



of violence against co-workers. The appointing authority determined that Baker's actions created a hostile and offensive work environment.<sup>1</sup>

## **I. PROCEDURAL HISTORY AND CHARGES**

Baker has been employed in State service for over 20 years and has received consistently high marks on his appraisals. His jobs skills routinely received ratings of "Exceeds" or "Consistently Exceeds" standards. Notwithstanding, Baker's inability to relate appropriately with co-workers has presented problems.

As early as May 2002, while employed in the Treasurer's Office, Baker received a written reprimand for unprofessional conduct.<sup>2</sup> The reprimand involved Baker's use of sexually offensive language to a female co-worker and threatening language involving physical violence.

In March of 2010, while employed at ADOR, Baker received a Warning for disruptive conduct and use of abusive or threatening language.<sup>3</sup> Baker was also issued an Action Plan for Performance Improvement on March 10, 2010.<sup>4</sup> Baker was referred to the Employee Assistance Program ("EAP") because he was not patient with others, was quick tempered, was not able to get along with others, and

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<sup>1</sup> ADOR Exhibit 1.

<sup>2</sup> Baker's Personnel File.

<sup>3</sup> ADOR Exhibit 11.

<sup>4</sup> ADOR Exhibit 12.

was unusually critical of others.<sup>5</sup> Subsequently, in June 2011, Baker’s supervisor issued Baker a second Action Plan for “Failure to cooperate with co-workers to include ignoring or refusing to answer questions asked by co-workers.” Under the section “Action to be taken by employee,” Baker was instructed to conduct himself in a professional manner, to treat others with respect, not to disrupt the workplace with negativity and criticism of others, and to provide assistance to everyone regardless of their level of knowledge.<sup>6</sup>

Baker was issued another Warning in November 2015 by his supervisor, Sidney Coon (“Coon”), who again referred Baker to EAP because, “Baker has a difficult time working along with others.”<sup>7</sup> Coon wrote in the Warning that he was referring Baker in an effort to help him “with his temper, patience and ability to get along with others...” Baker was also given another Action Plan in which Coon stated that Baker’s behavior “is creating a hostile work environment and morale and motivation issues with other employees.”

On Monday, August 6, 2018, at the beginning of the work day, Baker’s co-workers arrived at ADOR and found cryptic printed messages had been left at their work stations, including one for John Robert McConnell (“McConnell”) that read,

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<sup>5</sup> ADOR Exhibit 13.

<sup>6</sup> ADOR Exhibit 14.

<sup>7</sup> ADOR Exhibit 16.

“You Stink!”<sup>8</sup> Everyone concerned believed the messages had been placed by Baker because no message had been left at Baker’s desk and he was the last person to leave work the prior Friday. When asked, Baker did not deny leaving the messages. This action by Baker disrupted the ADOR workplace and caused safety concerns among the affected employees. After this incident, Pamela Williamson (“Williamson”), Manager of the Client Services Section, filed a grievance with the Director of ADOR’s IT Division with copies to ADOR’s Director of Human Resources and to Archie Rowe (“Dr. Rowe”), ADOR’s EEO Coordinator.<sup>9</sup> Subsequently, Dr. Rowe interviewed Baker’s co-workers.

On September 7, 2018, Baker was given notice of his proposed dismissal “for the good of the service” for making inappropriate comments of a sexual nature to co-workers, bullying co-workers, making threats of violence against co-workers, and threatening to kill a co-worker because of work-related issues.<sup>10</sup>

ADOR, in its Notice of Proposed Dismissal and Pre-Dismissal Conference dated September 7, 2018, which was reiterated in its Short Statement of Facts, stated in pertinent part:

Pursuant to Rule 670-X-18-.02 of the State Personnel Board Rules, it has been recommended that you be dismissed from your position with the Alabama Department of Revenue. Rule 670-X-18-.02 states, “(1)

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<sup>8</sup> ADOR Exhibit 7.

<sup>9</sup> *Id.*

<sup>10</sup> ADOR Exhibit 4.

*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.”*

You are being recommended for dismissal as a result of an internal investigation for making inappropriate comments of a sexual nature to co-workers, bullying co-workers, making threats of violence against co-workers and threatening to kill a co-worker because of work related issues. This behavior creates a hostile and violent work environment and is a violation of the department’s Misconduct or Violence in the Workplace Policy.

The following is a timeline of prior disciplinary and/or corrective actions taken for violating policies:

- |                  |                                                                                              |
|------------------|----------------------------------------------------------------------------------------------|
| March 10, 2010   | Warning and Action Plan for disruptive conduct and use of abusive or threatening language.   |
| June 8, 2011     | Action Plan for failure to cooperate with co-workers.                                        |
| November 9, 2015 | Warning and Action Plan for failure to cooperate with co-workers and inappropriate behavior. |

...

Baker denies he has engaged in conduct that should cause his dismissal from employment.<sup>11</sup>

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<sup>11</sup> Administrative Law Judge File. Baker sent a letter to Jackie Graham, State Personnel Director, dated September 20, 2018. Baker also rebutted grievances filed by co-workers in letters dated October 15 and 27, 2018.

On October 1, 2018, the undersigned held a prehearing conference at which the parties selected November 5, 2018, at 9:00 a.m., for the hearing. On that day, the undersigned conducted a *de novo* hearing on Baker's appeal. Baker appeared *pro se*. ADOR was represented by Gwendolyn Garner, Esq. and Hilary Parks, Esq.

ADOR offered Exhibits 1-20, which were admitted without objection. Baker offered no exhibits. The undersigned advised the parties that he would consider the State Personnel Department personnel file of Baker.

ADOR presented the testimony of the following witnesses:

1. Archie Lee Rowe, ADOR EEO Coordinator;
2. Pamela Williamson, ADOR IT Manager I;
3. Sidney Thomas Coon, ADOR IT Systems Specialist, Senior;
4. Derek Garvin, ADOR IT Systems Specialist, Associate;
5. Nathaniel Olm, ADOR IT Systems Specialist, Associate;
6. John Robert McConnell, ADOR IT Systems Technician; and
7. Samuel Payton Dooley, ADOR IT Systems Specialist, Senior.

Baker testified on his own behalf and cross-examined the ADOR witnesses.

## **II. FACTUAL BACKGROUND**

Having reviewed all the available evidence, the undersigned finds the greater weight of evidence supports the following findings of facts.<sup>12</sup>

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<sup>12</sup> All references to exhibits and testimony are intended to assist the State Personnel Board in considering

**A. Employee's Personnel File<sup>13</sup>**

Baker's annual performance appraisals reflect:

**DEPARTMENT OF REVENUE**

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
10/01/2017	34.3	Exceeds Standards
10/01/2016	32.9	Exceeds Standards
10/01/2015	31.4	Exceeds Standards
10/01/2014	31.4	Exceeds Standards
10/01/2013	32.9	Exceeds Standards
10/01/2012	34.3	Exceeds Standards
10/01/2011	35.7	Exceeds Standards
10/01/2010	37.1	Consistently Exceeds Standards
10/01/2009	32.9	Exceeds Standards
10/01/2008	34.3	Exceeds Standards
11/30/2007	30.0	Exceeds Standards
03/01/2007	30.0	Exceeds Standards
03/01/2006	30.0	Exceeds Standards
03/01/2005	26.7	Exceeds Standards

**TREASURER'S OFFICE**

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
03/01/2003	28.0	Exceeds Standards
03/01/2002	35.0	Exceeds Standards
05/03/2001	35.0	Exceeds Standards
11/01/2000	36.3	Exceeds Standards
01/02/2000	36.3	Exceeds Standards
12/5/1998	36.3	Exceeds Standards

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this recommended order and are not necessarily the exclusive sources for such factual findings.

<sup>13</sup> See generally State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history, considered in dismissing employee).

**DEPARTMENT OF INDUSTRIAL RELATIONS (LABOR)**

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
12/01/1997	25.0	Exceeds Standards
01/28/1997	20.0	Meets Standards
10/28/1996	11.7	Partially Meets Standards

Baker's disciplinary history reflects the following:

- May 7, 2002 – Written Reprimand for Unprofessional Conduct
- March 10, 2010 – Warning and Action Plan for disruptive conduct and use of abusive or threatening language
- June 8, 2011 – Action Plan for failure to cooperate with co-workers
- November 9, 2015 – Warning and Action Plan for failure to cooperate with co-workers and inappropriate behavior

**B. State Personnel Board General Work Rules and ADOR**

**Policies/Procedures Forming the Basis of the Charges**

**Rule 670-X-18-.02** 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.

**Rule 670-X-19-.01** 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:



(a) Violations that normally result in disciplinary actions of increasing severity:

...

8. Violation of specific department rules.

...

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

...

5. Use of abusive or threatening language.

...

12. Disruptive conduct of any sort.

13. Conduct unbecoming a state employee.

...

The **ADOR Employee Handbook**<sup>14</sup> provides in pertinent part:

### **Discipline of Employees**

Failure by an employee to conform to the policies, procedures and directives of the Department may result in demotion, suspension or dismissal, as provided for in the *Code of Alabama 1975*, Sections 36-26-9, 27 and 28. The Commissioner shall decide what disciplinary action shall be taken.

Violations that normally result in disciplinary actions of increasing severity are:

...

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<sup>14</sup> ADOR Exhibit 19.

- Disruptive conduct of any sort.

...

- Violations of specific department rules.

Serious violations that may result in suspension or discharge on the first offense, considering work record and length of service include:

...

- Use of abusive or threatening language.

...

- Serious violation of any other department rule.

...

The above listing of violations is not meant to be all inclusive and does not imply that discipline may not be imposed for other sufficient reasons.

...

In addition, regarding progressive discipline, the Department reserves the right to bypass any and all of these steps or use other forms of discipline which are in the best interest of the Department and its vast majority of effective employees, and the good of State service.

...

### **Misconduct or Violence in the Workplace**

The workplace is a gathering of people where basic safety and social order must be maintained. Further, the Department's supervisors must make decisions and direct people to accomplish legitimate tax administration assignments. All employees must behave in a moral, ethical, and business-like manner.

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

...

- b. Employees shall comply with the policies and operating procedures of the Department and their divisions.
- c. Employees will act in a manner that is consistent with generally recognized professional conduct and ethical principles. A good attitude and spirit of cooperation are expected of every employee. Conduct with fellow employees should not cause dissention or discord.
- 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.

**II.** The conduct, attitude, and demeanor described below is strictly prohibited; supervisors and co-workers will not tolerate escalations of misconduct as described in subparagraph b. through d. below, which go beyond the normal discipline process:

...

- b. Escalation of inappropriate behavior to include failure to comply with supervisor's corrections, or arguing, or resisting authority; unauthorized or abusive use of equipment; stalling work flow; malicious or excessive griping, or causing emotional stress to others with words; loud, disruptive language or threatening words; threatening gestures or movements toward another person; insubordination or disobedience; emotional outbursts at another individual or the Department.

...

Supervisors will follow the procedures in the Personnel Manual to insure social order and safety are maintained in the workplace.

### **C. Facts Forming the Basis of Dismissal**

Baker engaged in conduct in August 2018 that, considering his past history, was disruptive and perceived as threatening by his co-workers. Dr. Rowe, ADOR EEO Coordinator, interviewed ADOR IT Personnel who had been engaged by Baker in inappropriate comments about sexual activity. It was determined that in March or April of 2018, Baker had inappropriately asked a female employee who transferred to the ADOR IT Division on November 1, 2017 about sexual matters. Baker was overheard by co-workers who testified as to Baker's inappropriate and unwelcomed sexual inquiries. Dr. Rowe recommended to the appointing authority that Baker's employment be terminated.

Williamson, who had formerly supervised Baker, testified that he was disruptive and created a hostile work environment that was not fair to the other employees. She recounted numerous instances of Baker's threatening and bullying behaviors over a sustained period.<sup>15</sup> Williamson interpreted the cryptic message Baker left at her work station on August 3, 2018 that read "Yes" to mean she would be a target of his in a workplace shooting. She reported that since seeing the message, she has been "nervous when walking to my car at the end of the day that he will lay in wait for me. I am peeking around corners and checking behind me."

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<sup>15</sup> ADOR Exhibit 7.

Baker's bullying and abuse of McConnell was detailed in his written grievance against Baker. Baker would routinely tell McConnell, "You stink." According to McConnell's testimony, Baker would mock and insult him constantly. Baker's bullying finally reached the point that McConnell sought the intervention of Kim Burch ("Burch") who he asked to approach Baker in an attempt to find out why he was being targeted. Burch reported back to McConnell that Baker said he disliked McConnell because he lacked ambition and "didn't follow his [Baker's] path of Christianity."<sup>16</sup> Afterward, McConnell actively avoided interaction with Baker in an attempt to defuse the situation. Regarding the cryptic notes Baker left for his co-workers, McConnell stated, "The action taken by Phillip Baker that we saw Monday morning is an escalation in his pattern of behavior that continues to make our office a hostile work environment and I fear for my safety and well-being, especially when we have only one accessible entrance/exit within our office." McConnell has reported Baker to ADOR supervisors in the past including Burch and Williamson.

Derek Garvin ("Garvin") testified about overhearing Baker's inappropriate sexual inquiries made to a female co-worker.<sup>17</sup> Garvin was so incredulous after hearing Baker's crude remarks that he asked the female co-worker, "[i]f I heard what

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<sup>16</sup> ADOR Exhibit 8.

<sup>17</sup> ADOR Exhibit 9.

I just heard?” His co-worker confirmed the remarks and said she was scared to report Baker for fear of retribution. In the grievance Garvin filed, he stated that having to hear what Baker said felt like “second hand harassment.”

Nathaniel Olm (“Olm”), who began working at ADOR on January 2, 2014, filed a detailed grievance against Baker’s conduct outlining the escalating threats Baker made to him over the years.<sup>18</sup> Among the more disturbing claims Olm makes is that Baker threatened to kill him on at least three different occasions, the last time being before he transferred from Client Services to the Database Section in May 2018. According to Olm, this last occasion was more volatile resulting in his asking a co-worker to “let the front office know I am starting to fear for my life to work here.” Olm stated in his grievance, “I shouldn’t have to wonder if today is the day he shoots the place up.” Olm was present during the March/April 2018 incident Garvin reported that involved the female co-worker and confirmed Garvin’s account. Olm also related being told by the same female co-worker that Baker had sent her an inappropriate text message, but when confronted claimed he thought he was sending it to his wife.

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<sup>18</sup> ADOR Exhibit 10.

### III. ISSUE

Did ADOR, as the appointing authority, have sufficient evidence to sustain Baker's dismissal based upon violations of ADOR Policies and State Personnel Board Rules?

### IV. DISCUSSION

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).<sup>19</sup>

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<sup>19</sup> 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).

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. 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 (5<sup>th</sup> Cir. 1976).

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 this case, ADOR, over a period of years, patiently and carefully tried to salvage a very technically competent computer technician. ADOR did virtually everything possible to accommodate Baker, even to the extent of issuing him multiple warnings and action plans. ADOR repeatedly referred Baker to EAP hoping he would seek professional counseling to assist him with interpersonal relations with co-workers. ADOR gave Baker ample opportunities to improve and succeed. Unfortunately, Baker continued to bully, mock and insult co-workers. In fairness and consideration of Baker's co-workers, ADOR had no other course of action but termination of Baker's employment.

Baker claims the messages he left co-workers in August 2018 were "random phrases" from past interoffice jokes intended to spur conversations in which his co-workers would ask him the meaning and he would share context of the phrases. Baker claims they were placed randomly and had no deeper meaning. However, the record clearly reflects that the affected individuals perceived the messages as harassing and threatening. It is difficult to believe Baker's explanation that the messages were meaningless and placed randomly because the message placed at McConnell's work station repeated an insult (*i.e.*, "You stink!") that Baker had repeatedly made verbally to McConnell in the past and the message placed on a co-worker's desk who smokes read, "Eh, Umm, Uh Smoke?"

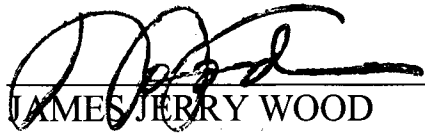
Baker filed several rebuttals of the grievances that were lodged by his co-workers. In the rebuttals, Baker admits to having experienced some past conflicts with co-workers, but states that he has not had any issues in the last three years. While his co-workers may not have reported any incidents in writing to ADOR Management in the last three years, it has been determined that the sexual harassment of a female co-worker by Baker, the continuing bullying of McConnell, and the additional threats of physical violence made to Olm have all occurred within the last year. Additionally, the grievance filed by Williamson cites numerous recent causes for concern including Baker acting angry about having to clean out his old cubicle and other IT employees moving into an area Baker liked to work (*i.e.*, the “Staging Room”). Williamson says that Baker recently left “mad for the day” over a trivial incident.

Regarding the statements concerning Baker making sexually harassing comments to a female co-worker, Baker admits in his rebuttals that the conversation occurred, but claims it was not unwelcome and the female co-worker did not seem offended. Again, this explanation is not credible as two males who overheard what Baker said found it so grotesque they claimed to have been personally repulsed. Baker claims he has witnessed other males at ADOR engaging in conversations of a sexual nature.

It is abundantly clear that Baker's co-workers believe he is a bully, that he creates a hostile workplace environment, and that he presents a tangible workplace violence threat. In a normal workplace, co-workers would not "wonder if today is the day he shoots the place up" (Olm, ADOR Exhibit 10); "fear for my safety and well-being" (McConnell, ADOR Exhibit 8); or think they "would be a target of his in a workplace shooting" (Williamson, ADOR Exhibit 7). Baker claims not to understand why his co-workers would feel threatened by him. However, the grievances filed by his co-workers and testimony presented during the hearing strongly attest to Baker openly threatening violence against others.

The undersigned has carefully considered all the evidence in this case and finds no basis for a lesser disciplinary action than dismissal. There is no evidentiary basis for mitigation. Accordingly, the undersigned finds the preponderance of the evidence warrants Baker's dismissal in this case for violation of State Personnel Board General Work Rules and extant ADOR Rules including its Misconduct or Violence in the Workplace Policy. Therefore, the undersigned recommends to the State Personnel Board that the dismissal of Baker be UPHELD.

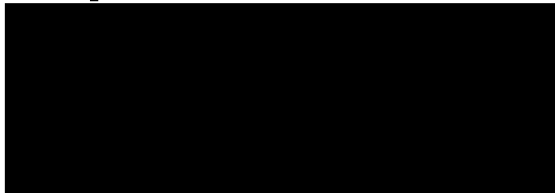
Done, this the 20<sup>th</sup> day of November 2018.



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**VIA E-MAIL, CERTIFIED AND FIRST-CLASS U.S. MAIL**

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