



Personnel Department in Montgomery, Alabama. Freeman proceeded *pro se*. Bart Harmon, Esq., appeared as counsel on behalf of DOC.

DOC introduced into evidence 21 exhibits, consecutively numbered 1 – 21. Freeman did not introduce any exhibits.

DOC called as witnesses:

- (1) Willie Thomas, Warden III of Bibb Correctional Facility;
- (2) Patricia A. Brown, Steward III; and
- (3) William R. Lawley III, DOC Personnel Director.

Freeman testified on her own behalf.

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

Freeman began State employment in October 2010 as a Steward I when she was hired by DOC to work at Bibb Correctional Facility (“Bibb”). Freeman remained in that classification until her dismissal.

By letter dated March 1, 2016, DOC Commissioner Jefferson S. Dunn (hereinafter “Dunn”) notified Freeman of her dismissal, stating:

On or about March 16, 2015, you provided the Warden at Bibb Correctional Facility with information from your healthcare provider which indicated that you were unable to perform the essential [job] functions of your Steward I position. Since that time, you have not been able to provide medical clearance which would enable you to resume your normal duties.

The Warden has made every effort to provide temporary light duty assignments while you endeavored to be placed on the Radio Operator and/or the Administrative Support Assistant I register in a

reachable position; however, this has not occurred.

Based on a review of the information provided by you and your healthcare provider, it is clear that you are unable to perform the essential functions of your Steward I position. I must inform you that there is no other alternative position to accommodate your disability. Therefore, I am notifying you that your employment with the Department of Corrections will terminate at the close of business on Tuesday[,] March 15, 2016.

...

Freeman timely appealed her dismissal to the Alabama State Personnel Board, pursuant to ALA. CODE § 36-26-27(a) (1975). On April 28, 2016, the undersigned conducted a *de novo* hearing (“the 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.<sup>1</sup>

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<sup>1</sup> 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.

## A. Employee's Personnel File<sup>2</sup>

Freeman's annual performance appraisals while at DOC reflect:

<u>Date Ending</u>	<u>Total Score</u>	<u>Category</u>
09/15	29.0	Exceeds Standards
09/14	31.0	Exceeds Standards
09/12	25.0	Meets Standards
10/11	25.0	Meets Standards <sup>3</sup>
04/11	16.0	Partially Meets Standards <sup>4</sup>

Freeman's disciplinary history at DOC included:

- Written Warning on November 17, 2013 for failing to use proper call-in procedure.
- Written Warning on November 14, 2013 for non-compliance with policies, procedures and regulations.
- Written Reprimand on January 28, 2013 for failure to follow supervisor's instructions.
- Written Reprimand on March 17, 2012 for failure to follow supervisor's instructions.
- Written Reprimand on February 11, 2011 for use of abusive, profane or threatening language to other employees, inmates, or the public.

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<sup>2</sup> Freeman did not have an employee performance evaluation during 2013 because she was on Leave Without Pay during a significant portion of that evaluation period.

<sup>3</sup> Final Probationary Evaluation.

<sup>4</sup> Freeman's probationary period was extended due to discipline she received within her first few months on the job.

**B. State Personnel Board General Work Rules and DOC Policies/Procedures Forming the Basis of the Charges**

ALA. CODE § 36-26-27 (1975) states, in pertinent part:

(a.) 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...

....

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

Approximately two years after Freeman began work for DOC she had knee surgery. Following her knee surgery, she was given certain work restrictions from her physician. On January 29, 2013, Bibb Correctional Warden III Willie Thomas (“Thomas”) temporarily reassigned Freeman from the kitchen to Central Control during her rehabilitation.<sup>5</sup> On or about April 17, 2013, Freeman wrote a letter to Thomas asking to be hired as an Administrative Assistant I/Shift Clerk. Freeman tested and was placed on the register for that job classification; however, she was not reachable on the register.<sup>6</sup> On April 26, 2013, Thomas wrote Freeman a memorandum and explained to her that she had reached her maximum limit of light duty. Thomas informed Freeman she did not qualify for another position at the

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<sup>5</sup> See DOC Exhibit 6.

<sup>6</sup> Testimony of DOC Personnel Director William Lawley.

facility and if her health would not permit her to return to work as a Steward I, she would be dismissed. Thomas asked for an update of her medical status by May 10, 2013.<sup>7</sup> Freeman returned to work as a Steward I shortly thereafter.

Freeman continued to have problems with her knee. Freeman's physician at Alabama Orthopedic Center wrote the facility and requested she be allowed to sit constantly. On September 18, 2014, Thomas wrote Freeman a memorandum to inform her he could not accommodate her need to sit down constantly. The work of a Steward I required Freeman to stand and walk constantly. She had to retrieve items from the pantry, monitor inmates retrieving items from the pantry, and monitor inmates who checked-out utensils (*e.g.*, knives). On or about October 14, 2014, Freeman went into Leave Without Pay status. On February 18, 2015, Thomas wrote Freeman a letter explaining he still could not accommodate her request to sit constantly.<sup>8</sup> After exhausting her Family and Medical Leave Act ("FMLA") allowance and additional Leave Without Pay days Thomas permitted her to take, Freeman ultimately returned from Leave Without Pay status on March 16, 2015.<sup>9</sup>

On or about April 16, 2015, Freeman's physician, Robert Sorrell, M.D., returned a completed Physician's Questionnaire to DOC.<sup>10</sup> He indicated Freeman

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<sup>7</sup> See DOC Exhibit 8.

<sup>8</sup> See DOC Exhibit 13.

<sup>9</sup> See Personnel File.

<sup>10</sup> See DOC Exhibit 15.

had arthritis and scar tissue in her knees which limited her ability to stand or walk for extended periods of time. Freeman's doctor recommended an accommodation that permitted her to sit down. Thomas, in an effort to help Freeman, temporarily reassigned her to a light duty position at Bibb. Freeman was assigned to work as a Radio Operator.

On July 17, 2015, Thomas wrote a letter to Dunn. Thomas explained he assigned Freeman to a temporary light duty position in an effort to have time to find another position for her within the facility. Freeman applied for several positions, but was unreachable on the registers. In an effort to further assist Freeman, Thomas asked Dunn if he could keep Freeman on light duty for an additional 90 days. Freeman was scheduled to test for a clerical position and Thomas indicated if she passed and was reachable he would hire her for that position. Thomas also indicated if Freeman was not able to obtain a reachable position as a Clerk he would be forced to dismiss her from service.

Freeman tested, but was still not reachable following the extra 90 days. Thomas wrote Dunn another letter asking for direction.<sup>11</sup> Freeman was allowed to work in a light duty position for an additional four months. After it became obvious that Freeman's knee condition would not improve and after she failed to obtain a

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<sup>11</sup> See DOC Exhibit 18.

reachable status on a register for another position, DOC dismissed her from employment.

Thomas testified at the hearing. He genuinely liked Freeman and recalled she was a very good worker when she was able to work. Thomas worked with Freeman and did far more than was required.<sup>12</sup> Even Freeman acknowledged Thomas was good to work with her and she testified he helped her a lot. Ultimately, Thomas concluded Freeman's knee was not going to allow her to work as a Steward I at Bibb. Furthermore, Freeman could not obtain a reachable position on a register in another job classification. Thomas had no position in which to place Freeman.

Freeman testified she appreciated the efforts of DOC. Freeman believed she qualified for another position as a Clerk, Administrative Assistant I, or Radio Operator. Freeman did not understand why she was not qualified for a Radio Operator position since she worked some of her time on light duty in that position. Close to the end of her testimony, Freeman indicated she could perform the essential job functions of a Steward I. However, Freeman could not offer any documentation from her doctor that showed a change in her medical status. Freeman also acknowledged she did not seek a change in medical status from her doctor.

### **III. ISSUE**

Did DOC produce sufficient evidence to warrant dismissal of Freeman?

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<sup>12</sup> Testimony of Thomas and William Lawley.

## 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).<sup>13</sup>

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

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<sup>13</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).

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 (5<sup>th</sup> Cir. 1976).<sup>14</sup>

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).

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<sup>14</sup> 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.

In the present case, DOC presented sufficient evidence establishing Freeman was unable to perform all of the essential job functions of a Steward I; therefore, DOC had the legal authority to dismiss her from employment pursuant to the provisions contained within the ADA.

### **The ADA**

Passage of the ADA occurred in 1990, and it was amended in 2008 in an effort to eliminate discrimination against individuals with disabilities.<sup>15</sup> In general, the ADA prohibits employers from terminating the employment of a qualified individual based solely on their disabilities. According to the ADA, a “qualified individual” means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”<sup>16</sup>

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<sup>15</sup> See 42 U.S.C. §12101(b).

<sup>16</sup> See 42 U.S.C. § 12111(8).

### **Essential Job Functions**

Freeman was not a qualified individual under the ADA since she could not perform some essential functions of her job following her knee surgery, with or without an accommodation. “Essential functions” are the fundamental functions of a position, and do not include marginal functions.<sup>17</sup> Based upon the evidence presented during the hearing, Freeman was a DOC Steward I. Stewards are responsible for monitoring inmates while they work in the kitchen. This position **requires** constant standing and walking and is considered a security sensitive position since inmates are allowed access to knives and other dangerous utensils.<sup>18</sup>

### **Reasonable Accommodation**

Freeman’s doctor indicated a reasonable accommodation would be to allow Freeman to sit for long periods. The duty to provide reasonable accommodations to qualified individuals with disabilities is considered an important statutory requirement of the ADA and this requirement has led to a great deal of ADA litigation. As discussed above, based on Freeman’s own testimony and her doctor’s assessment, Freeman could not stand or walk for prolonged periods of time; therefore, she was not a qualified individual pursuant to ADA.

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<sup>17</sup> 29 C.F.R. § 1630.2(n)(1); *VandenBroek v. PSEG Power Connecticut, LLC*, 356 Fed.Appx. 457 (2<sup>nd</sup> Cir. 2009).

<sup>18</sup> Testimony of Patricia Brown, Steward III, and testimony of Freeman.

ADA law is clear that employers never have to reallocate essential functions as a reasonable accommodation. For example, in *Steward v. New Chrysler*, 2011 U.S.App. LEXIS 2267 (6<sup>th</sup> Cir. 2011) (Unpublished), the court held that an employer is not required to restructure an employee's job by giving away an essential function. The Eleventh Circuit used compelling language when discussing the difference between a required accommodation and restructuring essential functions by saying it "[i]s the difference between saddling a camel and removing its hump." *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249 (11<sup>th</sup> Cir. 2001).

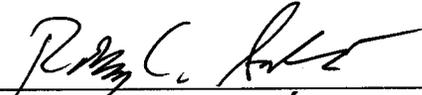
The evidence showed clearly that Thomas worked hard to keep Freeman employed. Thomas permitted her to take FMLA leave and even enter Leave Without Pay status on a few occasions. Thomas also assigned her light duty positions and extended the assignments by obtaining permission from DOC's Commissioner. The Federal courts have not punished an employer for going beyond the ADA's requirements. For example, in *Rehrs v. Procter and Gamble, Inc.*, 486 F.3d 353 (8<sup>th</sup> Cir. 2007), the employee claimed that "shift rotation" was no longer an essential function of his job because the employer allowed him to work a straight shift because of his diabetes. The court held that an employer should not be punished for doing more than the ADA requires. In *Scanlon v. Boeing Co.*, 2002 U.S.App LEXIS 21126 (9<sup>th</sup> Cir. 2002), the court held that the employer's "decision to continue to over-accommodate three employees with the same disability" was

considered irrelevant as to the essential functions of the plaintiff's job. Finally, in *Holbrook v. City of Alpharetta*, 112 F.2d 1522 (11<sup>th</sup> Cir. 1997), a police detective had a vision impairment and was excused from collecting evidence from crime scenes, a responsibility that was considered an essential function. The court rejected the detective's argument that the employer had to continue to excuse these duties, noting that the employer had gone beyond the ADA's requirements and the court did not want "to discourage other employers from undertaking the kinds of accommodations of a disabled employee" as those provided by the employer. Based upon the totality of evidence in this case, DOC's decision to dismiss Freeman from employment based upon her knee arthritis and scar tissue does not fall within the protection of ADA since Freeman cannot perform some of the essential functions of a Steward I. Freeman was a good employee and was well liked at the facility; however, she did not qualify or was unreachable on any register for another position at Bibb. There is simply nothing else DOC can do for her unless she has a change in her medical restrictions.

The undersigned has carefully considered mitigation in this case. The undersigned finds no grounds for mitigation exist justifying a lesser employment action than dismissal. The undersigned finds the totality of the evidence warrants termination in this cause. Therefore, the undersigned recommends to the State

Personnel Board that the dismissal be UPHELD.<sup>19</sup>

Done, this the 3<sup>rd</sup> day of June, 2016.

  
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<sup>19</sup> In recommending to uphold the dismissal, the undersigned has considered Freeman's work record. See A. Employee's Personnel File and Career History, *supra*. Having found sufficient evidence to uphold the dismissal, any/all remaining issues are moot.