STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAURA MENA, Petitioner, vs. LIFEMARK HOSPITALS OF FLORIDA, INC., d/b/a PALMETTO GENERAL HOSPITAL, Respondent.	)	Case No. 11-3373

RECOMMENDED ORDER

Pursuant to notice, an evidentiary hearing was conducted in this case in accordance with Mena v. Lifemark Hospitals, Inc., 50 So.3d 759 (Fla. 1st DCA 2010), as directed by the First District Court of Appeal (First District) in First District Case No. 1D11-1217, before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on December 6, 2011, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the hospital at which Petitioner was allegedly denied sign-language services in violation of the Florida Civil Rights Act of 1992 (Florida Act) according to the complaint she filed with the Florida Commission on Human Relation (Commission) "'holds itself out as serving patrons' of the cafeteria located on its premises," thus making the hospital a "public accommodation," within the meaning of section 760.02(11)(d), Florida Statutes, and giving the Commission jurisdiction to conduct an investigation of Petitioner's complaint pursuant to section 760.11(3), Florida Statutes, to determine whether there is reasonable cause to believe that "the [h]ospital's alleged denial of sign-language services . . . constituted discrimination as defined by the [Florida] Act" in section 760.08, Florida Statutes.

PRELIMINARY STATEMENT

On November 2, 2009, Petitioner filed with the Commission a public accommodation discrimination complaint (Complaint) in which she claimed that Respondent discriminated against her based on her deafness, in violation of "[c]hapters 509 and 760, Florida Statutes, and/or Title VII of the Federal Civil Rights

Act of 1964, and/or the Americans with Disabilities Act," when during her hospitalization at Respondent's Palmetto General Hospital (Hospital) from April 14 through 17, 2009, "[o]n various occasions, [she] asked for a certified American Sign Language interpreter but was denied [this requested accommodation]." By letter dated January 11, 2010, from its Executive Director, the Commission advised Petitioner, through her counsel, that it had "conclude[d] that a hospital is not a 'place of public accommodation' under the Florida Civil Rights Act" and that it was thus dismissing, on jurisdictional grounds, her complaint without conducting an investigation. The letter indicated "[t]he [Commission's] refusal of [Petitioner's] [C]omplaint constitute[d] final agency action" and therefore Respondent "ha[d] the right to seek judicial review of this decision."[1/]

Petitioner appealed the Commission's "refusal of [her] [C]omplaint" to the First District, which, in an opinion issued in First District Case No. 1D10-100 on December 28, 2010, and reported at Mena v. Lifemark Hosps. of Fla., Inc., 50 So. 3d 759 (Fla. 1st DCA 2010) (hereinafter referred to as Mena I), reversed the Commission's "refusal of [Petitioner's] [C]omplaint" and remanded the matter to the Commission, giving the following explanation and instructions:

Section 760.01(2), Florida Statutes, explains that the "general purposes" of the [Florida] Act are to

> secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state.

The [Florida] Act includes protections from discrimination in "public accommodations," as described in section 760.08, Florida Statutes:

> 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 race, color, national origin, sex, handicap, familial status, or religion.

Section 760.02(11) defines "public accommodations" as "places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments." Appellant concedes that hospitals are not included in the statutory definition of public accommodations. Appellant contends, however, that pursuant to section 760.02(11)(d), where a hospital has a cafeteria on its premises, the hospital derivatively becomes a public

accommodation. Section 760.02(11) defines as a public accommodation:

> (d) Any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.

Thus, an establishment may be transformed into a public accommodation for the [Florida] Act's purposes if: 1) it is an establishment located on the premises of an otherwise covered establishment; or 2) a covered establishment is on the premises of an otherwise uncovered establishment, so long as the latter establishment holds itself out as serving patrons of the covered establishment. Appellant relies on the second of these, contending the cafeteria, which does fall within the ambit of the [Florida] Act's definition of public accommodation, transformed the Hospital into a public accommodation.

We think whether an otherwise uncovered establishment "holds itself out as serving patrons" of a covered establishment is a question of fact. See, e.g., Regency Towers Owners Ass'n, Inc. v. Pettigrew, 436 So. 2d 266, 267 (Fla. 1st DCA 1983)(discussing hearing officer's findings of fact as to the number of "employees" as defined by the previous version of the [Florida] Act were employed by appellant). The Commission reached a summary conclusion that "[a] hospital offers its medical services to the public and provides meals for its patients, staff and visitors; however, the facility is not 'principally engaged in selling food for consumption on the premises.'" Based on this conclusion, the Commission determined that hospital cafeterias are not "a destination dining establishment," but a

> "business necessity, which does not transform the hospital into a place of public accommodation." It is not clear how the Commission reached this result considering that it did not endeavor to conduct any fact finding and did not even solicit any input from the Hospital itself.
>
> In addition to being unsupported by any record evidence, the Commission's finding does not address the critical question of whether the Hospital establishment "holds itself out as serving patrons" of the cafeteria located on its premises. Consequently, we must remand this case for the Commission to make the necessary fact findings. On remand, should the Commission determine that the Hospital is in fact a public accommodation, it must then determine whether Appellant has stated a claim cognizable under the Act and explain the grounds for its determination of that question. Only then will this matter be ready for appellate review.

On February 2, 2011, the Commission, through its General Counsel, filed with the First District a Response to Order on Remand (Commission's Response), in which it "reaffirm[ed] its conclusion that it did not have jurisdiction over [Petitioner's] complaint" inasmuch as the Hospital "is not, as a matter of law, a place of public accommodation."

On March 7, 2011, Petitioner filed a Notice of Appeal with the First District, seeking review of the Commission's Response. The "appeal" was docketed by the First District Clerk as First District Case No. 1D11-1217. It was subsequently "redesignated

[by the First District] as invoking the Court's jurisdiction to review nonfinal administrative agency action."

On July 11, 2011, the First District issued an Order in First District Case No. 1D11-1217, which provided, in pertinent part, as follows:

> On this Court's own motion, jurisdiction is relinquished to the Florida Commission on Human Relations for 60 days from the date of this order with directions that 1) the Commission refer this matter to the Division of Administrative Hearings (DOAH) for an evidentiary hearing in accordance with Mena v. Lifemark Hospitals, Inc., 50 So. 3d 759 (Fla. 1st DCA 2010), and 2) the Commission enter a final order after considering the recommended order issued by DOAH in accordance with section 120.57(1), Florida Statutes. Counsel for appellant shall file a status report with this court prior to the end of the period of relinquishment of jurisdiction.

That same day (July 11, 2011), the Commission referred the instant matter to DOAH to conduct the "evidentiary hearing" ordered by the First District. The DOAH Clerk docketed the case as DOAH Case No. 11-3373. By Notice of Hearing by Video Teleconference, the evidentiary hearing in DOAH Case No. 11-3373 was set for September 27 and 28, 2011.[2/] The Notice of Hearing contained the following "issue" statement: "As stated in Mena v. Lifemark Hospitals, Inc., 50 So. 3d 759 (Fla. 1st DCA 2010)."

On July 28, 2011, Respondent filed a Motion for Clarification in First District Case No. 1D11-1217, requesting

that the First District clarify that the scope of the "evidentiary hearing" it ordered in its July 11, 2011, Order was limited to "the threshold inquiry into whether [the Commission] has jurisdiction over [Petitioner's] complaint." On or about August 5, 2011, Petitioner filed a Response to Respondent's Motion for Clarification, urging the First District to deny the motion.

On August 12, 2011, Respondent filed in DOAH Case No. 11-3373 a Motion for Stay of Proceeding or Alternatively for Stay of Discovery and Proceeding Related to the Complaint (Respondent's August 12, 2011, Motion), requesting the following relief:

> (1) a stay of this proceeding until resolution of the Motion for Clarification pending before the First DCA regarding the scope of the evidentiary hearing;
>
> (2) alternatively, a stay of discovery (Nos. 1-22 of the Request to Hospital and Nos. 1-2 of the Subpoena to Accessible) and any proceeding related to the Petitioner Maura Mena's discrimination complaint until resolution of the question of whether the Florida Commission on Human Relations has jurisdiction under the Florida Civil Rights Act to investigate Mena's complaint.
>
> * * *
>
> (4) for such other relief as the ALJ determines is just and proper.

On August 16, 2011, Petitioner filed a Response to Respondent's Motion for Stay, asking that the undersigned deny the relief requested in Respondent's August 12, 2011, Motion.

On August 18, 2011, the undersigned issued an Order on Respondent's August 12, 2011, Motion, which provided, in pertinent part, as follows:

> Reading the First District's December 28, 2010, opinion and its July 11, 2011, Order, together with [the] provisions of section 760.11 (which prescribe the procedures for the filing and handling of public accommodation discrimination complaints), the undersigned is of the view that it is his task in the instant case to conduct an evidentiary hearing, and issue a recommended order, only on the jurisdictional issue addressed by the First District: whether "the Hospital is in fact a public accommodation," within the meaning of section 760.02(11)(d). . . .
>
> The Commission has yet to investigate the merits of Petitioner's Complaint and make a "reasonable cause" determination (a factor (1) which distinguishes the instant case from the cases cited by Petitioner on page 3 of her Response, wherein "ALJs have decided both the jurisdictional and substantive issues in one proceeding," and (2) which renders the provisions of subsection (7) of section 760.11, cited by Petitioner on page 2 of its Response, inapplicable to the instant case). If the outcome of the section 120.57(1) proceedings ordered by the First District is a determination that "the Hospital is in fact a public accommodation," within the meaning of section 760.02(11)(d) (and if that determination is not disturbed by the First District, which has only temporarily relinquished jurisdiction for the conducting of such proceedings), the

Commission will then be obligated to conduct such an investigation. § 760.11(3). If, based on its investigation, the Commission determines that there is not reasonable cause to believe that Respondent committed the violation alleged in the Complaint, Petitioner will have the opportunity to have a section 120.57(1) hearing before an administrative law judge on the merits of her Complaint, provided she requests such a hearing within 35 days of the Commission's determination. § 760.11(7). If, on the other hand, the Commission determines that there is reasonable cause to believe that Respondent committed the violation alleged in the Complaint, Petitioner will have the opportunity to choose between the following two mutually exclusive procedural options set forth in subsection (4) of section 760.11:

> (a) Bring a civil action against the person named in the complaint in any court of competent jurisdiction; or
>
> (b) Request an administrative hearing under ss. 120.569 and 120.57.

Petitioner will not, however, have to wait until the Commission concludes its investigation and makes a "reasonable cause" determination to "bring a civil action" or "request an administrative hearing" on the merits of her Complaint, given subsection (8) of section 760.11, which provides as follows:

> In the event that the commission fails to conciliate or determine whether there is reasonable cause on any complaint under this section within 180 days of the filing of the complaint, an aggrieved person may proceed under subsection (4), as if the commission determined that there was reasonable cause.

Inasmuch as 180 days have already passed since Petitioner first filed her Complaint with the Commission on November 2, 2009, if the jurisdictional issue is decided in her favor, she can, immediately after such decision is made, "proceed under subsection (4), as if the [C]omission [had] determined that there was reasonable cause," provided that, at that time, four years have not passed since the alleged violation. See Joshua v. City of Gainesville, 768 So. 2d 432, 433 (Fla. 2000)("[T]he general four-year statute of limitations for statutory violations, section 95.11(3)(f), Florida Statutes (1995), applies to actions filed pursuant to chapter 760, Florida Statutes, if the Commission on Human Relations does not make a reasonable cause determination on a complaint within the 180 days contemplated by section 760.11(8), Florida Statutes (1995)."); Woodham v. Blue Cross & Blue Shield of Fla., 829 So. 2d 891, 899 (Fla. 2002)("Reading the relevant provisions of the statute together clearly establishes that whenever the FCHR fails to make its determination within 180 days, even if the untimely determination is made before the filing of a lawsuit, the claimant may proceed to file a lawsuit under subsection (4)."); and Ross v. Jim Adams Ford, Inc., 871 So. 2d 312, 315-16 (Fla. 2d DCA 2004)("[T]here are many complaints that are not processed within 180 days by the Commission. As to those complaints, the supreme court has held that the four-year statute of limitations in section 95.11(3)(f) applies. However, the supreme court did not expressly state when the four-year period commenced or whether it was tolled by the administrative process. . . . [W]e hold that Mr. Ross's claim for a violation of the Florida Civil Rights Act accrued on the date of his alleged wrongful termination and that the running of the four-year statute of limitation in section 95.11(3) was not tolled while Mr. Ross

> pursued his administrative complaint with the Commission.").
>
> Turning now to the relief requested by Respondent in its Motion, it is hereby ORDERED:
>
> 1. Respondent's request for "a stay of this proceeding until resolution of the Motion for Clarification pending before the First DCA regarding the scope of the evidentiary hearing" is denied. The undersigned does not need such clarification to determine the "proper scope of the evidentiary hearing" that is to be conducted in this case.
>
> 2. Because the "evidentiary hearing" before the undersigned will be limited to the jurisdictional issue addressed by the First District and there will be no proceedings before the undersigned during the relinquishment period concerning the merits of Petitioner's complaint,[3/] the discovery sought by Petitioner in her Requests to Produce Nos. 1 through 22 to Respondent and her Requests 1 and 2 in the Attachment to Subpoena Duces Tecum to Accessible Communications for the Deaf (which relate to the merits of Petitioner's Complaint) shall not be had.

The same day that the undersigned issued this Order (August 18, 2011), Respondent filed a Notice of Withdrawal of its Motion for Clarification in First District Case No. 1D11-1217.

As noted above, the "evidentiary hearing" ordered by the First District in its July 11, 2011, Order issued in First District Case No. 1D11-1217 was held before the undersigned on December 6, 2011. Two witnesses (Tim Zuk and Georgina Diaz) testified at the hearing. In addition, a total of 14 exhibits

(Petitioner's Exhibits 1 through 5, and Respondent's Exhibits 1 through 9) were offered and received into evidence.

At the close of the evidentiary portion of the hearing, the undersigned, on the record, set a January 30, 2012, deadline for the filing of proposed recommended orders on the jurisdictional issue before the undersigned.

The transcript of the final hearing was filed on January 17, 2012.

On January 30, 2012, Petitioner and Respondent timely filed their Proposed Recommended Orders.

FINDINGS OF FACT

1. Respondent owns and operates Palmetto General Hospital (Hospital), a private[4/] general acute care hospital[5/] located at 2001 West 68th Street, Hialeah, Florida 33016,[6/] which has an average daily census of 282 patients[7/]; 1,400 filled full-time equivalent positions; and a total of 588 physicians on its medical staff (254 of whom are "active"). It markets the Hospital as "providing quality and personalized medical care to the communities [it] serve[s]."

2. The Hospital has an emergency room (offering emergency care and services), which is accessible to the public (through two entrances--an "ambulatory entrance" and an "ambulance entrance") 24 hours a day, seven days a week (24/7). The emergency room is a key point of public access to the Hospital

and the medical care the Hospital provides. It is the third busiest emergency room (in terms of patient volume) in Miami-Dade County.

3. There are two other public entrances to the Hospital, each of which is open from 6:00 a.m. to 8:00 p.m. and provides unscreened public access to the Hospital[8/]--the main entrance, and a side entrance leading from the "medical mall" which adjoins the Hospital. During the hours that these two public entrances are closed, visitors may gain access to other areas of the Hospital, aside from the emergency room (to which the public has 24/7 access), only by receiving clearance from the Hospital security personnel stationed at the doorway leading from the emergency room to the rest of the Hospital.

4. Inside the Hospital's main entrance is a lobby (Main Lobby) containing public waiting areas (equipped with chairs, small tables, and televisions), as well as an Information Desk manned by non-security personnel who provide informational assistance to those Hospital visitors seeking their help.

5. Respondent operates the Hospital under a license, issued by the Agency for Health Care Administration (ACHA) pursuant to chapter 395, Florida Statutes, which authorizes Respondent to maintain 360 beds and to provide the following (and only the following) medical services at the Hospital:

Level 2 Adult Cardiovascular Services;

Primary Stroke Center Services;

Emergency and Acute Inpatient Services in the following areas: Allergy; Anesthesiology; Cardiology; Cardiovascular Surgery; Colon and Rectal Surgery; Dermatology; Emergency Medicine; Endocrinology; Family Medicine; Gastroenterology; General Surgery; Geriatrics; Gynecology; Hematology; Hyperbaric Oxygen; Immunology; Infectious Diseases; Internal Medicine; Nephrology; Neurology; Neurosurgery; Obstetrics; Oncology; Ophthalmology; Orthopedics; Otolaryngology; Pediatrics; Plastic Surgery; Podiatry; Psychiatry; Pulmonary Medicine; Radiology; Thoracic Surgery; Urology; and Vascular Surgery.[9/]

6. An order from a physician with admitting privileges is a prerequisite to receiving these services on an inpatient basis at the Hospital. Persons without a preexisting relationship with such a physician may be admitted to the Hospital as an inpatient if they present to the Hospital's emergency room and the emergency room physician attending to them orders that they be hospitalized.

7. In return for having been granted the privilege (through ACHA licensure) to operate the Hospital and to provide therein the medical services set forth above, Respondent must act in accordance with the various Florida statutory and ACHA rule provisions to which the holders of such licenses are subject. These provisions include, among others, the following:

§ 395.1041, Fla. Stat. Access to emergency services and care.[10/]

(1) Legislative intent. --The Legislature finds and declares it to be of vital importance that emergency services and care be provided by hospitals . . . to every person in need of such care. . . . It is the intent of the Legislature that [AHCA] vigorously enforce the ability of persons to receive all necessary and appropriate emergency services and care and that [AHCA] act in a thorough and timely manner against hospitals . . . which deny persons emergency services and care.

* * *

(3) Emergency services; discrimination; liability of facility or health care personnel.

(a) Every general hospital which has an emergency department shall provide emergency services and care for any emergency medical condition when:

1. Any person requests emergency services and care; or

2. Emergency services and care are requested on behalf of a person by:

a. An emergency medical services provider who is rendering care to or transporting the person; or

b. Another hospital, when such hospital is seeking a medically necessary transfer, except as otherwise provided in this section.

* * *

(i) Each hospital offering emergency services shall post, in a conspicuous place in the emergency service area, a sign

clearly stating a patient's right to emergency services and care and the service capability of the hospital.

* * *

(5) Penalties.

(a) [AHCA] may deny, revoke, or suspend a license or impose an administrative fine, not to exceed $10,000 per violation, for the violation of any provision of this section or rules adopted under this section.

§ 768.13, Fla. Stat. Good Samaritan Act; immunity from civil liability

(2)(b)1. Any health care provider, including a hospital licensed under chapter 395, providing emergency services pursuant to obligations imposed by . . . s. 395.1041 . . . , shall not be held liable for any civil damages as a result of such medical care or treatment unless such damages result from providing, or failing to provide, medical care or treatment under circumstances demonstrating a reckless disregard for the consequences so as to affect the life or health of another.

* * *

4. Every emergency care facility granted immunity under this paragraph shall accept and treat all emergency care patients within the operational capacity of such facility without regard to ability to pay, including patients transferred from another emergency care facility or other health care provider pursuant to Pub. L. No. 99-272, s. 9121. The failure of an emergency care facility to comply with this subparagraph constitutes grounds for the department to initiate disciplinary action against the facility pursuant to chapter 395.

Fla. Admin. Code Rule 59A-3.081 Physical Plant Requirements for General, Rehabilitation and Psychiatric Hospitals.

(3) The following requirements shall apply to the medical, surgical and postpartum nursing care units. . . .

* * *

(b) Service Areas. Each nursing care unit shall contain the following service areas.

1. There shall be a nurse station for charting by the nurses and doctors, for communication and for storage of administrative supplies. The nurse station area shall include the following facilities.

* * *

b. There shall be a staff toilet room adjacent to the nurse station.

c. There shall be a staff lounge and/or conference room.

* * *

(4) When intensive care units are provided, the following requirements shall be met.

* * *

(o) The following additional service spaces shall be immediately available within each intensive care unit. These services may be shared by more than one intensive care unit if direct access is available from each intensive care unit suite.

* * *

7. There shall be purse lockers at each nurse station for the secure storage of staff's personal effects.

* * *

9. There shall be a staff toilet which may be in conjunction with the staff lounge. One staff lounge may serve several intensive care units.

10. There shall be a visitor waiting room for the unit, or units, with convenient access to telephones, drinking fountains and toilets. Such waiting rooms may serve several intensive care units.

* * *

(8) Surgical Facilities.

* * *

(f) Service Areas.

* * *

10. There shall be a staff lounge and toilet facilities. Separate or combined lounges for male and female staff shall be provided. . . .

* * *

(11) Emergency Service Department. When 24-hour emergency service is to be provided, the following elements shall be required.

* * *

(d) There shall be a public waiting area with adjacent toilet facilities, drinking fountains and telephones.

* * *

(o) There shall be locked cabinets or other secure storage for staff's personal effects within the nurses' work area or lounge.

(p) There shall be staff toilets.

* * *

(12) Radiology Suite.

* * *

11. There shall be staff toilets.

* * *

(13) Laboratory Suite.

* * *

10. There shall be lounge, locker and toilet facilities which shall be conveniently located for male and female laboratory staff. . . .

* * *

(17) Dietary Facilities.

(a) Food service facilities and equipment shall be provided as needed to meet the dietary requirements of the hospital. A conventional or convenience food preparation system or any appropriate combination thereof is acceptable.

(b) The following facilities shall be provided in the size required to meet the needs and to implement the type of food service selected.

* * *

6. There shall be a dining room for ambulatory patients, staff and visitors.

* * *

(18) Administration and Public Areas.

(a) All public waiting areas shall be provided with male and female toilets

designed to accommodate the handicapped. Such facilities shall be within 75 feet of the waiting area and may serve more than one such area.

* * *

(c) A lobby shall be provided which includes a counter or desk for reception and information, public waiting areas, public telephones and drinking fountains.

* * *

(e) There shall be an admissions area with a separate waiting area for patients and accompanying persons. . . .

* * *

(24) Employee Facilities. Lockers, lounges and toilets shall be provided for employees and volunteers. These shall be in addition to and separate from those required for the medical staff and the public.

Fla. Admin. Code Rule 59A-3.255 Emergency Care.

(6) SERVICE DELIVERY REQUIREMENTS.

(a) Every hospital offering emergency services and care shall provide emergency care available 24 hours a day within the hospital to patients presenting to the hospital.

Fla. Admin. Code Rule 59A-3.2085 Department and Services.

(1) Nutritional Care. All licensed hospitals shall have a dietetic department, service or other similarly titled unit which shall be organized, directed and staffed, and integrated with other units and departments of the hospitals in a manner designed to assure the provision of

appropriate nutritional care and quality food service.

(a) The dietetic department shall be directed on a full-time basis by a registered dietitian or other individual with education or specialized training and experience in food service management, who shall be responsible to the chief executive officer or his designee for the operations of the dietetic department.

(b) If the director of the dietetic department is not a registered dietitian, the hospital shall employ a registered dietitian on at least a part-time or consulting basis to supervise the nutritional aspects of patient care and assure the provision of quality nutritional care to patients. The consulting dietitian shall regularly submit reports to the chief executive officer concerning the extent of services provided.

(c) Whether employed full-time, part-time or on a consulting basis, a registered dietitian shall provide at least the following services to the hospital on the premises on a regularly scheduled basis:

1. Liaison with administration, medical and nursing staffs;

2. Patient and family counseling as needed;

3. Approval of menus and modified diets;

4. Required nutritional assessments;

5. Participation in development of policies, procedures and continuing education programs; and

6. Evaluation of dietetic services.

* * *

(e) Nothing in this section shall prevent a hospital from employing an outside food management company for the provision of dietetic services, provided the requirements of this section are met, and the contract specifies this compliance.

(f) The dietetic department, service or other similarly titled unit shall employ sufficient qualified personnel under competent supervision to meet the dietary needs of patients.

* * *

(i) The dietetic department, service or other similarly titled unit shall be guided by written policies and procedures that cover food procurement, preparation and service. Dietetic department policies and procedures shall be developed by the director of the dietetic department with nutritional care policies and procedures developed by a registered dietitian, shall be subject to annual review, revised as necessary, dated to indicate the time of last review, and enforced. Written dietetic policies shall include at least the following:

* * *

12. Ancillary dietetic services, as appropriate, including food storage and kitchens on patient care units, formula supply, cafeterias,[11/] vending operations and ice making.

* * *

(r) Dietetic services shall be provided in accordance with written orders by the individual responsible for the patient and appropriate information shall be recorded in the patient's medical record. . . .

8. To meet its nutritional care and food service obligations as a licensee, Respondent has had, since December 1, 2007, a Management Agreement with Morrison Management Services, Inc. (Morrison), pursuant to which Morrison has been granted "the exclusive right to manage and operate [Nutrition] Services for [the Hospital's] patients, employees, visitors and guests at the [Hospital]," an arrangement that is allowed by Florida Administrative Code Rule 59A-3.2085(1)(e). These "Nutrition Services" are described in the Management Agreement as including:

A. Patient Services
B. Cafeteria Services
C. Special Functions
D. Vending

9. To discharge its responsibilities under the Management Agreement with regard to "Patient Services," Morrison employs five dieticians (Patient Services Dieticians), one of whom serves as the lead dietician/clinical nutritional manager. Meals prepared by Morrison in accordance with menus approved by the Patient Services Dieticians (as complying with physician directives) are delivered to inpatients for consumption in their rooms.

10. Another responsibility that Morrison has undertaken under the Management Agreement is to manage and operate for Respondent Outtakes, an in-hospital retail operation (located

just off the Main Lobby) selling coffee, cold beverages, cereal, sandwiches, pastries, salads, candies, cards, flower arrangements, newspapers, magazines, and other merchandise.[12/] Its hours of operation are 6:30 a.m. to 8:00 p.m. on weekdays and 7:00 a.m. to 8:00 p.m. on weekends. The food products that are sold at Outtakes, which has no seating for patrons, are "grab and go" items, not intended for on-premises consumption. (Other "grab and go" food items may be purchased from the 17 Morrison-owned and operated vending machines located throughout the Hospital.)

11. Pursuant to the Management Agreement, Morrison also manages and operates for Respondent the Hospital cafeteria,[13/] a 75-seat sit-down eating establishment[14/] located on the first floor of the Hospital immediately past the Main Lobby,[15/] and the adjoining, but separate, 20-seat physician's dining room[16/] where Hospital administrators and the physicians and allied health practitioners practicing in the Hospital (and only these individuals) can enjoy complimentary buffet-style meals.

12. There are restrictions on when, but not to whom (with one exception), Hospital cafeteria food service is available. The cafeteria is not a 24/7 operation. It is open for business only from 6:30 a.m. to 9:30 a.m., 11:00 a.m. to 4:00 p.m., and 4:30 p.m. to 7:00 p.m. on weekdays, and from 7:00 a.m. to 9:30 a.m., 11:30 a.m. to 4:00 p.m., and 4:30 p.m. to 7:00 p.m.

on weekends. Anyone who wants to patronize the cafeteria during these hours can do so, except for inpatients, who are expected to eat only the physician-ordered, dietician-approved meals delivered to their rooms. Inpatients discovered seeking food service in the cafeteria are denied service and escorted back to their rooms.[17/]

13. Although the Hospital cafeteria is open to the general public and serves everyone regardless of their connection to the Hospital, other than inpatients, the overwhelming majority (approximately 94 percent) of the cafeteria's patrons work or volunteer in the Hospital as either Hospital non-administrator employees,[18/] Hospital administrators, members of the Hospital medical staff, Hospital volunteers, and law enforcement and emergency personnel whose work brings them to the Hospital (94 Percenters). Respondent has made arrangements with Morrison for Hospital non-administrator employees to receive a discount on the meals they purchase in the cafeteria and for the other 94 Percenters to eat for free.

14. Neither Respondent nor Morrison tracks the composition of the remaining six percent of the cafeteria's patrons (Six Percenters), but it stands to reason that well represented in this group of Six Percenters are visiting guests of inpatients and others having a reason to already be in the Hospital (such as vendors conducting business there, as well as those waiting

to receive, or having just received, Hospital-based medical care and services, along with anyone who may have accompanied them to the Hospital). Respondent markets the cafeteria to these "visitors" to the Hospital by extending the following invitation to them in the Hospital's Patient Guide, which is not only given to every inpatient, but is also published on the Hospital's webpage:

> [V]isitors are welcomed to join us for meals in our cafeteria at the first floor of the hospital. Our chefs and staff members offer appetizing and nutritious meals daily.[19/]

While the business of the general public is not actively solicited through advertising or other marketing efforts, if a person with no other reason to be in the Hospital seeks to patronize the cafeteria, that person will not be turned away by cafeteria staff.

15. Not surprisingly, since only six percent of its patrons are full-paying customers, the cafeteria does not turn a profit for Respondent; rather, its operation results in a $2 million a year net expense. Nonetheless, in order to comply with Florida Administrative Code Rule 59A-3.081(17)(b)6. (as it must, as a result of its having been granted a license to operate the Hospital), Respondent has no choice but to continue operating the cafeteria (or a dining facility like it, serving

"ambulatory patients, staff and visitors") on the premises of the Hospital.

Ultimate Facts

16. The Hospital (or, as the First District has referred to it, the "Hospital establishment") holds itself as serving patrons of the cafeteria located on its premises.

17. As a facility licensed by AHCA under chapter 395 to operate as a hospital with an emergency room, the Hospital establishment is required by Florida law to provide (and therefore necessarily holds itself out as providing) emergency services and care to any and every person who presents at its emergency room seeking such services and care, including, by necessity, those persons who patronize the Hospital cafeteria.[20/]

18. The Hospital establishment also serves patrons of the cafeteria by accommodating them in other ways, not involving the provision of medical care, when they are in, or passing through, the non-cafeteria areas of the Hospital. These accommodations include dedicating facilities for their use, comfort, and/or benefit (such as employee/staff work areas, change areas, lounges, lockers and other personal storage areas, and restrooms; and public waiting areas, telephones, drinking fountains, and restrooms, as well as the public information desk in the Main Lobby) and providing them with information concerning the cafeteria, including its location, hours of

operation, and offerings. In addition, as Respondent acknowledges in its Proposed Finding of Fact 38: "The Hospital provides certain [other] benefits to its employees and staff [who make up the bulk of the 94 Percenters], in its role as an employer or, in the case of physicians, as part of the Hospital-physician relationship," including, perhaps most notably for purposes of the instant case, meal-related benefits (in the form of discounted or complimentary meals).

CONCLUSIONS OF LAW

19. The legal principles governing the disposition of the jurisdictional issue before the undersigned were set forth by the First District in its opinion in Mena I, pertinent portions of which are recited above in the Preliminary Statement of this Recommended Order. These principles, as well as the First District's pronouncements in Mena I as to how these principles apply to the instant case, constitute the law of the case, and the undersigned is bound to follow them, as is the Commission. See Bryan v. Duncan, 106 Fla. 357, 358 (Fla. 1932)("The former opinions became the law of the case on its remand to the Court below."); Specialty Rests. Corp. v. Elliott, 924 So. 2d 834, 840 (Fla. 2d DCA 2005)("[B]ecause this court implicitly found the proposal for settlement to be enforceable in the earlier appeal, that ruling became the law of the case, and the trial court was not authorized to deviate from it by finding the proposal for

settlement unenforceable on remand."); Gulfstream Park Racing Ass'n v. Hialeah, Inc., 495 So. 2d 1200, 1202 (Fla. 3d DCA 1986)("[T]he trial court is without jurisdiction, in this independent action, to review this court's mandate from Hialeah to determine whether it was erroneous and is bound to follow it as the law of the case."); and In re Estate of Rasey, 238 So. 2d 647 (Fla. App. 4th DCA 1970)("This point of law became established as the law of the case when the earlier order of the county judge was affirmed by the circuit court in its appellate capacity and left undisturbed by the District Court of Appeal for the Second District. Once the law of the case was thus established, the trial judge was bound by it throughout the remainder of the cause.").

20. The First District concluded in Mena I that a "critical question," dispositive of the issue of the Hospital's status as a "public accommodation" over which the Commission has jurisdiction, remained to be answered: "whether the Hospital establishment 'holds itself out as serving patrons' of the cafeteria located on its premises." Finding this to be a question of fact, the Mena I court "remand[ed] this case for the Commission [which had yet to address this question] to make the necessary fact findings." The First District subsequently issued an Order directing that the Commission "refer this matter to [DOAH] for an evidentiary hearing in accordance with

[Mena I]." The Commission complied with the First District's directive, and the undersigned subsequently conducted the evidentiary hearing ordered by the First District. By issuing this Recommended Order, the undersigned is discharging his remaining task--presenting for the Commission's consideration his resolution of the factual question identified by the First District in Mena I as being outcome determinative of the issue of whether the Commission has jurisdiction to investigate Petitioner's Complaint pursuant to section 760.11(3).

21. The undersigned is without authority to recast this factual issue or to reject any determination underlying the First District's conclusion that this issue is dispositive, including its determination that the presence of a "covered establishment" on the premises of a hospital can, under certain circumstances, transform the hospital into a "public accommodation," within the meaning of section 760.02(11)(d), and its further determination that the Hospital cafeteria in the instant case is such a "covered establishment," separate, distinct, and independent from the Hospital establishment. While a reasonable argument can be made that the Hospital cafeteria is not such a "covered establishment," but is rather an integral, legally required (by Florida Administrative Code Rule 59A-3.081(17)(b)6.) part of the Hospital establishment having no independent existence of its own, the First District

has already decided to the contrary, leaving the undersigned powerless to entertain or consider this argument, however persuasive it might be.

22. The undersigned accepts, as he must (because the First District has already so decided), that the Hospital cafeteria is a "covered establishment" and that, whether its presence on the premises of the Hospital establishment, an "otherwise uncovered establishment," transforms the Hospital establishment into a "public accommodation," within the meaning of section 760.02(11)(d), over which the Commission has jurisdiction, depends on whether the Hospital establishment "holds itself out as serving patrons of such covered establishment."

23. The undersigned has performed the necessary fact finding and found that the Hospital establishment does indeed "hold[] itself out as serving patrons of the cafeteria located on its premises." It follows that the Commission has jurisdiction to, and therefore should, investigate Petitioner's Complaint pursuant to section 760.11(3).[21/]

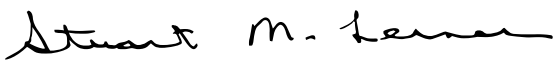
RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order on jurisdiction finding that it has jurisdiction to investigate Petitioner's Complaint pursuant to

section 760.11(3), inasmuch as the Hospital establishment, where Respondent was allegedly denied sign-language services, is a "public accommodation," within the meaning of section 760.02(11)(d), by virtue of having on its premises a "covered establishment," to wit: the Hospital cafeteria, whose patrons it holds itself out as serving.

DONE AND ENTERED this 21st day of February, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of February, 2012.

ENDNOTES

[1/] The body of the letter read, in its entirety, as follows:

> We are in receipt of your client's complaint of public accommodation discrimination by the named respondent. Ms. Mena, who is deaf, alleges that she was discriminated against when she was unable to obtain a sign language interpreter during her stay in the facility.

By the terms of its worksharing agreement with the EEOC, the Commission has been delegated the authority to accept and investigate "allegations of employment discrimination pursuant to Title I" of the ADA. Worksharing Agreement between FCHR and EEOC (2009). (Emphasis supplied) Title I does not include public accommodations in its ambit, only employment discrimination based upon disability. Therefore, this case may not proceed with the Commission under Title III of the ADA.

This raises the question whether hospitals are places of public accommodation for purposes of Chapter 760, Florida Statutes. The Commission concludes that a hospital is not a "place of public accommodation" under the Florida Civil Rights Act. The legislative history of Chapter 760 does not contain any reference to § 760.02(11). The allusions to public accommodations disability discrimination all reflect that a complaint could be filed with FCHR "based on discrimination in public lodging establishments and public food service establishments" based upon disability. This language was borrowed from § 509.092, Florida Statutes, which by its express terms refers only to public lodging and public food service establishments. These are the underpinnings of the definitions that appear in § 760.02(11), Florida Statutes (2009).

A hospital offers its medical services to members of the public and provides meals for its patients, staff and visitors; however, the facility is not "principally engaged in selling food for consumption on the premises." §760.02(11), Florida Statutes (2009). A hospital cafeteria is not a destination dining establishment; it is a business necessity which does not transform the hospital into a place of public accommodation.

[2/] The hearing was subsequently continued and rescheduled to commence on December 6, 2011.

[3/] In an endnote, the undersigned observed:

> Limiting the scope of the "evidentiary hearing" to this jurisdictional issue is consistent with what has been done in other cases before the Division of Administrative Hearings involving a Commission determination of "no jurisdiction." See Deleo v. Props. of the Vills., Case No. 09-0714, 2009 Fla. Div. Adm. Hear. LEXIS 599 *2 (Fla. DOAH July 16, 2009)(Recommended Order, ALJ Hooper)("At the May 14, 2009, hearing, only the question of jurisdiction was considered. This is because a recommended order finding jurisdiction, if adopted by the Commission, would trigger the investigation required by Subsection 760.11(3), Florida Statutes (2008). Or, in the alternative, a recommended order finding no jurisdiction, if adopted by the Commission, would end the case."); Baker v. Maycom Commc'ns/Sprint-Nextel, Case No. 08-5809, slip op. at 3 n. 1 (Fla. DOAH Dec. 2, 2008)(Order to Show Cause, ALJ Wetherell)("The scope of the proceeding is limited to the jurisdictional issue -- i.e., whether Respondent is a 'public accommodation' over which FCHR has jurisdiction. The merits of Petitioner's discrimination complaint are not yet at issue. If this case goes to hearing and Petitioner prevails on the jurisdictional issue, the case will be returned to FCHR with a recommendation that FCHR investigate the merits of Petitioner's complaint. Otherwise, the case will be returned to FCHR with a recommendation that the case be dismissed due to a lack of jurisdiction."); Banks v. Dep't of Corr., Case No. 08-4878, 2008 Fla. Div. Adm. Hear. LEXIS 296 **3-4 (Fla. DOAH Oct. 30, 2008)(Recommended Order, ALJ Wetherell)("The Order to Show Cause entered on October 10, 2008, stated in

pertinent part: . . . 'Petitioner is entitled to a de novo hearing on the issue of whether DOC was her employer. If it is determined that DOC was her employer, then the case will be returned to FCHR with a recommendation that it investigate the merits of Petitioner's discrimination complaint against DOC. If it is determined that DOC was not Petitioner's employer, then the case will be returned to FCHR with a recommendation that the petition be dismissed based upon a lack of jurisdiction.'"); Victor v. Ramada Plaza Resorts, Case No. 06-0343, 2006 Fla. Div. Adm. Hear. LEXIS 387 **3-5 (Fla. DOAH Aug. 11, 2006)(Partial Recommended Order, ALJ Meale)("At the hearing, the Administrative Law Judge bifurcated the issues in the case so that the hearing on June 12, 2006, would address only the issue of whether Respondent was an employer under the Act . . . . Respondent contended that, if the Administrative Law Judge determined that the Commission had jurisdiction over the claims of discrimination, he should not proceed directly to conduct an evidentiary hearing on those claims, but should instead relinquish jurisdiction to the Commission for the purpose of conducting an investigation, making a determination on the substantive claims of jurisdiction, and transmitting the petition to the Division of Administrative Hearings. Except for a reference to the Petition for Relief, the Transmittal of Petition, which is dated January 24, 2006, does not otherwise identify the issues that the Commission wants the Administrative Law Judge to address. However, after re-examining the charging documents and Notice of Determination: No Jurisdiction, the Administrative Law Judge is granting Respondent's request not to proceed to an evidentiary hearing on the substantive issues, but instead to relinquish jurisdiction to the Commission for

consideration of this Partial Recommended Order. Relinquishing jurisdiction to the Commission with a Partial Recommended Order determining that Respondent is a covered employer will permit the Commission to conduct an investigation on the substantive allegations--something that the Commission evidently has not yet done. This procedure will also permit the Commission to rule on the Administrative Law Judge's jurisdictional conclusions of law prior to requiring the parties to present evidence on the substantive claims of discrimination. A determination that Respondent is an employer includes conclusions of law within the substantive jurisdiction of the Commission, not the Administrative Law Judge, so the Commission will have the final word, as between the Commission and Administrative Law Judge, concerning such conclusions, which could effectively result in a determination that the Commission lacks jurisdiction."); and Myers v. Cent. Fla. Invs., Inc., Case No. 02-3580, 2003 Fla. Div. Adm. Hear. LEXIS 294 **2, 32 (Fla. DOAH Apr. 17, 2003)(Recommended Order, ALJ Wetherell)("Based upon the Commission staff's investigation of the amended charge, the Executive Director of the Commission issued a determination of 'no jurisdiction' on August 6, 2002. Notice of that determination was provided to Petitioner by mail on that same date. The determination did not address the merits of the amended charge, ... [I]t is RECOMMENDED that the Florida Commission on Human Relations issue a final order which:
1. determines that Petitioner was an employee of Respondent rather than an independent contractor for purposes of the Florida Civil Rights Act of 1992; and 2. directs the Commission staff to re-open its investigation into the merits of Petitioner's amended charge of discrimination against Respondent.").

[4/] The Hospital is a private hospital in that it is owned by a private entity--Respondent. See W. Coast Hosp. Ass'n v. Hoare, 64 So. 2d 293, 296-297 (Fla. 1953)("A private hospital is one founded and maintained by private persons or a corporation . . . ."). That it is privately owned, however, does not mean that it cannot be a "public accommodation," within the meaning of the Florida Act.

[5/] A general acute care hospital is a Class I hospital having an average length of stay of 25 days or less for all inpatient beds. Fla. Admin. Code Rules 59A-3.065 and 59A-3.252.

[6/] The Hospital is located in a commercial area where medical-related facilities predominate. It is not easily accessible by foot, there being no sidewalks leading to the Hospital from the public street on which it is located. The overwhelming majority of people who come to the Hospital get there by using some sort of vehicular transportation. For those using their own vehicles to travel to the Hospital, paid parking is available.

[7/] Over the past three years, the Hospital has averaged 20,400 inpatient admissions per year.

[8/] Although there are no security personnel at these entrances, there are security cameras there.

[9/] Respondent has three other licenses from AHCA. These other licenses authorize it to provide outpatient medical services at facilities separate from, but on the same "campus" as, the Hospital. These outpatient facilities are located in the "medical mall" that adjoins the Hospital.

[10/] "Emergency services and care," as used in chapter 395, "means medical screening, examination, and evaluation by a physician, or, to the extent permitted by applicable law, by other appropriate personnel under the supervision of a physician, to determine if an emergency medical condition exists and, if it does, the care, treatment, or surgery by a physician necessary to relieve or eliminate the emergency medical condition, within the service capability of the facility." § 395.002.

[11/] The imposition of the requirement that hospitals have "written dietetic policies" for their "cafeterias" necessarily presupposes that these "cafeterias" are a part of, rather than independent from, the hospitals in which they are located.

[12/] The record evidence is insufficient to support a finding that Outtakes is "principally engaged in selling food" (as opposed to non-food items).

[13/] The cafeteria is staffed by Morrison employees. The only involvement that any of the Morrison-hired Patient Services Dieticians have in the operation of the cafeteria is preparing posters containing "nutritional tips" for posting on the walls of the cafeteria.

[14/] The Hospital cafeteria serves, on average, 19,000 to 23,000 meals a month.

[15/] There is directional signage pointing to the cafeteria on the first floor of the Hospital. (Nowhere else is there such signage, either inside or outside the Hospital.) Just outside the cafeteria (on the Hospital walls), the cafeteria's menus are posted.

[16/] The physician's dining room can be accessed only by going through the cafeteria.

[17/] Respondent takes the view that denying cafeteria service to inpatients who are able to ambulate to the cafeteria does not violate the mandate of Florida Administrative Code Rule 59A-3.081(17)(b)6. that "[t]here shall be a dining room for ambulatory patients . . . ." According to Respondent, "ambulatory patients," within the meaning of this rule provision, are "outpatients . . . not inpatients."

[18/] Indicative of the patronage of these employees (to whom an on-site dining option is particularly attractive, given that they are given only a 30-minute meal break) is the presence of an employee bulletin board, maintained by the Hospital's Human Resources Department, on the wall of the cafeteria.

[19/] The hours of operation of the cafeteria are set forth on the following page of the Patient Guide.

[20/] Further medical care, provided by the Hospital establishment on an inpatient basis, is available to those emergency room patients who require it.

[21/] The undersigned declines Respondent's invitation (made through its Proposed Recommended Order) to include the following "Conclusions of Law" in this Recommended Order:

58. Under section 760.02(11)(d), the Hospital cannot be found derivatively to be a public accommodation by virtue of the presence of a cafeteria on its premises. As already noted, section 760.02(11)(d) provides that public accommodations include "[a]ny establishment . . . within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment." A cafeteria is listed among the expressly identified establishments which serve the public and thus are deemed places of public accommodation within the meaning of the FCRA. § 760.02(11)(b), Fla. Stat.

59. Yet, the Hospital, like all acute care licensed hospitals in Florida, is required by AHCA licensing regulations to provide a "dining room for ambulatory patients, staff and visitors." Rule 59A-3.081(17), Fla. Admin. Code. By complying with the licensing requirements to provide a cafeteria for ambulatory patients, staff and visitors, the Hospital and all other such licensed hospitals in Florida would be deemed automatically to be holding themselves out as serving the patrons of the cafeteria within the meaning of subsection (d) of [section 760.02(11) of] the FCRA [Florida Act]. To reach such a conclusion would judicially write into the list of defined public accommodations all hospitals in the State of Florida when the Legislature did not include them ab initio. The ALJ recommends that the Commission not do so.

60. The AHCA regulations also render the cafeteria a business necessity, which the Commission noted and which is a recognized ground for finding the cafeteria does not transform the Hospital into a public accommodation. In Martin v. University of New Haven, Inc., 359 F. Supp. 2d 185 (D.

> Conn. 2005), a private university created a cafeteria for the purposes of serving its faculty, staff and students. Id. 188-89. The cafeteria did not purport to be open to the general public in the same way as a hotel, restaurant or other entity covered under the Federal Civil Rights Act. Id. The court concluded, therefore, the cafeteria did not transform a private university into a covered entity. Id. Similarly here, a private hospital created a cafeteria for the business purposes of satisfying a licensure requirement and of serving certain patrons who have a business reason for being at the hospital. Such a cafeteria should not transform the Hospital into a public accommodation.

Respondent, in essence, is asking the undersigned to revisit and reject, on the grounds that "the Hospital, like all acute care licensed hospitals in Florida, is required by AHCA licensing regulations to provide a 'dining room for ambulatory patients, staff and visitors'" and that it therefore maintains the cafeteria on its premises as a "business necessity," the determination made by the First District in Mena I that the Hospital cafeteria is a "covered establishment," as that term is used in section 760.02(11)(d), capable of transforming the Hospital establishment into a "public accommodation." This the undersigned cannot do, inasmuch as he is bound by the First District's determination (a determination which, as Respondent seems to recognize, given the regulatory scheme governing hospitals in Florida, inescapably leads to the conclusion that the Hospital is a "public accommodation," as defined in section 760.02(11)(d)).

COPIES FURNISHED:

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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.