STATE OF FLORIDA
DEPARTMENT OF ADMINISTRATIVE HEARINGS

JOHNNY ELLIS, JR.,

Petitioner,

vs. Case No. 14-5355

AMERICAN ALUMINUM,

Respondent.
_________________________________/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on May 1, 2015, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Johnny D. Ellis, Jr., pro se
200 Alice Street
Perry, Florida 32348

For Respondent: Bret Carson Yaw, Esquire
Ford and Harrison LLP
Suite 1300
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Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether Respondent American Aluminum Accessories, Inc. (Respondent or American Aluminum), violated the Florida Civil Rights Act of 1992, sections 760.01–760.11 and 509.092, Florida

Statutes,[1/] by discriminating against and discharging Petitioner Johnny D. Ellis, Jr. (Petitioner), based upon Petitioner's race and age, or in retaliation for his participation in protected activity.

PRELIMINARY STATEMENT

On April 14, 2014, Petitioner filed an Employment Complaint of Discrimination (Complaint) with the Florida Commission on Human Relations (Commission or FCHR). The Commission investigated the Complaint, which was assigned FCHR No. 201400631. Following completion of its investigation, the Commission's executive director issued a Determination dated October 6, 2014, finding that "no reasonable cause exists to believe that an unlawful employment practice occurred." That same day, the Commission sent Petitioner a Notice of Determination of Cause (Notice) on the Complaint which advised Petitioner of his right to file a Petition for Relief for an administrative proceeding on his Complaint within 35 days of the Notice, or a civil action within one year from the Notice. Petitioner timely filed a Petition for Relief with the Commission reiterating the allegations of his Complaint.

On November 14, 2014, the Commission filed a Transmittal of Petition with the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge to conduct an

administrative hearing on Petitioner's Petition for Relief. The case was assigned to the undersigned.

The final hearing was first scheduled to be held on January 15, 2015, but was twice continued. The hearing was ultimately rescheduled and heard on May 1, 2015.

At the final hearing, Petitioner testified on his own behalf, but offered no exhibits. Respondent presented the testimony of two witnesses and offered five exhibits, the first three of which were officially recognized, and all five exhibits were received into evidence as Respondent's Exhibits R-1 through R-5.

The proceedings were recorded and a transcript was ordered. The parties were given 30 days from the filing of the transcript within which to file their proposed recommended orders. A one-volume Transcript of the proceeding was filed May 20, 2015. Respondent timely filed its Proposed Recommended Order (entitled "Post-hearing Brief") on June 19, 2015, which was considered in preparing this Recommended Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. American Aluminum is a company engaged in the business of building and selling toolboxes.

2. Petitioner is an African-American male who was employed at American Aluminum from 2002 until his discharge in March

2014. Petitioner was over the age of 40 at the time of his discharge.

3. From the time of his hire in 2002, until August 2013, Petitioner's job responsibilities consisted of assembling aluminum boxes.

4. In September of 2013, Petitioner's supervisor, Michael Flowers, who is also African-American, promoted Petitioner to Shipping Supervisor. Michael Flowers hoped that as a supervisor, Petitioner would take more responsibility in his work, take better care of American Aluminum's products, and inspire his subordinates.

5. Michael Flowers' brother, Duane Flowers, recommended Petitioner for this promotion. Duane Flowers is African-American.

6. Petitioner was American Aluminum's only Shipping Supervisor.

7. Petitioner's responsibilities as a Shipping Supervisor included placing labels on the boxes, ensuring that the right boxes were placed on the right pallets, correctly assembling orders, and ensuring that orders were loaded into shipping trucks without damage.

8. On the day of Petitioner's promotion, Michael Flowers explained the new job responsibilities to Petitioner. He informed Petitioner that as a supervisor, he needed to stay at

American Aluminum's facility until orders are shipped. He also told Petitioner that if Petitioner needed a ride home, someone at American Aluminum would find him a ride. Petitioner acknowledged the responsibilities, told Michael Flowers that he accepted the demands of the position, and indicated that he understood.

9. On February 25, 2014, prior to a 3:00 p.m. meeting, Michael Flowers gave Petitioner instructions on completing an order of boxes. The boxes had already been built, but still needed to be labeled, placed in shipping containers, and loaded onto a pallet.

10. Specifically, Michael Flowers gave Petitioner a direct order to make sure that the order on which they were working was completed and loaded onto the truck, because the order needed to be shipped that day.

11. Michael Flowers had already assigned Joseph Weaver the task of operating a forklift to physically load the order into the truck, but he apparently did not share this information with Petitioner.

12. After Michael Flowers left to attend his 3:00 p.m. meeting, Petitioner left American Aluminum's facility before the truck was loaded. The reason Petitioner left was because his ride home was leaving. He also decided to leave because he was not authorized to operate a forklift and therefore believed that

he would not be able to complete the assigned task of loading the truck. So, Petitioner took the ride home without assuring that the order was complete and loaded on the truck.

13. When Michael Flowers returned to the production floor, Petitioner was nowhere to be found. Instead, he saw American Aluminum’s Human Resources manager, a female, in the process of trying to label boxes and place them into shipping containers in an effort to complete the unfinished order.

14. Michael Flowers asked the human resources manager to return to the office, and then began working to complete the order. With assistance from two other employees, including Joseph Weaver, Michael Flowers was able to complete the order on time.

15. Completion of the order was important because, if the order had not shipped, American Aluminum would have jeopardized the customer relationship involved in the order.

16. American Aluminum depends on customer commitment. It pre-plans shipping arrangements and notifies customers of those arrangements. In addition to impacting customer relations, American Aluminum can incur financial penalties if it fails to timely ship an order.

17. After Michael Flowers completed the order, he called Petitioner and asked for an explanation as to why Petitioner had left prior to the order’s completion. Petitioner explained that

his ride was leaving and that he needed to leave. Petitioner did not offer any other explanation for why he left the facility before completing the order, and insisted that the situation was not his fault.

18. As a result of Petitioner's conduct, Michael Flowers suspended Petitioner for three days, and told Petitioner that, considering the severity of the infraction of leaving his post without completing the order, his future employment with American Aluminum was at stake.

19. Michael Flowers subsequently spoke to American Aluminum's President, Jennifer Arnold, about the situation, and Ms. Arnold agreed with the discipline imposed upon Petitioner.

20. After serving his suspension, Petitioner met with Michael Flowers in his office. Michael Flowers just wanted to counsel Petitioner about the events on February 25, 2014, and explain why it is unacceptable to leave work before completing assigned tasks.

21. Instead of responding positively and taking responsibility for his actions, Petitioner demanded his paycheck and attempted to turn the counseling session into an argument. Michael Flowers considered Petitioner's reaction insubordination, and terminated Petitioner's employment.

22. Subsequent to terminating Petitioner's employment, Michael Flowers spoke to Ms. Arnold, and explained that he

terminated Petitioner for his insubordination in failing to follow a direct order, failure to accept responsibility for his actions, and failure to rationally speak with Michael Flowers about why he had abandoned his job.

23. Ms. Arnold agreed with Petitioner's termination.

24. Petitioner testified that the only individuals at American Aluminum who discriminated against him on the basis of his race were Michael Flowers and Duane Flowers, both of whom are African-American.

25. Petitioner's rational for his belief that Michael Flowers and Duane Flowers discriminated against him on the basis of race is because they prefer to have romantic relationships with Caucasian women; because Michael Flowers does not like Petitioner sharing his general workplace opinions; and because Michael Flowers wanted to replace Petitioner with Duane Flowers, because Duane Flowers is Michael Flowers' brother.

26. Petitioner also stated that Michael Flowers discriminatorily terminated another African-American employee and hired a Caucasian individual.

27. Despite his allegations that he was discriminated against because of his race, at the final hearing, Petitioner admitted that he has no evidence to support his claim of race discrimination. And, the evidence does not otherwise support a

finding that American Aluminum discriminated against Petitioner because of his race.

28. As to his claim that American Aluminum discriminated against him because of his age, Petitioner alleges that, subsequent to his termination, he had a telephone conversation with Ms. Arnold, during which Ms. Arnold allegedly stated that "they" had a meeting to discuss Petitioner's age. Ms. Arnold testified that she never had a discussion with Petitioner regarding his age. Ms. Arnold's testimony is credited.

29. Moreover, during the final hearing, Petitioner admitted that no one ever told him that he was "too old," and no one ever told him that there were issues with his age.

30. And, while Petitioner stated that he believes that Michael Flowers wanted to replace him with Duane Flowers because Michael Flowers did not believe Petitioner could perform his job functions any more, other than his subjective belief, there is no evidence to support Petitioner's claim that American Aluminum discriminated against him because of his age.

31. As to Petitioner's claim that American Aluminum retaliated against him, Petitioner's testimony did not explain a basis for retaliation. While Petitioner indicated that he had expressed his opinions to Mike Flowers about the general workplace at American Aluminum, and that Mike Flowers did not like him sharing those opinions, there is no indication that

those opinions were in opposition to an unlawful employment practice. There was also no evidence that Petitioner ever participated in any activity opposing an alleged unlawful employment practice at American Aluminum prior to his termination.

32. While Petitioner testified that he believed that when Michael Flowers asked him to load the truck, Michael Flowers was actually telling Petitioner to operate a forklift himself, that misunderstanding on the part of Petitioner does not suggest retaliation. In fact, Michael Flowers never instructed Petitioner to operate a forklift.

33. Furthermore, Petitioner admitted in his testimony that he has no evidence that he engaged in protected activity, or that American Aluminum took adverse action against Petitioner because of his participation in protected activity.

34. In sum, Petitioner failed to substantiate his claim of discrimination based upon his race or age, and Petitioner did not show a basis for his claim that American Aluminum illegally retaliated against him.

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes, and Florida Administrative Code Rule 60Y-4.016(1).

36. The State of Florida, under the legislative scheme contained in sections 760.01–760.11 and 509.092, known as the Florida Civil Rights Act of 1992 (the Act), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et seq.

37. The Florida law prohibiting unlawful employment practices is found in section 760.10. Section 760.10(1)(a) provides that "[i]t is an unlawful employment practice for an employer:"

> To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

38. Section 760.10(7) provides:

> It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

39. Florida courts have held that because the Act is patterned after Title VII of the Civil Rights Act of 1964, as

amended, federal case law dealing with Title VII is applicable. See, e.g., Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

40. As developed in federal cases, a prima facie case of discrimination under Title VII may be established by statistical proof of a pattern of discrimination, or on the basis of direct evidence which, if believed, would prove the existence of discrimination without inference or presumption.[2/] Usually, however, as in this case, direct evidence is lacking and one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the shifting burden of proof pattern established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

41. Under the shifting burden pattern developed in McDonnell Douglas:

> First, [Petitioner] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Petitioner] sufficiently establishes a prima facie case, the burden shifts to [Respondent] to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by a preponderance that the legitimate reasons asserted by [Respondent] are in fact mere pretext.

U.S. Dep't of Hous. and Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)(housing discrimination claim); accord Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009)(gender discrimination claim)("Under the McDonnell Douglas framework, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination.").

42. Therefore, in order to prevail in his claims of discrimination and unlawful retaliation, Petitioner must first establish a prima facie case by a preponderance of the evidence. Id.; § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized.").

43. "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." Holifield, 115 F.3d at 1562; cf., Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000) ("A preponderance of the evidence is 'the greater weight of the evidence,' [citation omitted] or evidence that 'more likely than not' tends to prove a certain proposition.").

44. Although Petitioner's Complaint alleges that American Aluminum unlawfully discriminated against him in his employment

based upon his race and age, and in retaliation for his participation in protected activity, Petitioner failed to establish a prima facie case for any of these claims.

45. To establish a prima facie case of race discrimination, Petitioner must show: (1) he belongs to a protected group; (2) he was subjected to an adverse employment action; (3) his employer treated similarly-situated employees outside his classification more favorably; and (4) he was qualified to the job. Holifield, 115 F.3d at 1562. While it appears as though Petitioner established the first and second elements of his prima facie case, he did not establish the third or fourth criterion because he has no evidence that there was a similarly-situated person outside of his classification who was treated more favorably than he was treated, and he did not demonstrate that he was qualified for the position of Shipping Supervisor.

46. "If [Petitioner] fails to identify similarly situated employees who were not [African American], [his] case must fail because the burden is on [him] to establish [his] prima facie case." Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir.) modified on other grounds, 151 F.3d 1321 (11th Cir. 1998).

47. "If two employees are not 'similarly situated,' the different application of workplace rules does not constitute

illegal discrimination." Lathern v. Dep't of Children and Youth Servs., 172 F.3d 786, 793 (11th Cir. 1999)(citing Nix v. WLCY Radio/Rahall Commc'ns., 738 F.2d 1181, 1186 (11th Cir. 1984)).

48. To establish that American Aluminum treated similarly-situated employees outside Petitioner's protected classification more favorably than himself, Petitioner must show he and the employees are "similarly situated in all relevant aspects." Holifield, 115 F.3d at 1562. "The comparator must be nearly identical to the plaintiff to prevent courts from second-guessing a reasonable decision by the employer." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1091 (11th Cir. 2004).

49. Petitioner failed to offer evidence that American Aluminum treated similarly-situated employees outside of his protected class more favorably.

50. As to the fourth element required to establish a prima facie case for race discrimination, Petitioner failed to show that he was qualified for his position. Petitioner's primary responsibility included ensuring that customer orders were completed properly and on schedule. Petitioner, however, failed in this regard, after he had been given a direct order. Accordingly, Petitioner cannot demonstrate the fourth element of his prima facie case of race discrimination.

51. Petitioner also failed to state a prima facie case of age discrimination. In order to establish a prima facie case of

age discrimination, Petitioner must demonstrate that: "(1) he was a member of the protected group of persons between the ages of 40 and 70; (2) he was subject to an adverse employment action; (3) a substantially younger person filled the position from which he was discharged; and (4) he was qualified to do the job." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358 (11th Cir. 1999). Specifically, as in his race discrimination claim, Petitioner failed to prove the fourth element necessary for his prima facie case of age discrimination, by failing to prove that he was qualified for his position.

52. Petitioner also failed to prove that American Aluminum terminated him in retaliation for his participation in protected activity. Petitioner's explanation that he was discharged in retaliation for refusing to operate a forklift was not supported by the evidence and does not otherwise support a claim of unlawful retaliation under the Act.

53. In order to establish a prima facie case of retaliation, Petitioner must demonstrate that: "(1) he participated in an activity protected by [the Act]; (2) he suffered an adverse employment action; and (3) there is a causal connection between the participation in the protected activity and the adverse employment decision." Batch v. Jefferson Cnty. Child Dev. Council, 183 Fed. Appx. 861, 863 (11th Cir. 2006);

see also Stone v. Geico Gen'l Ins. Co., 279 Fed. Appx. 821, 823 (11th Cir. 2008)(applying same analysis to claims of retaliation for age claims).

54. Petitioner's claim of retaliation fails because he did not establish the first or third element to show a prima facie case. First, Petitioner failed to show that he engaged in protected activity within the meaning of the Act. In order to qualify for protected activity under the Act, Petitioner must have shown that he is a person who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the Act]." § 760.10(7), Fla. Stat.

55. There are two types of protected activity under the Act: (1) opposition activity, for example, an employee opposes an unlawful employment practice; and (2) participation activity, for instance, an employee files a charge with the Commission. Hinton v. Supervision Int'l, Inc., 942 So. 2d 986, 989-990 (Fla. 5th DCA 2006). Opposition activity occurs where an employee has "opposed any practice made an unlawful employment practice." Id. Participation activity occurs where an employee has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing." Id. "Courts have consistently required that, in order for an employee's complaint to constitute protected activity, the complaint must clearly put

an employer on notice of a violation of the law." Johnson v. Fla., 2010 U.S. Dist. LEXIS 42784, *6, 2010 WL 1328995 (N.D. Fla. 2010).

56. Petitioner provided no evidence to show that Petitioner engaged in either of these types of activity during his employment. In fact, Petitioner admitted that he has no evidence that he engaged in protected activity. Moreover, refusals to drive a forklift or a complaint regarding driving a forklift under the circumstances of this case are not activities protected by the Act.

57. Furthermore, even if Petitioner had engaged in protected activity, there was no evidence submitted in this case showing that Respondent retaliated against Petitioner for such participation. In other words, Petitioner failed to prove a causal connection between any alleged protected activity and his discharge. In order to establish a causal connection, Petitioner must show that "the decision-maker[s] [were] aware of the protected conduct," and "that the protected activity and the adverse action were not wholly unrelated." Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 590 (11th Cir. 2000). Even if Petitioner had actually refused to drive a forklift (which he did not) and that alleged refusal is protected activity (which it is not), Petitioner produced no evidence that Michael Flowers — the

decision maker in this case — was aware of Petitioner's alleged refusal.

58. In fact, Petitioner admitted at the final hearing that he has no evidence that American Aluminum took adverse action against Petitioner because of any alleged protected activity. Further, American Aluminum terminated Petitioner for legitimate, non-retaliatory reasons — Petitioner's inability to meet American Aluminum's work performance and conduct standards.

59. Finally, even if Petitioner had established a prima facie case of race or age discrimination, or unlawful retaliation, American Aluminum proved a legitimate, non-discriminatory reason for terminating Petitioner. The evidence showed that American Aluminum's decision to terminate Petitioner was because Petitioner failed to comply with a direct order from his supervisor, effectively abandoning his job, and jeopardizing an order for a valued customer, as well as Petitioner's failure to accept responsibility for his actions.

60. The evidence provided by American Aluminum supports the conclusion that Petitioner could not perform the duties of his position, and provided a legitimate, non-discriminatory reason for Petitioner's termination. Petitioner failed to demonstrate that this reason was mere pretext for discrimination, and there was no evidence introduced in this case showing that American Aluminum acted with unlawful

discriminatory intent. See Holifield, 115 F.3d at 1565.

61. Even if it had been demonstrated that American Aluminum's decision to terminate Petitioner was an erroneous, unfair, or unwise decision, such a showing, without more, would be insufficient to support Petitioner's claims. "[C]ourts 'do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, [the Act] do[es] not interfere. Rather, [the court's] inquiry is limited to whether the employer gave an honest explanation of its behavior.'" Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991). An "employer may [take an employment action] for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984).

62. In Combs v. Plantation Patterns Meadowcraft, Inc., 106 F.3d 1519 (11th Cir. 1997), the Eleventh Circuit, in outlining the analysis to determine whether an employee produced sufficient evidence to overcome an employer's proffered reasons for its actions, stated:

> The district court must, in view of all evidence, determine whether the plaintiff has cast sufficient doubt on [the

> employer's] proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered legitimate reasons were not what actually motivated its conduct. The district court must evaluate whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.

Id. at 1538 (citation and internal quotation marks omitted).

63. "A reason is not a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." Brooks v. Cnty. Comm'n of Jefferson County, Ala., 446 F.3d 1160, 1163 (11th Cir. 2006).

64. In this case, Petitioner presented no evidence to show that American Aluminum's reasons for terminating his employment were false and that the real reason was discrimination. Rather, the lack of evidence to support Petitioner's claims demonstrated that Petitioner's allegations of race and age discrimination, as well as his claim of retaliatory discharge, are not based on evidence, but on Petitioner's own speculation and belief. Such speculation and belief are not enough to prove discrimination. See St. Hilaire v. The Pep Boys-Manny, Moe & Jack, 73 F. Supp. 2d 1350, 1360 (S.D. Fla. 1999)(stating that a plaintiff's mere belief, speculation, or conclusion that he was subject to discrimination does not create an inference of discrimination).

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Complaint of Discrimination and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 14th day of July, 2015, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of July, 2015.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes, Florida Administrative Code, and federal laws are to the current versions which have not substantively changed since the time of the alleged discrimination.

[2/] For instance, an example of direct evidence in an age discrimination case would be the employer's memorandum stating, "Fire [petitioner] – he is too old," clearly and directly evincing that the plaintiff was terminated based on his age. See Early v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

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.