

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACHEL KOESTER, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case 170
No. 71823
PA(adv)-264

DECISION NO. 33992-B

Appearances:

Victor Arellano, with Kurt Kobelt on the brief, Arellano & Phebus S.C., 1468 N. High Point Road, Suite 202, Middleton, Wisconsin, appearing on behalf of Justyn Witscheber.

Julio R. Barron, Chief Legal Counsel and Andrea Olmanson, Legal Counsel, Department of Corrections, 3099 E. Washington Avenue, P.O. Box 7925, Madison, Wisconsin, appearing on behalf of the State of Wisconsin, Department of Corrections.

DECISION AND ORDER

Rachel Koester, formerly a Correctional Officer I at the Oakhill Correctional Institution, appeals her October 2, 2012 discharge from employment with the State of Wisconsin, Department of Corrections for purportedly intimidating, harassing, demeaning and interfering with coworkers and lying about her actions.

Hearing in this matter was held before Examiner Stuart Levitan on 16 days from July 8, 2013 to October 11, 2013. The 3,020-page transcript was ready for the parties by October 24, 2013.¹ The parties thereafter filed written arguments and replies, the last of which was received on January 6, 2014.²

¹The hearing in Koester's appeal was consolidated with those of two other former Oakhill Correctional Institution employees, Sergeant Matthew Seiler, who was discharged October 2, 2012, and Sergeant Justyn Witscheber, who was discharged on October 3, 2012, for purported offenses similar to and associated with Koester's.

²Although the parties submitted consolidated briefs, we give individual consideration to each appeal.

Examiner Levitan issued a proposed decision on March 4, 2015 affirming the discharge.³ The parties subsequently filed numerous, timely objections and responses to each other's objections, the last of which was received July 27, 2015.

Being fully advised in the premises, the Commission makes and issues the following:

FINDINGS OF FACT

1. The Department of Corrections ("DOC") is the State agency responsible for the operation of adult and juvenile correctional facilities, including the former Ethan Allen School for Boys ("EAS") and the Oakhill Correctional Institution ("OCI"), in Wales and Oregon, Wisconsin, respectively.

2. Rachel Koester was a Correctional Officer I at OCI from 2001 to 2005 and from 2007 until her discharge on October 2, 2012, at which time she had permanent status in class.

3. Koester intimidated, harassed, interfered with, and demeaned OCI Officer Z (not his real initial) and other coworkers who had recently transferred to OCI from EAS in violation of DOC work rules and/or directives.

4. Koester knowingly gave false information and otherwise failed to provide truthful, accurate and complete information about material matters under investigation in violation of DOC work rules and/or directives.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following:

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction over this appeal pursuant to § 230.44(1)(c), Stats.

³ This decision and order differs from the proposed decision issued by the hearing examiner as we believe that the proposed decision and order was unnecessarily detailed and contained extraneous opinions about this matter. We have also revised or eliminated some findings of fact to better conform to the record. However, we agree with the hearing examiner's ultimate findings of fact, conclusions of law and order.

It is alleged that Examiner Levitan engaged in improper conduct during his unsuccessful efforts to persuade the parties to enter into a settlement agreement. Because our consideration of this appeal is *de novo* and based solely on the evidentiary record, we need not and do not need to consider that allegation in the context of this decision.

2. The State of Wisconsin, Department of Corrections had just cause within the meaning of § 230.34(1)(a), Stats., to discharge Rachel Koester.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission hereby makes and issues the following:

ORDER

The State of Wisconsin, Department of Corrections' discharge of Rachel Koester is affirmed.

Signed at the City of Madison, Wisconsin, this 11th day of March 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This appeal is part of a consolidated proceeding regarding Officer I Rachel Koester and Sergeants Matthew Seiler and Justyn Witscheber who were discharged by DOC in October 2012. Cathy Jess, the Administrator of DOC's Division of Adult Institutions ("DAI"), found that each had committed a series of violations of several DOC work rules and/or directives, including demeaning, harassing, intimidating, and interfering with other employees, and failing to provide complete and truthful information, both contemporaneously and during a fact-finding inquiry and disciplinary investigation following the suicide of OCI Officer Z (not his real initial). This decision addresses only Koester's appeal.

Section 230.34(1)(a), Stats., provides in pertinent part the following as to certain employees of the State of Wisconsin:

An employee with permanent status in class ... may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

Section 230.44(1)(c), Stats., provides that a State employee with permanent status in class:

... may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission ... if the appeal alleges that the decision was not based on just cause.

Rachel Koester had permanent status in class at the time of her discharge and her appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that the employee was guilty of the misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v Personnel Board*, 53 Wis.2d 123 (1971); *Safransky v Personnel Board*, 62 Wis.2d 464 (1974).

OCI is a minimum-security facility in Oregon, Wisconsin, just south of Madison. It houses about 700 inmates and employs about 250 security personnel over three shifts. At all times relevant, the warden of OCI was Deirdre Morgan.

DID KOESTER COMMIT THE MISCONDUCT ALLEGED BY DOC?

The events leading to Koester's discharge began when DOC closed EAS, a correctional facility for male juvenile offenders in Wales, Wisconsin, on July 2, 2011, and eight EAS staff transferred to OCI. EAS transferees faced the challenges of moving from a juvenile facility into an adult one, with all new job duties and reporting requirements and an entirely new kind

of offender. Although juvenile corrections is more dangerous for officers than adult corrections, some OCI officers derided the EAS personnel for having worked in a non-security classification. Officer Z, who had worked at EAS for 20 years, was among those to accept transfer to OCI. Rather than take a first shift position, to which his seniority would have entitled him, Officer Z took a patrol post on the 3:00 p.m. – 11:00 p.m. second shift where Koester, Seiler, Witscheber, and Correctional Sergeant Sherri Mudd already worked. Mudd and Officer Z were contemporaries, while the other three were about 20 years younger. Supervisors and coworkers all considered Officer Z a conscientious and hardworking employee, always seeking to improve.

In the late fall of 2011, following an incident with Mudd, Koester began to harass, demean, interfere with and intimidate Officer Z. On November 6, 2011, Officer Z and Mudd were to strip search a group of offenders returning from farm work. When Officer Z was ready to do the searches, Mudd was in a residential unit, Cottage 5, watching the end of the Green Bay Packers – San Diego Chargers football game, and she was late reporting for the assignment. After waiting a period of time, Officer Z called a supervisor for permission to conduct a pat search, which can be done by a single officer, rather than a strip search. While Officer Z was holding the telephone, Mudd arrived and concluded, erroneously, that Officer Z was reporting her for neglecting her duties. Koester testified that shortly after the incident Mudd told her she had alerted Officer Z to the fact that she would be a few minutes late, and that when Mudd saw him with the telephone, she told Officer Z, “thanks for throwing me under the bus.” Officer Z made the following contemporaneous entry in a pocket notebook he kept: “gets upset I got approval to pat (-).” This encounter led Mudd to adopt a particularly hostile and demeaning attitude toward Officer Z and to refer to him repeatedly and publicly as a “snitch.” While the term is prevalent in prisons, it is used to describe inmates, not officers. There is no persuasive evidence to support Koester’s assertion that officers generally refer to coworkers in this manner, and we find “snitch” to be a term of opprobrium when applied by one officer to another.

Harassment of Officer Z continued following an incident in November 2011 when an inmate rubbed his genitals during a strip search Officer Z was conducting on him. Although Officer Z followed DOC protocol in performing the search, he was further mocked.

After Officer Z’s suicide on March 30, 2012, Morgan spoke to several officers on second shift and was informed Officer Z had been upset and was thought to be planning to transfer to a different shift. Several officers used the term “bullying” to describe the situation.

Following an investigation, Koester was discharged on October 2, 2012.

The Koester discharge letter encompasses the following allegations:

- *You made comments about [Officer Z's] sexual orientation in relation to the performance of his work duties.*

The record establishes that following the incident in which the inmate acted in a sexual manner while Officer Z was performing a strip search, Mudd and others intensified their taunting of Officer Z as purportedly being homosexual. Koester is accused of following Mudd's lead in using gay slurs to demean him.

Officer Matt Mitchell testified about a time he was parked on the track with Officer Z standing outside the vehicle when Koester and Mudd walked by. He said he heard one of them "making a reference to back door," implying that Officer Z was interested in anal intercourse. It was then that Officer Z told Mitchell that "the stuff was starting to bug him." Officer Jessica Kessler told investigators and testified that Officer Z told her of the same incident, which she related as Mudd and Koester walking by and one of them saying he was "trying to get some back door action." Koester affirmatively and unambiguously denied during the investigation and at hearing that she had made the "back door" comment and denied hearing anybody else make it.

Mitchell's "back door" accusation is corroborated by Kessler's testimony. There is no evidence of collusion between the two to concoct such a story, and Koester has not provided a reason to challenge Mitchell's or Kessler's credibility. The preponderance of the credible evidence, therefore, is that the comment was made by Koester or Mudd while they were walking together. However, neither Kessler nor Mitchell could testify whether it was Koester or Mudd who made the comment. Therefore, there is insufficient evidence to prove this portion of the allegation.⁴

Sergeant Andrew Lapp, who had not been an EAS-transferee, testified that Officer Z told him that "it would be Koester and Mudd in the lobby and they'd make gay jokes and [Officer Z would] hear them talking about him and telling gay jokes, insinuating things to him." Lapp also said that when Officer Z "went to the kitchen at night, he'd heard Witscheber and Koester making fun of him and looking and pointing at him and making gay jokes, during chow around 4pm when inmates were in there. So, he'd avoid those places or just leave if they were doing that."

An email exchange Koester had with Mudd less than a month before Officer Z's suicide documents their using a homophobic slur to demean him. "Hey girl," Mudd wrote Koester on March 3, 2012, "find me a cooler to hide in so I don't have to deal with Gay Boy!! ~ !AKA [Z]!!!! HAAA." Koester replied a minute later: "I'll have one waiting for you!!!" Referring to Officer Z as "Gay Boy" and talking about getting a cooler to hide from him is demeaning to

⁴ However, while DOC has not proven who made the comment, Officer Z heard the comment; Mitchell, inside the vehicle, heard the comment; if Koester did not make the comment, then she had to have heard it. By denying that any such comment was made, Koester knowingly gave false information in violation of DOC Work Rule #6.

Officer Z. Koester was a full and willing participant in this exchange. Although it was Mudd who started the wrongful communication, Koester responded, enthusiastically, in kind. This documented evidence of Koester's involvement in demeaning Officer Z sexually helps corroborate the testimony of Mitchell, Lapp and Kessler.

Koester contends that, even if she had made the comment about Officer Z looking for some "back door action," the comment "has no relation to the performance of [Officer Z's] work duties, as alleged." It is, however, demeaning for a DOC employee to make a sexually charged statement of *any* sort to a coworker while on duty; it is even more so when the comment is heard by other officers. Hearing other officers make a sexual slur such as this would certainly damage Officer Z's morale and performance, especially when the statement is particularly offensive, heard by another officer, and part of a pattern of intimidation.

The greater weight of credible evidence supports the charge that Koester made demeaning comments about Officer Z's supposed sexual orientation. Through her comments as related by Lapp and her "Gay Boy" exchange with Mudd, Koester sexually demeaned and harassed Officer Z, thereby violating DOC Work Rule #13 (for comments made prior to February 26, 2012) and DOC Work Rule #12 (those made or written on or after February 26, 2012).⁵

- *Called him cry baby.*

Mitchell testified that on March 24, 2012, less than a week before Officer Z's suicide, he and Officer Z were out on the track (Mitchell in a van, Z standing at the driver's door) when Koester, Mudd and a third person approached, and that when they were a few feet away, he heard one or both of the women say something about "cry baby ... he's probably going to snitch" and make a "waah" sound, evoking a crying infant. The conduct which Mitchell described is demeaning and would constitute a violation of DOC Work Rule #12. Koester affirmatively told investigators and testified at hearing that she did not make the "cry baby" comment or the "crying baby" sounds and neither did Mudd.

Mitchell reported the purported "cry baby" event very shortly after learning of Officer Z's death. He showed restraint in his accusations and did not claim to have heard Koester herself make any particular word or sound. The behavior described, particularly as it pertains to Mudd, is consistent with the statements and testimony of numerous employees, especially in light of the "Packers strip-search" incident.

Having found Mitchell more credible than Koester on the "back door" comment, we reach the same conclusion here. The greater weight of credible evidence is that the "cry baby"

⁵ DOC also charges a Work Rule #6 violation for Koester's response to investigators who asked if she had ever heard Officer Z referred to as "Gay Boy" in an email. She replied she did not recall. There is no evidence that Koester recalled it when being questioned during the disciplinary investigation. Thus, DOC has not proven that Koester's response constituted a knowingly false statement.

incident did occur. Because he was inside a vehicle, however, Mitchell could not definitively identify who said what or made such sounds. DOC has not established by the preponderance of credible evidence that Koester *herself* did either the verbalizing (“cry baby”) or vocalizing (“waah”).⁶

- *Talked about how the ‘fucking’ EAS people had no business at OCI and were just “fake timers.”*

Although juvenile institutions such as EAS are more dangerous for officers than adult facilities, employees who transfer to a secure facility (such as OCI) from a non-security classification (such as an EAS youth counselor) are sometimes demeaned as “fake timers.”

Sergeant David Tomaszewski, an EAS transferee, told investigators and testified that Koester did say the “fucking Ethan Allen people” were “fake timers” who were not doing their jobs properly and did not belong at OCI or in the DAI. Koester denied to investigators and at hearing that she had made such comments.

Koester’s rebuttal to Tomaszewski’s testimony relies on a misunderstanding of the record. She incorrectly describes the “fake timers” comment as “a statement the Report attributes to Tomaszewski who purportedly stated that [Officer Z] was present when these comments were made.” Because Tomaszewski did not testify at hearing that Officer Z was present when the comments were made, Koester argues, “this allegation must be dismissed.”

Koester misreads the exhibit she cites, a summary of the investigative interviews, which includes the following:

Sgt. Tomaszewski: Koester, she is really mean to [Officer Z]. She is one of those that would talk. I was sitting with the Lobby Sgt. and she would just talk about how these fucking EAS people are and that we had no business here and just fake timers. He [Officer Z] would refer to Koester and Mudd as his “tormentors.” She would just talk bad about him and ignore him and say inappropriate things as he walked by.

Tomaszewski reaffirmed this statement at hearing.

Officer Z was not the lobby sergeant; he was assigned to patrol. It was Seiler who was the lobby sergeant. Tomaszewski did not, as Koester asserts, state that Officer Z was present for the “fake timers” comment but that Koester would otherwise ignore him and say

⁶ But one or both of the women *did* make crying baby sounds towards Officer Z and call him a “cry baby.” Even if only one made the sounds, the other still had to have heard her. Koester’s contemporaneous and subsequent statements that she did not ever hear anybody engage in this behavior were untrue and deliberate. By thus knowingly giving false information Koester violated DOC Work Rule #6.

inappropriate things as he walked by. Koester has not offered any reason why Tomaszewski would lie to investigators and then perjure himself at hearing. We find that he did not and that his testimony was more credible than hers.

According, we find the preponderance of the credible evidence is that Koester did denigrate the EAS transferees in the manner alleged. Such comments clearly demean the EAS transferees. Because unit cohesion is so important in the protective services, spreading dissension and divisiveness among staff would certainly impair OCI's operations in violation of DOC Work Rules #13 and #12 depending on the date.

Koester's denials that she made any such statements are refuted by Tomaszewski, who was a more credible witness. By knowingly giving false information and denying she had made the comment Koester further violated DOC Work Rule #6.

- *Badmouthed him [Officer Z] to other staff and in front of inmates.*

Former Correctional Officer Shane Eddy, now Green County Deputy Sheriff, testified that he frequently heard Koester refer to Officer Z as "a snitch," a term of opprobrium in this context. Officer Nathaniel Ross testified that Koester told him he should not trust Officer Z. Mitchell testified that Officer Z told him that Koester and Mudd were harassing him, "talking behind his back, making comments to him when he was within earshot." Such comments would be demeaning and intimidating to Officer Z personally and would interfere with DOC's operations in violation of DOC Work Rule #13 (if uttered prior to February 26, 2012) and DOC Work Rule #12 (if uttered on or after February 26, 2012).

Mitchell's and Ross' accounts are supported by Eddy who no longer works at OCI. Koester offers no explanation why Eddy would also falsely accuse her and does not address his testimony in any manner. We find Eddy, Mitchell and Ross more credible than Koester and conclude the preponderance of credible evidence is that she did refer to Officer Z as a "snitch" and make other disparaging comments thereby violating DOC Work Rules #12 and #13 depending on the date. While DOC has proven that Koester's comments were made in front of other staff, DOC has not proven that Koester's comments were made in front of inmates.

DOC has also alleged Koester violated DOC Work Rule #6 by falsely denying that she had called Officer Z a snitch. According to the account of her investigative interview, Koester's response to the question, "Did you ever comment during the course of your work hours that [Officer Z] was a snitch," was "no." Koester testified that what she actually replied was, "no, not that I recall." Given the scope of the evidence against her, it is unlikely Koester did not remember calling Officer Z a snitch. That said, DOC has failed to prove that Koester denied doing so prior to her discharge.

Koester also told investigators and testified that she had never heard anyone else refer to Officer Z as a snitch. Several OCI employees told investigators and testified, however, that

they had personally heard Mudd routinely refer to Officer Z as a snitch on multiple occasions at times when Koester was present. Given the close working relationship between Koester and Mudd, and the number of OCI employees who testified credibly about Mudd's comments, it is inconceivable that Koester never heard Mudd call Officer Z a snitch. We have therefore found that Koester's denial constituted a further violation of DOC Work Rule #6 as alleged in the discharge letter.

- *Stared at [Officer Z] with Sgt. Witscheber in the cafeteria causing him to feel uncomfortable and intimidated. As a result [Officer Z] would not eat in the cafeteria if you were there.*

Although Koester claims this is just uncorroborated hearsay, sufficient credible evidence supports this charge. Lapp testified that he would save a tray of food for Officer Z in his cottage because Officer Z told him "he was afraid to go down to the kitchen because there were people down there" who Officer Z felt were "talking about him and they'd stare at him and laugh. So he just didn't want to go down there, so I'd save him a tray." Officer Z's statement was corroborated by the fact that Lapp did indeed save Officer Z a tray.

Koester's rejoinder to evidence she shunned and intimidated Officer Z while she was in the dining facility and he was in line is not persuasive – that eating dinner "cannot be considered part of [Officer Z's] job duties." Meal breaks are obviously among the conditions of employment, and Koester's actions toward Officer Z in the chow line are counted in the tally of her misdeeds.

Intentionally intimidating coworkers, making them feel so uncomfortable they take their meals separately interferes with their work and conditions of employment in violation of DOC Work Rules #12 and #13 depending on the date.⁷

Several employees testified Officer Z had told them about how Mudd and the others were harassing him but none took any of the mandated reporting steps. This, Koester argues, indicates either that hazing or harassment did not occur or that DOC cannot discipline Koester since it did not discipline the many other employees who also violated orders (to report hazing and harassment). There were numerous OCI employees who witnessed, experienced, or were told by Officer Z of the harassment by Koester and the others; they *were* responsible for reporting what they had seen and heard, and they did not do so. Some did not report it because Officer Z asked them not to do so and they complied. Some may have feared retribution or just did not want to get involved. All regret their silence.

⁷ In its written argument, DOC seeks to supplement the specific allegations in the discharge letter by asserting that Koester engaged in a series of other abusive acts towards Officer Z and other staff. Because we have affirmed Koester's discharge exclusively on the basis of specific acts identified in the discharge letter and proven at hearing, we need not comment further. For that same reason, we have also not addressed whether Koester violated work rules by the assistance she gave Seiler in the drafting and editing of the incident report he filed concerning his encounter with Sergeant Matthew Simes, leaving consideration of that allegation to Seiler's appeal.

Ultimately, the fact that none of the other officers or supervisors who knew of the hazing and harassment took formal action is immaterial to Koester's appeal. Whether or not their failure constituted a violation of any DOC work rule or policy stands on its own; it does not establish that Koester did not engage in hazing and harassment, only that there were no timely reports that she did. We reject the false equivalency Koester suggests; the failure to stop harassment, while serious and potentially tragic, is not as affirmative an offense as engaging in the ongoing harassment itself. DOC's failure to punish officers for not reporting Koester's misconduct does not prevent it from punishing Koester for that misconduct.

In summary, the greater weight of the credible evidence establishes that Koester did participate in and help cover up the "cry baby" and "back door" comments; that she did refer to former EAS personnel as "fucking fake timers"; that she did badmouth Officer Z to other staff; and that she did bully and shun Officer Z. The greater weight of the credible evidence also establishes that Koester provided both false and incomplete statements during the disciplinary investigation. The preponderance of the credible evidence thus supports many of the specific charges in the discharge letter.

DOES THE MISCONDUCT COMMITTED WARRANT DISCHARGE?

Notwithstanding Koester's protestations, there really can be little credible debate that the misconduct we have found constitutes just cause for discharge.

Koester maintains that calling coworkers gay or a snitch, or insinuating they seek anal intercourse, or talking about them behind their backs, or staring and glaring at them, or making them feel so uncomfortable they take their meals elsewhere, are merely "social faux pas," found in "virtually any workplace or high school cafeteria," and do not deserve any discipline at all. She suggests that DOC is trying to turn the work rules into "a social code of etiquette" for the employees and of "selectively enforce(ing) its social code against [her] with Taliban-like zeal." We reject emphatically the notion that the standard of interpersonal conduct for correctional officers in a state prison is no higher than that expected of adolescents eating a hurried lunch and that conduct which might somehow be acceptable in an office, shop or factory (which we doubt) is also acceptable in a Wisconsin correctional institution. That said we are here only concerned with the application of the facts in the record to the conduct proscribed by the relevant DOC work rules. As former DOC Secretary Gary Hamblin credibly testified, the prison setting is a unique workplace; it is stressful, potentially dangerous, and staffed by a paramilitary organization, where unit cohesion is vital for safety and security.

Further, by her repeated denials of what she did and what she knew Mudd to have done, Koester knowingly gave false information and failed to provide truthful, accurate, and complete information when required. These repeated violations of DOC Work Rule #6 were further grounds for Koester's discharge. We reject the notion that DOC cannot discipline an employee for making false statements. DOC has a clear interest in receiving truthful and

complete statements when investigating alleged misconduct. Koester says there is merely a “credibility dispute” between herself and the numerous OCI employees who testified to her misconduct. We conclude that Mitchell, Ross, Tomaszewski, Hakenson, Lapp, and the others were telling the truth and Koester was not.

Koester joined Mudd and other personnel in bullying Officer Z and other employees, and she was not truthful during the disciplinary investigation. We conclude, therefore, that DOC had just cause to discharge Koester.⁸

Koester asserts that the discharge should be modified because other OCI employees received no discipline or lesser discipline for similar conduct. Employees Simes, Schoonover and Anderson are specifically referenced.

Simes was not disciplined for spreading a false rumor among OCI staff that another OCI employee was “fucking inmates.” Schoonover was not disciplined for using DOC email to distribute a Jeff Foxworthy “You May be a Muslim” video. Anderson received a written reprimand for making racially offensive remarks to a black coworker.⁹

By comparison, Koester was discharged for an ongoing pattern of intimidation and harassment of coworkers and then lying about her actions. Her intimidation and harassment may well have played a role in Officer Z’s suicide. From our perspective, there is simply no meaningful comparability between Koester’s level of misconduct and that of Simes, Schoonover, and Anderson. Therefore, we reject this argument.

Koester also claims that she was effectively disciplined for exercising her legitimate First Amendment rights not to wear the so-called “black band.” The evidence does not support this argument.

Koester contends she was discharged to expiate the collective guilt that all at OCI felt over Officer Z’s suicide and that the only reason she was targeted was because she did not publicly mourn Officer Z with the black badge. There are two problems with this theory. The first is that other employees who *did* wear the mourning badge *were* disciplined, including Captain Michael Buettner (terminated) and Lieutenant William Asberry (suspended, after which he took a voluntary demotion and transferred). Security Director Ryan Blount was held to have failed to make probationary standards (for failing to act on alleged harassment by

⁸ Koester argues in her post-hearing briefs that § 885.16, Stats., the “Deadman’s Statute,” bars all investigative statements and hearing testimony in which witnesses purported to relate statements made by Officer Z. Koester did not raise this objection at any time during the hearing in this matter. A proper objection invoking the Deadman’s Statute is an objection to the competency of the witness, not to the admissibility of the evidence to be offered by the witness. *See in re Molay’s Estate*, 46 Wis.2d 450, 459, 175 N.W.2d 254 (1970) (*citing Carson v. Beloit*, 32 Wis.2d 282, 288, 145 N.W.2d 112 (1966)). The failure to raise the objection results in its waiver.

⁹ While there were allegations that Anderson engaged in more serious misconduct as to the black coworker, those allegations were not proven to DOC’s satisfaction and thus no action was taken.

Buettner toward Asberry) and was reinstated as a lieutenant and transferred to Columbia Correctional Institution. Several other employees, all of whom wore the mourning insignia, were also the subjects of disciplinary investigations. The second is that, as testified to by Hamblin and others, refusing to wear the black band was not itself misconduct. The fact that the fact-finders were aware of Koester's attitude toward mourning Officer Z by wearing the black band when they began their work does not mean they targeted Koester on that basis.

Morgan testified that when she asked for the fact-finding or climate assessment she did not discuss with Hamblin or his deputy secretary the incident reports concerning the encounters between Witscheber and Ross or between Seiler and Simes. Former Assistant Division Administrator Robert Humphreys testified that the investigation was not started as a result of the Witscheber and Ross encounter. Koester's decision to not publicly mourn Officer Z by wearing a black mourning band did not precipitate and had no bearing on the ensuing investigation and discharge.¹⁰

Based on the foregoing, we have affirmed the decision to discharge Rachel Koester.

Signed at the City of Madison, Wisconsin, this 11th day of March 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

¹⁰ We also conclude there is no persuasive evidence in the record that DOC was motivated by animus toward Koester due to her lawful concerted activity.