

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TAMARA A. GLEASON,)
)
 Petitioner,)
)
 vs.) Case No. 10-6756
)
 RICOH AMERICAS CORP.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge, John D.C. Newton, II, of the Division of Administrative Hearings conducted the hearing in this case, as noticed, on November 22, 2010, at Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Kimberly A. Gilmour, Esquire
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Davie, Florida 33314

For Respondent: David A. Young, Esquire
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Orlando, Florida 32801

STATEMENT OF THE ISSUES

A. Did Respondent, Ricoh Americas Corporation, (Ricoh), discriminate against Petitioner, Tamara Gleason (Ms. Gleason), because of her gender by demoting her?

B. Did Ricoh retaliate against Ms. Gleason for complaining about gender discrimination?

PRELIMINARY STATEMENT

Ms. Gleason filed a complaint of gender discrimination and retaliation by her former employer, Ricoh, with the Florida Commission on Human Relations (Commission) on February 18, 2010. The Commission investigated the complaint. On June 30, 2010, the Commission issued its Notice of Determination that there was no reasonable cause to believe that Ricoh committed an unlawful employment practice. The Commission dismissed Ms. Gleason's complaint.

Ms. Gleason filed a Petition for Relief from an Unlawful Employment Practice with the Commission on July 28, 2010. The Commission referred the Petition to the Division of Administrative Hearings on July 30, 2010. The undersigned scheduled the hearing in this matter to begin October 11, 2010. Upon the motion of Ricoh, the hearing was continued until November 22, 2010. The hearing was held as scheduled.

Ms. Gleason testified on her own behalf. Ms. Gleason offered the following Petitioner's exhibits that were accepted into evidence: 1-5 and 7-10. Ricoh presented the testimony of Rhonda McIntyre and Al Hines. Ricoh offered the following Respondent's exhibits that were accepted into evidence: 1-22. The parties ordered a transcript, which was filed with the

Division. The parties timely filed Proposed Recommended Orders. They have been considered in preparation of this recommended order.

FINDINGS OF FACT

1. Ricoh is in the business of selling and servicing document imaging and output equipment, including copiers, fax machines, printers, and related supplies and services such as software, paper, and toner. Ricoh has locations across the United States. Ms. Gleason worked for Ricoh from August 2008 until she resigned on March 31, 2010. She worked in its East Florida Marketplace. That area covers the eastern part of Florida from Jacksonville to Miami.

2. In 2008, and at all times relevant to this proceeding, Al Hines (Mr. Hines) was the East Florida Marketplace manager. His responsibilities included supervising sales personnel and meeting sales quotas. Mr. Hines has worked for Ricoh in various positions for over 31 years. He is based in Ricoh's Maitland, Florida, office near Orlando.

3. In 2008, the organizational structure of the East Florida Marketplace consisted of two group sales managers, one in Central Florida and one in South Florida. These group sales managers reported directly to the Marketplace Manager Mr. Hines. They oversaw sales managers who in turn supervised the various

account executives. Also, one sales manager in Jacksonville reported directly to Mr. Hines.

4. The group sales managers and sales managers were responsible for supervising the sales personnel, consisting of major account executives, senior account executives, and account executives. Ricoh assigned major account executives to work with specific large client accounts. Senior account executives were more experienced sales representatives. Senior account executives and account executives were assigned territories. Daytona Beach or a series of zip codes are examples of territories. Ricoh also assigned "vertical markets" for a specific industry, such as "faith-based" institutions to an Account Executive.

5. Ms. Gleason applied and interviewed for an account executive position in the central Florida area of the East Florida Marketplace in August 2008. Mr. Hines, General Sales Manager Cecil Harrelson, and Sales Manager Anthony Arritt interviewed Ms. Gleason.

6. On her resume and in her interview, Ms. Gleason represented that she had 20 years of experience as a sales representative in the office equipment field. Her resume stated that she was "[p]roficient in all areas relating to sales and leasing of copiers, printers, scanners, fax machines and various software solutions. Consistently exceeded sales quota."

7. After the interview, Mr. Hines decided to hire Ms. Gleason for Mr. Harrelson's team. Ricoh hired Ms. Gleason as a senior account executive on August 11, 2008. Mr. Hines initially assigned her to work in the vertical "faith-based" market.

8. In September 2008, a sales manager position for the Daytona Beach/Melbourne territories, overseen by Mr. Hines, opened. Three males applied for the position. Ms. Gleason did not apply. Mr. Hines asked Ms. Gleason if she would be interested in being considered for promotion to sales manager. Although Ms. Gleason had no prior management experience and had only worked for Ricoh for two months, Mr. Hines believed that she would be good in the position and asked her to consider it.

9. Ms. Gleason accepted Mr. Hines' proposal. On September 30, 2008, Mr. Hines promoted her to sales manager. Ricoh provided Ms. Gleason manager training.

10. In April and May of 2009, Ricoh restructured its sales positions. Ricoh changed group sales manager positions to strategic account sales manager positions. It removed all major account executives from teams supervised by sales managers and placed them on the teams supervised by the strategic account sales managers.

11. In central Florida, the reorganization resulted in Cecil Harrelson being moved from general sales manager to

strategic account sales manager. The major account executives on Ms. Gleason's team (Mary Cobb, David Norman, and Patrick Mull) and Arritt's team (Todd Anderson and Lynn Kent) were moved onto the new team supervised by Harrelson. All of the major account executives in the East Florida Market supervised by Mr. Hines were transferred to strategic account sales manager teams.

12. On average, the sales managers in the East Florida Marketplace each lost two major account executives due to the reorganization. Mr. Hines required all of the sales managers to hire new sales personnel to bring the number of sales personnel on their teams to expected levels. This is known as maintaining "headcount." Ms. Gleason knew of this requirement. Also it was not new. The responsibility to maintain headcount pre-existed the reorganization.

13. From the time of her hire until early 2009, around the time that the Company reorganized its sales positions, Ms. Gleason had no issues with Mr. Hines or complaints about his management.

14. As a sales manager, Ms. Gleason bore responsibility for supervising a team of sales personnel and for ensuring that her team members met their monthly sales quotas. In addition, Ms. Gleason was responsible for maintaining the headcount on her team.

15. Mr. Hines assigned monthly sales quotas for sales managers. He based the quotas on the types of sales representatives on each team. The monthly quota for major account executives was \$75,000. For senior account executives, the monthly quota was \$40,000. The monthly quota for account executives was \$30,000.

16. Mr. Hines conducted bi-monthly two-day sales meetings with all of the sales managers and office administrators to discuss their sales progress. Managers were expected to discuss their completed and forecast sales. Mr. Hines required managers to stand before the group to report on their progress and discuss any issues with quotas or goals based on month-to-date, quarter-to-date, and year-to-date expectations. Mr. Hines also considered "sales in the pipeline," or anticipated sales, to help determine sales trends for the next 90 days and in evaluating sales personnel.

17. In addition, Mr. Hines conducted weekly sales calls with the sales managers to review their sales progress. During the calls, sales managers were to identify which sales they believed had a strong, "95 percent chance," of closing. Mr. Hines also discussed the performance of each individual sales representative on a manager's team during the calls. The discussions included examination of reasons for non-performance.

18. Around the time of the reorganization, Mr. Hines transferred Senior Account Executive Tina Vargas in the Ocala territory from Mr. Arritt's team to Ms. Gleason's team. Mr. Hines made this transfer, in part, to help Ms. Gleason achieve her headcount and sales quotas.

19. At the time of the transfer, Vargas expected to complete a large, one-time \$320,000 sale on which she had been working. Mr. Hines anticipated that this sale would help Ms. Gleason achieve her sales quotas.

20. Ms. Vargas was not located in the Daytona Beach/Melbourne territory. But Mr. Hines expected that Ms. Vargas would require minimal supervision because she was an experienced sales representative.

21. Other managers also supervised sales representatives in multiple or large territories. For example, Cecil Harrelson supervised sales representatives in four areas. They were Orlando, Melbourne, Daytona, and Gainesville. Sales Manager Derrick Stephenson supervised a substantially larger geographic area than Ms. Gleason. His area reached from Key West to West Palm Beach.

22. After the reorganization, Ms. Gleason's sales productivity declined. She also was not maintaining her headcount. The other Sales Managers experienced the same

problems initially. But they recovered from the changes.

Ms. Gleason never did.

23. For the seven-month period of April through October, Ms. Gleason's record of attaining her quota was as follows:

April - 35% or \$70,867 in sales
May - 196% or \$385,452 in sales (Due to Ms. Vargas joining the team with a pending sale; 23% without Ms. Vargas.)
June - 31% or \$61,136 in sales
July - 8% or \$12,948 in sales
August - 12% or \$19,521 in sales
September - 11% or \$18,261 in sales
October - 23% or \$36,811 in sales

24. During that same period, Ms. Gleason was the lowest performing sales manager in July (19 points less than the next lowest), August (14 points less than the next lowest), September (33 points less than the next lowest), and October (6 points less than the next lowest). She was the second lowest in June when Mr. Comancho was the lowest with 25% attainment compared to Ms. Gleason's 31%.

25. The attainment percentages for all of the sales managers varied. Each had good months and bad months. After April and May, Ms. Gleason, however, had only bad months. For the months June through October, Ms. Gleason was the only sales manager who did not achieve 50% attainment at least twice, with two exceptions. They exceptions were Mr. Comancho and Mr. Rodham. Mr. Comancho chose to return to an account executive position after Mr. Hines spoke to him about his

performance. Mr. Rodham joined Ricoh in October and attained 52% of quota that month.

26. In addition to steadily failing to meet 50% of her quota, Ms. Gleason failed to maintain a full headcount for the same period of time.

27. No male sales managers in Ricoh's East Florida Marketplace had similar deficiencies in meeting sales quota. There is no evidence that any male sales managers in Ricoh's East Florida Marketplace had similar failures to maintain headcount. There is no evidence of sales manager productivity or headcount maintenance for any of Ricoh's other markets.

28. Ms. Gleason tried to improve her headcount by hiring additional sales personnel. She conducted a job fair with the assistance of Ricoh's recruiter. They identified 19 applicants for further consideration and second interviews. Mr. Hines reviewed and rejected all 19. They did not meet his requirement for applicants to have outside sales experience and a history of working on a commission basis. Ms. Gleason was aware of Mr. Hines' requirements. But she interpreted them more loosely than he did.

29. Mr. Hines helped Ms. Gleason's efforts to improve her headcount by transferring four sales representatives to her team. At Ms. Gleason's request, Mr. Hines also reconsidered his rejection of one candidate, Susan Lafue, and permitted

Ms. Gleason to hire her. Still Ms. Gleason was unable to reach the expected headcount.

30. David Herrick, one of the individuals who Mr. Hines assigned to Ms. Gleason's team, had already been counseled about poor performance. Mr. Hines directed Ms. Gleason to work with Mr. Herrick until he sold something. This was a common practice with newer sales representatives. Mr. Herrick had also been assigned to male sales managers.

31. Mr. Hines asked Ms. Gleason and Mr. Herrick to bring him business cards from their sales visits. He often did this to verify sales efforts. After Mr. Hines reviewed the cards, he threw them in the trash. But he first confirmed that Ms. Gleason had the information she needed from the cards. Mr. Hines often threw cards away after reviewing them to prevent sales representatives providing the same card multiple times.

32. Ricoh's Human Resources Policy establishes a series of steps for disciplinary action. The first is to provide an employee a verbal warning. The next two steps are written warnings before taking disciplinary action. Mr. Hines gave Ms. Gleason a verbal warning about her performance. He spoke to her about improving sales production and headcount. Ms. Gleason's performance did not improve despite her efforts.

33. Later, Mr. Hines gave Ms. Gleason a written warning in a counseling document dated August 31, 2009. The document stated that her performance had not been acceptable.

34. The counseling memorandum directed Ms. Gleason to reach 65% of her quota. It also said that she was expected to maintain a minimum of seven people on her team and work in the field with her sales representatives at least four days a week. Finally the memorandum advised that failure to perform as directed would result in "being moved to sales territory."

35. Around the end of August 2009, Mr. Hines began counseling Israel Camacho, a male, about his performance. Mr. Comancho decided to return to an account executive position.

36. In September Ms. Gleason achieved 11% of her quota. She also did not maintain her headcount.

37. September 24, 2009, Mr. Hines gave Ms. Gleason a second written counseling memorandum. It too said that her performance was unacceptable. The memorandum required her to produce 80% of her quota and maintain a minimum of seven people on her team. It also cautioned that failure to meet the requirements would result in "being moved to sales territory."

38. Ms. Gleason acknowledges that she understood that if she did not perform to the expected levels that she could be demoted.

39. After the written warning of September 24, 2009, Ms. Gleason's performance continued to be unacceptable. For October, Ms. Gleason had \$23,811 in sales for a total attainment of 23% of quota. Again, she did not maintain her team's headcount.

40. Sometime during the June through October period, Mr. Hines criticized Ms. Gleason's management style, saying that she "coddled" her personnel too much. He also directed her to read the book "Who Moved My Cheese" and discuss it with him and consider changing her management style.

41. Mr. Hines often recommended management books to all managers, male or female. There is no persuasive evidence that Ms. Gleason is the only person he required to read a recommended book and discuss it with him. Mr. Hines' comments and the reading requirement were efforts to help Ms. Gleason improve her performance and management.

42. During the June through October period, Ms. Gleason yawned during a manager meeting. She maintains that Mr. Hines' statement about her yawn differed from the words he spoke to a male manager who fell asleep in a meeting. The differences, she argues, demonstrated gender discrimination. They did not. In each instance Mr. Hines sarcastically commented on the manager's behavior in front of other employees. He made no gender references. And the comments were similar.

43. Sometime during the June through October period Mr. Hines also assigned Ms. Gleason to serve in an "Ambassador" role. "Ambassadors" were part of a Ricoh initiative to develop ways to improve the customer experience. There is no evidence that males were not also required to serve as "Ambassadors." And there is no persuasive evidence that this assignment was anything other than another effort to improve Ms. Gleason's management performance.

44. Also during the June through October period Ms. Gleason proposed hosting a team building event at a bowling alley. Someone in management advised her that the event could not be an official company sponsored event because the bowling alley served alcohol. Again, there is no evidence that males were subjected to different requirements or that the requirement was related to Ms. Gleason's gender.

45. During this same period, Ms. Gleason received written and oral communications from co-workers commenting on her difficulties meeting Mr. Hines' expectations. They observed that she was having a hard time and that they had seen Mr. Hines treat others similarly before discharging them. Nothing indicates that the others were female. These comments amount to typical office chatter and indicate nothing more than what the counseling documents said: Mr. Hines was unhappy with

Ms. Gleason's performance and was going to take adverse action if it did not improve.

46. On November 12, 2009, Ms. Gleason sent an email to Rhonda McIntyre, Regional Human Resources Manager. Ms. Gleason spoke to Ms. McIntyre that same day about her concerns about Hines' management style. Ms. Gleason said she was afraid that she may lose her job and that she was being set up for failure. Ms. McIntyre asked Ms. Gleason to send her concerns in writing.

47. Ms. Gleason did so on November 13, 2009. Ms. Gleason's e-mail raised several issues about Mr. Hines' management. But Ms. Gleason did not state in her email or her conversations that she was being discriminated against or treated differently because of her gender. Ms. Gleason never complained about gender discrimination to any Ricoh representative at any time.

48. On December 1, 2009, Mr. Hines demoted Ms. Gleason from sales manager to senior account executive. He assigned her to work on Mr. Arritt's team. Ms. Gleason had no issues with Mr. Arritt and no objection to being assigned to his team.

49. Mr. Hines has demoted male sales managers to account executive positions for failure to attain quotas or otherwise perform at expected levels. The male employees include Ed Whipper, Kim Hughes, and Michael Kohler. In addition,

Mr. Comancho was the subject of counseling before he chose to return to an account executive position.

50. After Mr. Hines demoted Ms. Gleason, he promoted Diego Pugliese, a male, to sales manager. He assigned Mr. Pugliese the same territory that Ms. Gleason had.

51. When Mr. Hines assigned Ms. Gleason to Mr. Arritt's team, Mr. Hines instructed Mr. Arritt to give Ms. Gleason two territories with substantial "machines in field" (MIF) to buttress Ms. Gleason's opportunity to succeed in her new position. Mr. Arritt assigned Ms. Gleason the two territories that records indicated had the most MIF. Ms. Gleason asserts that the preceding account executives maintained the records for the area poorly and that the new territories had no greater MIF than other areas. That fact does not indicate any intent to discriminate against Ms. Gleason on account of her gender.

52. In January 2010, after Ms. Gleason's demotion, Mr. Harrelson invited Ms. Gleason to attend a non-company sponsored, employees' poker party. She had been invited to other employee poker parties and attended some. Mr. Harrelson withdrew the invitation saying that Mr. Hines was attending and that Mr. Harrelson thought Ms. Gleason's presence would be uncomfortable. Mr. Harrelson did not say that Mr. Hines had made this statement. And Mr. Harrelson was not Ms. Gleason's supervisor. Nothing about the exchange indicates that

Ms. Gleason's gender had anything to do with withdrawal of the invitation. The incident seems to be based upon the natural observation that Mr. Hines might be uncomfortable socializing with someone he had recently demoted.

53. After her demotion, Ms. Gleason asked Mr. Arritt to go with her on a "big hit" sales call. Ms. Gleason claims that Mr. Arritt told her that Mr. Hines told him not to go on sales calls with her. That may have been Mr. Arritt's interpretation of what Mr. Hines said. Mr. Hines had told Mr. Arritt that because Ms. Gleason was an experienced sales representative Mr. Arritt should focus his efforts on the less experienced sales representatives on his team. This was a reasonable observation. There is no evidence indicating that Mr. Hines treated Ms. Gleason differently in this situation than he had similarly experienced males.

54. Ms. Gleason brought this issue to Ms. McIntyre's attention. The issue was resolved. Mr. Hines told Mr. Arritt that if Ms. Gleason wanted more assistance then Mr. Arritt should attend meetings with Gleason and provide any other assistance she believed she needed. Ms. Gleason had no other issues with Mr. Hines during the remainder of her employment.

55. On March 31, 2010, Ms. Gleason submitted a memorandum stating that she was resigning "effective immediately."

56. There is no evidence of derogatory or harassing comments by Mr. Hines or any other Ricoh representative toward Ms. Gleason referring to gender. There is no evidence of sexually suggestive comments or actions by a Ricoh representative. There also is no evidence of physically intimidating or harassing actions by any Ricoh representative.

CONCLUSIONS OF LAW

57. Ms. Gleason advances two claims. First, she maintains that Ricoh discriminated against her on account of her sex by demoting her. Second, she claims that Ricoh retaliated against her for complaining of gender discrimination.

58. Sections 120.569 and 120.57(1), Florida Statutes (2010), grant DOAH jurisdiction over the subject matter of this proceeding and of the parties.

59. Section 760.10 (1)(a), Florida Statutes (2009), makes it unlawful for an employer to take adverse action against an individual because of the individual's sex. Section 760.10(7) Florida Statutes (2009), makes it unlawful for an employer to discriminate against any person because that person has opposed an unlawful employment practice.

60. Section 760.11(7), Florida Statutes (2010), permits a party who receives a no cause determination to request a formal administrative hearing before the Division of Administrative Hearings. "If the administrative law judge finds that a

violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay."

Id.

61. The Florida Legislature patterned Chapter 760 after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida courts look to federal case law when interpreting Chapter 760. Valenzuela v GlobeGround North America, LLC., 18 So. 3d 17, 20 (Fla. 3d DCA 2009).

Discrimination Claim

62. A party may prove unlawful sex discrimination by direct or circumstantial evidence. Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989). Direct evidence did not establish unlawful discrimination in this case.

63. The evidence established, as set forth in the findings of fact, that Mr. Hines demoted Ms. Gleason because her performance was not satisfactory. He considered objective performance measures. He provided Ms. Gleason verbal and written notice of her performance deficiencies and the likelihood of demotion if she did not remedy them. He also attempted to help Ms. Gleason improve her performance through oral guidance and professional reading recommendations. Mr. Hines also demonstrated a lack of gender bias by proposing

that Ms. Gleason seek a promotion she had not applied for and promoting her over male applicants.

64. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround North America, LLC., 18 So. 3d 17, 21 (Fla. 3rd DCA 2009); Wascura v. City of South Miami, 257 F.3d 1238, 1242 (11th Cir. 2001). Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

65. The record is not sufficient to establish a prima facie case. Ms. Gleason argues that Mr. Hines treated her differently than male sales managers. She identifies differences in staffing and territory composition to support her argument. Nothing establishes that the differences necessarily or predictably made her job more or less difficult than that of her male colleagues. In addition, there is no evidence that identical sales areas or staff compositions were any sort of reasonable industry standard or even possible.

66. Ms. Gleason argues that Mr. Hines treated her differently than male managers whose performance was similar. The facts established by the evidence do not support the argument. First the facts reveal that Mr. Hines also demoted three male managers for not meeting the performance requirements. Second the facts show that Ms. Gleason's performance failings were not similar to those of the male managers who were not demoted. Both the magnitude of Ms. Gleason's failures to attain her sales quotas and her repeated poor performance differ from that of the male managers. Also, there is no persuasive evidence that any of the male managers Ms. Gleason identifies as having similar performance deficiencies failed to achieve and maintain the required headcount.

Retaliation Claim

67. Ms. Gleason did not establish that Ricoh retaliated against her for complaining of gender discrimination. The court in Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009), described the analysis required for a retaliation claim. The opinion says:

To establish a prima facie case of retaliation under section 760.10(7), a plaintiff must demonstrate: (1) that he or she engaged in statutorily protected activity; (2) that he or she suffered adverse employment action; and (3) that the adverse employment action was causally

related to the protected activity. See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385 (11th Cir.), cert. denied, 525 U.S. 1000, 119 S. Ct. 509, 142 L. Ed. 2d 422 (1998). Once the plaintiff makes a prima facie showing, the burden shifts and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1212 (10th Cir. 2003). The plaintiff must then respond by demonstrating that defendant's asserted reasons for the adverse action are pretextual. Id.

68. Ms. Gleason argues that her complaints to Ms. McIntyre were complaints about sex discrimination and therefore were statutorily protected activity and that she suffered adverse employment action because of them. The facts found do not establish a complaint about sex discrimination. Ms. Gleason complained about Mr. Hines' management. But she did not claim in her conversations or e-mails that Mr. Hines was treating her differently because of her gender. The comments of Ms. Gleason's co-workers even indicate that Mr. Hines was treating Ms. Gleason as he had treated other employees who were not meeting performance requirements. Consequently, Ms. Gleason's claim fails at the first step of the analysis. She did not engage in statutorily protected activity.

69. Ms. Gleason does not argue in her Proposed Recommended Order that her resignation amounted to a constructive discharge.

70. The facts do not support Ms. Gleason's claims of sexual discrimination and retaliation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations deny the Petition of Tamara A. Gleason in FCHR Case Number 2010-01263.

DONE AND ENTERED this 18th day of February, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.