

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHRISTOPHER ORR,

Petitioner,

vs.

Case No. 15-1177

AMERI-SCAPES LANDSCAPE
MANAGEMENT, INC.,^{1/}

Respondent.

_____ /

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 29, 2015, in Daytona Beach, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David W. Glasser, Esquire
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Daytona Beach, Florida 32114

For Respondent: Dean R. Fuchs, Qualified Representative
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Ameri-Scapes Landscape Management, Inc. ("Ameri-Scapes"), committed unlawful employment

practices contrary to section 760.10, Florida Statutes (2013),^{2/}
by discriminating against Petitioner based on his race.

PRELIMINARY STATEMENT

On or about August 15, 2014, Petitioner Christopher Orr ("Petitioner") filed with the Florida Commission on Human Relations ("FCHR") an Employment Charge of Discrimination against Ameri-Scapes. Petitioner alleged that he had been discriminated against pursuant to chapter 760, and Title VII of the Florida Civil Rights Act, based upon race, as follows:

I began employment on or about July, 2013. My position was a landscaper. I was performing my duties without problems. During the time that I was employed, I was working at an apartment complex. My boss told me that the manager of the complex stated that I had been looking at someone. I was told that I was not allowed to look at anyone. I spoke to the manager of the complex. The manager indicated that I was not allowed to look at anyone while working at the complex. I questioned her about this. She then told me that I was not allowed to work at the complex. I later contacted my boss. They told me I was terminated from my position.

I am an African-American male. It was alleged that this began when I was looking at a Caucasian female and making hand gestures. I believe most of the individuals in the complex are Caucasian.

I believe I was terminated based on my race in violation of the Florida Civil Rights Act of 1992.

The FCHR investigated Petitioner's complaint. In a letter dated January 27, 2015, the FCHR issued its determination that there was no reasonable cause to believe that an unlawful employment practice occurred.

On March 3, 2015, Petitioner timely filed a Petition for Relief with the FCHR. On March 5, 2015, the FCHR referred the case to the Division of Administrative Hearings ("DOAH"). The case was originally scheduled for hearing on April 14, 2015. Two continuances were granted. The hearing was ultimately held on June 29, 2015.

At the hearing, Petitioner testified on his own behalf and presented the testimony of Chad Stroh, a fellow Ameri-Scapes employee at the time of the incidents in question. Petitioner offered no exhibits. Respondent presented the testimony of Dana Speer, the property manager of Osprey Landings Apartments ("Osprey Landings"), the apartment complex that was the site of the incidents in question; Katherine Brugh, office manager for Ameri-Scapes; and Gerardo Mora, Petitioner's direct supervisor at Ameri-Scapes. Respondent's Exhibit 1 was admitted into evidence. Petitioner testified in rebuttal and called Ms. Speer as a rebuttal witness.

The one-volume Transcript of the hearing was filed at DOAH on July 28, 2015. On July 13, 2015, prior to the filing of the Transcript, Respondent filed a motion requesting an extension of

the time for filing proposed recommended orders due to a pending two-week jury trial that its counsel was about to begin. The motion was granted by Order dated July 15, 2015, granting the parties until August 17, 2015, to file their proposed recommended orders. Both parties timely filed their Proposed Recommended Orders.

FINDINGS OF FACT

1. Ameri-Scapes is an employer as that term is defined in section 760.02(7). Ameri-Scapes is a landscape management company based in Norcross, Georgia, that is authorized to transact business in the State of Florida.

2. Petitioner, a black male, was hired by Ameri-Scapes in July 2013 as a commercial landscaper. The job consisted of everything involved with landscaping commercial properties: mowing, edging, weed-eating, and planting trees and flowers. Petitioner was qualified for the position that he held and had been subject to no adverse disciplinary action prior to August 23, 2013.

3. Petitioner's direct supervisor was Gerardo Mora, who was in charge of the crew that worked at Osprey Landings in Daytona Beach on August 23, 2013.

4. Petitioner was part of the Ameri-Scapes crew working at Osprey Landings on August 23, 2013. Petitioner and a Hispanic

worker, Augustine Augusto, were planting trees in front of the main office, near the mailboxes.

5. Dana Speer, the property manager at Osprey Landings, testified that two white female residents came to her office and were very upset. One of them was shaking. They told her that one of the Ameri-Scapes workers had stared at one of them for an uncomfortably long time as they walked to the mailboxes, and then had made hourglass hand gestures to indicate that she had "a big butt." The residents stated that this made them feel very uncomfortable. When Ms. Speer inquired as to which of the two workers near the mailboxes was the culprit, they stated that it was the black man. Ms. Speer was concerned that Petitioner's behavior was a reflection on Osprey Landings because the residents perceived that he was an employee of the apartment complex.

6. Ms. Speer testified that she had had her own run-in with Petitioner earlier that day. As she was walking toward the office after being out on the property, she passed the area where Petitioner was working. She said, "Hey, how are you?" Petitioner replied, "Hey, momma." Ms. Speer did not believe this was an appropriate way to address her or any of her residents. She had never seen Petitioner and thought he must be new. She made a mental note to mention the incident to Mr. Mora

so that he could educate Petitioner as to the manner in which he was expected to conduct himself while at Osprey Landings.

7. After the residents left her office, Ms. Speer went directly to Mr. Mora and told him that he needed to talk to Petitioner because such behavior was not acceptable. Mr. Mora needed to make sure that Petitioner was working, not checking out the ladies and making them uncomfortable. Mr. Mora said that he would handle the situation. Not long after that, Petitioner came into Ms. Speer's office. Ms. Speer testified Petitioner immediately denied having "disrespected" anyone, and admonished her for going to his boss and saying that he had. Petitioner denied making a gesture at the resident. He said that he was making the gesture to his co-worker to indicate that the resident had a big butt.

8. Ms. Speer testified that she became upset at this point, because Petitioner was essentially telling her that what he just did was okay. She stood up from her desk and told Petitioner that he should leave her office because his behavior was unacceptable. Ms. Speer stated that Petitioner became more agitated. He asked whether she was forbidding him to look at or talk to anyone while he was working. Ms. Speer told him that of course he could look at people, but could not make gestures or otherwise make the residents feel uncomfortable.

9. Ms. Speer testified that Petitioner had become so loud and obnoxious that she feared for her safety. She would have asked him to sit down and talk about what happened, but his aggressive demeanor made a reasonable conversation impossible. He left her office and went out to speak to Mr. Mora. Ms. Speer felt threatened enough that she went to her cabinet and pulled out a container of wasp spray for self-defense.

10. Ms. Speer phoned Katherine Brugh, Ameri-Scapes' office manager, and told her that she did not feel comfortable with how Petitioner treated the situation. She told Ms. Brugh that she did not want Petitioner on the Osprey Landings property because he had been disrespectful to her and made her residents feel uncomfortable. Ms. Speer made it clear that Osprey Landings would terminate Ameri-Scapes services if they kept Petitioner on the property. Ms. Brugh told Ms. Speer that she would take care of it.

11. Soon thereafter, Petitioner walked into Ms. Speer's office again. He loudly told her that he had just been fired, that it was Ms. Speer's fault, and that he was getting a lawyer to sue Osprey Landings. She told Petitioner to leave or she would call the police. Ms. Speer testified that Petitioner left the office and "kind of walked around" the parking lot, making her nervous enough that she called two of her maintenance men

over to keep an eye on him. Petitioner left after ten minutes or so.

12. Ms. Speer testified that about two hours later, Petitioner returned to her office. He asked for her business card. She directed him to the cards on her desk and told him to take one and leave the premises, because he was now trespassing. Petitioner left the office. Ms. Speer did not see him again.

13. Petitioner admitted that when he was working near the mailboxes, a lady walked up and he stopped cutting the grass and "looked at her for a long time." However, Petitioner denied that he "disrespected" her by making gestures or saying anything to her.

14. Petitioner testified that the first he knew about the accusations was when Mr. Mora told him that he needed to go to the office and talk to Ms. Speer. Mr. Mora told him that he had made inappropriate hand gestures to someone. Petitioner assumed that the accusation had come from a resident of the complex.

15. Petitioner testified that he went to Ms. Speer's office to explain that he had not made inappropriate gestures, spoken out of turn, or taken any disrespectful actions toward anyone at Osprey Landings. However, Ms. Speer cut him off and stated that residents had complained to her about Petitioner's staring at them, and making gestures about their body shapes. Ms. Speer stated that Petitioner had made hand gestures to

someone and was talking about a resident's "butt." Petitioner denied the accusation and stated he would never do such a thing.

16. Petitioner testified that at this point Ms. Speer told him that he was not allowed to look at anyone while working at Osprey Landings. Petitioner said, "Excuse me?" Ms. Speer stated that he was not to look at, or speak to anyone. Petitioner asked her how she expected him to comply with such an instruction. Ms. Speer told him that if he wanted to remain employed by Ameri-Scapes, he was not to look at anybody. If someone walked past him, Petitioner was to turn his head away. Ms. Speer asked for his name and told him that he was not to work on her premises anymore. Petitioner stated that he had no problem leaving her office, but that she could not fire him for looking at someone.

17. Petitioner testified that he left Ms. Speer's office and went straight to Mr. Mora. He asked Mr. Mora if he was going to fire him for looking at someone. Mr. Mora stated that he had to let Petitioner go. Mr. Mora told Petitioner that the decision was not his to make, and that someone above him in the company had made the decision to terminate Petitioner's employment.

18. Petitioner testified that the Osprey Landings work crew was ordinarily picked up from a central location and transported to the work site. Therefore, Petitioner was

stranded at Osprey Landings after his firing. Mr. Mora at first told Petitioner that he would not give him a ride, but relented when Petitioner told him that Ms. Speer was threatening to have him arrested if he remained on the property. Mr. Mora gave Petitioner a ride to his godmother's house.

19. Petitioner testified that his wife later drove him back to Osprey Landings for the purpose of obtaining Ms. Speer's business card, and to tell her that she had cost him his job. Petitioner stated that Ms. Speer became very angry and tossed her business card at him. Petitioner left when Ms. Speer told him that she was calling the police.

20. Petitioner called his Ameri-Scapes co-worker, Chad Stroh, to testify on his behalf. Mr. Stroh testified that he worked in close proximity to Petitioner on August 23, 2013, and did not notice any inappropriate behavior. Mr. Stroh had no first-hand knowledge of any of the events regarding Petitioner's dismissal. He testified that Mr. Mora told him that Petitioner had been fired because of an incident in the office at Osprey Landings. Mr. Mora did not provide any details of the incident to Mr. Stroh.

21. Katherine Brugh, the office manager for Ameri-Scapes, testified and confirmed that she received a call from Ms. Speer on the morning of August 23, 2013. Ms. Speer called to say that a resident had complained that an Ameri-Scapes employee was

making unacceptable comments or gestures about her figure.

Ms. Brugh told Ms. Speer that she would take care of the matter.

22. Ms. Brugh called Mr. Mora, who knew only what Ms. Speer had told him. Ms. Brugh instructed Mr. Mora to tell Petitioner that he was no longer an employee of Ameri-Scapes.

23. Ms. Brugh later took a second call from Ms. Speer, who stated that Petitioner had come to her office and was loud and disrespectful. Ms. Brugh called Mr. Mora again and told him to get Petitioner off the Osprey Landings property.

24. Ms. Brugh testified that Petitioner phoned her, saying that he was very upset and did not understand what had happened. He had looked at a resident because she was pretty. He denied making any gestures or comments toward the resident.

25. Ms. Brugh stated that she received a written statement recounting the day's event from Ms. Speer, but she made no effort to speak with the offended residents to confirm their stories. Ms. Brugh testified that Ameri-Scapes will not keep an employee who makes a customer feel uncomfortable. Ms. Speer had made it clear that Ameri-Scapes would be dismissed by Osprey Landings unless it ensured that Petitioner never came back onto its property. Ms. Brugh stated that Ameri-Scapes at that time had four commercial landscaping customers, and that the business could not afford to retain an employee who was unable to work at

all of the properties Ameri-Scapes serviced. She credibly denied that Petitioner's race had any bearing on his dismissal.

26. Mr. Mora testified that he was supervising the crew at Osprey Landings on August 23, 2013. Work was proceeding normally until he received a call from Paul Schlossman, the president and owner of Ameri-Scapes, who instructed Mr. Mora to fire Petitioner. Mr. Mora asked Mr. Schlossman for a reason. Mr. Schlossman only stated that something happened on the property and that Petitioner must be dismissed right away.

27. Mr. Mora went to the Osprey Landings office to talk with Ms. Speer. He asked Ms. Speer what happened. Mr. Mora recalled Ms. Speer telling him that a female resident had come in to complain that Petitioner "was doing signals with the hands that she had big titties."

28. Mr. Mora testified that no one said anything to him about Petitioner's race being a factor in his dismissal. It was a termination for improper conduct on the Osprey Landings property. Mr. Mora stated that Petitioner later told him that he was going to sue Ameri-Scapes for firing him because of his race, and asked Mr. Mora to testify in support of that contention. Mr. Mora told Petitioner that if he had to testify, he would tell the truth and the truth was that Ameri-Scapes dismissed Petitioner for the gestures he made to the resident.

29. Given the speed with which phone calls and meetings were occurring on August 23, 2013, it is not surprising that testimony given nearly two years later is somewhat inconsistent as to details. Ms. Brugh stated that she gave the order to dismiss Petitioner, but Mr. Mora recalled that it was Mr. Schlossman. Whether Petitioner's gestures related to the resident's buttocks or breasts was a matter of differing recollection. However, the gist of the testimony is sufficiently of a piece to permit the overall finding that Petitioner's race was not a factor in his dismissal.

30. Petitioner complained that he was fired on the basis of hearsay voiced by Ms. Speer as to his actions toward the residents. However, Ms. Speer credibly testified that Petitioner's behavior toward her in the office was a factor in her insistence that Ameri-Scapes remove Petitioner from the Osprey Landings premises, which in turn was a factor in Ameri-Scapes' decision to dismiss Petitioner. Thus, there was direct testimony as to some of the behavior that led to Petitioner's termination. Further, Petitioner's testimony regarding his conversations with Ms. Speer was not credible. As Ms. Speer noted, Petitioner, in his rage and confusion, might have believed she told him not to look at the residents, but in fact, she never made such a statement to him.

31. Petitioner adamantly denied making any gestures or doing anything else that might have made the resident uncomfortable, save for staring at her. Petitioner criticized Ameri-Scapes for summarily firing him without giving him a fair hearing or an opportunity to question his accusers. Petitioner contended that Ameri-Scapes should have had a formal investigatory process in place for situations such as that in which he found himself. The company took the word of Ms. Speer, who was not herself a witness to anything other than Petitioner's impertinent greeting, and terminated Petitioner's employment on the spot.

32. Whether Petitioner's dismissal was fair is not at issue in this proceeding. The issue is whether Ameri-Scapes has shown a legitimate, non-discriminatory reason for terminating Petitioner's employment. Ameri-Scapes's decision to dismiss Petitioner was not subject to the hearsay rule. The company reasonably took the word of its customer as to the misbehavior of its employee and made a business decision to sever relations with that employee in the interest of keeping the customer's business, and forestalling any future incidents of a similar nature. No evidence was presented that race played any factor in Petitioner's dismissal.

33. Petitioner offered no credible evidence disputing the legitimate, non-discriminatory reasons given by Ameri-Scapes for his termination.

34. Petitioner offered no credible evidence that Ameri-Scapes's stated reasons for his termination were a pretext for discrimination based on Petitioner's race.

35. Petitioner offered no credible evidence that Ameri-Scapes discriminated against him because of his race in violation of section 760.10.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

37. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), chapter 760, prohibits discrimination in the workplace.

38. Section 760.10 states the following, in relevant part:

(1) It is an unlawful employment practice for an employer:

(a) 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.

39. Ameri-Scapes is an "employer" as defined in section 760.02(7), which provides the following:

(7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

40. Florida courts have determined that federal case law applies to claims arising under the Florida Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under section 760.10, absent direct evidence of discrimination.^{3/} See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

41. Under the McDonnell analysis, in employment discrimination cases, Petitioner has the burden of establishing, by a preponderance of evidence, a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to the employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts

the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that the employer's offered reasons for its adverse employment decision were pretextual.

See Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

42. In order to prove a prima facie case of unlawful employment discrimination under chapter 760, Petitioner must establish that: (1) he is a member of the protected group; (2) he was subject to adverse employment action; (3) AmeriScapes treated similarly situated employees outside of his protected classifications more favorably; and (4) Petitioner was qualified to do the job and/or was performing his job at a level that met the employer's legitimate expectations. See, e.g., Jiles v. United Parcel Serv., Inc., 360 Fed. Appx. 61, 64 (11th Cir. 2010); Burke-Fowler v. Orange City, 447 F.3d 1319, 1323 (11th Cir. 2006); Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003); Williams v. Vitro Serv. Corp., 144 F.3d 1438, 1441 (11th Cir. 1998); McKenzie v. EAP Mgmt. Corp., 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

43. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

44. As a black male, Petitioner is a member of a protected class as it relates to race discrimination. Petitioner was subject to an adverse employment action in that he was

terminated from his position as a commercial landscaper with Ameri-Scapes. Petitioner was qualified to perform the job of commercial landscaper. The evidence established that Petitioner's job performance was adequate and that he had not been subject to adverse disciplinary action prior to August 23, 2013.

45. As to the question of disparate treatment, the applicable standard was set forth in Maniccia v. Brown, 171 F.3d 1364, 1368-1369 (11th Cir. 1999):

"In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in, or accused of, the same or similar conduct and are disciplined in different ways." Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir.), opinion modified by 151 F.3d 1321 (1998) (quoting Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)). "The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed." Id. (internal quotations and citations omitted). We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. See Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir.1989) ("Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples."). (Emphasis added).^[4/]

46. Petitioner presented no credible evidence that his race played any role in the business decisions made by Ameri-Scapes. He presented no evidence that any similarly situated employee was treated any better or differently than was Petitioner. Petitioner's testimony regarding his meetings with Ms. Speer was not credible, which cast doubt upon the credibility of his denials of the misbehavior that caused his termination. Having failed to establish the disparate treatment element, Petitioner has not established a prima facie case of employment discrimination.

47. Even if Petitioner had met the burden, Ameri-Scapes presented evidence of legitimate, non-discriminatory reasons for Petitioner's termination. Ms. Speer, representing Osprey Landings, complained to Ameri-Scapes management about Petitioner's behavior as relayed to her by two residents. Ms. Speer herself had been subject to a crass greeting from Petitioner, and later directly witnessed Petitioner's meltdown in her office. She feared for her safety and the reputation of her employer. Ameri-Scapes was threatened with the loss of a significant customer if it did not take immediate action to rectify the situation. Ms. Brugh credibly testified that the company could not afford to carry an employee who was unable to work at all the properties serviced by Ameri-Scapes. The

company's decision to terminate Petitioner's employment was abrupt, but had nothing to do with Petitioner's race.

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 finding that Ameri-Scapes Landscape Management, Inc. did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 15th day of October, 2015, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of October, 2015.

ENDNOTES

^{1/} The style of the case has been amended to correct the spelling of Respondent's name.

^{2/} Citations shall be to Florida Statutes (2013), unless otherwise specified. Section 760.10, Florida Statutes, has been unchanged since 1992, save for a 2015 amendment adding pregnancy to the list of classifications protected from discriminatory employment practices. Ch. 2015-68, § 6, Laws of Fla.

^{3/} "Direct evidence is 'evidence, which if believed, proves existence of fact in issue without inference or presumption.'" Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) (quoting Black's Law Dictionary 413 (5th ed. 1979)). In Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989), the court stated:

This Court has held that not every comment concerning a person's age presents direct evidence of discrimination. [Young v. Gen. Foods Corp. 840 F.2d 825, 829 (11th Cir. 1988)]. The Young Court made clear that remarks merely referring to characteristics associated with increasing age, or facially neutral comments from which a plaintiff has inferred discriminatory intent, are not directly probative of discrimination. Id. Rather, courts have found only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, to constitute direct evidence of discrimination.

Petitioner offered no evidence that would satisfy the stringent standard of direct evidence of discrimination.

^{4/} The Eleventh Circuit has questioned the "nearly identical" standard enunciated in Maniccia, but has, in recent years, reaffirmed its adherence to it. See, e.g., Brown v. Jacobs Eng'g, Inc., 572 Fed. Appx. 750, 751 (11th Cir. 2014); Escarra v. Regions Bank, 353 Fed. Appx. 401, 404 (11th Cir. 2009); Burke-Fowler, 447 F.3d at 1323 n.2.

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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.