

Coen, Esq., and Kaasha D.B. Griffin, Esq., appeared as counsel on behalf of DOT. Hill proceeded *pro se*, but failed to appear at the hearing.¹

DOT introduced into evidence 28 exhibits consecutively marked DOT Exhibits 1-28.² Hill did not present any additional exhibits for consideration. Hill's personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

DOT called the following individuals as witnesses during the hearing:

- (1) Lonnie Barnett, Drill Crew Technologist;
- (2) Kathy Gwin, Office Manager/Materials & Tests Bureau; and
- (3) Kay Chancellor Davis, Assistant Materials & Tests Engineer/Geotechnical.

I. PROCEDURAL HISTORY AND CHARGES

Hill began State employment in October 2013 as an Engineering Assistant I when he was hired by DOT. Hill was promoted to Engineering Assistant II in April 2015. He was promoted to Engineering Assistant III in October 2016 and remained in that classification until his dismissal.

¹ Hill participated in the prehearing and assisted with the selection of the hearing date, time and location.

² Due to the sensitive nature of, and/or the privacy protected material contained in portions of some exhibits, DOT Exhibits 11, 21, and 28 are hereby placed UNDER SEAL and are not available for public inspection without appropriate Court Order, an Order from the Administrative Law Judge acting under the authority of the State Personnel Board, or an Order of the State Personnel Board.

Following the pre-dismissal conference conducted on August 8, 2018, DOT terminated Hill's employment, effective close of business August 8, 2018. *See* DOT Exhibit 3 (dismissal letter dated August 8, 2018, signed by Transportation Director John Cooper). DOT determined:

...

A pre-dismissal conference was scheduled for you on August 8, 2018. Said conference was designed to afford you an opportunity to present any relevant information regarding your proposed dismissal, and you failed to attend said conference. After considering your non-response, I have concluded that your dismissal is warranted.

...

On July 19, 2018, a letter was mailed to you notifying you of the exhaustion of your leave entitlement under the Family and Medical Leave Act (FMLA), had expired and that your deadline to return the appropriate paperwork from your physician, as required to return to duty, was extended to July 26, 2018.

As of the date of this letter, you have not submitted a fitness to return to duty, nor have you called in and/or communicated with your supervisor or the Bureau Office Manager.

...

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

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

On October 19, 2018, 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.³

A. Employee's Personnel File⁴

Hill's annual performance appraisals while at DOT reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
2/18	26.7	Exceeds Standards
3/17 ⁵	26.7	Exceeds Standards
8/16	27.5	Exceeds Standards
9/15 ⁶	27.5	Exceeds Standards
2/15	27.5	Exceeds Standards
4/14 ⁷	27.5	Exceeds Standards

³ 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.

⁴ See generally State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history).

⁵ Engineering Assistant III Probationary Performance Appraisal.

⁶ Engineering Assistant II Probationary Performance Appraisal.

⁷ Engineering Assistant I Probationary Performance Appraisal.

Hill's prior disciplinary actions include:

- Counseling on October 30, 2017 for a violation of DOT's Attendance/Punctuality Policy.
- Verbal Warning on October 11, 2017 for failing to follow safety precautions and failing to follow a supervisor's instructions.

B. DOT Policies/Procedures Forming the Basis of the Charges

DOT's FMLA Policy and Procedure Manual provides, in pertinent part:

Restoration and Fitness for Duty

...

As a condition of reinstatement, the Department may also require certification from a health care provider that the employee is able or fit to resume productive work status of the position's essential job functions.

...

Employee's Continued Illness after Exhaustion

...

If the employee has exhausted all leave options, the employer may dismiss the employee or determine that the employee voluntarily resigned employment. An employer who considers this option must determine whether the employer would take similar action against another employee who had exhausted all leave and was ill, but had not taken FMLA leave. Such an analysis will assist an employer in avoiding retaliation claims under the FMLA.

...

C. Facts Forming the Basis of Dismissal

In October 2017, Hill began exhibiting erratic behavior. Hill's immediate supervisor, Lonnie Barnett ("Barnett"), a Transportation Technologist, worked as the Assistant Crew Chief and was responsible for monitoring the workers assigned to his crew. Barnett testified that on one occasion his crew was working in the roadway with a lane closure and Hill walked out into a travel lane and just stood there. Two of the crew members told Hill to move out of the lane. Hill then placed a traffic cone on his head and stated he was a traffic cone. After further instruction to leave the roadway, Hill tarried a bit longer and then walked back to the side of the road.⁸ Later that month, Hill was disciplined because he was late reporting for a job causing the entire crew to be late to their assignment.⁹

Hill's erratic behavior continued over the next few months and Barnett believed Hill became a risk to himself and the other workers on his crew. On April 2, 2018, Barnett referred Hill to the State of Alabama Employee Assistance Program ("EAP"). Barnett provided Hill with EAP documentation in a meeting on April 2, 2018 attended by Barry Dingler, Transportation Technologist, Sr.; Kathy Gwin ("Gwin"), Office Manager for the Materials & Test Bureau; and Kaye Chancellor

⁸ Testimony of Barnett and DOT Exhibit 8.

⁹ Testimony of Barnett and DOT Exhibit 9.

Davis (“Davis”), Assistant Materials & Tests Engineer/Geotechnical. Hill attended the meeting with his sister.

During the meeting, Hill told Barnett he was dealing with some family problems that involved his wife and children. Barnett noticed that Hill was talking to himself and had trouble maintaining attention. On the EAP referral, Barnett indicated the reasons for the referral included: absenteeism; decline in job performance; difficulty with communicating or interacting with others; safety or mental health concern; and substance abuse issue or positive drug screen.¹⁰

Hill’s appointment with Behavioral Health Systems (“BHS”) was originally scheduled for April 5, 2018. Hill missed his first appointment and the referral was closed on April 6, 2018. On April 9, 2018, BHS re-opened the referral after speaking with Hill. Hill met with a representative from BHS and they gave him a treatment recommendation on April 13, 2018.¹¹

Gwin testified she participated in the April 2, 2018 meeting with Hill and provided him with FMLA paperwork and instructions during that meeting. Hill also requested paperwork regarding the Americans with Disabilities Act (“ADA”), claiming he needed a workplace accommodation. Gwin provided Hill with the

¹⁰ DOT Exhibit 10.

¹¹ DOT Exhibit 11 and Exhibit 28. BHS recommended Hill complete a substance abuse evaluation, be seen for a psychiatric evaluation, and comply with any recommended psychiatric treatment.

appropriate ADA paperwork and explained what he needed to do pursuant to DOT's policies and procedures. On May 1, 2018, Gwin received a call from Hill stating that he had completed his FMLA paperwork. However, Gwin did not receive any paperwork from Hill. She reminded him that he needed a physician to complete the FMLA paperwork she gave him at the April 2, 2018 meeting and then return those forms to her. Hill told her he would do so.¹²

On May 7, 2018, Hill's treating physician, Daniel T. Meadows, Jr., M.D., ("Dr. Meadows") sent completed FMLA paperwork to Gwin. Dr. Meadows indicated Hill was unable to perform his job and would need to be off work from March 26, 2018 through June 26, 2018.¹³

In a letter dated May 11, 2018, Hill was approved for FMLA leave until June 26, 2018. Hill was reminded in the letter, "On June 27, 2018, you will be expected to return to work and ready to travel with the Statewide Drill Crew. However, we will need a letter from your treating physician stating you are able to return to work without being a harm to yourself or any of your coworkers."¹⁴

¹² Testimony of Gwin and DOT Exhibit 16 (memo to file written by Gwin).

¹³ DOT Exhibit 16, Bates Stamp 135-137.

¹⁴ DOT Exhibit 15, Bates Stamp 138.

Incidentally, during the April 2, 2018 meeting, Hill completed an ADA Assessment Worksheet for Gwin. In his worksheet, Hill disclosed he fell from a scaffolding five years ago and landed on his head.¹⁵

On May 31, 2018, Gwin sent a letter and two packets of information to Hill regarding his request for an ADA accommodation – one to be filled out by Hill and a second to be filled out by his physician. Gwin indicated she spoke to Hill the day before on the phone and reminded him that he needed to produce a return to work letter from his physician when he returned to the job on June 27, 2018.¹⁶

On June 9, 2018, Hill returned his ADA Essential Function Questionnaire, via facsimile, marked that he was “ready for work” and could complete all of his required tasks “without accommodation.” Hill’s form was not signed by a physician.¹⁷

On June 11, 2018, Gwin received a letter from Dr. Meadows. Dr. Meadows acknowledged receiving the ADA Essential Function Questionnaire and concluded his letter by stating, “The patient’s present condition does not permit him to work safely and reliably. I have instructed the patient to remain off work and to apply for short term disability benefits while treatment of his past condition is pursued.”¹⁸

¹⁵ DOT Exhibit 17.

¹⁶ DOT Exhibit 18.

¹⁷ DOT Exhibit 19, Bates Stamp 144-152.

¹⁸ DOT Exhibit 21.

Gwin testified that based upon Dr. Meadows letter, Hill's FMLA leave was extended until July 18, 2018.¹⁹

On July 10, 2018, Gwin sent a letter to Hill explaining that his FMLA leave would be exhausted on July 18, 2018. Gwin also reminded Hill they had spoken by phone and he needed a letter from his physician documenting his fitness to return to work. Gwin also reminded Hill he needed his physician to complete and return his ADA paperwork.

On July 19, 2018, Gwin wrote a letter to Hill and told him he had exhausted his FMLA leave. Gwin noted Hill did not return to work on July 19, 2018, did not provide a return to work letter from Dr. Meadows, and did not return ADA paperwork completed by Dr. Meadows. Gwin warned Hill, "You have forfeited your right under the FMLA to return to your previous job or equivalent position. Unless you return to work on the next scheduled workday after you receive this letter and with documentation of your fitness for duty from your treating physician, you will be regarded as having voluntarily resigned your employment with the state." Hill did not return to work.

Gwin testified that, as of the date of the appeal hearing, she has not received a completed ADA accommodation worksheet from Hill's physician. Gwin also

¹⁹ Testimony of Gwin and letter dated June 15, 2018. Bates Stamp 87.

testified that, as of the date of the appeal hearing, she has not received a return to work/fit for duty letter from Dr. Meadows.

Davis testified she participated in the April 2, 2018 meeting with Hill. Davis participated in developing a plan of action to assist Hill and agreed with referring Hill to EAP. Davis's primary concern was the safety of Hill and of the other DOT employees assigned to Barnett's crew.

Hill failed to appear at the hearing and testify on his own behalf.

III. ISSUE

Did DOT produce sufficient evidence to warrant dismissal of Hill?

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).²⁰

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 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).²¹

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

²⁰ 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).

²¹ 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.

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).

THE FMLA

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.²² Coverage extends to “[e]ligible employees to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned and accrued it, for up to a total of 12 work weeks in any 12 months . . .”²³ 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.”²⁴ The courts have identified that the FMLA envisions a **cooperative effort between the employer and employee** to ensure that the employee gets leave necessary for medical treatment while not unduly disrupting the employer’s operations. *Kaylor v. Fannin Regional Hospital, Inc.*, 946 F. Supp. 988, 998 (N.D. Ga. 1996).

²² See 29 U.S.C. §2601(b)(1-4).

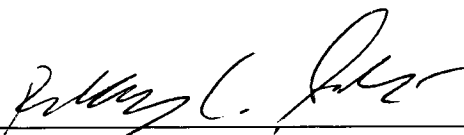
²³ See 29 CFR §825.100(a).

²⁴ See 29 CFR §825.101(c).

In the present case, DOT provided substantial evidence that Hill violated DOT's FMLA Policy. Hill had some serious family issues that unfortunately affected his ability to work safely for DOT. Hill jeopardized his personal safety and the safety of his coworkers by erratic and unpredictable behavior. Hill's supervisor took appropriate steps to refer Hill to BHS in an attempt to help him. Hill followed the recommendations of BHS and was treated by Dr. Meadows. Dr. Meadows did not release Hill to return to work. Hill's FMLA leave has been exhausted and he has not complied with the employee's responsibility of providing a fitness for duty letter from his treating physician. DOT cannot jeopardize the safety of its employees and took appropriate steps to ensure workplace safety. Hill failed to meet his responsibility under DOT's FMLA Policy and should therefore be dismissed from State service.

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 UPHELD.

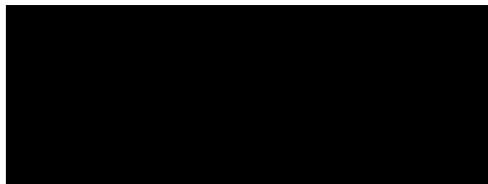
Done, this the 5th day of November 2018.



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

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