

**BEFORE THE STATE PERSONNEL BOARD
IN THE MATTER OF**

LATRICIA SCOTT,)	
)	
Appellant,)	
)	
v.)	Case No: 16-23-RCS
)	
ALABAMA DEPARTMENT OF)	
REVENUE,)	
)	
Appellee.)	

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

This Recommended Order arises from an employment termination action by the Alabama Department of Revenue (hereinafter “DOR”). DOR terminated the employment of Latricia Scott (hereinafter “Scott” or “the employee”) based upon job abandonment. DOR relied on the testimony of witnesses and exhibits. The evidence presented by DOR during the hearing demonstrated a violation of DOR rules and policies. Therefore, DOR’s decision to dismiss Scott was within its authority and should be upheld.

A hearing was held on June 30, 2016, at the State Personnel Department in Montgomery, Alabama. Gwendolyn Garner, Esq., appeared as counsel on behalf of DOR. Scott proceeded *pro se*.

DOR introduced into evidence seven exhibits consecutively numbered DOR Exhibits 1-7. Scott introduced two exhibits into the record, numbered Employee

Exhibits 1-2. The undersigned informed the parties that Scott's personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

DOR called as witnesses:

- (1) Susan Valynn Helms, DOR Director of Collection Services Division;
- (2) Linda Ellis, DOR Personnel Manager; and
- (3) Archie Rowe, DOR EEO and EAP Coordinator.

Scott called her husband, Ernest Scott, to testify and also testified on her own behalf.

I. PROCEDURAL HISTORY AND CHARGES

Scott began State employment in July 2014 as an Account Clerk when she was hired by DOR. Scott remained in that classification until her dismissal.

Following the pre-dismissal conference conducted on May 2, 2016, DOR terminated Scott's employment, effective close of business May 3, 2016. *See* DOR Exhibit 3 (dismissal letter dated March 3, 2016, signed by Julie P. Magee, Commissioner). DOR determined:

...

You are being dismissed as a result of being on unapproved leave without pay since April 15, 2016. You were initially placed on mandatory leave effective March 18, 2016 for ten (10) work days due to a disruption in the workplace and a reported verbal threat concerning another employee that occurred on March 17, 2016. You approached a co-worker's cubicle, accused her of stealing your sweater and

demanded that she give it back to you. After the altercation, the co-worker reported the incident to management and said that she felt frightened and did not feel safe. Another co-worker heard you make the statement, "I'll beat her ass and still come back to work." Your husband came and picked up Family and Medical Leave Act (FMLA) paperwork on March 23, 2016. He stated that you had been admitted to Beth Manor. Mandatory leave was extended for an additional ten (10) work days on April 1, 2016 to allow you time to submit FMLA certification from your health care provider. Your placement on mandatory leave expired on April 14, 2016. You were sent another letter on April 18, 2016 concerning the status of your employment with the Department of Revenue. You also called the department on April 18, 2016 and stated to Ms. Linda Ellis, Personnel Manager, that you didn't think you were going to submit FMLA paperwork and that you had been held against your will at Beth Manor. Ms. Ellis explained to you that you were on unapproved leave without pay and that you would be recommended for termination if we didn't receive the FMLA certification by April 26, 2016. Your husband called on April 19, 2016 and stated that you were at a different facility now, and he came and picked up another set of FMLA paperwork on that day. He was advised that you were told that we had to have the FMLA paperwork in our office by April 26, 2016. To date, we have not received any FMLA paperwork concerning your health condition. Your unapproved absences from work are not acceptable.

...

Id.

Scott timely appealed her employment dismissal to the State Personnel Board and requested a hearing, pursuant to ALA. CODE § 36-26-27(a) (1975).

In its Plain Statement of the Facts, DOR reiterated its charges against Scott and cited the same DOR policies listed in the charge and dismissal letters.

On June 30, 2016, the undersigned conducted a *de novo* hearing, at which *ore tenus* and documentary evidence was received.

II. FACTUAL BACKGROUND

Having reviewed the documentary evidence and having heard the testimony presented at the hearing and having observed the witnesses' demeanor and assessed their credibility, the undersigned finds the greater weight of the evidence supports the following findings of fact.¹

A. Employee's Personnel File²

Scott's annual performance appraisals while at DOR reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
11/15	35.0	Exceeds Standards
12/14 ³	35.0	Exceeds Standards

Scott did not have any prior discipline with DOR.

B. DOR Policies and State Personnel Board Rules Forming the Basis of the Charges

DOR Policy:

The DOR Employee Handbook states, in pertinent part:⁴

Misconduct or Violence In The Workplace

...

¹ All references to exhibits and testimony are intended to assist the State Personnel Board in considering this Recommended Order and are not necessarily the exclusive sources for such factual findings.

² See generally State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history, considered in dismissing employee).

³ Probationary Performance Appraisal.

⁴ DOR Exhibit 4, p. 28.

I. Specifically, employees are expected to behave as follows:

...

- d. Misunderstandings or disagreements will be discussed in a respectful manner. Supervisors will make the final decision to resolve the situation and employees will abide by the decision.

...

State Personnel Board Work Rules

Chapter 670-X-18-.02 Dismissals provides, in pertinent part:

- (1) An appointing authority may dismiss a classified employee whenever he considers the good of the service will be served thereby, for reasons which shall be stated in writing, served on the affected employee and a copy furnished to the Director, which action shall become a public record.

...

Chapter 670-X-19-.01 General Work Rules provides, in pertinent part:

- (1) In addition to any special rules issued by the various appointing authorities for the guidance of their employees, the following standard general work rules shall apply to all classified employees:

...

- (b) More serious violations that may result in suspension or discharge on the first offense.

...

- 5. Use of abusive or threatening language.

...

10. Serious violation of any other department rule.
11. Leaving job station without permission.
12. Disruptive conduct of any sort.
13. Conduct unbecoming a state employee.

...

C. Facts Forming the Basis of Dismissal

On March 17, 2016, Scott approached co-worker Wanda Walton (“Walton”) and falsely accused Walton of stealing her sweater. Scott demanded the sweater be returned. Walton did not steal Scott’s sweater and felt threatened by the accusation. Another employee, Jasmine Williams (“Williams”), overheard Scott say, “I’ll beat her ass and still come back to work.” Walton reported the incident to the Director of the Collection Services Division, Susan Valynn Helms (“Helms”). Helms sent Walton and Williams home and then called Linda Ellis (“Ellis”) in DOR’s Personnel Division.

On March 18, 2016, Scott met with Archie Rowe (“Rowe”), DOR’s EEO and EAP Coordinator. Following her meeting with Rowe, Scott was placed on mandatory leave pending an investigation into the incident.⁵ Rowe testified he

⁵ Testimony of Ellis and DOR Exhibit 5.

recommended to Scott she see a doctor concerning her disruptive and threatening outbursts at work.

On March 23, 2016, Scott's husband, Earnest Scott ("Earnest"), spoke with Ellis and another DOR employee, Annette Russell, about the Family and Medical Leave Act ("FMLA"). Earnest left with FMLA paperwork to fill out. On March 29, 2016, Earnest had Scott involuntarily committed because she was non-compliant with her medication and therapy.⁶

On April 1, 2016, DOR extended Scott's mandatory leave for an additional ten days to allow her to provide FMLA certification from her health care provider.⁷ On April 18, 2016, Scott called Ellis. Ellis explained FMLA job protection to Scott and sent her a letter further explaining that she needed to submit the FMLA Certification from her health care provider by April 26, 2016 or she would be recommended for dismissal from State service. Scott told Ellis on the telephone she did not want to fill out the FMLA paperwork and she was being held against her will at a local mental health facility.

On April 19, 2016, Earnest called Ellis and informed her Scott escaped the medical facility, Beth Manor. Earnest told Ellis that Scott was moved to a more secure facility, the Crisis Unit. Earnest went to DOR and retrieved a second copy

⁶ Testimony of Earnest and Employee Exhibit 1.

⁷ DOR Exhibit 6.

of FMLA paperwork. Ellis told Earnest that the paperwork needed to be returned to DOR by April 26, 2016.

Ultimately, DOR did not receive FMLA paperwork from Scott or Earnest by April 26, 2016. In fact, DOR never received FMLA paperwork from Scott or her husband. On April 28, 2016, Ellis sent Scott a notice of Scott's proposed dismissal from DOR for failure to return FMLA paperwork in a timely fashion. A pre-dismissal conference was scheduled for May 2, 2016. Scott failed to attend the pre-dismissal conference or offer any documentation in her defense. Scott's dismissal was effective May 3, 2016.

Earnest testified he did not return the FMLA paperwork because Scott did not list him as a caregiver. Earnest explained the doctors would not speak with Earnest about Scott's condition and would not accept FMLA paperwork from him since he was not included on her list of people they could speak with concerning her condition. Scott was dismissed from the Crisis Unit on or about May 13, 2016.⁸ Following her release, Scott did not attempt to complete or file FMLA paperwork with DOR.

III. ISSUE

Did DOR produce sufficient evidence to warrant dismissal of Scott?

⁸ Employee Exhibit 2.

IV. DISCUSSION

Standard of Review

The purpose of the administrative appeal is to determine if the termination of the employee's employment is warranted and supported by the evidence. *Kucera v. Ballard*, 485 So. 2d 345 (Ala. Civ. App. 1986); *Thompson v. Alabama Dept. of Mental Health*, 477 So. 2d 427 (Ala. Civ. App. 1985); *Roberson v. Personnel Bd. of the State of Alabama*, 390 So. 2d 658 (Ala. Civ. App. 1980). In *Earl v. State Personnel Board*, 948 So. 2d 549 (Ala. Civ. App. 2006), the Alabama Court of Civil Appeals reiterated:

“[D]ismissal by an appointing authority ... is reviewable by the personnel board only to determine if the reasons stated for the dismissal are sustained by the evidence presented at the hearing.”

Id. at 559, quoting *Johnston v. State Personnel Bd.*, 447 So. 2d 752, 755 (Ala. Civ. App. 1983).⁹

In determining whether an employee's dismissal is warranted, the departmental agency bears the burden of proving the charges warrant termination by a “preponderance of the evidence.” The law is well settled that a “preponderance of the evidence” standard requires a showing of a *probability* that the employee is

⁹ The Alabama Court of Civil Appeals went further to hold: “both this court and the circuit court must take the administrative agency's order as ‘prima facie just and reasonable’ and neither this court nor the circuit court may ‘substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.’” *Id.* at 559, citing ALA. CODE § 41-22-20(k) (1975); *State Dept. of Human Res. v. Gilbert*, 681 So. 2d 560, 562 (Ala. Civ. App. 1995).

guilty of the acts as charged. **Thus, there must be more than a mere possibility or one possibility among others that the facts support the disciplinary action at issue.** The evidence must establish that *more probably than not*, the employee performed, or failed to properly perform, as charged. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S. Ct. 1953, 138 L.Ed. 2d 327 (1997), holding that a “significant possibility” falls far short of the Administrative Procedure Act’s preponderance of the evidence standard. *See also Wright v. State of Tex.*, 533 F.2d 185 (5th Cir. 1976).¹⁰

An administrative agency must act within its constitutional or statutory powers, supporting its decision with substantial evidence. “Substantial evidence has been defined as such ‘relevant evidence as a reasonable mind might accept as adequate to support a conclusion,’ and it must be ‘more than a scintilla and must do more than create a suspicion of the existence of a fact to be established.’” *Alabama Alcoholic Beverage Control Bd. v. Tyson*, 500 So. 2d 1124, 1125 (Ala. Civ. App. 1986).

In the present case, DOR provided substantial evidence Scott violated DOR policy and State Personnel Board rules and regulations. Scott committed a serious violation of DOR policy on March 17, 2016 when she falsely accused Walton of

¹⁰ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

stealing her sweater and then made threatening statements that were overheard by Williams. Her actions violated DOR's policy regarding Misconduct and Violence in the Workplace as well as State Personnel Board Work Rules 670-X-19-.01(1)(b)(5) – use of abusive or threatening language; and 670-X-19-.01(1)(b)(12) – disruptive conduct of any sort. These are considered more serious offenses that may result in suspension or dismissal on the first offense.

Furthermore, Scott violated State Personnel Board Work Rule 670-X-19-.01(1)(b)(13) – conduct unbecoming a State employee by failing to return her FMLA Certification paperwork. The purpose of the FMLA is to balance the demands of the workplace with the needs of families and to entitle employees to take *reasonable* leave for medical reasons.¹¹ It is important to point out that the purpose of FMLA “[i]s both intended and expected to benefit employers as well as employees. A direct correlation exists between stability in the family and productivity in the workplace.”¹² It is intended to be a cooperative effort between employer and employee. In this case, Scott did not cooperate and did not fulfill her obligation pursuant to federal law governing FMLA. Scott's leave was unforeseeable. She stopped taking her medication and refused to utilize her therapy techniques. As a result her husband had her involuntarily committed to a facility to improve her

¹¹ See 29 U.S.C. §2601(b)(1-4).

¹² See 29 CFR §825.101(c).

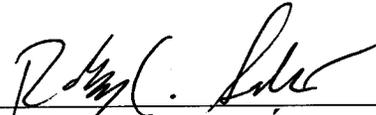
condition. DOR fulfilled its obligation to Scott and Earnest by giving Earnest FMLA paperwork on two separate occasions. Furthermore, Ellis spoke with Scott on the telephone about the FMLA paperwork and Scott indicated she did not intend to file the paperwork. Ellis sent a letter to Scott reminding her of the importance of the FMLA paperwork and even warned her that failure to return the certification documents would result in a recommendation for Scott's dismissal from State service. Scott never filed her FMLA Certification paperwork. The law governing FMLA states:

(b) Unforeseeable leave. In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. ***If the employee never produces the certification, the leave is not FMLA leave.*** 29 C.F.R. § 825.313 "Failure to provide certification."

The evidence in the record clearly showed Scott never returned her FMLA Certification paperwork to DOR. By rule, her leave was not FMLA leave and therefore she had no protection from dismissal.

Accordingly, the undersigned finds the totality of the evidence warrants dismissal in this cause. Therefore, the undersigned recommends to the State Personnel Board that the dismissal be UPHOLD.

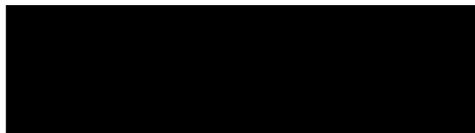
Done this the 16th day of August, 2016.



RANDY C. SALLÉ
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VIA CERTIFIED AND FIRST CLASS U.S. MAIL

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