STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DANIEL W. MCMAHON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-5031
	)	
NAPLES HMA,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on February 1, 2008, by video teleconference between sites in Ft. Myers and Tallahassee, Florida.

APPEARANCES

For Petitioner: Daniel W. McMahon, pro se
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For Respondent: Joseph D. Stewart, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner in connection with his use or enjoyment of a place of public accommodation in violation of Section 760.08, Florida Statutes.

PRELIMINARY STATEMENT

On April 18, 2007, Petitioner filed a Public Accommodation Complaint of Discrimination with the Florida Commission on Human Relations (Commission). On October 15, 2007, the Commission issued a "no cause" determination on the complaint. On October 29, 2007, Petitioner timely filed a Petition for Relief with the Commission.

On October 30, 2007, the Commission referred the petition to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct a hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes.[1/] The referral was received by DOAH on October 31, 2007.

The final hearing was scheduled for and held on February 1, 2008. At the hearing, Petitioner testified in his own behalf and presented the testimony of Joseph Stewart; and Respondent presented the testimony of Dawn Bencomo. The following exhibits were received into evidence: Petitioner's Exhibits A through L and Respondent's Exhibits 1, 2, 3, 4-1 through 4-5, 4-9, 4-10, 4-12 through 4-19, 4-21, 4-23 through, 4-25, 5, and 6.

The one-volume Transcript of the final hearing was filed on February 12, 2008. The parties were given 10 days from that date to file proposed recommended orders (PROs). Petitioner timely filed a letter summarizing his position on February 20,

2008. Respondent filed a PRO on February 25, 2008. The parties' post-hearing filings have been given due consideration.

FINDINGS OF FACT

1. Petitioner is 36 years old. He is not employed.

2. Petitioner claims to have a "mental disability" that entitles him to accommodations under the Americans with Disabilities Act (ADA).

3. In May 1996, the U.S. Social Security Administration (SSA) found Petitioner to be disabled for purposes of receiving Social Security disability benefits because he had a "personality disorder" that caused "deeply ingrained, maladaptive patterns of behavior associated with persistent disturbance of mood."

4. In June 2005, the SSA found that Petitioner's disability was "continuing" and that he remained eligible for Social Security disability benefits.

5. The SSA disability determination was based upon Petitioner's personality disorder, not a specific "mental disability." The 1996 SSA determination did not find that Petitioner had "organic mental disorders" or "schizophrenic, paranoid, and other psychotic disorders."

6. The most current medical information presented by Petitioner is an October 2003 report by Dr. Alejandro Perez-Trepachio (Dr. Perez), an internal medicine specialist. The

report notes that Petitioner "has a history of personality disorder [and has] been diagnosed with passive aggressive and obsessive compulsive personalities," but it did not diagnose Petitioner with those conditions. The report stated that Petitioner "needs the care of [a] psychiatrist" and that Dr. Perez would refer Petitioner to a local psychiatrist, because psychiatric issues were beyond his expertise.

7. Petitioner presented no credible evidence that his "personality disorder" impacts his major life activities or his activities of daily living.

8. Petitioner claims that he has difficulty communicating, particularly when he is under stress. However, he had no problems communicating during the course of the final hearing.

9. In 2005 and 2006, Petitioner filed a number of suits against the Cleveland Clinic and various physicians affiliated with the hospital. The suits claimed that the hospital and physicians were discriminating against Petitioner based upon his disability in violation of the ADA.

10. The federal judge in one of the suits--No. 2:05-cv-90-FtM-33SPC--denied a motion for summary judgment filed by the Cleveland Clinic because the judge determined that there was a material issue of fact as to whether or not Petitioner had an ADA disability.

11. The judge did not determine that Petitioner did, in fact, have an ADA disability. Indeed, the judge noted that Petitioner testified during his deposition that he was able to perform a number of activities of daily living, including managing his financial affairs, using a computer, driving a vehicle without limitation from place to place, maintaining daily hygiene, and generally taking care of himself. The judge also observed that Petitioner was able to effectively communicate his answers during his deposition in that case, which is consistent with the undersigned's observation of Petitioner at the final hearing in this case.

12. The Cleveland Clinic hospital in Naples was purchased by Respondent in May 2006. The "closing agreement" between the Cleveland Clinic and Respondent made the Cleveland Clinic responsible for defending the ADA suit brought by Petitioner.

13. All of Petitioner's suits against the Cleveland Clinic, including the ADA suit referenced above, were resolved through settlement in September 2006.

14. Petitioner testified that he was initially told by Respondent's representatives that he was not welcome as a patient at the hospital, but that he was subsequently told that he would be permitted to make appointments with the hospital and the physicians affiliated with the hospital.

15. At the time, there were two ways that a patient could make an appointment with a physician affiliated with the hospital. The patient could call the physician's office directly and make an appointment or the patient could call the hospital's central scheduling office and make the appointment with the physician through that office.

16. At some point after Respondent acquired the hospital from the Cleveland Clinic,[2/] Petitioner attempted to make an appointment with Dr. Perez. Dr. Perez had previously seen Petitioner in October 2003, and according to Petitioner, Dr. Perez had never formally terminated their doctor-patient relationship.

17. Petitioner called Dr. Perez's office and spoke to his secretary, Dawn Bencomo. He asked Ms. Bencomo whether there was any reason that Dr. Perez would not give him an appointment. Ms. Bencomo found this question strange, so she put Petitioner on hold and spoke with Dr. Perez.

18. Dr. Perez told Ms. Bencomo that he would not see Petitioner because of his confrontational nature with other physicians and his threats to sue other physicians.

19. Ms. Bencomo relayed this information to Petitioner, who became upset and threatened to sue Dr. Perez. There is no evidence that he followed through with that threat.

20. Petitioner then called the hospital's central scheduling office and made an appointment with Dr. Perez, even though he had previously been told by Dr. Perez's office that Dr. Perez was unwilling to see him.

21. When Dr. Perez noticed that Petitioner was on his schedule, he directed Ms. Bencomo to call Petitioner and inform him that the appointment was cancelled and would not be rescheduled. Ms. Bencomo left Petitioner a message to that effect on his voice mail.

22. There is no credible evidence that Respondent played any role in the cancellation of Petitioner's appointment with Dr. Perez. There is also no credible evidence that Petitioner's "disability" played any role in Dr. Perez's decision to not see Petitioner.

23. In September 2006, Respondent's attorney sent a letter to Petitioner stating that Respondent did not wish to treat Petitioner at its facility and that Respondent would be opposed to Petitioner having surgery at its facility.

24. The hospital's desire not to have further dealings with Petitioner is based primarily upon his harassing, confrontational, and litigious behavior towards the hospital and its staff when the facility was owned by the Cleveland Clinic. However, many of the same staff members continued to work at the hospital when it was acquired by Respondent.

25. There is ample evidence in the record to support Respondent's characterization of Petitioner's behavior as harassing, confrontational, and litigious. For example, he left several harassing and threatening phone messages with Respondent's attorney, and he has threatened to "file many actions against [Respondent] in federal court" for denying his civil rights. Additionally, he has been escorted out of the Lee County Courthouse by law enforcement officers on at least two occasions because of his disruptive behavior; he was rude and confrontational in his dealings with the ADA administrator for the Circuit Court in Lee County; and he has sued the Collier County Sheriff's Office in federal court in regard to their dealings with him.

26. Petitioner presented no evidence that similarly-situated persons outside of his protected class--i.e., persons without his claimed "mental disability" and with a similar history of harassing, confrontational, and litigious behavior towards the hospital--were treated more favorably by Respondent.

27. The complaint filed by Petitioner with the Commission that gave rise to this proceeding (No. 200701192) focuses on Petitioner's inability to schedule appointments and be treated at Respondent's facility. The complaint does not mention an inability to use or enjoy any other aspect of Respondent's

facility, such as the coffee shop in the hospital that Petitioner mentioned in his testimony.

28. Petitioner filed virtually identical complaints against three other corporate entities--Health Management Associates (No. 200601498); Collier HMA Physician Management, Inc. (No. 200701724); and Collier HMA Facility Based Physician Management (No. 200701744)--because he did not know which corporate entity his complaint should be brought against. The Commission dismissed each of those complaints, and Petitioner did not request a hearing to contest the dismissal.

29. In August 2007, Respondent filed suit against Petitioner in the Circuit Court for Lee County seeking to enjoin Petitioner from (1) contacting or placing telephone calls to the hospital "unless for emergency medical needs," and (2) filing further administrative or judicial actions against Respondent without an attorney. The suit, Case No. 07-2775-CA, does not contend that Petitioner has a disability that makes him incapable of representing himself, as Petitioner seems to believe. Instead, the suit contends that Petitioner should not be allowed to file additional suits against Respondent without an attorney because his numerous prior suits "constituted abuse of process" and "created frivolous and unnecessary impediments to the administration of justice and served no valid justiciable purpose."

30. On November 9, 2007, in response to the injunction suit filed by Respondent, Petitioner filed suit against Respondent in federal court claiming that Respondent is violating his rights under the ADA. On December 26, 2007, a federal magistrate judge recommended that the suit be dismissed because the federal court lacks subject matter jurisdiction over the suit.

31. On January 14, 2008, Petitioner filed a Notice of Removal in the injunction suit brought by Respondent seeking to have the case removed to the federal court. The case was still pending as of the date of the final hearing.

32. Petitioner is requesting that he be allowed to use Respondent's facility and that Respondent be required to provide him an accommodation so that he can do so. It is not entirely clear what accommodation Petitioner is seeking.

33. The accommodation requested by Petitioner from the Circuit Court for Lee County was "someone to speak for him" because he "had an inability to seem polite"; because people "misinterpreted the tone of his voice and his inflection"; and because people "misinterpreted his communications." That request was denied.

CONCLUSIONS OF LAW

34. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11(7), Florida Statutes.

35. Petitioner claims that Respondent discriminated against him based upon his disability and in retaliation for his filing of the prior discrimination complaints. Petitioner has the burden of proof on these claims, as discussed below.

36. Section 760.08, Florida Statutes, provides:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this chapter, without discrimination or segregation on the ground of . . . handicap . . . .

37. Section 760.08, Florida Statutes, does not prohibit public accommodation discrimination in retaliation for prior complaints. It only prohibits such discrimination based upon "race, color, national origin, sex, handicap, familial status, or religion."

38. There are other statutes that prohibit retaliation. See, e.g., §§ 760.11(7) (prohibiting employment discrimination in retaliation for prior complaints) and 760.37, Fla. Stat. (prohibiting housing discrimination in retaliation for prior complaints). However, those statutes do not apply in the context of alleged public accommodation discrimination.

39. The ADA prohibits discrimination in retaliation for complaints of public accommodation discrimination. See 42 U.S.C. § 12203(a). However, the Commission has no authority to enforce the ADA.

40. To prevail on his public accommodation discrimination claim, Petitioner must establish that (1) he is a member of a protected class (i.e., handicapped); (2) that he attempted to contract for services and to afford himself of the full benefits and enjoyment of a public accommodation[3/]; (3) that he was denied the right to contract for those services and, thus, was denied those benefits and enjoyments; and (4) that similarly-situated persons who are not members of his protected class received full benefits or enjoyment, or were treated better. See Afkhami v. Carnival Corp., 305 F. Supp. 2d 1308, 1322 (S.D. Fla. 2004); Henderson v. Days Inn I-75, Case No. 07-2847, 2007 Fla. Div. Adm. Hear. LEXIS 535, at ¶ 19 (DOAH Sep. 27, 2007; FCHR Nov. 7, 2007).

41. If Petitioner establishes this prima facie case, the burden shifts to Respondent to proffer a legitimate non-discriminatory reason for its disparate treatment of Petitioner. See Afkhami, 305 F. Supp. 2d at 1321 (applying the burden-shifting framework from McDonnell Douglass Corp. v. Green, 411 U.S. 792 (1973), in a case involving a public accommodation discrimination claim). If Petitioner does not establish a prima

facie case, then the burden of production never shifts to Respondent.

42. If Respondent meets its burden of production, the burden shifts back to Petitioner to prove by a preponderance of the evidence that the reason proffered by Respondent is false and that it is merely a pretext for discrimination. See Afkhami, 305 F. Supp. 2d at 1321 (citing cases).

43. There is no statutory definition for the term "handicap" used in Section 760.08, Florida Statutes, and the Commission has not adopted a rule to define the term.

44. The courts have construed the term "handicap" in Chapter 760, Florida Statutes, in accordance with the definitions of "disability" in the federal Rehabilitation Act and the ADA. See, e.g., St. John's School District v. O'Brien, 2007 Fla. App. LEXIS 20540, at *9 (Fla. 5th DCA Dec. 28, 2007); Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646, 647 (Fla. 5th DCA 1997); Brand v. Florida Power Corp., 633 So. 2d 504, 510, n. 10 (Fla. 1st DCA 1994).

45. Thus, in order to be entitled to the protections of Section 760.08, Florida Statutes, based upon a handicap, Petitioner must establish that he has a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or that he is perceived

as having such an impairment. See St. John's School District, 2007 Fla. App. LEXIS 20540, at **11-12.

46. As explained in St. John's School District:

> A plaintiff is "perceived as" being disabled if he meets one of three conditions: (1) he has a physical impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; or (3) has no physical or mental impairment but is treated by an employer as having such an impairment. For a plaintiff to prevail under this theory, he must show two things: (1) that the perceived disability involves a major life activity; and (2) that the perceived disability is "substantially limiting" and significant. To fall within the "perceived as" disability, it is necessary that an employer entertain misperceptions. It must believe the individual has a substantially limiting impairment that does not exist or that there is a substantially limiting impairment when, in fact, the impairment is not so limiting. A substantially limiting impairment must preclude that individual from more than one type of job, a specialized job, or a particular job of choice.

2007 Fla. App. LEXIS 20540, at **11-12 (citations omitted).

47. Petitioner failed to meet his burden of proof on this issue. He presented no current or credible medical evidence concerning his condition; he did not establish that the "personality disorder" referenced in the SSA determination and the 2003 report from Dr. Perez limits his activities of daily

living or any major life activity; and he did not establish that he is perceived as disabled by Respondent.

48. In reaching this conclusion, the undersigned did not overlook the Order entered in Petitioner's 2005 federal suit against the Cleveland Clinic. That Order did not determine one way or the other whether Petitioner has an ADA disability. The federal judge simply determined that there was a material issue of fact regarding Petitioner's disability, which precluded summary judgment in favor of the Cleveland Clinic. If that case had proceeded to trial, Petitioner would have had the burden to prove that his condition constitutes a disability under the ADA based upon the standards described above.

49. The undersigned also did not overlook the SSA's determination that Petitioner is disabled. However, the case law is clear that such a determination is not a "dispositive factor" in determining whether Petitioner has a disability covered by the ADA because the legal standards are not the same. See, e.g., Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 802 (1999); Couts v. Beaulieu Group, LLC, 288 F. Supp. 2d 1292, 1304 (N.D. Ga. 2003) ("An individual may receive disability benefits from the [SSA] and yet not have an impairment that substantially limits one or more major life activities for purposes of the ADA.").

50. Petitioner's claim would have failed even if he had established that he had a handicap for purposes of Section 760.08, Florida Statutes.

51. First, the evidence was not persuasive that Petitioner has been denied services by Respondent. For example, there is no persuasive evidence that Respondent played any role in the cancellation of Petitioner's appointment with Dr. Perez or another doctor, and it is undisputed that Petitioner was able to use Respondent's central scheduling office to make the appointment with Dr. Perez.

52. Second, even if it was determined that the September 2006 letter from Respondent's attorney was tantamount to a denial of the hospital's services to Petitioner, there is no evidence that any similarly-situated person outside Petitioner's protected class was treated differently by Respondent.

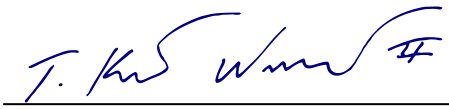
53. Third, even if it was determined that Petitioner had an ADA disability and was treated differently than a similarly-situated non-disabled person, Respondent produced sufficient evidence to demonstrate that its desire to have no further dealings with Petitioner was based upon a legitimate, non-discriminatory reason (e.g., his history of harassing, confrontational, and litigious behavior), and Petitioner failed to prove that reason was a false or merely a pretext for unlawful discrimination.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Commission issue a final order dismissing the Petition for Relief with prejudice.

DONE AND ENTERED this 4th day of March, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 4th day of March, 2008.

ENDNOTES

1/ All statutory references in this Recommended Order are to the 2007 version of the Florida Statutes.

2/ Petitioner's testimony did not identify exactly when these events occurred, but according to the testimony of Dawn Bencomo, the events occurred "not long after we became HMA."

3/ Respondent did not argue that its facility is not a public accommodation, even though hospitals are not expressly included in the definition of "public accommodations" in Section 760.02(11), Florida Statutes. See, e.g., Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1204-05 (11th Cir. 2007) ("§ 760.02(11)'s definition of 'public accommodations' does not

include medical facilities"); Foster v. Howard University Hospital, 2006 U.S. Dist. LEXIS 74512, at ** 5-6 (Dist Ct. DC Oct 12, 2006) (concluding that Title II of the Civil Rights Act of 1964, which is virtually identical to Section 760.02(11), Florida Statutes, does not apply to hospitals because Title II's definition of "place of public accommodation" does not mention hospitals); Verhagen v. Olarte, 1989 U.S. Dist. LEXIS 13881, *4 (S.D.N.Y. 1989) (same). But cf. 42 U.S.C. § 12181(7)(F) (including hospitals in the definition of "public accommodation" for purposes of Title III of the ADA).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.