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DARYL "CHICO" BULLER,  
 Complainant,

v.

Chancellor, UNIVERSITY OF  
 WISCONSIN-MADISON,  
 Respondent.

Case No. 80-PC-ER-49

\* \* \* \* \*

DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This is a complaint alleging discrimination based on arrest record and handicap. An investigator assigned to investigate the complaint issued an Initial Determination of probable cause to believe discrimination occurred with respect to the termination of complainant. A hearing on the merits was conducted by a hearing examiner appointed by the Commission. Complainant did not appeal an Initial Determination of no probable cause with respect to discrimination in a paid suspension or in conditions of employment; and those are not issues before the Commission.

FINDINGS OF FACTS

1. Daryl "Chico" Buller was employed by the Fiscal Affairs Department of the University Hospitals, University of Wisconsin-Madison as a bill collector until his termination on May 9, 1980.
2. During the course of his affiliation with respondent, complainant on at least two occasions carried firearms into the work place; on one occasion a knife was confiscated from him.
3. In June, 1979, complainant was arrested at his work place for carrying a loaded concealed firearm; he was suspended from work for 30 days as a result of the work-rule violation of carrying a loaded concealed firearm; he told his employer he was afraid for his physical safety because he believed he was in disfavor with a Madison motorcycle club.

4. Sometime in 1979, some of complainant's co-workers became aware that complainant was seeing a psychiatrist; complainant was the source of their information.

5. At least one employe other than complainant carried some form of weapon to the work place, but the employer was not aware of it at the time it happened. Only complainant carried a loaded gun into the actual office work place.

6. Complainant's relationships with female co-workers were characterized by repeated use of sexually-related humor, innuendo and story-telling; including stories about unusual sexual behavior and violence. Several of his co-workers felt uncomfortable in complainant's company and were apprehensive with respect to his possible future conduct.

7. Complainant never physically threatened or physically harmed any of his female co-workers.

8. Complainant focused some of his sexual human and social attention on a particular female co-worker who did not solicit or appreciate it; most of this activity occurred approximately one year before the termination.

9. Complainant's dress and behavior were out of the ordinary, in the eyes of his co-workers, but most of them tolerated both the dress and behavior and did not feel threatened by it.

10. None of complainant's supervisors perceived him as handicapped by reason of his habits or behavior, but were concerned about the disquieting effect he had on his female co-workers.

11. The complainant's supervisors did perceive complainant's social manner and his relationship to fellow workers as casting doubt on the quality of his judgment; the doubts about his judgment affected the employer's response to his carrying a concealed weapon into the work place.

12. The employer did not consider the June, 1979, arrest as a factor in the termination, but did consider the reason for the arrest as a factor.

13. The employer did not consider complainant to be mentally or emotionally handicapped on the basis of his behavior eccentricities or lifestyle.

14. The complainant was not handicapped.

15. The termination was based on factors other than discrimination based on arrest record or handicap.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this complaint pursuant to §§111.33(2) and 230.45(1)(b), Wis. Stats.

2. The burden of persuasion is on complainant to show by the preponderance of credible evidence that respondent considered his arrest record as a factor in his termination and that respondent perceived him as handicapped and considered the handicap as a factor in his termination in contravention of §§111.32(f) and 111.32(h), Wis. Stats.

3. Complainant has failed to carry the burden of persuasion.

4. Respondent did not discriminate against him on the basis of his arrest record or any handicap when the decision was made to terminate Mr. Buller's employment.

#### OPINION

The question before the Commission is whether certain facts or situations, if proven by a preponderance of credible evidence, constitute discrimination on the basis of handicap and on the basis of arrest record in violation of §§111.31-111.37 Wis. Stats. The issues which were heard on the merits were agreed to by the parties and are here set out in full:

Were some of the reasons for the termination based on complainant's handicap and arrest record and were those reasons determining factors in the termination?

Subissues: 1) Whether it is discrimination based on arrest record within the meaning of the statute when the information upon which disciplinary action was taken was based on knowledge of carrying a loaded gun in the work place and not on any arrest record; 2) Is it discrimination based on arrest record within the meaning of the statute for an employer to take disciplinary action (termination) against an employe based on misperception or misunderstanding of the reasons for the arrest, the actual nature of the charge and the ultimate disposition after the arrest and charge? 3) Does an employer engage in discrimination on the basis of handicap within the meaning of the statute when he or she requires an employe to submit to a psychiatric examination, if it is shown that the subject of the examination is unrelated to the efficient and effective performance of the duties of the employe's position?

The first question posed by its terms admits that complainant did not have a past arrest record. The facts show that complainant was arrested at his work place because his supervisors believed he had a gun on his person and, had reason to feel uncertain of what actions Mr. Buller might take under the circumstances. Mr. Buller had, in fact, appeared at work in possession of a loaded concealed handgun, which was a violation of a work rule. The suspension which occurred as a result of this incident is not at issue here. Only the termination is contested. (Comm. Ex. 3) It is not disputed that the gun incident was a factor, considered along with prior and subsequent behavior of complainant, in the decision to terminate complainant's employment. It is, nevertheless, not discrimination based on arrest record to consider a serious work rule violation as a factor in taking disciplinary action against an employe. The supervisors who terminated complainant were not aware of similar conduct with weapons by other employes under circumstances similar to complainant's until informed by the complainant. In this case, the employer was responsible for the arrest which is alleged to be the basis of discrimination. Mr. Buller presents the theory that it is discrimination

based on arrest record to consider as a factor in a termination decision the fact of a serious work rule violation, where there is no prior arrest record. The Commission rejects Mr. Buller's theory and holds that where the acts constituting the work rule violation rather than the arrest were considered by the employer in the termination decision, there is no discrimination based on arrest record.

Contrary to complainant's legal theory set out in his briefs, proof of illegal discrimination does not require a showing that the employer's actions were based on a true set of facts, rather than false perceptions or beliefs. Under the Fair Employment Act, §111.31-111.37, Stats., the employer may terminate complainant for any reason, however unreasonable or unjust, as long as the basis of the action is not one of those prohibited in the statute. This is not a case in which the burden is on the employer to show just cause for termination. The burden of persuasion is on complainant to show that impermissible considerations played a part in his termination.

On the issue of discrimination based on arrest record, complainant has not shown that the employer terminated him because of his arrest. The employer was responsible for the arrest. The gun incident was related to the circumstances of the job because it was a work rule violation and because the employer had some reason to question the soundness of Mr. Buller's judgment, based on his prior behavior with co-workers.

On the issue of handicap discrimination, complainant must show either that he is handicapped or that respondent perceived him as handicapped, and that the fact or the perception of that fact did play a part in the termination decision. Complainant has not shown that he is handicapped or that his employer perceived him as such. It is necessary to show more than that co-workers and supervisors had doubts about his judgment in certain areas

and that there was concern as to whether complainant was capable of physically threatening or harming others at the work place. It is necessary to show more than that co-workers were aware of the fact that Mr. Buller was seeing a psychiatrist or psychologist. There was no evidence introduced at the hearing which tended to prove that any supervisory or management personnel believed that Mr. Buller had a specific emotional or psychological condition which constituted a handicap, or that he actually had such a condition, and that the employer then acted in a discriminatory way against him based on that belief, perception, or actual condition.

The record only shows that Mr. Buller was perceived of as a somewhat eccentric and troublesome person whose behavior and attitude caused discomfort and apprehension among some of his female co-workers. In addition, the employer had reason to question Mr. Buller's judgement and credibility when he would carry weapons to the work place because he feared physical violence from members of a Madison motorcycle club.


All of this, taken together still does not amount to handicap or a perception of handicap. Whether respondent handled Mr. Buller in the most reasonable way is not the issue before the Commission. The only issue is whether there was discrimination in violation of the Fair Employment Act. The Commission concludes there was not a violation of the statute.

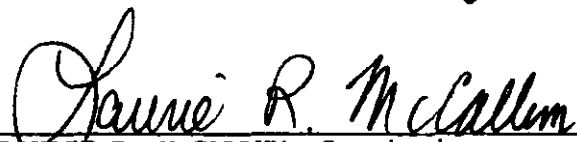
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ORDER

The complaint is dismissed.

Dated: October 14, 1982 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

  
LAURIE R. MCCALLUM, Commissioner

AR:jmf

Commissioner James W. Phillips abstained  
from voting in this decision.

Parties

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