STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICK MCNAMARA, M.D.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-6825
	)	
WALT DISNEY WORLD,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER OF DISMISSAL

The parties agreed to a schedule by which they briefed numerous issues of record. The memoranda the parties filed pursuant to their briefing schedule are matters of record and are not repeated in this Order. This Order refers only to those memoranda the undersigned considers material to the Order.

On July 21, 2010, Petitioner filed Petitioner's Brief on Available Remedies. On July 22, 2010, Respondent filed Walt Disney World Co.'s Motion to Dismiss for Lack of Standing and Jurisdiction (Motion to Dismiss). On August 17, 2010, Petitioner filed Petitioner Dr. McNamara's Response to Respondent Disney's Motion to Dismiss on Standing and Jurisdiction (Response to the Motion to Dismiss), and Respondent filed Walt Disney World Co.'s Response to Petitioner's Brief on Available Remedies (Response on Available Remedies). For the

reasons stated in this Order, it is recommended that the Motion to Dismiss should be GRANTED.

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STATEMENT OF THE ISSUES

The issues are whether Petitioner has standing, and whether the Division of Administrative Hearings (DOAH) has authority under Subsection 26.012(2)(c), Section 89.011, and Subsection 760.11(6), Florida Statutes (2009),[1] to grant the relief requested in the Petition for Relief.

PRELIMINARY STATEMENT

A final hearing has not been conducted in this proceeding. No findings are made concerning any disputed issues of fact.[2] Some undisputed facts are discussed, together with the procedural history, in the Findings of Fact.

Administrative Law Judge (ALJ) Daniel Manry conducted numerous case management conferences and motion hearings in this proceeding. Those conferences and motion hearings are matters of record in the file of the Division of Administrative Hearings (DOAH), and the ALJ has not repeated that record in this Order.

After several conferences and motion hearings, the parties agreed to a briefing schedule to address a number of legal issues intended to narrow the scope of the final hearing. The final hearing is currently continued to a date to be determined after the resolution of the pending legal issues that are the subject of the briefing schedule.

Between July 6 and July 26, 2010, the parties filed their briefs and responses. Pursuant to that briefing schedule, Respondent filed the Motion to Dismiss that precipitated this Order.

FINDINGS OF FACT

1. On or about March 26, 2009, Petitioner filed a Public Accommodation Complaint of Discrimination (Complaint) with the Florida Commission on Human Relations (Commission). The Complaint alleges, in relevant part, that Respondent discriminated against him for reasons discussed hereinafter.

2. On November 9, 2009, the Commission issued a Determination: Cause (Determination of Cause). The

Determination of Cause found there was reasonable cause to believe that a "public accommodation violation has occurred."

3. The Determination of Cause advised Petitioner that Petitioner had the option of either requesting an administrative hearing before DOAH or filing a civil action in court. In relevant part, the Determination of Cause provided:

> The Complainant may request an administrative hearing by filing a Petition for Relief within 35 days of the date of this Notice of Determination: Cause or Complainant may file a civil action within one year of the date of this Notice of Determination: Cause. (Emphasis deleted)

The Determination of Cause at 1.

4. On December 14, 2009, Petitioner timely filed a Petition for Relief with the Commission. The Petition for Relief requested an administrative hearing, and the Commission referred the request for hearing to DOAH.

5. When Petitioner filed the Petition for Relief on December 14, 2009, Petitioner was pro se. Petitioner obtained counsel on or about February 16, 2010.[3] The one-year period for filing a civil action expires on or about November 9, 2010.

6. Several material facts are undisputed. Petitioner is a male and is an individual with disabilities. Petitioner has recognized impairments that substantially limit one or more major life activities, including mobility.

7. Petitioner resides in Ohio. In 2009, Petitioner wanted to travel to Disney World (Disney) in Orlando, Florida, to see Petitioner's son play baseball at a Disney sports complex.

8. Petitioner wanted to bring his own personal mobility device onto Disney property to assist with Petitioner's mobility handicap. The mobility device is identified in the record as a Segway.

9. Respondent refused to allow Petitioner to bring Petitioner's personal Segway onto Disney property. Respondent does not allow any Segways onto Disney property.

10. Some of the disputed issues of fact are discussed at this juncture to provide context in understanding the dispute between the parties. However, no finding is made concerning these disputed facts, and no finding is required to dispose of the Motion to Dismiss.

11. Respondent alleges facts which, if proven in an evidentiary hearing, may provide legitimate safety reasons for a policy that prohibits Segways from Disney. Respondent argues that its safety concerns have already been evidenced and litigated in Federal District Court for the Middle District of Florida.[4]

12. The parties dispute whether Respondent made a reasonable accommodation for Petitioner. Petitioner alleges that Respondent would not reserve and guarantee the availability

of a stand-up, four-wheel mobility device that Respondent had purportedly developed but not yet deployed at Disney at the time that Petitioner wanted to travel to Disney.

13. Respondent disputes the claim that a four-wheel mobility device was unavailable and not reserved for Petitioner. In addition, Respondent alleges the availability of alternative devices, including wheel chairs, that Respondent claims were adequate for Petitioner's needs.

14. The Petition for Relief, including the typed addendum (Petition for Relief), seeks specific relief. The original, handwritten version states:

> I have been emotionally harmed, humiliated, and denied participating in my son's important event--Disney must alter its policy to allow Segway use [by] the disabled and pay me reasonable damages and punitive damages of $50,000.

Petition for Relief (December 8, 2009).

15. Any doubt concerning the intended meaning of the term "reasonable damages" in the foregoing paragraph is resolved in the typed addendum to the Petition for Relief. The typed addendum states:

> Disney should pay me reasonable damages for the pain, humiliation, and loss I have suffered of not less than $15,000 and punitive damages of not less than $50,000. . . .

Petition for Relief (December 8, 2009).

16. The Petition for Relief requests two types of relief. One type of relief is damages. The other type of relief is an order prohibiting Respondent from barring the use of Segways at Disney (injunctive relief).[5]

17. The damages requested in the Petition for Relief are properly defined as non-quantifiable damages. The injunction requested in the Petition for Relief is properly defined as equitable relief.[6] The requested equitable relief is not limited to the parties to this proceeding, but, if granted, would reach all persons at Disney who might wish to use Segways.

18. For the reasons stated in the Conclusions of Law, DOAH has no statutory or constitutional authority to grant either type of relief requested in the Petition for Relief. Nor does DOAH have authority to grant relief not requested in the Petition for Relief.

CONCLUSIONS OF LAW

19. DOAH has no authority to grant the request in the Petition for Relief for non-quantifiable damages. DOAH is an administrative agency, not a court imbued with constitutional power pursuant to Article V of the Florida Constitution. See Florida Department of Revenue v. WHI Limited Partnership, d/b/a Wyndham Harbor Island Hotel, 754 So. 2d 205, 206 (Fla. 1st DCA 2000); Florida State University v. Hatton, 672 So. 2d 576, 579 (Fla. 1st DCA 1996)(each case holding that neither DOAH nor its

ALJs constitute a court). See also Johnson v. Albertson's LLC, 2008 U.S. Dist. LEXIS 60230 (August 6, 2008)(the Commission on is not a state court for purposes of the federal removal statute in 28 U.S.C. Section 1441); Bellsouth Telecommunications, Inc. v. Vartec Telecom, Inc., 185 F. Supp. 2d 1280 (N.D. Fla. 2002)(Florida Public Service Commission is an administrative agency and not a court for purposes of the federal removal statute). An administrative agency, including DOAH, has no constitutional authority to grant non-quantifiable damages. Laborers' International Union of North America, Local 478 v. Myrtice Burroughs, 541 So. 2d 1160, 1162 (Fla. 1989); City of Miami v. Wellman, 976 So. 2d 22, 27 (Fla. 3d DCA 2008)(each case acknowledging that administrative agency is constitutionally prohibited from awarding non-quantifiable damages).

20. DOAH has no authority to grant the request in the Petition for Relief for injunctive relief enjoining Respondent from barring the use of Segways at Disney. Remedies in the form of injunctive relief are classic equitable remedies. Phillips v. Cutler d/b/a Venetian Mobile Home Park, 388 So. 2d 48, 49 (Fla. 2d DCA 1980). In Florida, circuit courts have exclusive jurisdiction over all cases in equity. § 26.012(2)(c); Phillips, 388 So. 2d at 49.

21. DOAH has no authority to grant relief that is not requested in the Petition for Relief. Only those claims

encompassed within the Petition for Relief are relevant matters in this proceeding. See Cheek v. Peabody Coal Co., 97 F.3d 200, 203 (7th Cir. 1996)(a claim must be raised in the EEOC complaint to prosecute the claim in the civil action); Chambers v. American Trans Air, Inc., 17 F.3d 998, 1003 (7th Cir. 1994)(only those claims fairly encompassed within an EEOC charge can be the subject of a lawsuit (the proceeding before the tribunal)).

22. The Petition for Relief is filed with the Commission, not DOAH. Petitioner must petition the Commission to amend the Petition for Relief. See, e.g., Ward v. Cyberguard Corporation, 2007 U.S. Dist. LEXIS 3593 (2007)(while a proceeding was pending before DOAH, the petitioner filed with the Commission a motion to withdraw the petition for relief).

23. Petitioner argues that this proceeding should determine whether Respondent discriminated against Petitioner (a determination of liability). Petitioner's argument fails to recognize the distinction between Subsection 760.11(7), in which the Commission determines there is "No Cause" to believe a violation of the Florida Civil Rights Act of 1992 (the Act) occurred, and Subsection 760.11(6), in which the Commission determines, as it did in this proceeding, that there is "Cause" to believe a violation of the Act occurred.

24. The statutory relief afforded in Subsection 760.11(6) is elective pursuant to Subsection 760.11(4)(b). Unlike the

elective relief provided in Subsection 760.11(6), the relief afforded in Subsection 760.11(7) is mandatory for a petitioner who wishes to challenge a determination of "No Cause." The distinction between elective and mandatory relief provided in the two statutory subsections has important due process implications.

25. If the Commission were to have issued a "No Cause" determination in this proceeding, Petitioner would be correct in his assertion that a determination of liability would have legal significance. After the issuance of a "No Cause" determination, Subsection 706.11(7) would have statutorily precluded the election of remedies provided in Subsection 760.11(4)(b).

26. After a "No Cause" determination from the Commission, Petitioner would be statutorily required to prosecute his claim of discrimination in an administrative proceeding at DOAH. At DOAH, Petitioner would be precluded from obtaining a final administrative order awarding him non-quantifiable damages and equitable relief, including injunctive relief.[7]

27. The Legislature avoids any prejudice to a petitioner traveling under a "No Cause" determination by adding the last sentence in Subsection 706.11(7). That sentence underscores the legal significance of a determination of liability in a proceeding precipitated by a "No Cause" determination and

conducted pursuant to Subsection 760.11(7). The last sentence provides:

> In the event the final order issued by the commission determines that a violation of the Florida Civil Rights Act of 1992 has occurred, the aggrieved person may bring, within 1 year of the date of the final order, a civil action under subsection (5) as if there has been a reasonable cause determination or accept the affirmative action offered by the commission, but not both.

§ 760.11(7).

28. The last sentence in Subsection 760.11(7) imbues a determination of liability in a DOAH proceeding precipitated by a "No Cause" determination with legal significance. The petitioner in such a proceeding is statutorily empowered to take his or her determination of liability into a court of competent jurisdiction, pursuant to Subsection 760.11(5), and obtain any of the relief sought by Petitioner in this administrative proceeding.

29. The Legislature omitted the last sentence in Subsection 760.11(7), or substantially similar language, from Subsection 760.11(6). Language such as that found in the last sentence in Subsection 760.11(7) is not necessary in Subsection 760.11(6), because Subsection 760.11(6) is elective rather than mandatory.

30. Subsection 760.11(10) authorizes a judgment for the amount of damages and costs assessed pursuant to a final order entered by the Commission pursuant to Subsection 760.11(6). Such a judgment in this proceeding, however, would be zero, because an administrative agency, including DOAH and the Commission, has no authority to enter an order awarding the non-quantifiable damages requested in the Petition for Relief.

31. If Petitioner were to prevail on the merits in this proceeding, this proceeding would end with a determination of liability with no adequate remedy at law. That result would be the functional equivalent of a declaratory judgment. Section 89.011 vests circuit courts with exclusive jurisdiction over declaratory actions. Phillips, 388 So. 2d at 49.

32. Declaratory relief is a classic equitable remedy. Phillips, 388 So. 2d at 49. Id. Subsection 26.012(2)(c) vests exclusive jurisdiction in the circuit courts over all matters involving equitable relief. See, e.g., Phillips, 388 So. 2d at 49.

33. Subsection 760.11(6), in relevant part, authorizes an administrative agency to issue a final order "prohibiting the practice" and "providing affirmative relief." The quoted statutory terms must be construed in pari materia with the Legislature's enactment in Subsection 26.012(2)(c), which vests exclusive jurisdiction in the circuit courts over all matters

involving equitable relief, including injunctions. See, e.g., Phillips, 388 So. 2d at 49. If the quoted terms in Subsection 760.11(6) were construed to convey equitable powers to administrative agencies, that interpretation would nullify the exclusive jurisdiction reserved to circuit courts in Subsection 26.012(2)(c). It should never be presumed that the Legislature intends an enactment to be a nullity. Butler v. State, 838 So. 2d 554, 555 (Fla. 2003); Sharer v. Hotel Corporation of America, 144 So. 2d 813 (Fla. 1962).

34. If the quoted terms in Subsection 760.11(6) were construed to imbue administrative agencies with equitable power, that interpretation would amend Subsection 26.012(2)(c) by implication. Amendment of a statute by implication is not favored, especially where the Legislature does not expressly designate the adopted statute, in this case Subsection 760.11(6), as an amendment to the adoptive statute, Subsection 26.012(2)(c). State ex rel. Quigley v. Quigley, 463 So. 2d 224, 226 (Fla. 1985); State v. J.R.M., 388 So. 2d 1227, 1229 (Fla. 1980).[8]

35. Under Florida law, any reasonable doubt as to the lawful existence of a particular administrative power should be resolved in favor of arresting the further exercise of that power. Florida Elections Commission v. Davis, Case No. 1D09-3716 (Fla. 1st DCA September 30, 2010); Radio Telephone

Communications, Inc. v. Southeastern Telephone Company, 170 So. 2d 577, 582 (Fla. 1964); Edgerton v. International Company, 89 So. 2d 488 (Fla. 1956); State v. Atlantic Coast Line Railroad Company, 47 So. 969 (Fla. 1908); Fraternal Order of Police, Miami Lodge v. City of Miami, 492 So. 2d 1122, 1124 (Fla. 3d DCA 1986). Therefore, the ALJ follows the legislative mandate in Subsection 26.012(2)(c) and Section 89.011 and arrests the exercise of authority pursuant to any contrary implication in Chapter 760.

36. Assuming arguendo that administrative agencies such as DOAH and the Commission were to possess statutory authority to grant declaratory relief, Petitioner admits that he is currently too ill to travel to Disney to attend depositions or to attend the final hearing. Petitioner's Motion for Protective Order, filed May 24, 2010 (alleging inability to travel to Disney); Affidavit of Dr. McNamara, Exhibit F, paragraphs 1 and 3. However, Petitioner asserts in other memoranda that, at some undetermined time in the future, he may be able to travel to Disney. Petitioner claims that this potential for future injury is sufficient to give Petitioner standing to seek the injunctive relief claimed in the Petition for Relief.

37. The ALJ finds the assertion of a potential future injury too tenuous, conjectural, and hypothetical to satisfy the requirements of administrative standing. Lujan v. Defenders of

Wildlife, 504 U.S. 555, 561 (1992). Accepting the facts alleged by Petitioner as true, the facts do not show a sufficient likelihood that Petitioner will be affected by the alleged unlawful conduct in the future. Johnson v. Board of Regents of the University of Georgia, 263 F.3d 1234, 1265 (11th Cir. 2001). In an administrative proceeding, the requirement for standing is jurisdictional. Abbott Laboratories v. Mylan Pharmaceuticals, Inc., 15 So. 3d 642, 651 (Fla. 1st DCA 2009); Grand Dunes, Ltd. v. Walton County, 714 So. 2d 473, 474-475 (Fla. 1st DCA 1998).

38. If the ruling in the preceding paragraph were determined to be in error, the error is without prejudice to Petitioner. If Petitioner travels to Disney on that uncertain future date, and Disney were to discriminate against Petitioner, Petitioner will be extricated from the administrative limits of this proceeding and will be free to file a civil action, pursuant to either Subsection 760.11(4)(a) or Section 760.11(7), seeking the non-quantifiable damages and equitable relief for that future unlawful act, which Petitioner mistakenly believed he could obtain in this proceeding for an allegedly past unlawful act.[9]

39. Petitioner had an adequate procedure to seek the relief at issue in this proceeding by electing a civil action in a court of competent jurisdiction pursuant to Subsection 760.11(4)(a). Petitioner did not elect that procedure.

Petitioner elected an administrative procedure that has no statutory or constitutional authority to grant the relief requested in the Petition for Relief. The election by Petitioner of requesting an administrative hearing under Subsection 760.11(4)(b) is the exclusive procedure available to Petitioner pursuant to the Act. § 760.11(4)(flush paragraph).

40. Attorney's fees comprise the finale to Petitioner's argument that DOAH should retain jurisdiction. Petitioner relies on the authority in Subsection 760.11(6) for the Commission to award attorney's fees.

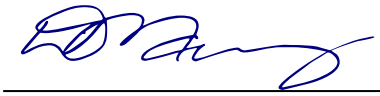
41. In the absence of any adequate remedy at law, going forward with this proceeding for the sole purpose of awarding attorney's fees amounts to incurring fees for the purpose of awarding fees. That prospect is rejected without further comment.[10] Respondent's pending Motion for Reconsideration of its request for attorney's fees is also DENIED.[11]

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Commission enter a final order dismissing the Petition for Relief for the reasons stated in this Recommended Order of Dismissal.

DONE AND ENTERED this 7th day of October, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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ENDNOTES

[1/] References to subsections, sections, and chapters are to Florida Statutes (2009), unless otherwise stated.

[2/] Factual disputes required to resolve a motion to dismiss, if any, must be resolved against the moving party in the absence of an evidentiary hearing.

[3/] See Order Denying Attorney Fees (May 21, 2010).

[4/] See Walt Disney World Co.'s Brief on Applicable Legal Standards (July 7, 2010).

[5/] The term "injunction" is used to describe the requested relief because the term "prohibition" technically refers to the process by which a superior court prevents an inferior court from exceeding its jurisdiction. A writ of prohibition is the counterpart of a writ of mandamus. Black's Law Dictionary (5th Ed. 1979) (hereinafter "Black's") at 1091.

[6/] An injunction is a prohibitive, equitable remedy issued by a court, directed to a party defendant in the action, forbidding the latter to do some act, or restraining the party defendant in the continuance of the act being unjust and inequitable to the

plaintiff and not such as can be adequately addressed by an action at law. Black's at 705.

[7/] See n. discussion in paragraphs 17 and 18.

[8/] The issue of amendment by implication could be further muddied if it were determined that the quoted statutory terms infiltrated state statutes when state statutes were modeled after federal discrimination law. If so, the conflict between the quoted terms in state statutes, which arguably trace their origin to federal law, and Subsection 26.012(2)(c) may present a "federalism" issue, i.e., a vertical division of power between federal and state government, in which federal law amends by implication, albeit inadvertently, the state provision for exclusive equity jurisdiction in circuit courts which the Legislature mandates in Subsection 26.012(2)(c).

[9/] Petitioner's Motion for Protective Order is DENIED as moot. Petitioner's Motion in Limine is DENIED as moot.

[10/] Res ipsa loquitur (literally: the thing speaks for itself without further explanation).

[11/] Petitioner devoted much time and effort to the argument that the law applicable to this proceeding is the (Florida) Act and not the federal Americans with Disabilities Act (ADA). The ALJ is somewhat perplexed by Petitioner's argument in light of the holding in Lenard v. A.L.P.H.A. "A Beginning" Inc., 945 So. 2d 618 (2d DCA 2006), the citation to which the undersigned provided to counsel for both parties during a pre-hearing conference before the briefing schedule began in this proceeding. As counsel for the parties know, the undersigned wrote the Recommended Order in Lenard, and the appellate court upheld the decision. In relevant part, the appellate court held that, "Florida courts construe the FCRA in conformity with the federal Americans with Disabilities Act ("ADA")." McCaw Cellular Commc'ns of Fla., Inc. v. Kwiatek, 763 So. 2d 1063, 1065 (Fla. 4th DCA 1999); Greene v. Seminole Elec. Coop., Inc., 701 So. 2d 646, 647 (Fla. 5th DCA 1997)(citations not omitted).

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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.