

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JUSTYN WITSCHEBER, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case 172
No. 71825
PA(adv)-266

DECISION NO. 33994-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

Justyn Witscheber, formerly a sergeant at Oakhill Correctional Institution, appeals his October 3, 2012 discharge from employment with the State of Wisconsin, Department of Corrections for purportedly intimidating, harassing, demeaning and interfering with coworkers and lying about his 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 Witscheber's appeal was consolidated with those of two other former Oakhill Correctional Institution employees, Sergeant Matthew Seiler and Officer Rachel Koester, who were discharged October 2, 2012, for purported offenses similar to and associated with Witscheber'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. Justyn Witscheber worked for DOC from 2004 until his discharge on October 3, 2012, at which time he had permanent status in class.

3. Witscheber harassed five of his coworkers at OCI by demeaning and/or intimidating them in violation of DOC work rules and/or directives.

4. Witscheber retained in his DOC email account and forwarded to other DOC employees emails which were racially offensive and sexually oriented in violation of DOC work rules and/or directives.

5. Witscheber 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 Justyn Witscheber.

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 Justyn Witscheber 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 Sergeants Justyn Witscheber and Matthew Seiler and Officer Rachel Koester 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 Witscheber'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.

Justyn Witscheber had permanent status in class at the time of his discharge and his 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 WITSCHBER COMMIT THE MISCONDUCT ALLEGED BY DOC?

The events leading to Witscheber'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 Witscheber, Seiler, Koester, and Corrections 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.

On March 30, 2012, Officer Z committed suicide. The suicide and related events led to an investigation which ultimately led to Witscheber's discharge on October 3, 2012. The discharge letter encompassed the following allegations:

- *Harassment of Coworkers.*

The evidence establishes that prior to Officer Z's death, Witscheber harassed Officer Z in the cafeteria at OCI.

Koester and Witscheber intimidated Officer Z by talking about him, staring at him, and laughing at him in the cafeteria. Officer Arthur Lapp saved trays of food for Officer Z because he knew that Officer Z would otherwise not eat in order to avoid the intimidation of Koester and Witscheber in the cafeteria. Officer Z told Lapp about the intimidation he experienced from Koester and Witscheber. That is hearsay. The fact that Lapp saved food for Officer Z provides sufficient corroboration of what Officer Z told to Lapp.⁴

The evidence also establishes that Witscheber harassed Officer Nathaniel Ross while he was mourning Officer Z's death. After returning to work on April 3, 2012 from vacation, Witscheber confronted Ross about why he was wearing a black band over his badge. By the time of the confrontation, Witscheber had been back to work for at least an hour. While he was away, Morgan had sent an email to all staff regarding Officer Z's death and Sergeant Cal Schoonover sent Witscheber a text message regarding Officer Z's death. Witscheber's remarks to Ross during their confrontation were demeaning of both Officer Z and of Ross for choosing to mourn Officer Z's death. Witscheber's subsequent comments rhetorically questioning why Ross was wearing the black band, in the presence of Sergeants Cole Olsen and Jason Shaitel,

⁴ Witscheber argues in his 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. Witscheber 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.

who were each also wearing mourning bands, were additionally demeaning of Ross. Demeaning Ross in such a manner was harassment.

The evidence persuades us that Witscheber also harassed Sergeant L. During her tenure at OCI, Witscheber made fun of Sergeant L for being short and did not stop when asked. He also made frequent comments containing sexual innuendo about Sergeant L. Witscheber argues that his conduct regarding Sergeant L should be excused because he believed she “opened the door” to such topics. Even if she had, which we do not conclude she did, that provides Witscheber no immunity for his own conduct, particularly where she asked him to stop. Sergeant L testified that Witscheber’s conduct contributed to her decision to leave employment with DOC. Making fun of Sergeant L and making demeaning comments about her was harassment.

Sergeant L’s husband, also a DOC employee, was also harassed by Witscheber. Witscheber made fun of his lisp. Demeaning the speech impediment in this manner was harassment.

Officer Z was not the only employee to experience cafeteria harassment from Koester and Witscheber. Ross and Sergeant Jennifer Solana also experienced staring, whispering, and laughing directed at them in the cafeteria by Koester and Witscheber. As petty as this form of intimidation may be, it nonetheless made its victims uncomfortable and constitutes harassment.

- *Improper Email Message.*

Witscheber admitted that he received, retained, and forwarded emails which DOC characterized as inappropriate. The content of the emails is inappropriate for use within DOC’s email system and forwarding them was in violation of DOC’s policies.

- *Improper Conduct During Investigation.*

Finally, Witscheber lied about his conduct as to Officer Z, Sergeant L, and Sergeant L’s husband. Witscheber denied intimidating Officer Z in the cafeteria. Lapp’s testimony about Witscheber’s conduct in the cafeteria was more credible. When Witscheber denied committing the lunchroom conduct, he was lying. When Witscheber told DOC’s investigators that he made fun of Sergeant L’s husband’s lisp outside of work, he was less than honest and dissembling. Former Correctional Officer, now Green County Deputy Sheriff, Shane Eddy, testified credibly that Witscheber mocked Sergeant L’s husband’s lisp at work. Eddy’s testimony was more credible than that of Witscheber. Although Witscheber later argues that his conduct toward Sergeant L should not be punishable because she opened the door to such topics as her height and sexual conduct, Witscheber initially denied to DOC that he made fun of her height or made sexual commentary about her. Sergeant L and Officer Jessica Kessler testified more credibly that Witscheber made fun of Sergeant L’s height, including

after Sergeant L asked him to stop, and that he made repeated sexually charged statements about her.⁵

DOES THE MISCONDUCT COMMITTED WARRANT DISCHARGE?

There can be little doubt that the conduct Witscheber committed constitutes just cause for discharge.

Witscheber harassed five of his coworkers. DOC maintains work rules and policies to govern its relationship with employees and the relationships between employees. Former Work Rule #12, subsequently replaced by Work Rule #13, which were alternately in effect during Witscheber's time at OCI, prohibits harassment of coworkers. DOC Executive Directive 50 does the same. Witscheber was aware of these rules, but harassed his coworkers nonetheless.

Witscheber also lied and dissembled during DOC's investigations. His dishonesty was deliberate and persistent. It is true that we look warily at the notion of "penalty enhancement," whereby an employer disciplines an employee first for an act of misconduct and then also for his dishonesty about the act. That said, here Witscheber's other negative conduct covers a lot of ground. The breadth of his dishonesty to deny virtually every allegation against him over a wide expanse of offenses justifies a separate finding of misconduct based upon his dishonesty.

Witscheber's conduct impaired operations at OCI. Officer Z would not eat in the cafeteria. Sergeant L left her employment with DOC "mostly" because of Witscheber's harassment. Former DOC Secretary Gary Hamblin credibly testified that working in a corrections environment is unique – it is stressful, potentially dangerous, and staffed by a paramilitary organization. He further testified that unit cohesion and honesty are essential to institutional safety, security, and the employer's operations. Demeaning coworkers for their physical traits, ridiculing coworkers with sexual innuendo, spreading racially and sexually inappropriate emails, demeaning coworkers for their grief over the loss of a colleague, and pervasive dishonesty would certainly impair an employer's operations in any environment. In a prison, the tendency for impairment of operations is more significant due to the greater importance of unit cohesion and trust.

⁵ DOC failed to prove by a preponderance of the evidence that Witscheber committed other conduct alleged in the discharge letter. Specifically, DOC offered little or no evidence to suggest that Witscheber made derogatory remarks to staff while walking to assigned locations or made sexually motivated comments about Ross. DOC also failed to offer sufficient evidence to demonstrate that Witscheber made fun of Sergeant L's husband's hearing disability.

DOC argued that Witscheber should be held accountable for certain other conduct, specifically: lying about never hearing anyone else call Officer Z a snitch; violating post orders; lying about the reason he returned to OCI from the Black River Correctional Center; harassing Sergeant David Torres; loudly making sexual comments and jokes with Koester; and making admissions to Sergeant Dawn Cain that he harassed Officer Z. We need not address those contentions as we have concluded there was just cause for discharge based on the misconduct already addressed.

DOC has discharged other employees for harassment. Most closely related, Koester was discharged for her sustained harassment of Officer Z. Also, in 2012, in a case cited by Witscheber for other reasons, a correctional officer was discharged for harassing a female coworker by making her believe that she would be pat searched before entering a prison and then lying about his conduct. *Walls v. DOC*, Dec. No. 34026-D (WERC, 1/2015).

Witscheber 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.⁶

By comparison, Witscheber was discharged for an ongoing pattern of intimidation and harassment of coworkers, lying about his actions and improper email usage. His intimidation and harassment may well have played a role in Officer Z’s suicide and the emails he retained and forwarded using DOC email were far more offensive than Schoonover’s. 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.

Witscheber claims the fact-finding at OCI was a direct result of reports submitted about his confrontation with Ross about wearing a black mourning band, essentially arguing that he was disciplined for exercising his legitimate First Amendment right not to wear the so-called “black band.” The evidence does not support this argument.

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 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. Former DOC Secretary Gary Hamblin and others testified that declining to wear the black band was not itself misconduct. The fact that the ODES fact-finders were aware of Witscheber’s attitude toward mourning Officer Z by wearing the black band when they began their work does not establish they targeted Witscheber on that basis.

⁶ 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.

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 ODES investigation was not started as a result of the Witscheber and Ross encounter. Witscheber'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.

Based on the foregoing, we have affirmed the decision to discharge Justyn Witscheber.

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