STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT M. MILLER,

Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 89-0092-PC-ER

DECISION AND ORDER

Nature of the Case

On August 9, 1989, complainant filed a charge of discrimination with the Commission alleging that respondent had discriminated against him on the basis of handicap when it terminated his employment. A hearing was held on April 15, and 16, 1993, before Laurie R. McCallum, Chairperson. The parties were required to file briefs and the final brief was filed on August 3, 1993.

Findings of Fact

1. Complainant was employed by respondent's Division of Motor Vehicles, Bureau of Field Services from April of 1974 until he was terminated effective February 3, 1989.

2. Complainant began his employment with respondent in April of 1974 as a Driver License Examiner Aide. As an Aide, complainant performed all of the duties of a Driver License Examiner except administering road tests to applicants for driver licenses. These duties primarily included: administering and grading the written tests given to applicants for driver licenses, administering vision tests, handing out safety literature, observing applicants for obvious handicaps, collecting fees, putting information relating to license renewals and duplicate licenses "on-line," and updating files. Occasionally, an Aide accompanies a driver out to his or her vehicle to obtain the vehicle

identification number. Most of these checks don't require entering the vehicle. The road testing duties of an Examiner consume approximately 70-80% of the position's time. Each Examiner position and each Aide position has out-of-office responsibilities which include presentations to schools and other public groups and which involve travel with co-workers. Both Examiner and Aide positions have access to sensitive personal information relating to members of the public. Appellant's position was subsequently reclassified to a Driver License Examiner 1 and Examiner 2. The Driver License Examiner 2 classification was renamed Motor Vehicle Services Specialist 5 which was complainant's classification at the time of his termination.

3. In 1975, complainant was assigned to the Northwest Motor Vehicle Office in Milwaukee. John Bonlender became the supervisor of this office in August of 1988. Mr. Bonlender supervised 13-14 employees and was out of the office 1-2 days each week.

4. On December 23, 1988, Mr. Bonlender asked complainant to come into his office. Mr. Bonlender then showed complainant a letter which had been prepared on or around November 23, 1988. This letter stated as follows, in pertinent part:

> Here is the description of the incidents that occurred on November 11, 1988 while I was taking my road test.
>
> * * * * *
>
> 1) The examiner did not introduce himself to me.
>
> 2) I was sitting in the car working the lights, directionals, etc., while the examiner was outside checking everything to make sure it worked OK when I saw him break apart a nutty bar. I don't know where he put it but I assumed he had put it in his pocket.
>
> 3) He then came into the car, told me that everything he was going to tell me to do was legal.
>
> 4) We drove a little while, then he asked me to parallel park. Once I was through he asked me to look at my tires to see how they were. So, I proceeded by taking off my seat belt to open the door. He then said that all I had to do was open the window and bend over to see them. I did so and when I did, he placed a piece of the nutty bar underneath me. I was aware of what was going on and took it out from underneath myself. He then got real nervous and knew he had been caught so he very quickly tried to brush it off. This man, being red in the face, slouched back in his chair, put his hand over his forehead and shook his head. I suspected he was going to do this because I had a customer . . . a

few days before my road test who said she had an examiner who put something chocolate underneath her.

5) He took the nutty bar with him because I checked my car and there was nothing there. Luckily, it didn't stain my clothing or interior.

6) When the road test was through he told me I did all right. He also added that I should do my backing up a little bit slower.

7) It also seemed as though he may have been under the influence of alcohol.

5. Complainant admitted to Mr. Bonlender that he had engaged in the conduct described in this letter and described such conduct as resulting from a "sexual fetish" of several years' duration. Complainant asked Mr. Bonlender if he would have to see the Employee Assistance Program (EAP) people and indicated that he most likely would benefit by consultation with them, although he preferred not to deal with the local EAP resource coordinator. Mr. Bonlender gave him the telephone number of Cephus Childs, who was affiliated with the EAP but who was not the local resource coordinator. Complainant indicated to Mr. Bonlender that he was "glad it was over." Mr. Bonlender advised complainant that he would not be allowed to administer road tests until further notice.

6. It was respondent's practice to advise employees who may be subject to disciplinary action of the availability of the DOT Employee Assistance Program. All contacts to the EAP are strictly confidential. It is not a function of the EAP to provide treatment to employees but they may provide information to employees on where treatment may be available.

7. Respondent subsequently determined that complainant had engaged in the following conduct:

a. On 3/24/86, while administering a road test to a female applicant, complainant told her to lean out the door to see how far she was from the curb, and he placed on her car seat a brownie which she sat on when she returned to the normal driving position. Complainant also told her to back straight over to a doll at the curb, causing her to strike or drive over it.

b. On 10/15/86, while administering a road test to a female applicant, complainant instructed her to pass back and forth several times over a doll lying in the road.

c. On 8/30/88, while administering a road test to a female applicant, complainant told her to pull over to the curb where a doll was lying in the road, causing her to strike or drive over the doll.

8. Complainant engaged in conduct similar to the "brownie" incidents described above at home with his wife and his wife's sisters on 50-100 occasions. Respondent was not aware of this conduct prior to the date of the subject termination.

9. Complainant had not sought treatment for this behavior prior to respondent learning of it as the result of the contact from Ms. Baars because he did not consider it a big problem. Complainant had not considered the impact of his conduct on respondent's operation.

10. Complainant obtained sexual gratification from engaging in the conduct described above. At the time he had the female applicants drive over the dolls, he got an erection and ejaculated in the car. After retrieving the brownies from beneath the female applicants, complainant ate them; this action served as a form of oral sex for him. Respondent was not aware of the impact this conduct had on complainant prior to the date of the subject termination.

11. Complainant prepared and packaged the brownies at home and brought them with him to the work place.

12. Complainant placed the dolls in the roadway prior to administering the road tests. Prior to the subject termination, complainant denied engaging in the "doll" incidents described above.

13. Complainant's conduct in relation to the "brownie" and "doll" incidents described above, constituted a serious violation of DOT work rules and code of ethics.

14. On January 31, 1989, complainant participated in a meeting with Mr. Bonlender and Donald Brieger, the Manager of District 8, Bureau of Field Services, Division of Motor Vehicles. The "brownie" and "doll" incidents described above were discussed. Mr. Bonlender and Mr. Brieger indicated these incidents were considered very serious and could result in severe discipline up to and including discharge. Complainant indicated that he was now "attending therapy sessions" and that his conduct resulted from a "sexual aberration." In a January 11 meeting with Mr. Bonlender and Mr. Brieger, complainant had indicated he was getting "professional help." Complainant

also indicated that he should not be administering road tests then or in the near future and, to keep his job, he would accept a demotion to a position classified as a MVSS 3, i.e., an Aide position.

15. On February 3, 1989, complainant again met with Mr. Bonlender and Mr. Brieger. Complainant was given a letter of termination. When complainant asked if there wasn't some other way or some other option, both Mr. Bonlender and Mr. Brieger indicated there was not.

16. On January 21, 1989, complainant had his first meeting with James Gerber. Mr. Gerber has a master's degree in clinical social work and is certified as a clinical social worker. Since that time, he has provided therapy services for individuals with mental health disorders in order to help them meet mental health goals. Mr. Gerber is not a trained or licensed psychologist or psychiatrist and has relatively limited training in diagnosing psychiatric disorders. After four meetings with complainant, Mr. Gerber prepared a report dated February 28, 1989, which stated as follows, in pertinent part:

> Mr. Miller suffers from a paraphilia disorder of 20 years duration, which has affected his behavior at work. Should he resume work in an environment which allowed little or no opportunity for his behavioral dysfunction, namely away from private, isolated time with women, he could return to work.
>
> . . . Should . . . [Mr. Miller] return to work in the appropriate setting, it would further assist his recovery from his disorder at this point.

Neither this report nor any other evaluation of complainant's mental health or mental condition by a mental health professional was made available to respondent prior to the date of the subject termination. Mr. Gerber defines a "paraphilia disorder" as a sexual disorder which involves urges, behaviors, alpha states, or fantasies which center around an object or a body part of a person not typically associated with sexual intercourse or typical sexual function. Complainant never told Mr. Gerber about the "doll" incidents. Complainant did tell Mr. Gerber about the incidents at home involving his wife and her sisters and about the "brownie" incidents at work.

17. At respondent's request, complainant was examined by Basil Jackson, M.D., in March of 1993. Dr. Jackson has been a licensed and practicing psychiatrist for 35 years, a professor of psychiatry, and the author of numerous articles on psychiatry in medical and other professional journals. Dr. Jackson administered a battery of psychological tests and completed a

psychosocial evaluation and a personal examination of complainant. After this examination, Dr. Jackson prepared a report which stated as follows, in pertinent part:

> It is my medical and psychiatric judgment that Mr. Miller presents evidence of an immature personality disorder in association with a sexual paraphilia. It is also my medical and psychiatric judgment that this condition has existed in Mr. Miller since early in his life.
>
> It continues to be my medical and psychiatric judgment that these sexual impulses experienced by Mr. Miller are in no way uncontrollable, and his history indicates that he has, in fact, the ability to control them selectively and to confine the expressions of these impulses to certain situations and to his associations with certain individuals.
>
> It also continues to be my medical and psychiatric judgment and clinical experience that these sexual fantasies and activities frequently have the potential for shifting their focus and object. It is for this reason that I feel there is a definite risk to permit him to work in close association with any other individuals, whether male or female, young or old, unless he remains under very close and constant monitoring and supervision.

Dr. Jackson is also of the opinion that Mr. Miller's condition is not a psychiatric illness or impairment but a personality disorder which does not limit his capacity to work.

18. Complainant never used the terms "handicap" or "disability" in discussions with his supervisors prior to his termination. Complainant testified at hearing that he didn't think that respondent ever believed that complainant had a handicap.

Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

2. The complainant has the burden to prove that respondent discriminated against him on the basis of handicap in terminating his employment.

3. The complainant has failed to sustain this burden.

Opinion

As the Commission stated in Harris v. DHSS, Case Nos. 84-109-PC-ER, 85-0115-PC-ER (2/11/88), a typical handicap discrimination case will involve the following analysis:

(1) Whether the complainant is a handicapped individual;

(2) Whether the employer discriminated against complainant because of the handicap;

(3) Whether the employer can avail itself of the exception to the proscription against handicap discrimination in employment set forth at §111.34(2)(a), Stats., -- i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment (this determination must be made in accordance with §111.34(2)(b), Stats., which requires a case-by-case evaluation of whether the complainant "can adequately undertake undertake the job-related responsibilities of a particular job");

(4) If the employer has succeeded in establishing its discrimination is covered by this exception, the final issue is whether the employer failed to reasonably accommodate the complainant's handicap.

The first question then is whether complainant is handicapped within the meaning of the Fair Employment Act. Section 111.32(8), Stats., defines a "handicapped individual" as an individual who:

> (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
>
> (b) Has a record of such an impairment; or
>
> (c) Is perceived as having such an impairment.

There is very little federal or state case law relating to the status of mental or emotional conditions as handicapping conditions. In Rezza v. Department of Justice, FEP Cases 1366 (E.D. Penn., 1988), the U.S. District Court, in reviewing a complaint filed pursuant to the Rehabilitation Act of 1973 stated as follows, in pertinent part:

> To state a claim under the Rehabilitation Act of 1973, a plaintiff must aver: (1) that he is an "individual with handicaps"; (2) that he is "otherwise qualified" for the position sought: (3) that he was excluded from the position solely because of his handicap; and (4) that the program or activity in question received federal financial assistance.

The Act delineates an "individual with handicaps" as "any person, who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a records of such an impairment, 1 (iii) is regarded as having such an impairment." 29 U.S.C.A. §706(8)(B).

"In determining whether a particular individual is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance." School Board v. Arline, 107 S. Ct. 1123, 94 L.Ed.2d 307, 43 FEP Cases 81. The regulations define "physical or mental impairment" to mean "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. §1613.702(a) (1987). In addition, the regulations describe "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. §1603.702(c).

Courts have characterized impairment as "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity." E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1098, 23 FEP Cases 1253 (D. Hawaii 1980). The determination of "who is a handicapped person under the Act is best suited to a 'case by case determination.' " Forrisi v. Brown, 794 F. 2d 931, 933, 41 FEP Cases 190 (4th Cir. 1986. . . "It is the impaired individual who must be examined not just the impairment in the abstract." E.E. Black, 497 F. Supp. at 1099. . . .

* * * * *

Within this framework, the issue is whether plaintiff is an "individual with a handicap." According to affidavits of plaintiff and Robert L. Custer, M.D. a leading expert in the field, plaintiff appears to be a compulsive gambler. Compulsive gambling is now widely recognized as a mental disorder. The most recent Diagnostic Manual of the American Psychiatric Association (DSM-III-R) classifies "pathological gambling" as a disorder, having certain essential features:

> [C]hronic and progressive failure to resist impulses to gamble, and gambling behavior that compromises, disrupts, or damages personal, family, or vocational pursuits. The gambling preoccupation, urge, and activity increase during periods of stress. Problems that arise as a result of the gambling lead to an intensification of the gambling behavior. Characteristic problems include extensive indebtedness and consequent default on debts and other financial responsibilities, disrupted family

> relationships, inattention to work, and financially motivated illegal activities to pay for gambling.
>
> American Psychiatric Association, Diagnostic and Statistical Manual of Stress Disorders (3d Ed. Revised 1987). (See footnote)
>
> [footnote: Plaintiff cites the testimony of defendants' witness, Seymour Halleck, M.D., a psychiatrist, for the proposition that compulsive gambling is similar to other compulsive disorders such as alcoholism and drug addiction that are recognized impairments under the Act. (citations omitted)]
>
> While "compulsive gambling" or "pathological gambling" may come within the abstract definition of "psychological impairment," the effect upon the person must also be evaluated to determine if there is actual impairment. Here, the facts though not extensively developed, suggest that "major life activities" were affected. Plaintiff's condition is alleged to have required residential treatment. In Arline, hospitalization was considered "a fact more than sufficient to establish that one or more . . . life activities were substantially limited by . . . impairment." Arline, 480 U.S. at ___, 107 S. Ct. at 1127. Even so, because the evidence of actual impairment is largely inferential and because a statutory issue persists whether plaintiff was "other wise qualified" -- to continue to be an FBI agent--a ruling on impairment will be deferred.

The Commission has recently explored the meaning of the term "handicapped individual" within the context of a mental or emotional condition in Jacobus v. UW, 88-0159-PC-ER (3/19/92); and Jacobsen v. DHSS, 92-0001-PC-ER (10/16/92) In Jacobus, the Commission concluded that complainant had "borderline mental retardation." In its decision, the Commission stated, in pertinent part:

> Although the experts may disagree as to the correct label to attach to complainant's intellectual abilities, the record shows that such abilities are below average and have resulted in unusual difficulties for complainant in passing his high school courses, in passing an examination to obtain a driver's license or any other written examination, in learning to balance his checkbook, in following verbal instructions, in adapting to changes, and in planning or exercising independent judgment. The Commission is of the opinion that these limitations demonstrate a mental impairment which has made complainant's achievement of certain of life's basic activities unusually difficult. This is consistent with the Commission's decision in Brummond v. UW, Case Nos. 84-0185-PC-ER & 85-0031-PC-ER. In that case, complainant had an organic mental disorder which caused him severe anxiety and interfered with his ability to plan his work or to deal with a variety of different duties or changes

in his duties. The Commission decided that the complainant's disorder was a handicap within the meaning of the FEA.

The Commission also stated in this decision that "[n]ot every physical or mental impairment constitutes a handicap, only those impairments that are profound enough to make achievement unusually difficult."

In Jacobsen, the complainant's psychological condition was concluded to be within normal limits but that he had certain ingrained personality characteristics including irritibability, argumentativeness, and a tendency to transfer blame to others. In its decision, the Commission stated as follows, in pertinent part:

> In American Motors Corp. v. LIRC, 119 Wis. 2d 706, 713-714, 350 N.W.2d 120 (1984), the Supreme Court held that a complainant who was four feet, ten inches tall and who was not hired because of her height, was not handicapped:
>
> > These definitions indicate that a "handicap" is an injury, deterioration or lessening that could impede a person's normal functioning in some manner and preclude the full and normal use of one's sensory, mental or physical faculties. Thus, a handicap within the meaning of the Act is a physical or mental condition that imposes limitations on a person's ability to achieve and capacity to work beyond the normal limitations that might render a person unable to make certain achievements or perform every possible job. All persons, given their individual characteristics and capabilities, have inherent limitations on their general ability to achieve or to perform certain jobs. All persons have some mental or physical deviations from the norm. However, such inherent limitations or deviations from the norm do not automatically constitute handicap. A handicap is a mental or physical *disability or impairment* that a person has in addition to his or her normal limitations that makes achievement not merely difficult but *unusually* difficult, or that limits the capacity to work.
>
> It may also be said that every person has a particular set of personality characteristics, some of which help and some of which hinder that person in life's endeavors, including the workplace. A person who has certain problematical personality characteristics, but whose psychiatric diagnosis is "well within the normal range" does not appear to fit within the concept of a handicapped individual envisioned by the Supreme Court in American Motors Corp. Another case from a different jurisdiction adds support to this conclusion. Daley v. Koch, 51 FEP

Cases 1077, 892 F.2d 212 (2d Cir. 1989) involved a claim under the Rehabilitation Act of 1973. . . .

* * * * *

The plaintiff had been rejected for employment by the New York City Police Department after a psychological screening reached the conclusion that he:

> [S]howed "poor judgment, irresponsible behavior and poor impulse control" which rendered plaintiff "unsuitable to be a police officer." Plaintiff was not diagnosed as having any particular psychological disease or disorder.
>
> In a subsequent review of [plaintiff's] file and Dr. Udanis' report, the Coordinator of the Psychological Services Testing Program agreed with the doctor that appellant had "significant personality traits" that would prevent him from effectively functioning as a police officer.

51 FEP Cases at 1078, 892 F. 2d at 214 (emphasis supplied). The Court held:

> In Forrisi, the Court of Appeals for the Fourth Circuit noted that the Rehabilitation Act was intended to protect the disabled from discrimination in employment and stated that:
>
> > It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.
>
> 794 F.2d at 934 (citation omitted). Appellant's personality traits could be described as commonplace; they in no way rise to the level of an impairment.
>
> This Court holds that "poor judgment, irresponsible behavior and poor impulse control" do not amount to a mental condition that Congress intended to be considered an impairment which substantially limits a major life activity and therefore a person having those traits or perceived

> as having those traits cannot be considered a handicapped person within the meaning of the Act.

51 FEP Cases at 1079, 892 F.2d at 215.

While it is apparent that there are no easy answers or definitive sign posts in this area, three of the themes apparently relied upon by the courts and the Commission in these cases appear to be the level of control the individual has over the behavior resulting from the mental condition; the extent of the impact of the mental condition on the individual's major life activities and on the capacity to work in general; and whether the behavior resulting from the mental condition is within the range of normal behavior.

The question of where complainant's condition and the behavior which results from it fall within the range of "normal" human behavior requires an examination of the current cultural standards of sexual normalcy. It also necessarily engenders debate about whether or how far this agency, the courts, or others should go in labeling certain sexual activities as "normal" and certain as "impaired." As discussed above, complainant engages in certain sexual fantasies and has certain sexual urges which result in his choice of certain types of sexual "partners," objects, and practices. His choices appear to be "aberrations" since they are not the types of partners, objects, and practices chosen by the majority of individuals. However, does this necessarily mean that the complainant's choices or the mental process he utilizes in selecting these choices should be regarded as "impaired?" The Commission does not find this a necessary conclusion. In view of the conclusion reached below that complainant's mental condition does not make his achievement unusually difficult or limit his capacity to work, the commission does not reach the question of whether complainant's mental condition constitutes an impairment within the meaning of the FEA.

The parties dispute the level of control complainant has over the behavior he exhibited in the "brownie" and "doll" incidents. Although complainant has characterized his mental condition as a "compulsive disorder," this characterization is not consistent with Dr. Jackson's diagnosis nor with certain of the evidence in the record. Moreover, complainant's expert, Mr. Gerber, did not specifically address this point. In Dr. Jackson's medical opinion:

> It continues to be my medical and psychiatric judgment that these sexual impulses experienced by Mr. Miller are in no way uncontrollable, and his history indicates that he has, in fact, the ability to control them selectively and to confine the expressions of these impulses to certain situations and to his associations with certain individuals.

This is in contrast to the gambling compulsion which was the subject of the court's decision in the Rezza case discussed above and the compulsive disorders such as alcoholism and drug addiction referenced in a footnote in the Rezza decision. In addition, the selectivity and infrequency with which complainant engaged in the subject behavior, and the planning he did to prepare to carry out this behavior, tend to buttress Dr. Jackson's opinion that complainant's behavior did not result from an uncontrollable or irresistible urge or impulse.

The only limitation on a major life activity or on his capacity to work in general which complainant cites in support of his argument that he is handicapped is that his mental condition caused him to engage in the behavior at work which led to his discharge. If, as complainant argues, this behavior was the result of an uncontrollable or irresistible urge or impulse, this would certainly limit his capacity to work since it would, at a minimum, prevent him from working in a setting which involved unsupervised one-on-one contact with women. (See opinion of Mr. Gerber, Finding of Fact 16, above). However, since complainant has failed to show that the sexual urges or impulses he acted on in carrying out the "brownie" and "doll" incidents were uncontrollable or irresistible, complainant has failed to show that his mental condition limits his capacity to work within the meaning of the FEA.

Complainant does not explain, other than by offering the limitation on working conditions cited above, how his mental condition "makes achievement unusually difficult," i.e., how it substantially limits a major life activity. In Adams v. GSA, 51 FEP Cases 647 (1989), the U.S. District Court for the District of Columbia stated as follows in a case brought pursuant to the Rehabilitation Act of 1973:

> Plaintiff Adams, a 44-year-old white male GS-12 career computer programmer analyst with defendant General Services Administration (GSA), was removed from federal services in February, 1987. The precipitating cause for his removal was Adams' violent physical assault upon a female supervisor the preceding October, which he followed by a rampage through the office damaging or destroying office equipment. Having unsuccessfully exhausted his administrative remedies, Adams, proceeding *pro se*, sues under the Rehabilitation Act of 1973, 29

> U.S.C. §701 *et seq.*, alleging that he is a handicapped individual by reason of an "adjustment disorder with mixed disturbance of emotion and conduct" and a "compulsive personality disorder." He says that it was GSA's obligation under the law to make reasonable accommodation of his handicap, and that GSA failed in its obligation by firing him. . . .
>
> The medical evidence presently of record is equivocal. Adams' present psychiatrist (and expert witness) describes his condition as a "maladaptive reaction to a psychosocial stressor," viz., the antagonizing supervisor, which is however, a transitory phenomenon that can be expected to disappear when the "psychosocial stressor" is removed. It is, therefore, hardly an "impairment" which "substantially limits one or more . . . major life activities." . . .

The Commission finds that the transitory nature of complainant's conduct is similar to that in the Adams case and leads to the same conclusion that complainant's mental condition does not substantially limit one or more major life activities, i.e., does not make achievement unusually difficult. This conclusion is buttressed by the lack of evidence or argument on this point by complainant.

The Commission concludes, based on the above discussion, that complainant's mental condition does not constitute a handicap within the meaning of the FEA.

If complainant had shown that he was handicapped, the Harris analysis would then turn to the question of whether complainant had been discriminated against on the basis of his handicap. Assuming that complainant had proved the existence of a handicap and of respondent's notice or perception of this handicap, the conclusion that complainant had been discriminated against on the basis of this handicap would necessarily follow since the behavior which formed the basis for the termination was the behavior complainant exhibited as the result of his mental condition.

If complainant had proved that he was handicapped and that he was discriminated against on the basis of this handicap, he would also satisfy the third prong of the Harris analysis since, as the parties agree, complainant could not carry out the road test duties of an Examiner position.

The final issue then is that of accommodation. Both Mr. Gerber and Dr. Jackson prescribe that complainant not work in a setting where there is an opportunity for private, one-on-one contact with females and that complainant receive close and constant monitoring by a supervisor.

Respondent has made a showing that DOT has no position which does not potentially involve work with a female co-worker or customer or other member of the public; and that organizational and workload realities prevent any position from involving the close and constant monitoring by a supervisor. The only accommodation arguably suggested by complainant is his demotion to an Aide position. However, the record shows that Aides can not be closely and constantly monitored by a supervisor since the office supervisors are not present in the office for one or more days of each week; that Aide positions are open to males and females; that Aides could have private, one-on-one contact with female co-workers when they work on teams, when they work together at the counter, when they take breaks in the break room together, when they travel as a team for educational or other outreach purposes; that Aides have private, one-on-one contact with customers when they go out to vehicles to check vehicle identification numbers and when they administer certain types of tests; etc. Complainant argues that, since complainant's condition "chiefly manifested itself when he was in a closed private motor vehicle with an attractive female," his condition could have been accommodated by his demotion to an Aide position, i.e., a position which did not involve road testing. However, this ignores the fact that complainant also engaged in the subject behavior at home with his wife and her sisters in his kitchen, i.e., not in a closed private motor vehicle; and that his own therapist, Mr. Gerber, opined that complainant should work in an environment "away from private, isolated time with women." Complainant has failed to rebut the showing by respondent that there was no position in the agency which could meet the criteria cited by both Mr. Gerber and Dr. Jackson. See Prewitt v. USPS, 662 F. 2d 292, 27 FEP Cases 1043 (5th Cir. 1981).

Commission agrees with respondent that complainant was terminated for engaging in activities not resulting from a handicapping condition which constituted serious violations of applicable work rules and serious violations of the public trust, and which exposed his employer to significant liability and his victims to fear for their personal safety.

Order

This complaint is dismissed.

Dated: November 23, 1993 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:rcr

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must

serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.