STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

MAURA MENA,	DCA Case No. 1D11-1217
Petitioner,	FCHR Case No. 2010-00286
v.	DOAH Case No. 11-3373
LIFEMARK HOSPITALS OF FLORIDA, INC., d/b/a PALMETTO GENERAL HOSPITAL,	FCHR Order No. 12-023
Respondent.	

_____/

FINAL ORDER DISMISSING PUBLIC ACCOMMODATIONS COMPLAINT OF DISCRIMINATION FOR LACK OF JURISDICTION

Preliminary Matters

Petitioner Maura Mena filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 509.092 and 760.01 - 760.11, Florida Statutes (2008), alleging that Respondent Lifemark Hospitals of Florida, Inc., d/b/a Palmetto General Hospital committed an unlawful public accommodations practice on the basis of Petitioner's disability by denying Petitioner a certified American Sign Language interpreter during her stay at the hospital.

The Commission issued an order dismissing the complaint, concluding that a hospital is not a place of public accommodation within the meaning of the Florida Civil Rights Act of 1992.

Petitioner appealed this order to the District Court of Appeal, First District, and the Court subsequently issued an order directing that the Commission refer the case to the Division of Administrative Hearings for an evidentiary hearing in accordance with an earlier opinion issued by the Court, and to enter a final order after considering the Recommended Order issued by the Division of Administrative Hearings.

The Commission transmitted the case to the Division of Administrative Hearings for the conduct of a formal proceeding in accordance with the order of the District Court of Appeal, First District.

An evidentiary hearing was held by video teleconference at sites in Miami and Tallahassee, Florida, on December 6, 2011, before Administrative Law Judge Stuart M. Lerner.

Judge Lerner issued a Recommended Order, dated February 21, 2012, recommending that the Commission "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."

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order.

Findings of Fact

We find the Administrative Law Judge's findings of fact as set out in Recommended Order paragraph numbers 1 through 15 to be supported by competent substantial evidence, and we adopt those findings of fact.

The Administrative Procedure Act states, "The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Section 120.57(1)(l), Florida Statutes (2011).

We find no competent substantial evidence in the record to support the inferences contained in Recommended Order paragraph numbers 16, 17, and 18, in which the Administrative Law Judge finds that the hospital holds itself out as serving patrons of the cafeteria located at the hospital. To the contrary, while containing no evidence to support this inference, the record appears to us to support a finding that the hospital does not hold itself out as serving patrons of the cafeteria, given the testimony of Mr. Zuk at page 108 of the hearing transcript, and the testimony of Ms. Diaz at page 215 of the hearing transcript.

Accordingly, we reject the findings of fact set out at Recommended Order paragraph numbers 16, 17, and 18.

Nevertheless, even if a reviewing Court were to disagree with us as to this finding, we do not believe this issue to be dispositive of this case, as explained in the Conclusions of Law section of this Order, below.

Conclusions of Law

We conclude that when all the applicable statute sections are read together the presence of a cafeteria maintained by a hospital and located in the hospital cannot turn the hospital into "a place of public accommodation" as defined by the Florida Civil Rights Act of 1992, and that, therefore, the complaint of discrimination in this matter should be dismissed because the Commission has no jurisdiction to investigate the complaint of discrimination.

The Florida Civil Rights Act of 1992 prohibits discrimination on the basis of physical disability, and other bases, in "public food service establishments." Section 509.092, Florida Statutes (2011). The statutory definitions section applicable to Section

509.092, Florida Statutes, states that any eating place maintained by a facility certified or licensed and regulated by the Agency for Health Care Administration is specifically excluded from the definition of "public food service establishment." Section 509.013(5)(b)4, Florida Statutes (2011). A license issued by the Agency for Health Care Administration is required in order to operate a hospital. Section 395.003(1)(a), Florida Statutes (2011).

At the time of the alleged discriminatory act in this case, April 14 through April 17, 2009, the 2008 version of the Florida Statutes was in effect, and Section 509.013(5)(b)(4), Florida Statutes (2008) simply states that "[a]ny eating place maintained by a hospital…" is excluded from the definition of "public food service establishment."

In any event, a cafeteria maintained by a hospital that is licensed by the Agency for Health Care Administration is not a "public food service establishment" within the meaning of Section 509.092, Florida Statutes (2011), and, consequently, is not subject to that statutory section's prohibitions against discrimination.

Further, the Florida Civil Rights Act of 1992 prohibits handicap discrimination in "public accommodations." Section 760.07, Florida Statutes (2011).

In defining the term "public accommodations," the Florida Civil Rights Act of 1992 states, "'Public accommodations' means 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. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this section: 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." Section 760.02(11)(d), Florida Statutes (2011).

Reading these statutory provisions together, the question then becomes, does a cafeteria in a hospital, which under the Florida Civil Rights Act of 1992 is specifically excluded from being a "public food service establishment" in which the law's prohibition against discrimination applies, operate to turn a hospital into "a place of public accommodation" under Section 760.02(11)(d), Florida Statutes, subject to the law's discrimination prohibitions?

Logic would suggest it cannot.

Admittedly, when reading solely the definitions set out in Section 760.02(11), Florida Statutes, it would seem that a cafeteria in a hospital would be a "public accommodation" within the meaning of the Florida Civil Rights Act of 1992.

But, upon reading the Florida Civil Rights Act of 1992 in its entirety, including Section 509.092, Florida Statutes, and the appropriate definitions sections applicable to that statutory provision, as set out above, it becomes clear that a cafeteria in a hospital is not really a place of public accommodation at all, and that, therefore, logically, its

presence in the hospital cannot be used to turn the hospital into "a place of public accommodation" under Section 760.02(11)(d), Florida Statutes.

In short, a cafeteria maintained by a hospital and located in the hospital, by operation of Section 509.092, Florida Statutes, is not a "covered establishment" that can turn the hospital into a "covered establishment" under Section 760.02(11)(d), Florida Statutes.

The Administrative Law Judge took the position that the District Court of Appeal, First District, had already decided that the cafeteria in question was a "covered establishment" and that the only issue before him for determination was whether the hospital "holds itself out as serving patrons of such covered establishment." The Administrative Law Judge found that the hospital did hold itself out as serving patrons of the cafeteria, and, therefore, found that the hospital was a covered "public accommodation."

As indicated in the Findings of Fact section of this Order, we are unable to find competent substantial evidence in the record from which this inference could be drawn.

But, even if we are wrong as to this finding, we conclude that the Administrative Law Judge committed an error of law in concluding that the presence of the cafeteria in the hospital operates to turn the hospital into a place of public accommodation, because, as indicated, the operation of Section 509.092, Florida Statutes, prevents the cafeteria from being a "covered establishment."

In correcting this conclusion of law of the Administrative Law Judge, we conclude: (1) that the conclusion of law being corrected is a conclusion of law over which the Commission has substantive jurisdiction, namely a conclusion of law determining whether an entity is subject to the provisions of the Florida Civil Rights Act of 1992; (2) that the reason the correction is being made by the Commission is that the conclusion of law as stated fails to take into consideration all the applicable provisions of the Florida Civil Rights Act of 1992; and (3) that in making this correction the conclusion of law being substituted is as or more reasonable than the conclusion of law which has been rejected. See, Section 120.57(1)(l), Florida Statutes (2011).

Our review of the December 28, 2010, opinion in this matter, and the July 11, 2011, order in this matter, both issued by the District Court of Appeal, First District, reveals nothing to suggest that the Court has already definitively decided that the cafeteria in question is a "covered establishment" within the meaning of Section 760.02(11)(d), Florida Statutes.

Exceptions

Respondent filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Exceptions of Respondent Lifemark Hospitals of Florida, Inc., d/b/a Palmetto General Hospital, to the Recommended Order."

The exceptions document consists of 22 pages, and contains exceptions to the following Recommended Order paragraphs: Statement of the Issue, Preliminary Statement, 2, 3, 4, 7, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, and 23.

A reading of this document suggests to us that when Respondent's specific exceptions are read collectively, Respondent has three primary exceptions to the Recommended Order.

First, Respondent excepts to the Administrative Law Judge's position that the District Court of Appeal, First District, identified the single issue to be placed before the Administrative Law Judge as whether the hospital holds itself out as serving patrons of the cafeteria.

Second, Respondent excepts to the factual finding of the Administrative Law Judge that the hospital holds itself out as serving patrons of the cafeteria located on its premises.

Third, Respondent excepts to the Administrative Law Judge's position that the District Court of Appeal, First District, has already decided that the cafeteria on the hospital's premises is a "covered establishment" under the public accommodations discrimination provisions of the Florida Civil Rights Act of 1992.

For reasons discussed in the Findings of Fact and Conclusions of Law sections of this Order, above, we accept Respondent's three primary exceptions, as set out above.

Dismissal

The Public Accommodations Complaint of Discrimination is DISMISSED with prejudice because the Commission lacks jurisdiction over the Complaint.

The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 16th day of May, 2012.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Lizzette Romano (dissenting); and
Commissioner Billy Whitefox Stall

Filed this 16th day of May, 2012,
in Tallahassee, Florida.

_____/s/_____
Violet Crawford, Clerk
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Stuart M. Lerner, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 16th day of May, 2012.

By: _____/s/_____
Clerk of the Commission
Florida Commission on Human Relations

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SUBJECT: Maura Mena v. Lifemark Hospitals of Florida, Inc., d/b/a Palmetto General Hospital

PAGES: 23, Including Cover Sheet

MESSAGES: Please see attached.

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