

[Cite as *Ziadeh v. Columbus*, 2010-Ohio-1323.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Salah Ziadeh,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-503 (C.P.C. No. 07CVH09-12143)
City of Columbus,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 30, 2010

Daniel H. Klos, for appellant.

Richard C. Pfeiffer, Jr., City Attorney, and *Wendy S. Kane*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Salah Ziadeh, appeals from a judgment of the Franklin County Court of Common Pleas in favor of defendant-appellee, the City of Columbus ("City"). For the following reasons, we affirm.

{¶2} In late February 2004, Ziadeh underwent cardiac surgery to treat a 90 percent blockage in one of his arteries. After surgery, Ziadeh entered cardiac rehabilitation. At the time of his surgery and rehabilitation, the City employed Ziadeh as a street cleaning and maintenance supervisor. To allow him time to recover, the City

extended short term disability benefits to Ziadeh for 26 weeks pursuant to the terms of the collective bargaining agreement between the City and the Columbus Municipal Association of Government Employees, Communications Workers of America, Local 4502. When Ziadeh exhausted his short term disability benefits, the City allowed him to use his accrued vacation and comp time.

{¶3} On October 28, 2004, Ziadeh and his wife attended a fitness-for-duty hearing. According to Ziadeh and his wife, at the hearing, they told Becky Perkins, a human resources analyst for the City, that they expected Ziadeh's physician to release him to return to work in late November. Ziadeh and his wife asked Perkins if she could do anything to extend his leave until that time.

{¶4} Perkins remembers this conversation differently. Perkins does not recall the Ziadehs representing that Ziadeh might be able to return to work in late November. According to Perkins, the only information she had regarding Ziadeh's prognosis came from a physician's report attached to Ziadeh's application for disability retirement. That report stated that Ziadeh was permanently incapacitated from the performance of his job duties.

{¶5} At the end of the hearing, the hearing examiner ordered the City to grant Ziadeh leave without pay until November 6, 2004 so that he could receive health insurance benefits through the end of November. On November 6, 2004, the City terminated Ziadeh's employment.

{¶6} On September 10, 2007, Ziadeh filed suit against the City and, in relevant part, claimed that the City failed to accommodate his disability in violation of R.C. 4112.02 and 4112.99. The parties both consented to a jury trial before a magistrate. At trial, the

Ziadehs and Perkins testified to the facts set forth above. Additionally, Ziadeh presented evidence regarding at least two ways in which he alleged that the City could have, but did not, accommodate his disability. First, pursuant to the time donation program, an employee who has exhausted all paid leave and disability leave benefits for a catastrophic illness may request that co-workers donate vacation time, which the employee can then use to extend his sick leave. Second, pursuant to the transitional return to work program, the City can provide an employee recovering from illness with a temporary work assignment in which the employee only performs duties and tasks compatible with his or her physician's restrictions.

{¶7} Perkins acknowledged that she did not mention either program to Ziadeh. Because Perkins believed Ziadeh was permanently incapacitated and unable to return to work, she did not see how either program would assist him.

{¶8} The jury rendered its verdict for the City, and the magistrate reported that verdict to the trial court. The trial court entered judgment in favor of the City in a judgment entry dated May 14, 2009. Ziadeh now appeals from that judgment, and he assigns the following errors:

[1.] The Court of Common Pleas Magistrate Judge abused his discretion and committed plain error because he failed to instruct the jury on the law of disability discrimination requiring an interactive process on the part of both the employer and employee to find a reasonable accommodation for a disabled employee.

[2.] The Court of Common Pleas Magistrate Judge abused his discretion and committed plain error because he failed to instruct the jury on the law of disability discrimination and for proposed jury instructions of the Plaintiff, or the Defendant, on the basis that the jury instructions were way too long already and that giving a favorable instruction for one party would require giving a favorable instruction for the other party, such

being a completely arbitrary and capricious standard to deny the Plaintiff's proposed instructions or withhold instructions essential to the law of the case.

{¶9} Because they are interrelated, we will address Ziadeh's two assignments of error together. By these assignments of error, Ziadeh argues that the jury should have received his proposed jury instruction regarding an employer's duty to interact with the employee in good faith to arrive at a reasonable accommodation for the employee's disability. Before we consider the merits of this argument, we must determine the appropriate standard of review.

{¶10} Civ.R. 53(D)(3)(b) imposes a duty to assert timely, specific objections to a magistrate's decision before the trial court. *Nelson v. Lane*, 10th Dist. No. 09AP-291, 2009-Ohio-4844, ¶6; *Watley v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 07AP-902, 2008-Ohio-3691, ¶17. Pursuant to Civ.R. 53(D)(3)(b)(iv), "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." Thus, other than plain error, a party waives all error by the magistrate that the party could have, but did not, assert before the trial court. *Nelson* at ¶6-7; *Watley* at ¶17-18. These waived errors include those made by the magistrate as he or she presides over a jury trial. *O'Connor v. Trans World Servs., Inc.*, 10th Dist. No. 05AP-560, 2006-Ohio-2747, ¶9-10. See also *Hartt v. Munobe*, 67 Ohio St.3d 3, 6, 1993-Ohio-177 (recognizing that a party must object to the trial court about any alleged error by a magistrate, including "errors such as evidentiary rulings or jury instructions," made during a jury trial).

{¶11} In the case at bar, Ziadeh did not file any objections alleging error in the magistrate's handling of the jury trial. We therefore limit our review of the magistrate's decision to a consideration of whether it amounts to plain error.

{¶12} Appellate courts only find plain error in those exceptional circumstances where the error "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 123, 1997-Ohio-401. Here, Ziadeh claims that such error arose from the magistrate's refusal to give his proposed jury instruction on the interactive process an employer and employee must engage in to find a reasonable accommodation for the employee's disability. Ziadeh, however, failed to file his proposed jury instructions with the trial court, and thus, they do not appear anywhere in the record.¹ Accordingly, we are without the means to review the error asserted. Without the text of the proposed jury instruction, we are unable to determine whether it contained a correct statement of the law applicable to the facts of this case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591 (" 'Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction.' ") (quoting Markus & Palmer, *Trial Handbook for Ohio Lawyers* (3d ed.1971) 860, Section 36:2).

¹ We note that Ziadeh attached to his reply brief a document entitled "Plaintiff's Proposed Jury Instructions." This document does not bear a time stamp from the Clerk of Courts nor does it appear in the certified record. Because an appellate court's review is limited to those materials contained in the record before the trial court, we cannot consider the supplemental material Ziadeh submitted on appeal. *Galloway v. Khan*, 10th Dist. No. 06AP-140, 2006-Ohio-6637, ¶49.

{¶13} Moreover, even absent the proposed jury instruction, we cannot conclude that the magistrate committed plain error in instructing the jury. The instruction that the magistrate gave the jury on Ziadeh's failure to accommodate claim generally conformed to prevailing Ohio law. Therefore, this case is not the exceptional case that challenges the legitimacy of the judicial process and requires reversal on plain error grounds.

{¶14} For the foregoing reasons, we overrule Ziadeh's two assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and SADLER, J., concur.
