STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHARON DOUSE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-3393
	)	
AGENCY FOR PERSONS WITH DISABILITIES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

An administrative hearing was conducted in this case on December 20, 2013, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Sharon Douse, pro se
5269 Peanut Road
Graceville, Florida 32440

For Respondent: Julie Waldman, Esquire
Kelly Anthony, Qualified Representative
Agency for Persons with Disabilities
1621 Northeast Waldo Road
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STATEMENT OF THE ISSUE

Whether Respondent, the Agency for Persons with Disabilities (Respondent or the Agency), violated the Florida Civil Rights Act of 1992, as amended, sections 760.01–760.11 and 509.092, Florida Statutes,[1/] by discriminating against

Petitioner, Sharon Douse (Petitioner), during her employment with the Agency and then by terminating her employment, based upon her disability, marital status, sex, color, race, age, and the national origin of her spouse, and by illegally retaliating against her.

PRELIMINARY STATEMENT

On March 29, 2012, Petitioner filed a charge of discrimination (Charge of Discrimination) with the Florida Commission on Human Relations (Commission). After investigating Petitioner's allegations, the Commission's executive director issued a Determination of No Cause on September 26, 2012, finding that "no reasonable cause exists to believe that an unlawful employment discrimination practice occurred . . . ." An accompanying Notice of Determination notified Petitioner of her right to file a Petition for Relief for an administrative proceeding within 35 days of the Notice.

On October 15, 2012, Petitioner timely filed a Petition for Relief and, on October 16, 2012, the Commission forwarded the petition to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct an administrative hearing. The case was originally scheduled for a final hearing to be held on November 29, 2012, but was rescheduled and subsequently held on December 20, 2012.

During the administrative hearing, Petitioner called one witness, testified on her own behalf, and introduced 13 exhibits which were received into evidence as Exhibits P-1 through P-13. Respondent called three witnesses and offered six exhibits which were received into evidence as Exhibits R-1 through R-6.

The proceedings were not recorded. The parties were given 30 days from the date of the hearing to submit their respective proposed recommended orders. The parties timely filed their Proposed Recommended Orders, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Sunland Center in Mariana, Florida, is operated by the Agency as an intermediate-care facility for developmentally-disabled individuals. Connally Manor is a residential setting within Sunland Center for 16 developmentally-disabled individuals with significant behavioral and medical involvement.

2. Petitioner began her employment with the Agency on July 15, 2011, until her dismissal on January 5, 2012. During her employment, she was classified as career-service employee, Human Services Worker II, assigned to provide direct care for residents in Connally Manor.

3. As a career-service employee, Petitioner was required to serve a one-year probationary period, during which she was subject to termination at will.

4. While employed with the Agency, Petitioner had a number of performance deficiencies and conflicts with her co-workers and supervisors.

5. On July 22, 2011, Petitioner attended training for the treatment and care of residents. Shortly thereafter, however, Petitioner mishandled residents on at least two occasions. As a result, Joe Grimsley, a senior human services support supervisor for the Agency, suspended Petitioner from working independently with residents, and asked Petitioner to work closely with her peers to learn appropriate care procedures.

6. On August 25, 2011, because of excessive absences and failure to perform duties in a timely manner, Petitioner received counseling from Mr. Grimsley and Agency behavior program supervisor Scott Hewett. Petitioner was counseled for excessive absences because, from July 18 through August 22, 2011, Petitioner took a total of 48 hours of leave time, which was greater than the Agency's policy of no more than 32 hours in a 90-day period. Although Petitioner discussed most of those absences with her supervisor prior to taking the time off, as a result of her absences, Petitioner missed some of her initial training, including professional crisis management training.

7. During the August 25, 2011, counseling session, Mr. Grimsley and Mr. Hewett also discussed other issues of concern with Petitioner, including resident care, following

chain of command, team work, proper parking, and data collection sheets.

8. As a follow-up, on the same day as the August 25th counseling, Petitioner received some in-service training regarding proper log book documenting, proper use of active treatment sheet, and unauthorized and excessive absences.

9. Mr. Grimsley permitted Petitioner to go back to her duties of working directly with residents after she received additional training on August 27, 2011.

10. On September 8, 2011, Petitioner's supervisors once again found it necessary to counsel Petitioner regarding resident care, chain of command, teamwork, parking, and data collection, as well as to address two incidences of unsafe handling of residents, and Agency policy regarding food in the bedrooms, and class and work schedules.

11. Because of Petitioner's continued performance deficiencies, on October 5, 2011, Mr. Grimsley wrote an interoffice memorandum to his supervisor, Agency residential services supervisor, Julie Jackson, recommending Petitioner's termination. The memorandum stated:

> Mrs. Jackson:
>
> I am writing to you in regard to Mrs. Sharon Douse HSW II Second Shift Connally Manor Unit 3.

> Mrs. Douse came to us July 15, 2011, since then she has had three employee documented conferences, due to poor work habits, resulting in corrective action, including retraining. These deficiencies include and are not limited to data collection, excessive absences, and unsafe handling of residents. This past week she was insubordinate to her immediate supervisor by refusing to answer the phone after being requested to do so twice, and being directed that it is part of her job.
>
> [Mr. Hewett] as well as my self [sic] has made every effort to help Mrs. Douse achieve her performance expectation; however these attempts have been met with resistance as Mrs. Douse openly refuses to take direction from her supervisors and also to seek the assistance of her peers, who have many years of experience working with the Connally Manor population. Mrs. Douse has not met probationary period. Her continual resistance to positive mentoring and her confrontational attitude and demeanor towards her supervisors and coworkers is creating an increasingly difficult work environment, not only on Connally Manor, but also on the other houses within the unit.
>
> It is apparent that Mrs. Douse lacks the willingness to improve her overall poor work performance. I am formally requesting Mrs. Douse to be terminated from her employment here in Unit 3.

12. Mr. Grimsley's testimony at the final hearing was consistent with the above-quoted October 5, 2011, interoffice memorandum, and both his testimony and memorandum are credited.

13. Upon receiving Mr. Grimsley's memorandum, Ms. Jackson submitted a memo dated October 26, 2011, to the Agency's program operations administrator, Elizabeth Mitchell, concurring with

the request for Petitioner's termination. In turn, Ms. Mitchell agreed and forwarded her recommendation for termination to Sunland's superintendent, Bryan Vaughan. Mr. Vaughan approved the recommendation for termination, and, following implementation of internal termination proceedings, Petitioner was terminated on January 5, 2012, for failure to satisfactorily complete her probationary period.

14. Petitioner made no complaints to Mr. Grimsley or anyone else in the Agency's management until after Mr. Grimsley's October 5, 2011, memorandum recommending Petitioner's termination.

15. Petitioner's Charge of Discrimination filed with the Commission on March 29, 2012, after her termination, charges that she was "discriminated against based on retaliation, disability, marital status, sex, color, race and age." The evidence adduced at the final hearing, however, failed to substantiate Petitioner's allegations.

16. In particular, Petitioner's Charge of Discrimination[2/] alleges that Mr. Grimsley discriminated against her because of her age by "not providing [her] with the same training as offered the other employees -- [professional crisis management training] was offered to the younger employees who were hired at or around the same time [as Petitioner]." The evidence at the final hearing, however, showed that Petitioner was scheduled

for, but missed professional crisis management training, because of her absences early in her employment. The evidence also showed that professional crisis management training was not necessary for the position for which Petitioner was hired. Nevertheless, the evidence also demonstrated that, if Petitioner had not been terminated, the Agency intended to provide her with that training.

17. Petitioner's Charge of Discrimination also asserts that Mr. Grimsley discriminated against her by "[n]ot allowing [her] to have . . . scheduled time off . . . [and taking away her] scheduled time off August 12th & 13th and [giving it to a] Caucasian female." The evidence did not substantiate this allegation. Rather, the evidence demonstrated that Petitioner had extraordinary time off during her first two months of employment.

18. Next, Petitioner's Charge of Discrimination states that Mr. Grimsley did not follow up on her written concerns and verbal complaints to the "depart[ment] head" regarding the welfare of the disabled residents. Petitioner alleges that she was terminated as a result of her complaint that Mr. Grimsley "sat in the kitchen and baked cookies with the staff who were neglecting disabled residents." Petitioner, however, failed to present any evidence at the final hearing with regard to this allegation. Rather, the evidence showed that, while employed,

Petitioner never reported any instances of abuse, neglect, or exploitation to the Florida Abuse Registry, as required by her training. And, there is no evidence that she reported any such concerns to any outside agency prior to her Charge of Discrimination. Petitioner otherwise presented no evidence suggesting that she was terminated in retaliation for engaging in any protected activity.

19. Petitioner's Charge of Discrimination further states that she was discriminated against on the basis of her disability because Mr. Grimsley did not allow her to be properly monitored by her physician, and that when she would bring in her doctor's notes, Mr. Grimsley would refuse to put them in her personnel file. The only support for this claim were two medical reports on Petitioner, one prepared in April 2011, and one prepared in October 2011.

20. According to Petitioner, she gave the reports to someone at the Agency's human resources office. She could not, however, identify the person to whom she gave the reports. Also, according to Petitioner, it was in November 2011, after she was recommended for termination, that she gave her medical reports to the Agency to be filed. Considering the circumstances, the undersigned finds that Petitioner's testimony regarding this allegation is not credible.

21. In addition, the evidence did not show that Petitioner ever asked the Agency for an accommodation for her alleged disability. Rather, based upon the evidence, it is found that Petitioner never advised the Agency, and the Agency was unaware, that Petitioner had a disability. It is also found that Petitioner never asked the Agency for an accommodation for her alleged disability.

22. Petitioner, in her Charge of Discrimination, further contends that part of the employee counseling session documented on employee-documented conference forms dated August 25, 2011, and all of the counseling session documented in a September 8, 2011, employee-documented conference form, were held without her, and that some of the concerns expressed on those documents were fabricated. There were two forms documenting discussions from the August 25th session that were submitted into evidence — - one was signed by Petitioner, the other was not. The employee-documented conference form from the September 8, 2011, session was signed by Petitioner's supervisors, but not Petitioner.

23. Mr. Grimsley, who was present for all of the counseling discussions with Petitioner documented on the forms, testified that the documented discussions occurred, but that he just forgot to get Petitioner's signatures on all of the forms. During the final hearing, Petitioner acknowledged most of the

documented discussions, including two incidents of mishandling residents and the resulting prohibition from working with residents imposed on her until she received additional training. Considering the evidence, it is found that all of the counseling discussions with Petitioner documented on the three forms actually took place, and that they accurately reflect those discussions and the fact that Petitioner was having job performance problems.

24. Petitioner's Charge of Discrimination also alleges that a fellow employee discriminated against her because of her age and race based on an incident where, according to Petitioner, a co-worker screamed and yelled at her because Petitioner had not answered the house telephone. At the hearing, Petitioner submitted into evidence affidavits regarding the incident from the co-worker and another worker who observed the incident. Neither of the affidavits supports Petitioner's contention that she was discriminated against. Rather, they both support the finding that Petitioner had trouble getting along with co-workers and accepting directions from Agency staff. Further, according to Petitioner, after she talked to Mr. Grimsley about the incident, he spoke to both Petitioner and the co-worker, and their conflict was resolved. The incident occurred after Mr. Grimsley had already recommended that Petitioner be terminated.

25. Finally, Petitioner alleges in her Charge of Discrimination that Mr. Hewett discriminated against her based upon her marital status, race, and the national origin of her spouse. In support, Petitioner contends that Mr. Hewett "made rude comments about art work on my locker that Scott knew my husband had drawn[,]" asked, "[do] blacks like classical music?" and, upon seeing Petitioner's apron that was embroidered with a Jamaican flag, Mr. Hewett said, "You can't trust things from overseas," when he knew that her husband was Jamaican. Petitioner also stated that Mr. Hewett "bullied her" about answering the telephone.

26. While Petitioner testified that she wrote to Agency management regarding these comments and the alleged bullying by Mr. Hewett, she did not retain a copy. The Agency claims that Petitioner never complained about these alleged comments or Mr. Hewett's alleged bullying while she was an employee. Considering the evidence presented in this case, and Petitioner's demeanor during her testimony, it is found that Petitioner did not raise these allegations against Mr. Hewett until after her termination from the Agency.

27. It is further found that if Mr. Hewett made the alleged comments, as described by Petitioner during her testimony, Mr. Hewett's comments were isolated and not pervasive. Further, Petitioner's testimonial description of

Mr. Hewett's comments did not indicate that his comments were overtly intimidating, insulting, or made with ridicule, and the evidence was insufficient to show, or reasonably suggest, that Mr. Hewett's alleged comments made Petitioner's work environment at the Agency hostile or intolerable.

28. In sum, Petitioner failed to show that the Agency discriminated against Petitioner by treating her differently, creating a hostile work environment, or terminating her because of her disability, marital status, sex, color, race, age, or her spouse's national origin. Petitioner also failed to show that the Agency retaliated against her because of any complaint that she raised or based upon Petitioner's engagement in any other protected activity.

CONCLUSIONS OF LAW

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

30. The State of Florida, under the legislative scheme contained in sections 760.01–760.11 and 509.092, Florida Statutes, 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.

31. The Florida law prohibiting unlawful employment practices is found in section 760.10. That section prohibits discrimination "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." § 760.10(1)(a), Fla. Stat.

32. 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).

33. 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.[3/] Usually, however, 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).

34. 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. & 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.").

35. Therefore, in order to prevail in her claim against the Agency, 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.").

36. "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.").

37. Petitioner's Charge of Discrimination against the Agency, in essence, alleges that Petitioner was subjected to disparate treatment and terminated because of her disability, marital status, sex, color, race, age, and national origin of her spouse. Petitioner's Charge of Discrimination also mentions retaliation. Petitioner, however, failed to prove her allegations.

38. Petitioner did not present any statistical or direct evidence of discrimination, and otherwise failed to present a prima facie case of discrimination based on disparate treatment.

39. In order to establish a prima facie case of discrimination based on disparate treatment, a petitioner must show that: (1) she belongs to a protected class; (2) she was subjected to adverse job action; (3) her employer treated similarly-situated employees outside her classification more

favorably; and (4) she was qualified to do the job. Holifield, 115 F.3d at 1562.

40. To demonstrate that similarly-situated employees outside her protected class were treated more favorably, Petitioner must show that a "comparative" employee was "similarly situated in all relevant respects," meaning that an employee outside of Petitioner's protected class was "involved in or accused of the same or similar conduct" and treated in a more favorable way. Id.

41. As far as the verbal and written counseling that Petitioner received prior to her termination, Petitioner failed to present evidence that similarly-situated employees outside Petitioner's protected class were or would have been treated any differently.

42. Petitioner also failed to present sufficient evidence to show disparate treatment resulting in her discharge by failing to identify another non-protected class employee with similar job performance problems during their employment probationary period that was not terminated, as was Petitioner.

43. Therefore, Petitioner did not establish a prima facie case of discriminatory counseling, discipline, discharge, or unfairness based on disparate treatment.

44. When a Petitioner fails to present a prima facie case the inquiry ends and the case should be dismissed. Ratliff v. State, 666 So. 2d 1008, 1013 n.6 (Fla. 1st DCA 1996).

45. Even if Petitioner had established a prima facie case of discriminatory treatment or discharge, the Agency met its burden of demonstrating that it had legitimate, nondiscriminatory reasons for counseling and then ultimately discharging Petitioner.

46. The Agency demonstrated that the documented counseling sessions held with Petitioner and her subsequent termination, were legitimate and based on Petitioner's poor job performance. The Agency also presented evidence showing that the reason Petitioner did not receive professional crisis management training was because of her absences from work. The Agency further showed that, even though the training was not required for her position, Petitioner would have eventually received the training, had she had not been terminated.

47. The evidence demonstrated that the Agency counseled and eventually terminated Petitioner without regard to Petitioner's membership in any protected class, but rather, based upon legitimate, non-discriminatory reasons.

48. Petitioner offered no proof that the Agency's proffered reasons for counseling or discharging her, or the Agency's explanation of why Petitioner did not receive

professional crisis management training, were pretexts for unlawful discrimination. In proving that an employer's asserted reason is merely a pretext:

> A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute [her] business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason.

Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000).

49. Petitioner's speculation as to the motives of the Agency, standing alone, is insufficient to establish a prima facie case of discrimination. See, e.g., Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001) (Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.").

50. For the foregoing reasons, it is concluded that Petitioner failed to establish her claim of discrimination based on disparate treatment.

51. Petitioner also failed to demonstrate that she was subjected to discrimination based upon a hostile work environment. A hostile work environment claim is established upon proof that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe

or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1998)). Evidence of Mr. Hewett's alleged comments was insufficient to reasonably demonstrate that Petitioner's work environment at the Agency was a hostile work environment permeated with discriminatory intimidation, ridicule, or insult. Rather, Petitioner's testimonial description of Mr. Hewett's comments, if accurate, indicated that they were isolated, not pervasive, and not suggestive of an abusive work environment. In addition, while it was shown that Petitioner had conflicts with other employees, the evidence in that regard did not demonstrate a hostile work environment based on discrimination, but rather was indicative of Petitioner's inability to get along with co-workers.

52. Petitioner also failed to demonstrate that the Agency unlawfully retaliated against her. Petitioner presented no direct evidence of retaliation. Thus, under the same burden-of-proof analysis discussed above, Petitioner must first establish a prima facie case. In order to demonstrate a prima facie case of retaliation, Petitioner must show: (1) that she was engaged in statutorily-protected expression or conduct; (2) that she suffered an adverse employment action; and (3) that there is

some causal relationship between the two events. Holifield, 115 F.3d at 1566.

53. Petitioner failed to establish a causal link between any alleged protected conduct and the adverse employment actions. As to whether Petitioner was engaged in statutorily-protected conduct or expression, Petitioner asserted at the final hearing that, prior to her termination, she complained to management about Mr. Grimsley's neglect of residents and about Mr. Hewett's alleged discriminatory comments and bullying. Petitioner failed, however, to prove that she made these complaints prior to her termination.

54. Even if Petitioner had proved that she had actually complained about Mr. Grimsley or Mr. Hewett prior to her termination, the Agency advanced legitimate, non-retaliatory reasons for Petitioner's counseling and termination. Like the disparate treatment analysis, above, in claims asserting retaliation, once an employer offers a legitimate, non-discriminatory reason to explain the adverse employment action, a Petitioner must prove that the proffered reason was pretext for what actually amounted to discrimination. Id. Rather than supported by credible evidence, the only support Petitioner has for the Agency's alleged retaliatory motives is based upon Petitioner's unsupported opinion which, standing alone, is insufficient. See Lizardo, supra.

55. Petitioner did not carry her burden of persuasion necessary to state a prima facie case for her claims of discrimination or retaliation under any theory advanced by Petitioner. Even if she had, the Agency proved legitimate, nondiscriminatory reasons for the counseling Petitioner received and for termination of Petitioner's employment, which Petitioner failed to show were a mere pretext for unlawful discrimination.

56. Therefore, it is concluded, based upon the evidence, that the Agency did not violate the Florida Civil Rights Act of 1992, and is not liable to Petitioner for discrimination in employment or unlawful retaliation.

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 Charge of Discrimination and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 7th day of February, 2013, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of February, 2013.

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/] The particulars of Petitioner's allegations are set forth on the two pages attached to the Charge of Discrimination.

[3/] 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.