

McLeod was discharged from employment at ALDOT effective at the close of business on January 14, 2016.

McLeod's last day at work at ALDOT was August 5, 2015. McLeod was employed at Noble Manor, an assisted living facility, for four or five years contemporaneously with her ALDOT employment. McLeod worked at Noble Manor, 610 Botts Avenue, Troy, Alabama during the time she was not reporting to work at ALDOT.¹ At the time of the hearing her employment there continued. Her duties included food service, medications, and interacting with residents and their families.² McLeod's payroll records from Noble Manor show she was working virtually full-time for Noble Manor during most of 2015, including September, October, November and December 2015, when she could have worked at ALDOT remediated facilities.³

McLeod was an excellent employee during all of her State service achieving consistently high ratings on her annual performance appraisals. She had no disciplinary issues of record.

In July 2015, McLeod manifested some chronic health issues, including acute sinus problems. McLeod is a cigarette smoker.⁴ On July 8, 2015, McLeod's

¹ ALDOT Exhibit 8, p. 158.

² ALDOT Exhibit 10, p. 176.

³ ALDOT Exhibit 11.

⁴ Employee Exhibit 1, p. 1.

physician, Donald P. Dennis, M.D. (“Dr. Dennis”), recorded in her medical records a litany of ailments for which he scheduled additional tests.⁵

Dr. Dennis, from the history related by McLeod and his examination of her, determined she “... obviously has toxic mold exposure, especially with this history she is going to do some mold plate testing there (meaning her ALDOT office).” McLeod did “plate testing” for mold at her office, which showed the presence of mold in the samples she collected, as determined by subsequent lab testing.⁶ Dr. Dennis concluded that McLeod should not return to work in her office.⁷ He advised McLeod with her “sensitivity to fungus” that she should not return to work in the ALDOT office building because of the high mold counts.⁸

McLeod told her supervisor, Sharon Ellis (“Ellis”), on or about July 13, 2015, her physician said if she went back to work in the same ALDOT location “she would die.”

Ellis arranged for McLeod to be placed on Family and Medical Leave Act (“FMLA”) leave while the ALDOT facility was evaluated by experts. Dr. Dennis opined in August 2015 that McLeod could perform all her essential job functions in

⁵ Employee Exhibit 1, p. 1. McLeod’s medical records are HIPPA protected and are placed under seal by the undersigned.

⁶ Employee Exhibit 1, pp. 9-14.

⁷ Employee Exhibit 2, p. 20.

⁸ Employee Exhibit 3, p. 21.

a “mold free environment.”⁹

Ellis offered to provide an N100 OSHA-approved mask with appropriate filters for McLeod to wear at work as a “temporary” accommodation.¹⁰ Dr. Dennis opined the mask accommodation was not adequate.¹¹

On August 19, 2015, McLeod advised she, “... was able to perform all ... duties in an environment that is free of toxic mold. ... I have been able to do my job at this time if you would either allow me to work from home or work from the warehouse until my work area is cleaned and disinfected ...”¹² Dr. Dennis said McLeod could perform all her essential job functions on August 21, 2015, but said, “She cannot work in the mold contaminated environment. She must be moved to a safe environment.”¹³

McLeod’s essential functions involve significant interaction with the public and co-workers, in person, and on the telephone. They included:

1. Critical to the mission is ensuring that information is retrieved from daily work reports and entered into various computer programs to generate payrolls, expense accounts, equipment usage reports, etc., in a timely manner which requires her to work full time.

⁹ Employee Exhibit 4, p. 22.

¹⁰ Employee Exhibit 11, p. 41.

¹¹ Employee Exhibit 5, p. 24.

¹² Employee Exhibit 6, pp. 25-26.

¹³ Employee Exhibit 7, pp. 27-28.

2. Typing of correspondence and documents for supervisors so deadlines are met.
3. Answers telephone and radio for the office staff so that calls are routed to proper personnel in a timely manner.
4. Operates copier/scanner to reproduce various documents to be distributed.
5. Communicates [accurately] with co-workers, supervisors, and other Department employees [on the phone and in person] on information relating to various items such as requisitions, purchase orders, etc.
6. Proofreads correspondence and documents so that errors in calculations and typing are corrected in a timely manner.
7. Maintains all licenses and/or certifications pertinent to this position and attends all training as necessary or scheduled.
8. Prepares correctly Special Work Authorizations and requisitions for supplies for Maintenance, District Offices, etc., with no delays.

McLeod suggested to Ellis she could perform her job from home. But, her home burned during this timeframe.¹⁴ Ellis was not confident about conditions in the warehouse area where McLeod also suggested she could work since it had large open space and fans and had not been tested for possible mold spores at the time McLeod suggested she be moved there.¹⁵ McLeod admitted she did not know if the ALDOT warehouse was a safe place for her to work.¹⁶

¹⁴ The record does not reflect where McLeod proposed to work after her home burned, destroying her two computers, etc.

¹⁵ Testimony of Ellis.

¹⁶ ALDOT Exhibit 10, p. 176.

ALDOT accommodated McLeod by placing her on leave until it could be established that there was a place where she could safely work. ALDOT, through Ellis, advised McLeod she would need to provide medical documentation of what she had told them. There was some delay in McLeod's provision of the medical documentation.¹⁷ ALDOT attempted to have an interactive meeting with McLeod on her accommodations request on August 26, 2015. Ellis notified McLeod's attorney on August 21, 2015.¹⁸ McLeod and her attorney cancelled that meeting without suggesting an alternate time to meet.¹⁹ Dr. Dennis was McLeod's treating physician. Based on petri dish "tap" test samples collected by McLeod and tested by a lab, Dr. Dennis concluded her workspace was unsafe for her.

ALDOT had replaced the roof and the HVAC system in the ALDOT building where McLeod worked in the 2012-2014 time frame. McLeod's office was in Room 139. The building had two stories, which included the basement.

On August 4, 2015, within less than a month of McLeod's initial complaint to Ellis, ALDOT had Safety Environmental Laboratories and Consulting, Inc. ("SELCO") conduct an assessment of the ALDOT Seventh Division Facility located at 299 Elba Highway, Troy Alabama 36081. The assessment followed the

¹⁷ Ellis's testimony, ALDOT Exhibit 18, p. 290, and ALDOT Exhibit 20, p. 294.

¹⁸ ALDOT Exhibit 22, p. 301.

¹⁹ ALDOT Exhibit 24, p. 309.

practices and guidelines of the American Industrial Hygiene Association and the ASTM Standard D7338-10 *Standard Guide for the Assessment of Fungal Growth in Buildings*.²⁰

The pre-remediation inspection found “the structure does not appear to be impacted by significant fungal contamination.” There was visible fungi on two HVAC units on the bottom floor. Based on this assessment by SELC, ALDOT engaged ARES Contracting, Inc. to perform mold remediation and cleaning of the building pursuant to the recommendations of SELC.

ARES completed the cleaning and remediation in early September 2015. SELC did a post-remediation assessment and found the building had been remediated consistent with its recommendations.²¹ The post-remediation indoor airborne fungal spore samples recovered concentrations significantly less than the outdoor ambient atmosphere.²²

ALDOT advised McLeod the building, including her workspace, had been cleaned. It had been assessed and tested with methods more sophisticated than the “tap” tests she and her physician had relied upon.²³ Tap tests are done as

²⁰ ALDOT Exhibit 14, p. 221.

²¹ ALDOT Exhibit 15.

²² ALDOT Exhibit 15, p. 260.

²³ Employee Exhibit 24, p. 71. Note: Dr. Dennis relies upon himself as a mold exposure authority.

preliminary screening tests to determine if further testing is needed to determine mold sources.²⁴ ALDOT needed and wanted McLeod to return to work.²⁵ Communications were problematic,²⁶ especially after McLeod's home burned. McLeod received E-mails and text messages through her daughter's cell phone.²⁷ McLeod largely relied on her lawyer to communicate with ALDOT and the State Employees Injury Compensation Trust Fund ("SEICTF").²⁸

Ellis attempted interactive efforts to accommodate McLeod.²⁹ Remediation of the building was completed by September 15, 2015. Ellis advised McLeod and asked that she return to work.³⁰ McLeod did not return and quit calling in to her supervisor, in violation of ALDOT's Attendance/Punctuality Guidelines.³¹ Ellis continued to try to get McLeod to return to work in September and October 2015.³²

ALDOT made extraordinary efforts to keep McLeod as an employee. It offered reasonable accommodations to McLeod in spite of her failing to participate

²⁴ ALDOT Exhibit 26 and Employee Exhibit 18, pp. 58-59.

²⁵ ALDOT Exhibit 27.

²⁶ Employee Exhibit 10, p. 33.

²⁷ Testimony of McLeod.

²⁸ Employee Exhibits 8, 9, and 14.

²⁹ Employee Exhibit 11.

³⁰ Employee Exhibit 20, p. 62.

³¹ ALDOT Exhibit 1, p. 141.

³² ALDOT Exhibits 17, 30, and 31.

in an interactive process to determine the best possible reasonable accommodation for her. ALDOT offered McLeod:

1. FMLA, which provided 480 hours of leave;
2. SEICTF benefits;
3. The opportunity to work during remediation with an N100 OSHA-approved mask;
4. Leave Without Pay (“LWOP”);
5. Form 11 Long LWOP (After 20 days of consecutive LWOP);
6. Remediation of the Troy Area Office with notice to McLeod she could return to work.³³

ALDOT, after all McLeod’s leave sources were exhausted on October 30, 2015, advised her that unless she returned on the next scheduled workday after receipt of that letter, it would be considered that she had voluntarily resigned from her ALDOT employment.³⁴

ALDOT’s appointing authority ultimately terminated McLeod’s employment with ALDOT effective January 14, 2016.³⁵ ALDOT’s decision to terminate McLeod should be sustained.

³³ Employee Exhibit 26, p. 11.

³⁴ ALDOT Exhibit 31, p. 335.

³⁵ ALDOT Exhibit 3, p. 147.

I. PROCEDURAL HISTORY AND CHARGES

On March 28, 2016, the undersigned conducted a *de novo* hearing (“the hearing”) at the offices of the Alabama State Personnel Department in Montgomery, Alabama, during which *ore tenus* and documentary evidence was received. Gilda Branch Williams, Esq. appeared as counsel on behalf of ALDOT. McLeod was represented by Elizabeth Borg, Esq.

At the beginning of the hearing, ALDOT introduced Exhibits 1 – 34, without objection. McLeod introduced Employee Exhibits 1 – 38. The undersigned informed the parties, without objection, that McLeod’s personnel file at the Alabama State Personnel Department would be included in the record as evidence in this matter. ALDOT called five witnesses, including McLeod, who also testified on her own behalf. ALDOT called the following witnesses:

1. William Bradley Stiles, Operations Director, SELC, Inc. (Expert Witness);
2. Matthew D. Wilson, P.E., ALDOT Environmental Compliance Coordinator;
3. Mark Baker, ALDOT Transportation Maintenance Superintendent;
4. Jennifer Stephens McLeod, Employee/Appellant; and
5. Sharon Ellis, P.E., ALDOT Troy Area Operations Engineer.

McLeod called two witnesses:

1. Jennifer Stephens McLeod; and
2. Louis R. Dick, Retired ALDOT employee.

II. PROCEDURAL HISTORY AND CHARGES

McLeod timely appealed her dismissal to the Alabama State Personnel Board, pursuant to ALA. CODE § 36-26-27(a) (1975). At the prehearing conference held on February 5, 2016, the parties selected March 28, 2016, for the hearing.

In its Short Plain Statement of Facts, ALDOT stated, in pertinent part:

...

1. On January 5, 1998, Ms. Jennifer McLeod was employed by ALDOT as an Administrative Support Assistant I (“ASA I”). On July 31, 2000, McLeod was promoted to the classification of Administrative Support Assistant II (“ASA II”). McLeod was a good employee who consistently exceeded standards or exceeded standards on her performance appraisals.
2. On or about July 13, 2015, McLeod requested to be moved to another building based on a medical condition. McLeod said she had a lab report stating that mold was in the building and she could not report to work.
3. During the months of July and August, 2015, Troy Area Supervisor, Sherry Ellis talked with McLeod on several occasions in an attempt to get medical verification from her physician and completion of the Family Medical Leave Act (FMLA) paperwork and State Employee Injury Compensation Trust Fund (SEICTF) paperwork.

4. McLeod last worked at ALDOT on August 4, 2015. On several dates in August 2015, McLeod made contact with the Troy office by text messages, email or communications from her attorney, Elizabeth Borg. However, McLeod would not provide any medical documentation from her doctor, return to work or talk to her supervisor.
5. On August 11, 2015, Ellis received a physician's letter by email. The letter was dated July 20, 2015. The letter stated that McLeod was hyper sensitive to mold and that she should not work in the environment. On August 25, 2015, ALDOT placed McLeod on FMLA.
6. On September 17, 2015, Ellis sent a letter to McLeod stating that ALDOT had completed the recommended remediation on the building and that she could return to work. On September 30, 2015, ALDOT sent McLeod an email and text message to make her aware of her remaining leave balances and her FMLA leave balance. McLeod did not report to work or respond to the letter.
7. On October 30, 2015, McLeod was notified that FMLA was exhausted and that she should return to work on the next scheduled work day or she would be considered to have voluntarily resigned. McLeod did not respond or return to work.
8. On December 30, 2015, ALDOT's Personnel Bureau Chief, Steve Dukes, informed McLeod that termination of her employment had been recommended and that a pre-dismissal conference would be held on January 7, 2016. The recommendation for termination was based on violations of the General Work Rules 670-X-19-.01(1)(a)1 – Absenteeism – unexcused absence, unreported absence, a pattern of absences, or excessive absences; and, violation of Alabama Department of Transportation Attendance/Punctuality Guidelines Policy #18.

9. On January 7, 2016, a Pre-Dismissal conference was held and McLeod was advised of the charges against her and given the opportunity to present relevant information regarding her proposed dismissal. McLeod was informed that her employment was terminated at the close of business on January 14, 2016.
10. On January 29, 2016, McLeod filed notice of appeal with the State Personnel Board.

III. FINDINGS OF FACT

Having reviewed the documentary evidence, having heard the witnesses' testimony, having observed the witnesses' demeanor and assessed their credibility the undersigned finds the greater weight of evidence supports the following findings of fact.³⁶

A. Employee's Personnel File³⁷

McLeod's performance appraisals while working for the State and ALDOT reflect:

Date Ending	Total Score	Category
10/01/2015	37.10	Consistently Exceeds Standards
10/01/2014	37.10	Consistently Exceeds Standards
10/01/2013	37.10	Consistently Exceeds Standards
10/01/2012	37.14	Consistently Exceeds Standards
10/01/2011	38.60	Consistently Exceeds Standards
10/01/2010	38.30	Consistently Exceeds Standards

³⁶ 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.

³⁷ See generally State Personnel Board Rule 670-X-18-.02(5) (employee's work record, including performance and disciplinary history considered in dismissing employee).

10/01/2009	38.30	Consistently Exceeds Standards
10/01/2008	35.80	Exceeds Standards
05/01/2007	35.80	Exceeds Standards
05/01/2006	35.80	Exceeds Standards
05/01/2005	36.70	Consistently Exceeds Standards
05/01/2004	36.70	Consistently Exceeds Standards
05/01/2003	36.00	Exceeds Standards
05/01/2002	36.70	Consistently Exceeds Standards
05/01/2001	36.70	Consistently Exceeds Standards
05/01/2000	36.70	Consistently Exceeds Standards
08/01/1999	34.30	Exceeds Standards
08/01/1998	31.50	Exceeds Standards
08/01/1997	38.57	Consistently Exceeds Standards
08/01/1996	37.10	Consistently Exceeds Standards
08/01/1995	37.10	Consistently Exceeds Standards
08/01/1994	37.80	Consistently Exceeds Standards
09/21/1993	31.10	Exceeds Standards
06/21/1993	21.30	Meets Standards

McLeod had no disciplinary actions of record while a State employee.

B. State Personnel Board General Work Rules and ALDOT Policies, Guidelines and Procedures Forming the Basis of the Charges

State Personnel Board 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:

...

1. Absenteeism – Unexcused absence, unreported absence, a pattern of absences, or excessive absences

...

ALDOT Attendance/Punctuality Guidelines Policy, #18, provides, in part:

...

If for any reason, an employee will be late or cannot report to work, the supervisor should be notified at the start of the day or as soon as possible. ... Failure to report absences, including arriving at work late or leaving the work site early or excessive absences could result in disciplinary actions.

IV. ISSUES

Did ALDOT produce sufficient evidence to sustain McLeod's dismissal based upon violations of State Personnel Board Rules and ALDOT policies, guidelines and procedures?

V. 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).³⁸

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 (5th Cir. 1976).³⁹

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

³⁹ 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).

In this case, the preponderance of the available testimonial and documentary evidence supports the decision by ALDOT to terminate the employment of McLeod.

The undersigned has reviewed and carefully considered the documentary and testimonial evidence in this case. The credibility of individual witnesses has been weighed along with the relationships of the witnesses to each other. The undersigned finds the reasons for the dismissal of McLeod are supported by more than a preponderance of the evidence presented at the hearing. The undersigned finds no basis for mitigation. McLeod unilaterally chose not to call in or remain in touch with her supervisor concerning her plans to return to work. McLeod and her counsel did not avail themselves of opportunities to interactively participate in a mutually reasonable and acceptable accommodation plan. McLeod admits she failed to follow the ALDOT Attendance/Punctuality Guidelines. McLeod worked at her Noble Manor job virtually full-time in the last quarter of 2015, during which time ALDOT actively sought her return to her ALDOT job.

The undersigned recommends the dismissal of McLeod by ALDOT be upheld.

Done, this the 26th day of April, 2016.



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