sound reason to compel an employee to struggle with the inevitable simply to attain the "discharge" label. *Mauzy* at 589. Courts must seek to determine whether the cumulative effect of the employer's actions would make a reasonable person believe that termination was imminent. Id.

{¶23} Based on the trial testimony, the magistrate found that appellant was unable to show an adverse employment action occurred or that she was constructively discharged. According to the magistrate's findings, appellant testified that the stress in her personal life and at work made her unable to work without the requested FMLA leave. Although appellant claimed she was distressed by her stressful relationship with Carter and her disagreements with Noble, there was no evidence that these tense professional relationships made her work conditions so intolerable that a reasonable person would have felt compelled to resign. The magistrate also found Carter's testimony credible that her counseling session with appellant regarding her phone usage, treatment of Noble, and sick leave status was appropriate and professional. In addition, Carter testified that she was surprised that appellant had resigned because she had performed her job well and corrected the behaviors that had prompted the counseling session; thus, it did not appear that appellant's termination was imminent. Assuming the magistrate's factual findings are accurate, and the credibility determinations sound, as we must without the benefit of a transcript, we cannot find any error in the trial court's conclusion that appellant failed to demonstrate a prima facie case for discrimination under R.C. 4112.02, the ADA, or the Rehabilitation Act. Therefore, appellant's second assignment of error is overruled.

{¶24} Accordingly, appellant's two assignments of error are overruled, and the judgment of the Court of Claims of Ohio is affirmed.

Motion granted;
judgment affirmed.

TYACK and DORRIAN, JJ., concur.

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