

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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RACHEL KOESTER, Appellant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case 170  
No. 71823  
PA(adv)-264

DECISION NO. 33992-B

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**Appearances:**

Victor M. Arellano, with Atty. Kurt Kobelt on the brief, Arellano & Phebus, S.C., 1468 North High Point Road, Suite 202, Middleton, Wisconsin, appearing on behalf of the Appellant.

Andrea Olmanson, Wisconsin Department of Corrections, 3099 East Washington Avenue, Madison, Wisconsin, appearing on behalf of the Respondent.

**PROPOSED DECISION AND ORDER**

Rachel Koester, formerly a Corrections Officer 1 at Oakhill Correctional Institution, appeals her October 2, 2012 disciplinary termination from employment with the Wisconsin Department of Corrections for purportedly intimidating, harassing, demeaning and interfering with coworkers and lying about her actions. Hearing in this matter was held on 16 days from July 8, 2013 to October 11, 2013.<sup>1</sup> The 3,020-page transcript was ready for the parties by October 24, 2013. The parties thereafter filed written arguments and replies, the last of which was received on January 6, 2014.<sup>2</sup> The Commission, being fully advised in the premises, hereby makes and issues the following

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<sup>1</sup> The hearing in Koester's appeal was consolidated with those of two other former OCI employees, Sergeants Matthew Seiler and Justyn Witscheber, who were terminated October 2 and October 3, respectively, for purported offenses similar to, and associated with, Koester's.

<sup>2</sup> Although the parties filed omnibus written arguments combining all three appeals, due process requires individual consideration of each case.

### FINDINGS OF FACT

1. Respondent Wisconsin 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. Appellant Rachel Koester (“Koester”) was a Correctional Officer I (and occasionally acting Sergeant) at OCI from 2001 to 2005 and from 2007 until she was terminated on October 2, 2012, for purportedly violating DOC Work Rules #2, #6, #12 and #13.

3. At all times material, DOC has had in effect Executive Directive 43, which subjects any employee who violates DOC Work Rules to discipline, up to and including discharge.

4. At all times material, DOC has had in effect Work Rule #2, which subjects any employee who fails to comply with written policies or procedures, including Executive Directives, to discipline, up to and including discharge.

5. At all times material, DOC has had in effect Work Rule #6, which subjects any employee who knowingly gives false information, or fails to provide truthful, accurate and complete information when required, to discipline, up to and including discharge.

6. At all times material, DOC has had in effect work rules which subject any employee who intimidates, demeans, interferes with or harasses another employee to discipline, up to and including discharge.

7. At all times material, DOC has had in effect Executive Directive 7, which subjects any employee who engages in harassment or hazing to discipline, up to and including discharge.

8. At all times material, OCI has had in effect Procedure No. 308.01 of its Policies and Procedures Manual, relating to Harassment and Hazing, which establishes that employees are responsible for preventing and addressing harassment and hazing by objecting to it when they observe it and reporting the behavior to their supervisor if it does not cease.

9. In 2011, DOC began the process of closing EAS and transferring personnel to OCI. Among those who transferred was Youth Counselor A.Z. (not his real initials), who assumed the position of Correctional Officer 1 at OCI in August, 2011, assigned to second shift.

10. Officer Z (“Z”) committed suicide at his home on March 30, 2012.

11. Koester violated DOC Work Rules #2, #12 and #13 by her intimidation, harassment, interference, and demeaning of Z.

12. Koester violated DOC Work Rules #2, #12 and #13 by her intimidation, harassment, interference, and demeaning of OCI personnel who had transferred from EAS.

13. Koester violated DOC Work Rule #6 by knowingly giving false information and otherwise failing to provide truthful, accurate and complete information when required to do so.

14. Respondent DOC had just cause to discipline Appellant Rachel Koester.

15. The termination of Appellant Rachel Koester was not excessive discipline.

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

### CONCLUSIONS OF LAW

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

2. Respondent had just cause within the meaning of § 230.34(1)(a), Stats., to terminate Appellant 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 Department of Corrections’ termination of Rachel Koester is affirmed.

Signed at the City of Madison, Wisconsin, this 4th day of March 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

This proceeding is part of a consolidated appeal by former Corrections Officer 1 Rachel Koester and former Corrections Sergeants Matthew Seiler and Justyn Witscheber of their disciplinary termination by the Wisconsin Department of Corrections (“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, 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 A.Z. (not his real initials).<sup>3</sup> This decision addresses only Koester’s appeal.

Section 230.34(1)(a), Stats., requires that termination of an employee with permanent status in class, such as Koester, must be for just cause. The courts have equated this to proof to a reasonable certainty by the greater weight or clear preponderance of the evidence. *Reinke v. Personnel Board*, 52 Wis.2d 123 (1971); *Hogoboom v. Wis. Pers. Comm.*, Dane County Circuit Court, 81-CV 5669, 4/23/84; *Jackson v. State Personnel Board*, Dane County Circuit Court, 164-086, 2/26/79. The underlying questions are: 1) whether the greater weight of credible evidence shows the appellant committed the conduct alleged by respondent in its letter of discipline; 2) whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes just cause for the imposition of discipline; and, 3) whether the imposed discipline was excessive. *Mitchell v. DNR*, 83-0228-PC, 8/30/84. In considering the severity of the discipline to be imposed, the Commission must consider, at a minimum, the weight or enormity of the employee’s offense or dereliction, including the degree to which it did or could reasonably be said to have a tendency to impair the employer’s operation, and the employee’s prior work record with the respondent. *Safransky v. Personnel Board*, 62 Wis.2d 464 (1974), *Barden v. UW*, 82-237-PC, 6/9/83, as cited in *Del Frate v. DOC*, Dec. No. 30795 (WERC, 2/2004).

The first question is one of fact, the second one of policy, the final of justice.

Oakhill Correctional Institution (“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.<sup>4</sup> At all times relevant, the warden of OCI was Deirdre

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<sup>3</sup> Koester’s termination letter is R.103, p.1; Seiler’s termination letter is R.104, p.1; Witscheber’s termination letter is R.105, p.1.

<sup>4</sup> Tr.1272.

Morgan.<sup>5</sup> Koester worked as a Correctional Officer I at OCI from 2001 to 2005 and again from 2007 until her termination on October 2, 2012.<sup>6</sup>

In Koester's termination letter, Jess asserted that she was part of a small group of employees who engaged in "harassing, belittling, intimidating, threatening and demeaning behaviors" which "played a part in instilling fear in Officer Z and creating a toxic climate" that permeated OCI. Jess asserted that Koester "partnered with Sergeant Mudd and others to demean" Z, by "shunning him, taunting him with name calling and humiliating him in front of inmates."<sup>7</sup>

At all times material, Koester worked, in several capacities, on the second shift (3:00 p.m. to 11:00 p.m.), under the supervision of Lieutenant William Asberry. She has a clean disciplinary record.<sup>8</sup>

On January 30, 2010, Asberry submitted his Performance Planning and Development Report ("PPD") for Koester, in which he found that she met 18 and exceeded two job standards. Among his supervisory comments, he noted "she is very credible and maintains accurate records ... is a very sensitive; yet, caring person ... respected by her peers ... very courteous of others ... very dependable ... proven to be a leader by example ... always represents herself in a professional manner ... very well-liked and respected by her peers. Very dependable. A pleasure to work with."<sup>9</sup>

At the time, Asberry had supervised Koester for about three months. Sergeant Nathaniel Ross later told DOC investigators that Koester "boasted once that she scolded Asberry once. She said, 'he wrote me a good PPD because I scared the shit out of him.'<sup>10</sup> Koester denied to DOC investigators she had made such a comment.<sup>11</sup> Asberry did not disavow the evaluation at hearing.

On November 14, 2011, Lieutenant Donald Scanlon submitted the next PPD for Koester, in which he found she met all job standards, exceeding none. He commented that Koester "could be more sensitive to others needs and concerns ... could be a little more tactful

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<sup>5</sup> Morgan, a 22-year veteran of DOC at the time of Z's suicide, was made a regional chief for the Division of Juvenile Corrections ("DJC") in August, 2012; after about a month in that position, she was promoted to deputy secretary of DOC, which position she held when she testified herein. Tr.1259. Former Secretary of Corrections Gary Hamblin testified that "concerns about the climate at Oakhill" were a factor in her transfer to the DJC position. Tr.1240

<sup>6</sup> Koester also worked as an acting sergeant.

<sup>7</sup> The others being Sergeants Witscheber and Seiler. Sergeant Susan Mudd retired before any disciplinary action was taken against her.

<sup>8</sup> The one instance in which Koester was disciplined (for insubordination) was found by an arbitrator to be without cause. R.103, p.35; Tr.1273-4.

<sup>9</sup> R.103, p.173-5.

<sup>10</sup> R.103, p.71.

<sup>11</sup> R.103, p.40.

when dealing with inmates, staff and the general public ... could deal with constructive criticism in a better way ... can become argumentative when being criticized ... does a good job overall ... needs to monitor what she says and how she talks to inmates.”<sup>12</sup>

The events leading to Z’s suicide and Koester’s termination began when DOC closed the Ethan Allen School for Boys (“EAS”), a correctional facility for male juvenile offenders in Wales, Wisconsin, on July 2, 2011, and eight EAS staff, including Z, transferred to Oakhill.<sup>13</sup> Mudd had worked at EAS in the 1990s.<sup>14</sup>

Seniority within each DOC institution is an important consideration to officers and sergeants, as they bid on assignments, choose vacation and consider overtime at each facility on the basis of their departmental seniority. Officers at OCI knew that some of them would likely have their working conditions adversely affected by the unexpected influx of EAS personnel.<sup>15</sup> Several EAS transferees later reported that they felt they had suffered mistreatment by OCI staff, primarily on that basis.<sup>16</sup> EAS transferees also 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. And although juvenile corrections is more dangerous for officers than adult corrections, some OCI officers also derided the EAS personnel for having worked in a non-security classification.

Officer Z, 52, who had worked at EAS for 20 years, was among those who accepted transfer to OCI. Rather than take a first shift position, to which his seniority would have entitled him, Z took a patrol post on the 3:00 p.m. – 11:00 p.m. second shift, where Koester, the other two Appellants and Mudd already worked. Mudd and Z were contemporaries, while the other three were about 20 years younger.

Supervisors and coworkers all considered Z a conscientious and hardworking employee, always seeking to improve.<sup>17</sup> Older, with an advanced degree, he was also soft-spoken and somewhat reserved.<sup>18</sup> At the time of his death, Z had been married for 21 years, with a daughter.

The State’s central construct in this proceeding is that Mudd and the three Appellants were a clique that acted in consort to demean and intimidate Z and other second-shift officers, especially those from EAS.

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<sup>12</sup> R.103, p.170-1.

<sup>13</sup> Tr.2034, 2047.

<sup>14</sup> R.101, p.85.

<sup>15</sup> R.101, p.82; R.102, pp.137, 311; R.103, p.131; Tr.138, 740-1, 2048.

<sup>16</sup> R.101, p.37, pp.54, 65, 114; R.103, pp.84; 109; Tr.740.

<sup>17</sup> R.103, p.103; Tr.114-5, 736, 2086.

<sup>18</sup> Z had a B.S. from UW-La Crosse and a M.S. from UW-Madison.

Koester challenges the notion that she and the three others formed a foursome because they “did not have a particularly close social relationship with each other or with Mudd.”<sup>19</sup> But their social relationship is not at issue; our interest is in their working relationship, and several second-shift officers and supervisors spoke and testified that it was a noticeably close one, particularly Koester with Mudd, and with Witscheber.<sup>20</sup>

The preponderance of the evidence establishes that, as Respondent asserts, the four formed a group on the second shift that stood separate from the rest of the second shift and which came to intimidate several other second-shift officers.<sup>21</sup> In a word, they formed a clique.<sup>22</sup> Due to the potentially adverse impact on their hours and wages, and their attitude toward juvenile corrections, they focused especially on EAS transferees.<sup>23</sup>

In the late fall of 2011, following an incident with Mudd, they would make Z their primary target.<sup>24</sup> Sergeant Anthony Hakenson later told investigators that Z told him that there were four employees on second shift – Mudd, another woman, and two men – who “every single day they called him a fag, worthless, a coward, a snitch, a big fucking sissy. Every day. He told me that there were four people doing it on a regular basis.”<sup>25</sup>

As part of their rehabilitation program, some offenders housed at OCI perform farm-related duties outside the institution. When they return, they are strip-searched, an activity which requires two officers to be present.

On November 6, 2011, Z and Mudd were to strip search a group of offenders returning from their farm work. But when Z was ready to do the searches, Mudd was in residential unit Cottage 5, watching the end of the Green Bay Packers – San Diego Chargers football game; it was a high-scoring game which went down to the wire, and she was late reporting for the assignment.<sup>26</sup> After waiting a period of time, Z decided to call a supervisor for permission to conduct a pat search, which can be done by a single officer, rather than a strip search. While Z was holding the telephone, Mudd arrived and concluded, erroneously, that Z was reporting her for neglecting her duties.<sup>27</sup>

Koester testified that Mudd told her shortly after the incident that she had alerted Z to the fact that she would be a few minutes late, and that when she saw him with the phone, she

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<sup>19</sup> App.Br., p.69.

<sup>20</sup> R.101, pp.42-3, 56; 140-3; R.103, pp.105; 133; R.105, p.64; Tr.1349.

<sup>21</sup> R.101, pp.32, 39, 45, 56, 64, 82, 140, 149, 283; R.102, pp.151, 312; Tr.767.

<sup>22</sup> Tr.766.

<sup>23</sup> R.101, p.40-1; p.46, p.137.

<sup>24</sup> R.101, p.48, p.67, p.85, p.142, p.144-5.

<sup>25</sup> R.102, p.124.

<sup>26</sup> The Packers won, 45-38.

<sup>27</sup> R.101, pp.82, 144, .177; R.102, pp.276, 296; Tr.25, 773, 839, 939, 1329.

told Z, “thanks for throwing me under the bus.”<sup>28</sup> Z made the following contemporaneous entry in a pocket notebook he kept: “gets upset I got approval to pat (-)”<sup>29</sup>

This encounter led Mudd to adopt a particularly hostile and demeaning attitude toward Z and to refer to him repeatedly and publicly as a “snitch.”<sup>30</sup>

Despite the interest that law enforcement has in persons reporting any information they have about inappropriate or criminal conduct, some law enforcement and corrections officers apparently look with great disdain on fellow officers who report misconduct by their colleagues.

Koester claim that staff “commonly,” refer to other staff as a “snitch,” and that there is no negative connotation, so that even if she *had* used the term in referring to Z, her doing so would not have been misconduct.<sup>31</sup> But while the term is prevalent in prisons, it is used to describe inmates, not officers. There is no evidence in the record for 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.

The harassment of Z and his stress increased markedly following an incident in November, 2011, when an inmate rubbed his genitals during a strip search Z was conducting on him.<sup>32</sup> Although Z followed DOC protocol in performing the search, he was further mocked, and worried that he had done something wrong, or that others might think that he did. He expressed concern that he could be disciplined and possibly even investigated criminally, neither of which were ever contemplated.<sup>33</sup>

Z committed suicide in his garage in the early morning hours of Thursday, March 30, 2012.<sup>34</sup>

A detective from the Dane County Sheriff’s Department who conducted preliminary interviews with Z’s widow and daughter following the discovery of Z’s body called Morgan to notify her of Z’s death; when he said he was not at liberty to divulge any details, she intuited that Z had committed suicide. Based on his initial conversation with Z’s widow and daughter, the detective asked that arrangements be made for him to interview second shift Captain Michael Buettner and Mudd. Believing it best that the interviews take place off OCI grounds,

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<sup>28</sup> Tr.149.

<sup>29</sup> R.101, p.60.

<sup>30</sup> R.101, pp.38-9, 47, 55, 66, 177; R.102, pp.82, 151, 276; Tr.326, 465, 838.

<sup>31</sup> App. Br. pp.30, 56.

<sup>32</sup> R.102, pps.728-32.

<sup>33</sup> R.101, p.57; Tr. 1723-4.

<sup>34</sup> R.101, p.299.

Morgan contacted the Fitchburg Police Department to arrange for the use of one of their rooms.<sup>35</sup>

Later that day, Morgan spoke to several officers on second shift, and was informed Z had been upset and was thought to be planning to transfer to a different shift.<sup>36</sup> Several officers used the term “bullying” to describe the situation.<sup>37</sup>

The following evening, OCI Sergeant Mary Kelly sent Morgan an email, with the subject line “Did you KNOW this was going on???,” in which she forwarded an email she had received from another OCI officer, which stated: “Am also so angry for the harassment (Z) suffered the past six months at the hands of some of his ‘co-workers.’ What was going on took mean behavior to a whole new level. Am praying for the strength to behave as Our Lord would have me toward those who tormented him constantly.”<sup>38</sup> Kelly testified she retired after 17 years with DOC because she was “not going to work in an environment like that any longer,” with “the hostility and the – all the negative things that were going on.”<sup>39</sup>

On Monday, April 2, Hakenson sent an email to Deputy Warden Paul Ninneman in which he wondered “if all the harassment that (Z) put up with from certain Blue shirts on 2nd shift pushed him into making such a horrible and permanent decision.”<sup>40</sup> Ninneman forwarded the email to Morgan at 1:15 p.m., along with a note; “Hakenson worked with Mr. (Z) for 15 yrs. at EAS. It appears Officer Hakenson never shared what Mr. (Z) disclosed to him with a supervisor.”<sup>41</sup>

At 1:40 p.m., Morgan directed Ninneman to cause the creation of “a file for Officer (Z) fact-finding.” Later that day and evening, three more officers offered information, including Officer Matthew Mitchell, who related to Ninneman and Captain David Hicks three incidents involving Mudd and Z, including the November 6 incident.<sup>42</sup>

Sometime over the weekend, Morgan notified OCI personnel they were authorized to honor Z by wearing a makeshift mourning badge of black electrical tape.<sup>43</sup> Koester, Witscheber, Seiler and Mudd chose not to, apparently the only OCI employees to decline to publicly mourn Z in this manner.<sup>44</sup>

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<sup>35</sup> Tr.1260-3.

<sup>36</sup> Tr.1266.

<sup>37</sup> Tr.1290.

<sup>38</sup> R.101, p.287-8.

<sup>39</sup> Tr.981.

<sup>40</sup> R.101, p.290. “Blue shirt” refers to Correctional Officer I and II (Sergeant). Lieutenants and Captains are referred to as “white shirts.”

<sup>41</sup> R.101, p.289.

<sup>42</sup> R.101, p.177.

<sup>43</sup> Inexplicably, neither the date of Morgan’s email, nor its text, are in the record.

<sup>44</sup> Tr.178.

OCI staff began wearing the “black bands” by Monday, April 3. At about 4:20 p.m. on that date, Witscheber had a hostile encounter with Ross over Ross’ decision to wear the blackened badge and the general notion of mourning Z.<sup>45</sup> Shortly thereafter, Ross complained about Witscheber’s attitude to Koester, who informed him that she wouldn’t wear the mourning insignia either, because she considered it reserved for those who had died in the line of duty.<sup>46</sup> Ross took offense to this as well.<sup>47</sup> The following day, Seiler had an encounter with Sergeant Matthew Simes, who reacted angrily when Seiler told him that, due to his religious beliefs, he would not wear a mourning badge for someone who had committed suicide.<sup>48</sup>

An account of the Witscheber-Ross encounter, from Ross’s perspective, was cleared into the system and available to others on April 5.<sup>49</sup> Seiler and Simes filed their accounts of their encounter at 6:06 p.m. and 9:21 p.m., respectively, on April 9.<sup>50</sup>

At 2:50 a.m. on April 5, third-shift Captain Michael Green sent Morgan an email in which he warned of “a staff war brewing” between those who were friends of Z’s and those who weren’t, that “the entire 2nd shift is in disarray,” and that “everyone is choosing sides.”<sup>51</sup>

Five hours later, Ninneman sent Morgan a summary of information he received from Officers Hakenson and Christine Hutsell and an interview he and Captain Hicks conducted with Mitchell at his request. Hakenson and Hutsell, both former EAS employees, reported the “strip search” incident with Mudd; Hakenson also “reported staff were calling Officer Z a ‘fag,’” while Hutsell added that Z had confided in her and Officer Johnson about being harassed. Mitchell also cited that strip search incident, and that Mudd would refer to Z as “that fucking snitch.” And Mitchell related an incident about a week before Z’s suicide in which he claimed Mudd and Koester called Z a “cry baby” and made the sounds, of a crying infant.<sup>52</sup>

About that time, arrangements were made with DOC’s Office of Diversity Employee Services (“ODES”) to conduct a fact-finding “climate assessment” of the facility, particularly the second shift. Morgan testified she couldn’t recall precisely when she requested the ODES fact-finding, and was inconsistent whether it was before or after she received the reports of the two “black band” encounters.<sup>53</sup>

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<sup>45</sup> R.102, p.599. This incident is significant in Witscheber’s appeal, and is discussed in detail in that decision.

<sup>46</sup> Tr.177-8, 2756-7.

<sup>47</sup> Tr.2758-9.

<sup>48</sup> R.102, p.600. The Seiler encounter with Simes incident is addressed more fully in his appeal.

<sup>49</sup> Ross reported the incident to Lieutenant Jon Peterson but declined to file a formal incident report. Peterson then wrote an incident report based on what he heard Ross tell him. Tr.1984-7.

<sup>50</sup> R.101, p.200-1.

<sup>51</sup> R.101, p.284.

<sup>52</sup> R.103, p.49-51.

<sup>53</sup> Tr.1275, 1282-8.

On the afternoon of April 9, Morgan emailed staff that ODES personnel would be available for anyone with information they wished to share.<sup>54</sup> Twenty-five OCI employees voluntarily spoke with the ODES fact-finding team over the next few weeks. None of the Appellants, or Mudd, did so.<sup>55</sup>

On April 16, Z's widow told investigators that Z had been increasingly unhappy about work, showing signs of increasing stress. She said she knew about the strip search incident and related that "Mudd and 'another female staff person' would routinely ridicule and belittle Z at work." Z's daughter said she heard him say, for the first time, how unhappy the job was making him. Because there were no family problems, or financial concerns or other circumstances that would account for a suicidal depression, both women said they believed Z's suicide "was almost all related to work issues."<sup>56</sup>

The ODES fact-finding report, submitted April 19, detailed allegations of widespread abuse and other very serious problems caused by line, supervisory and administrative staff at OCI.<sup>57</sup> It recommended disciplinary investigations of Mudd, Koester, Witscheber and Seiler for alleged harassment of Z, and of Asberry, Buettner, Sergeant Brian Anderson, Lieutenant Marty Winchell, Lieutenant James Logan, Captain Mark Nelson and Deputy Warden Paul Ninneman for a variety of offenses including failing to respond to Z's complaints of harassment, making racial and sexual jokes about Morgan, sexual harassment, inappropriate ageist remarks, bullying and harassing a subordinate supervisor, making racial/sexual jokes and disclosing another's financial information.

The ODES report identified several "themes to investigate," as follows:

- Reports of harassment and bullying of line staff going unanswered by Security Supervisors on 2nd shift;
- Harassment, bullying, and inappropriate behaviors by Security Supervisors towards other supervisors (history to present reported);
- Lack of confidentiality from the supervisors' office and security in general. This was reported from Security Supervisors and Sergeants and Officers. Reports of confidential concerns if reported to Supervisors and Security Director;
- Line staff being insubordinate to supervisors and permitted to do so. (institution wide). Supervisors not holding staff accountable (do not want

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<sup>54</sup> R.101, p.171.

<sup>55</sup> R.101, p.133.

<sup>56</sup> R.101, p.87-8.

<sup>57</sup> R.101, p.129-31.

to handle difficult behaviors). Supervisor decisions not being supported by upper management;

- No confidence when reporting confidential information to Supervisors and Security Director at OCI (history that nothing is confidential, would rather go directly to the Warden or not report at all).

Based on the ODES fact-finding report, DOC Secretary Gary Hamblin on May 3 assigned an investigation team consisting of two DOC managers and three retired DOC or law enforcement personnel to investigate potential work rule violations.<sup>58</sup>

On May 14, Koester was placed on paid administrative leave, while the investigative interviews took place over the next few months.<sup>59</sup>

Koester makes several challenges to the disciplinary process itself and the evidence proffered. One argument applies to all Appellants, others are unique to Koester.

All Appellants argue that the so-called “Deadman’s Statute,” bars all investigative statements and hearing testimony in which witnesses purported to relate statements made by Z.

Section 885.16, Stats., “Transactions with deceased or insane persons,” bars witnesses with a “present, certain and vested” interest from testifying to a “transaction or communication” between themselves and a decedent. Appellants contend that “all supervisory personnel who testified must be considered interested parties” under the statute “since they are agents of the DOC which has an interest in prevailing in these proceedings.”<sup>60</sup>

Appellants’ first problem is that they failed to make this objection at any one of the 16 days of hearing. An objection to the admissibility of evidence or testimony must be raised at the time the testimony or evidence is offered, not in the briefs filed long after the evidentiary record is closed.<sup>61</sup>

Even if Appellants *had* raised a timely objection, it should not have been sustained. As DOC accurately notes – at undue length<sup>62</sup> - the relationship Appellants claim between the supervisors and DOC administration is nowhere near what the courts have meant by a “present, certain and vested” interest in the proceedings.<sup>63</sup>

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<sup>58</sup> R.103, p.9. Koester suggests there was something wrong because the investigative team purportedly consisted of “friends and acquaintances” of Hamblin and Morgan. There’s no evidence to support the claim or insinuation.

<sup>59</sup> R.103, p.156-7.

<sup>60</sup> App.Br. p.32.

<sup>61</sup> *In Matter of Estate of Reist*, 91 Wis.2d 209 (1979); *see also* § 901.03(1)(a), Stats.

<sup>62</sup> DOC devoted 6 pages and 12 citations to this single, simple legal principle.

<sup>63</sup> *See, In re Estate of Christen*, 72 Wis.2d 8 (1976), *Estate of Moley*, 46 Wis.2d 450 (1970).

Finally, even if the objection had been made timely and were sustained, that would have no bearing on this proceeding, where all the substantive witnesses were non-supervisory personnel.

We therefore reject Appellants' attempt to apply the "Deadman's Statute" to bar any statements or testimony in this proceeding.

Koester also contends she was personally targeted in part due to her active and aggressive union representation. Morgan testified she did have "issues" with Koester over her criticism of Morgan's administration of the facility.<sup>64</sup> Asberry testified that Koester was "one of the worse ones" at OCI "as far as being argumentative and challenging with the supervisors."<sup>65</sup> Some supervisory, administrative and even line personnel found her advocacy to be strident and excessive.<sup>66</sup>

Koester's argument, however, is belied by her co-Appellants. Neither Witscheber nor Seiler have any union involvement whatsoever, yet were also investigated and terminated for purported misconduct associated with the charges against Koester.

It is true that one of the three employees terminated for alleged harassment and intimidation of Z and other officers had been a zealous union representative; but that is correlation, not causation. There is no evidence Koester was targeted and terminated due to her role in union or other protected concerted activity.

Koester also complains that when Morgan started the ODES fact-finding, all Morgan knew about her was that she was associated with Witscheber and Seiler and that she wouldn't wear a black band to mourn Z. That's neither completely true nor particularly relevant.

Within two days of Z's death, Morgan knew there were explicit accusations that a group of blue shirts on second shift were bullying him and other second shift personnel. And the point of the ODES inquiry was not to investigate anyone in particular, but find the facts as to the climate at the institution, particularly on the second shift.

Koester asserts it was not until Witscheber and Seiler pointedly refused to wear mourning bands for Z that there arose any concern about harassment of Z or investigation into his suicide, and that the investigation that ensued was specifically to target them.

But it wasn't the lack of a black band on Appellants' badges that caused the initial fact-finding and then the disciplinary investigation – it was Z's suicide and the spontaneous outpouring about ongoing abuse on the second shift that followed his death.

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<sup>64</sup> Tr.1273.

<sup>65</sup> Tr.2189-91.

<sup>66</sup> R.103, pp.128, 153; Tr.2097-9.

Koester repeatedly claims the ODES fact-finding was “a direct result of the black band altercation report” involving Witscheber and Ross, meaning she was effectively disciplined for exercising her legitimate First Amendment rights not to wear the so-called “black band.”<sup>67</sup> The evidence does not support this argument.

First, as he did throughout the hearing, Koester’s counsel misrepresents the record by asserting that Morgan issued a memo “*requesting* that all employees honor (Z) by wearing a black band” (*emphasis added*).<sup>68</sup> Koester also misrepresented the email at hearing, referring to it as “a directive to wear the black band.”<sup>69</sup> Although, inexplicably, Morgan’s email on this issue is not in the record, un rebutted testimony by Morgan and others was that her memo *authorized* staff to wear a black band, but did not *request* or *direct* that they do so.<sup>70</sup>

Witscheber and Seiler had their encounters over the black band on April 3 and 4, respectively. Ross reported what had happened to Lieutenant Jon Peterson, but declined to file an incident report. Peterson filed an incident report of his conversation with Ross on April 4; it was approved by then-Security Director Ryan Blount the following day.<sup>71</sup> Witscheber himself submitted his report of the incident on April 7.<sup>72</sup> Seiler submitted his incident report complaining of how certain coworkers were treating him in the aftermath of Z’s suicide on April 9.<sup>73</sup>

By that time, Morgan had been aware for a week of the divisions within second shift over the way certain officers were said to be treating Z and other colleagues, and that some OCI staff thought that Z’s suicide could be work-related.

Moreover, while Witscheber and Seiler each had specific, argumentative encounters which occasioned the submission of formal incident reports, there was no contemporaneous account of Koester’s encounter with Ross.

Koester contends she and the other Appellants were fired to expiate the collective guilt that all at OCI felt over Z’s suicide, and that the only reason the three were targeted is because they were the only three remaining employees who didn’t publicly mourn Z with the black badge.

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<sup>67</sup> Br.3

<sup>68</sup> *Id.* Counsel was even more explicit at hearing, asking Mitchell on cross examination: “And you also learned, did you not, that at some point everyone was directed to wear a black band to honor (Z), correct?” Tr.536.

<sup>69</sup> Tr.2756.

<sup>70</sup> Tr.473, 612, 1275. Our examiner explicitly clarified this point during the hearing, apparently with little success. *See, e.g.,* Tr.1882-3.

<sup>71</sup> R.102, p.596-8.

<sup>72</sup> R.102, p.599.

<sup>73</sup> R.102, p.550-1.

There are two problems with this theory.

The first is that other employees who *did* wear the mourning badge *were* disciplined, including Captain Buettner (terminated)<sup>74</sup> and Lieutenant Asberry (suspended, after which he took a voluntary demotion and transferred).<sup>75</sup> And 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.<sup>76</sup> 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 then-Secretary Hamblin and others, refusing to wear the black band was not itself misconduct.<sup>77</sup> The fact that the ODES fact-finders were aware of the Appellants' attitude toward mourning Z by wearing the black band when they began their work does not mean they targeted the Appellants on that basis.

Morgan testified she did not discuss with Hamblin or his deputy secretary the incident reports concerning the Witscheber-Ross or Seiler-Simes encounters when she asked for the fact-finding or climate assessment.<sup>78</sup> Humphreys testified that the ODES investigation was not started as a result of the Witscheber-Ross encounter.<sup>79</sup>

Koester's decision to not publicly mourn Z in this manner did not precipitate and had no bearing on the ensuing investigation and her termination. Her First Amendment rights were not abridged.

Koester claims that when OCI personnel "were not willing to provide negative information" on the Appellants during the ODES fact-finding, Humphreys "would issue a 'disciplinary investigation' notice, thus securing additional information of a negative nature against the appellants."<sup>80</sup> She is mistaken; the notices of disciplinary investigations cited by Koester were issued after the completion of the ODES fact-finding, as follow-through on the report's recommendation for a full disciplinary investigation.<sup>81</sup>

Koester complains that she and the other Appellants were put on administrative leave – which often indicates eventual termination – "without any evidence of wrong-doing other than the fact that Appellants refused to wear the black band."<sup>82</sup>

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<sup>74</sup> Tr.2293.

<sup>75</sup> A.30; Tr.2129.

<sup>76</sup> Tr.2203-5.

<sup>77</sup> Tr.1254.

<sup>78</sup> Tr.1294.

<sup>79</sup> Tr.1779, 1792.

<sup>80</sup> App. Br.4

<sup>81</sup> R.102, pp.326, 332, 357, 370, 411, 464, 490, 499, 504, 523.

<sup>82</sup> According to Koester, Tonya Hesselberg, one of the ODES fact-finders, who also participated in the disciplinary investigation, told an OCI sergeant that "all of the people on administrative leave are not coming

That analysis is backwards. First, as noted, declining to wear the black band was not wrongdoing at all. As noted, Hamblin testified that it was not a violation of any policy for Koester and the others to refrain from wearing a black band, and their decision to so refrain was not a work rule violation.<sup>83</sup> Second, there *was* considerable evidence regarding potential rule violations, including specific allegations about Koester and the other Appellants gleaned from the 25 ODES fact-finding interviews and the statement by Z's widow that Mudd and "another female officer" on second shift had harassed her late husband. And a formal disciplinary investigation had begun.

Finally, the timeline also rebuts Koester's claim that she was "placed on administrative leave after she notified Ross that she was not going to wear the black band." As noted above, Koester told Ross that she wouldn't be wearing a mourning badge on April 3; she was not placed on administrative leave until May 14. Such a six-week gap indicates there was not the direct causality as she alleges.

The investigative team conducted 61 interviews, including 15 formal investigative interviews, including two with Koester. At a session on August 13 that Koester requested, she provided the investigators with a three-page typed statement listing thirty alleged separate acts of misconduct by sixteen OCI employees, including sexual harassment by a supervisor, sexual misconduct, race-based discipline, and inappropriate fraternization with inmates.<sup>84</sup> The team filed its report on August 15 without investigating any of Koester's allegations.<sup>85</sup>

The team recommended disciplinary action be taken against the five employees who had been placed on leave (Buettner, Mudd, Koester, Witscheber and Seiler), and three others who had not been placed on leave (Sergeant Cal Schoonover, Asberry and Blount). They recommended no discipline for seven others, including Morgan and Ninneman.<sup>86</sup>

On August 28, investigator Tonya Hesselberg filed a report on behalf of the investigative team which concluded that "a clear pattern emerged in which Officer Koester was identified by nearly every employee as part of a group of employees on 2nd shift who were engaging in behavior which was inappropriate, unprofessional, and in many cases harassing, belittling, intimidating, threatening or demeaning," sometimes pertaining only to Z but also as

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back." R.103, p.21.

<sup>83</sup> Tr.1254. Witscheber was disciplined, in part, for the *manner* in which he purportedly conveyed his decision not to wear the black band to Ross; Seiler was disciplined, in part, for purportedly being untruthful in explaining how his related incident report came to be written.

<sup>84</sup> R.103, pp.167-9.

<sup>85</sup> R.102, consisting of 779 pages.

<sup>86</sup> R.102, pp.5-7.

to “other OCI employees on 2nd shift and throughout OCI.”<sup>87</sup> The report identified potential violations of four DOC Work Rules – 2, 6, 12 and 13.<sup>88</sup>

After pre-disciplinary interviews, Jess terminated Koester on October 2, 2012. In her letter notifying Koester she had been terminated, Jess cited four work rules she asserted Koester had violated, as follows:

#2 Failure to comply with written policies or procedures including but not limited to Executive Directives and Administrative Directives. (Effective 02/26/2012).

#2 Failure to follow policy or procedure, including but not limited to the DOC Fraternization Policy and Arrest and Conviction Policy. (Effective 09/2004).

#6 Falsification of records, knowingly giving false information, or knowingly permitting, encouraging or directing others to do so. Failing to provide truthful, accurate and complete information when required. (Effective 02/26/2012).

#6 Falsifying records, knowingly giving false information, or knowingly permitting, encouraging, or directing others to do so. Failing to provide truthful, accurate, and complete information when required. (Effective 09/2004).

#12 Verbally threatening, intimidating, demeaning, interfering with another employee, an inmate, juvenile, offender or the public. (Effective 02/26/2012).

#12 Threatening, attempting, or inflicting bodily harm to another person. (Effective 09/2004).

#13 Harassment, including but not limited to harassment based on protected status (race, gender, religion, etc.) towards employees, the public, inmates, juveniles, or offenders. (Effective 02/26/2012).

#13 Intimidating, interfering with, harassing (including sexual or racial harassment), demeaning, or using abusive language in dealing with others. (Effective 09/2004).

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<sup>87</sup> E.g., R.103, pps.66-7, 75, 80-1, 87, 91, 108, 114, 145, 147.

<sup>88</sup> R.103, p.11-14.

Jess also cited Executive Directive 7, which defines “harassment,”<sup>89</sup> and Executive Directive 43, which makes DOC employees subject to discipline, up to and including discharge, for violating DOC Work Rules. Both Executive Directives were in force at all times material to this proceeding.<sup>90</sup>

Jess listed nine specific acts which she alleged Koester engaged in, with Mudd and the others, to torment Z. We address whether the preponderance of the credible evidence supports the primary charges, whether there was just cause to impose discipline for the conduct so established, and, if so, whether the level of discipline imposed (termination) was excessive.

According to Jess’s letter:

You partnered with Sgt. Mudd and others to demean Officer (Z). This included shunning him, taunting him with name calling and humiliating him in front of staff and inmates. Officer (Z) referred to you and Sgt. Mudd as his tormentors. Specifically you:<sup>91</sup>

- *“You made comments about his sexual orientation in relation to the performance of his work duties.”*

As noted, Z was married for many years, with an adult daughter, and there is nothing in the record to suggest that he was anything other than heterosexual. However, following the incident in which the inmate acted in a sexual manner while Z was performing a strip search, Mudd and others intensified their taunting of Z as purportedly being homosexual, causing anguish and concern. 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 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 Z was interested in anal intercourse. It was then that Z told Mitchell that “the stuff was starting to bug him.”<sup>92</sup>

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<sup>89</sup> “Offensive verbal, physical or graphic conduct constitutes harassment when this conduct: 1) has the purpose or effect of creating a hostile, intimidating or offensive working environment; 2) has the purpose or effect of unreasonably interfering with an individual’s work performance; 3) otherwise adversely affects an individual’s employment opportunities. Harassment is such offensive behavior when linked to protected status (race, sex, age, etc., for example).”

<sup>90</sup> Former DOC Secretaries Jon E. Litscher and Matt Frank issued Executive Directive 7 and Executive Directive 43, respectively, in 2001 and 2004.

<sup>91</sup> For clarity in presentation, the allegation listed last in Jess’s letter has been placed first.

<sup>92</sup> Tr.520.

Officer Jessica Kessler told investigators and testified that 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.”<sup>93</sup>

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.<sup>94</sup>

Koester challenges Mitchell’s credibility on this and other charges due to personal animus. As Mitchell stated during the investigation and at hearing, he resented Koester returning to OCI in 2007 because he believed she had known that another female officer at OCI had been intimate with an inmate, and concealed that information, making Koester “dirty.”<sup>95</sup> Koester, who acknowledged sharing an apartment with the other officer, denied knowing of her misconduct which occurred while Koester was between stints with DOC.<sup>96</sup>

Mitchell’s “back door” accusation, however, 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 Kessler’s credibility. For Kessler’s testimony to be untrue, there would have to be collusion between them, or between Mitchell and Z. There is no evidence or even suggestion of either being the case. The preponderance of the credible evidence, therefore, is that the comment was made, while Koester and Mudd were walking together.

However, neither Kessler nor Mitchell could testify whether it was Koester or Mudd who made the comment. There is thus insufficient evidence to support the charge in the termination letter that Koester did so.

Z heard the comment; Mitchell, inside the vehicle, heard the comment; if Koester didn’t make the comment, then she had to have heard it. We believe Koester thus knowingly gave false information, in violation of DOC Work Rule #6.

Koester contends that, even if she had made the comment about Z looking for some “back door action,” the comment “has no relation to the performance of (Z’s) work duties, as alleged.”<sup>97</sup> We disagree.

It is 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 Z’s morale and

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<sup>93</sup> Tr.595-6.

<sup>94</sup> Ex.103, 34-5; Tr.151.

<sup>95</sup> R.102, p.205; R.103, p.66; Tr.538-9.

<sup>96</sup> Tr.132-3.

<sup>97</sup> Br., p.56.

performance, especially when the statement is particularly offensive, heard by another officer, and part of a pattern of intimidation.

Sergeant Andrew Lapp, who had not been an EAS-transferee, also provided relevant evidence, telling the ODES fact-finders that Z told him that “it would be Koester and Mudd in the lobby and they’d make gay jokes and (Z’d) hear them talking about him and telling gay jokes, insinuating things to him.” Lapp also said that when 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.”<sup>98</sup>

An email exchange Koester had with Mudd less than a month before Z’s suicide documents their using a homophobic slur to demean him.

“Hey girl,” Mudd wrote Koester on March 3, “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!!!”<sup>99</sup>

Referring to Z as “Gay Boy” and talking about getting a cooler to hide from him is demeaning to Z. Koester is 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 Z sexually helps corroborate the testimony of Mitchell, Lapp and Kessler.

The greater weight of credible evidence supports the charge that Koester made demeaning comments about Z’s supposed sexual orientation.

Koester asserts that because Sergeant Ross wasn’t disciplined for an exchange he had with Mudd, she can’t be disciplined for her response. But Koester’s comparison is not applicable.

Ross told investigators Mudd would comment that Z was gay, and once said he was “a queer.” Ross, who was not an intimate of Mudd’s the way Koester was, replied that Z was married with a child, and tried to end the exchange by saying, “whatever.”<sup>100</sup> Ross sought to deflect Mudd; Koester joined her with complete support.

Koester told investigators she was “not a gay basher” and didn’t “have anything against gay people,” and that she herself is bisexual.<sup>101</sup> Even so, bisexuality itself is not an inoculation against committing homophobic acts.

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<sup>98</sup> R.101, p.55; Tr.1569.

<sup>99</sup> R.102, p.553.

<sup>100</sup> R.102, p.251.

<sup>101</sup> R.103, p.41; Tr.2785.

Through her knowing presence and willful engagement when the “back door action” comment was made, her comments as related by Lapp, and her “Gay Boy” exchange with Mudd, Koester sexually demeaned and harassed 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).

Respondent also charges a DOC Work Rule #6 violation for Koester’s response to investigators who asked if she had ever heard Z referred to as “Gay Boy” in an email. She replied she did not recall.<sup>102</sup>

It has been said, “perjury is a tough rap to prove. Just be damned sure to say, ‘I don’t remember, I can’t recall.’”<sup>103</sup> And, indeed, Koester asserts she never *denied* receiving such an email, but only said she did not recall doing so, and thus cannot be found to have lied. Koester testified that two or three days prior to the email, an officer who was a closeted lesbian was found to be drunk and in possession of a whiskey bottle while on duty; she was outed during the aftermath, creating an uproar and incurring much hostility which Koester had to deal with as her representative. This, she said, caused her to forget the “Gay Boy” email, one of hundreds she would have received each month.<sup>104</sup>

The March 3 email exchange is important in documenting Koester’ gay-based demeaning of Z, and thus supporting the DOC Work Rules #12 and #13 charges; but there is no evidence that Koester recalled it when being questioned during the disciplinary investigation. Thus, we do not find that Koester’s response constituted a knowingly false statement.

However, it is also a violation of DOC Work Rule #6 for an employee to fail to provide “accurate and complete information when required.” Even if Koester was not knowingly being untruthful in stating that she could not recall receiving such an email, she clearly did receive it and failed to meet this latter standard, and thus committed a further violation of that work rule.

- *“Called him cry baby.”*

Mitchell also told the ODES fact-finders and the subsequent investigators, and testified accordingly, that on March 24, 2012, less than a week before Z’s suicide, he and 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.<sup>105</sup>

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<sup>102</sup> R.103, p.34.

<sup>103</sup> President Richard M. Nixon to John W. Dean and H. R. Haldeman, Mar. 21, 1973.

<sup>104</sup> Tr.2848-50.

<sup>105</sup> R.101, pp.44-5, R.102, p.204-7; Tr.518-20, 546, 552.

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.<sup>106</sup>

As noted above, Koester challenges Mitchell’s credibility due to his resentment over her return based on his belief that she had known about the sexual misconduct of another OCI officer which she denied.

Mitchell acknowledged his attitude towards Koester, even volunteered the information. He reported the purported “cry baby” event very shortly after learning of Z’s death.<sup>107</sup> 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 pertains to Mudd, is consistent with the statements and testimony of numerous employees, especially in light of the “Packers strip-search” incident; the narrative does not seem concocted.

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” incident did occur.

Because he was inside a vehicle, Mitchell could not definitively identify who said what or made such sounds.<sup>108</sup> Respondent has thus not established by the preponderance of credible evidence that Koester *herself* did either the verbalizing (“cry baby”) or vocalizing (“waah”).

But one or both of the women *did* make crying baby sounds towards 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.

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<sup>106</sup> Ex.103, p.34; Tr.150-1, 2770, 2784.

<sup>107</sup> R.103, p.51.

<sup>108</sup> R.101, p.177; Tr.519-20.

- *“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 ones, employees who transfer to a secure facility (such as OCI) from a non-security classification (such as EAS youth counselor) are sometimes demeaned as “fake timers.”<sup>109</sup>

Sergeant David Tomaszewski, an EAS transferee, told investigators and testified that Koester did say that the “fucking Ethan Allen people” were “fake timers” who weren’t doing their jobs properly and did not belong at OCI or in the DAI.<sup>110</sup>

Koester denied to investigators and at hearing that she had made such comments.<sup>111</sup>

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 (Z) was present when these comments were made.” Because Tomaszewski did not testify at hearing that Z was present when the comments were made, she argues, “this allegation must be dismissed.”<sup>112</sup>

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

Sgt. Tomaszewski: Koester, she is really mean to (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 (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.”<sup>113</sup>

Tomaszewski reaffirmed this statement at hearing.<sup>114</sup>

But Z was not the Lobby Sergeant; he was assigned to patrol. It was Seiler who was the Lobby Sergeant.<sup>115</sup> Tomaszewski thus did not, as Koester asserts, state that Z was present for

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<sup>109</sup> Tr.140.

<sup>110</sup> R.103, p.80; Tr.818-9.

<sup>111</sup> R.103, p.35; Tr.140, 152, 2791.

<sup>112</sup> App.Br., p.53.

<sup>113</sup> R.103, p.12.

<sup>114</sup> R.101, p.64; Tr.820, 823.

<sup>115</sup> Tr.435.

the “fake timers” comment, but that Koester would otherwise ignore him and say inappropriate things as he walked by.

Although Koester has given reasons why Ross and Mitchell would have had motive to make false accusations against her, she 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 Jess alleged.

Such comments clearly demean the EAS transferees. And 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.<sup>116</sup>

By knowingly giving false information denying she had made the comment, Koester further violated DOC Work Rule #6.

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

Former OCI Officer Shane Eddy, a Green County Deputy Sheriff at the time of hearing, testified that he frequently heard Koester refer to Z as “a snitch,” a term of opprobrium in this context.<sup>117</sup> Ross testified that Koester told him she shouldn’t trust Z.<sup>118</sup> Mitchell testified that Z told him that Koester and Mudd were harassing him, “talking behind his back, making comments to him when he was within earshot.”<sup>119</sup> Such comments would be demeaning and intimidating to Z personally, and would interfere with the employer’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).<sup>120</sup>

In addition to her challenge to Mitchell’s credibility noted above, Koester suggests two reasons to discount Ross’ testimony – their disagreement over wearing a mourning badge to honor Z and highly offensive comments she claims he made.

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<sup>116</sup> Again, Respondent’s counsel failed to establish whether this incident occurred before or after February 26, 2012.

<sup>117</sup> Tr.939; 953-5.

<sup>118</sup> Tr.845.

<sup>119</sup> Tr.518. Mitchell also testified in support of Respondent’s charge that Mitchell also testified that Koester called Sergeant Amanda Lyga “a snitch” because she had reported another officer who had violated procedure by bringing a camera into the institution. Tr.529.

<sup>120</sup> Again, Respondent did not establish whether these incidents occurred before or after February 22, 2012.

Ross acknowledged that he became upset with Koester when she told him she, too, wouldn't wear the black tape because she felt it was reserved for officers who died in the line of duty. Koester suggests Ross made up the story about hearing Koester call Z a snitch to get her punished for not publicly mourning Z.

And she alleged, in her August 13 statement, that Ross "would make comments to me about how he couldn't wait until his kids were older so he could divorce his wife, 'fuck me,' and 'motorboat my boobs.'"<sup>121</sup> She testified that she expressed her outrage at his comments, and angrily reminded Ross they were friends and Koester knew his wife.<sup>122</sup>

Ross testified the claim was "absolutely absurd," and was in retaliation for his cooperation with the investigation.<sup>123</sup> At the time Koester made the charge (along with the 29 other incidents in her August 13 statement), she was aware of Ross's role in her potential discipline.

Schoonover, who was not an EAS-transferee, testified that on more than one occasion he heard Ross say he would "have fun putting his face in between her chest," which Koester "wasn't happy about," but that he did not recall Ross making a comment about intercourse, as Koester claimed.<sup>124</sup>

Koester claims she "filed a sexual harassment claim against Ross,"<sup>125</sup> but there is no evidence in the record that she filed anything beyond the list of purported acts of misconduct by numerous OCI line and supervisory personnel. Although her written statement includes the notation that "incident reports have been written" about 25 of the 30 incidents she described, she cites no evidence in the record substantiating that such reports were in fact filed, either concerning Ross or any of the 15 other line, supervisory or administrative personnel she claimed engaged in misconduct.

Koester is correct that Respondent went out of its way to avoid risking damage to Ross' reputation, presumably to protect his credibility. It certainly had an interest in doing so. By the time Koester reported Ross' purported misconduct, Ross had already given the ODES fact-finders and DMS investigators statements<sup>126</sup> that would be valuable in any discipline against Mudd and the Appellants.<sup>127</sup>

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<sup>121</sup> R.103, pp.167-8.

<sup>122</sup> R.103, pp.167-8; Tr.99, 2745, 2748.

<sup>123</sup> Tr.857; R.102, p.755.

<sup>124</sup> Tr.1361-2.

<sup>125</sup> App. Br., p.9.

<sup>126</sup> R.103, pp.70-3;

<sup>127</sup> Because of the significance of Witscheber's "black band" encounter with Ross to his discipline, Ross' credibility is also critically important in Witscheber's appeal.

Koester claims Respondent violated its published protocol by not conducting an intake interview with Koester about the charges she made on August 13. However, all the policies and procedures she cites require a degree of reporting which she apparently did not undertake.

The OCI procedure for handling harassment/discrimination complaints provides that a staff member “may contact any Supervisor to report” being aggrieved by such conduct, after which the supervisor “must immediately conduct an Intake Interview, as practicable.”<sup>128</sup> Although the investigators to whom Koester presented her August 13 list had an independent responsibility to report her allegations in a timely and meaningful way, none of them were OCI supervisors.

The policy and procedure to address harassment and hazing also calls for the subject of the harassment to report the behavior to a supervisor or department head.<sup>129</sup> Koester did not do so.

DOC Executive Directive 5 requires that, in order for ODES to investigate, a written complaint must provide details such as date, time, and witnesses.<sup>130</sup> Koester never filed such a written complaint. DOC Executive Directive 7 also references such a written complaint.<sup>131</sup>

But while Respondent might not technically have violated any published protocols as Koester claims, it clearly failed in its responsibility to conduct a meaningful investigation of Ross’ purported misconduct. It waited seven weeks before conducting Ross’ single investigatory interview, finally doing so on the day after Koester was fired.<sup>132</sup> Then, on that same day, without interviewing any other witnesses, or giving Koester a chance to rebut his denials, investigators recommended no further action based on their “belief that the allegations are unfounded.” Later that same day, Robert Humphreys, assistant DAI administrator, informed Ross that no discipline would be taken,<sup>133</sup> a decision not communicated to Koester.<sup>134</sup>

Respondent could not have done more to damage Ross’ credibility if it had tried. Faced with a serious allegation against one of its main witnesses, Respondent chose to look the other way, sitting on the matter for seven weeks and never conducting a legitimate investigation. It clearly did not want to know if Ross had made the offensive comments.

Making such comments would not necessarily have harmed Ross’ credibility in this proceeding. The words are offensive and against DOC Work Rules #12 and #13, but their

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<sup>128</sup> A.1.

<sup>129</sup> A.2.

<sup>130</sup> A.5.

<sup>131</sup> A.6.

<sup>132</sup> The same day, Humphreys wrote letters clearing several other employees who had been subjects of disciplinary investigations.

<sup>133</sup> R.102, 750-60.

<sup>134</sup> Tr.1511-2.

utterance doesn't explain why Ross would lie in his accusation; in fact, it could be argued the comments suggest a reason he would testify favorably to Koester.

But engaging in such misconduct, and denying doing so, would affect his credibility – it would mean he lied during the investigation and under oath at hearing, which would subject the rest of his testimony to challenge.

Ross' account, however, is supported by Eddy, who no longer even works at OCI. Koester offers no explanation why Eddy would also falsely accuse her, or addresses his testimony in any manner.

Moreover, Koester actually *relies* in part on Ross' testimony that no inmates were within earshot when she was reportedly berating Z and another officer for how they were packing an inmate's belongings for removal.<sup>135</sup> It is inconsistent to accuse a witness of bias against you while citing that witness as supporting your defense.

We do not find Schoonover's testimony supporting Koester sufficiently more credible than Ross' testimony refuting her to draw adverse inferences about Ross' truthfulness.

We find Eddy, Mitchell and Ross more credible than Koester, and conclude the preponderance of credible evidence is that she did refer to Z as a "snitch" and make other disparaging comments, thereby violating DOC Work Rules #12 and #13, depending on the date.

Respondent has also alleged Koester violated DOC Work Rule #6 by falsely denying that she had called 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 (Z) was a snitch?" was "no."<sup>136</sup> Koester testified that what she actually replied was, "no, not that I recall."<sup>137</sup> Given the documented problems with DOC note taking (see below), we cannot find Koester's testimony wrong.

As noted above, there is a difference between a witness saying she didn't do something, and saying she couldn't recall if she had done something. But, again as noted, DOC Work Rule #6 also subjects an employee to discipline for "failing to provide ... complete information when required." Whether or not calling a fellow officer a "snitch" on multiple occasions is something which a correctional officer could reasonably forget doing, not recalling doing so means Koester provided information which was inaccurate and incomplete, thus violating the work rule.

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<sup>135</sup> App. Br., p.56, Tr.843.

<sup>136</sup> R.103, p.33.

<sup>137</sup> Tr.2805.

Koester also told investigators and testified that she had never heard anyone else refer to Z as a snitch.<sup>138</sup> Several OCI employees told investigators and testified, however, that they had personally heard Mudd routinely refer to Z as a snitch on multiple occasions, at times when Koester was present.<sup>139</sup> 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 Z a snitch. We have therefore found that Koester's denial constituted a further violation of DOC Work Rule #6.

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

Although Koester claims this is just uncorroborated hearsay, sufficient credible evidence supports this charge. Sergeant Lapp testified that he would save a tray of food for Z in his cottage because Z told him “he was afraid to go down to the kitchen because there were people down there” who he 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.”<sup>140</sup> Although Z's statement was hearsay, it was corroborated by the fact that Lapp did indeed save Z a tray.

Koester's rejoinder to evidence she shunned and intimidated Z while she was standing chow and he was in line is not persuasive – that eating dinner “cannot be considered part of (Z's) job duties.”<sup>141</sup> Meal breaks are obviously among the conditions of employment, and Koester's actions toward 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.

In addition to the specific misconduct enumerated in the termination letter, Jess asserted that Koester “engaged in harassing, belittling, intimidating, threatening and demeaning behavior ... creating a toxic climate that permeated through the entire second shift” at OCI. Respondent elaborates in its voluminous brief on those concepts.

In its rambling, repetitive and unduly long (346 pages) written argument, Respondent seeks to supplement the specific allegations in the respective termination letters by asserting that Koester engaged in a series of other abusive acts towards Z and other staff.

Appellants assert that due process bars Respondent from relying on “any allegations of misconduct not presented” to them for response “prior to their termination and not contained in

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<sup>138</sup> Tr.144.

<sup>139</sup> R.101, pp.38-9, 47, 55, 57, 66, 143, 177; R.102, pp.13, 82, 151, 251, 276; Tr.326, 373-4, 465, 838, 983.

<sup>140</sup> Tr.1570-1.

<sup>141</sup> App. Br. 54

their termination letters.”<sup>142</sup> Because we have affirmed Koester’s termination exclusively on the basis of specific acts identified in the termination letter, the question is moot.

And for that reason we have 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 Simes over the mourning tape, leaving consideration of that allegation to Seiler’s appeal.

Koester raises further objections to her discharge.

She rightly complains about the preparation and use of some of the ODES fact-finding and subsequent disciplinary interviews, where there were widespread errors in the transcription. Several witnesses testified that statements attributed to them were inaccurate, frequently weighed against the Appellants. For example, the record of Lieutenant James Logan’s ODES interview reports that “He said that he believed that (Z) had taken his own life due to the fact of how he was treated at work.”<sup>143</sup> However, when asked at hearing if he had made that statement, Logan replied, “No, I did not.”<sup>144</sup>

And we are extremely disturbed that Respondent’s counsel knew of such errors prior to the start of hearing, and yet offered the interviews into evidence without any disclosure to our hearing examiner or opposing counsel. That does not satisfy our sense of an attorney’s obligation to the tribunal and opposing counsel.

Koester also complains about the seeming inconsistency of DOC discipline for employees who violated OCI post orders – particularly post order 308.01, requiring employees to take several steps to ensure a harassment-free workplace. To wit: They are to avoid engaging in such behavior themselves; to object to harassment or hazing even if not a member of the group directly affected; inform anyone engaging in behavior which might be harassing or hazing that such behavior is offensive; and ask them to cease, and if direct feedback is not possible or feasible, report the behavior to a supervisor.<sup>145</sup>

Several employees testified Z had told them about how Mudd and the others were harassing him, but none took any of the mandated reporting steps.<sup>146</sup> This, Appellants argue, indicates either that hazing or harassment did not occur, or that Respondent cannot discipline Koester since it did not discipline the many other employees who also violated orders (to report hazing and harassment).

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<sup>142</sup> App. R.Br., pp. 2-5.

<sup>143</sup> R.102, p.181.

<sup>144</sup> Tr.1752.

<sup>145</sup> A.2.

<sup>146</sup> Tr.1475.

The State has a truly bizarre rejoinder – that because there is nothing on the record establishing that *Koester* received these post orders to report harassment, “it is reasonable to conclude that the other blue-shirts similarly did not receive the OCI-specific procedure that requires reporting.”<sup>147</sup>

The State’s position is doubly flawed. First, it conflates its failure to offer evidence with such evidence not existing. That is, the State asserts the negative presumption – that the *absence* of evidence (that *Koester* received the post orders) proves that something *did* happen (that OCI failed to distribute the orders to other officers). We disagree, and consider this evidentiary failure just one of a series of litigation mistakes on the part of Respondent.

Moreover, the State is stating that OCI felt that combatting harassment and hazing was so important that it promulgated a specific and detailed policy and procedure to require employees to report any instances, but never bothered to distribute the policy to line personnel, or see to its enforcement. Such an argument is absurd on its face.

There were numerous OCI employees who witnessed, experienced, or were told by Z of harassment by *Koester* and the others; they *were* responsible for reporting what they had seen and heard, and they did not do so. Some didn’t report because Z asked them not to do so and they complied. Some may have feared retribution or just didn’t want to get involved. All regret their silence.

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 policy 308.01 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. And we reject the false equivalency Appellants suggest; the failure to stop harassment, while serious and potentially tragic, is not as affirmative an offense as engaging in the ongoing harassment itself. Respondent’s failure to punish officers for not reporting *Koester*’s misconduct does not prevent it from punishing *Koester* for that misconduct.

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 Z to other staff; and that she did bully and shun him. The greater weight of the credible evidence also establishes that *Koester* provided both false and incomplete statements during the disciplinary investigation (and at hearing). The preponderance of the credible evidence thus supports the specific charges in the termination letter. Respondent has satisfied the first test of just cause.

Notwithstanding *Koester*’s protestations, there really should be little debate that the misconduct we have found warrants discipline.

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<sup>147</sup> R.Rep.Br., pp.36-7.

Appellants maintain 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 don’t deserve any discipline at all. They suggest that Respondent 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 Appellants with Taliban-like zeal.”<sup>148</sup>

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.

We are not concerned whether certain conduct is acceptable among clerical employees at the Department of Administration or Department of Transportation road crews. We are only concerned with the application of the facts in the record to the conduct proscribed by the relevant DOC Work Rules.

As former Secretary 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.<sup>149</sup>

Koester joined Mudd and other personnel in bullying Z and other employees; she fomented dissension within the second shift; she was not truthful during the disciplinary investigation. We conclude, therefore, that Respondent did have just cause to discipline Koester.

Finally, we consider whether the discipline imposed – termination – was excessive. In so doing, it is difficult but necessary to focus on the acts themselves and not the tragedy of Z’s suicide.

Koester challenges her termination as excessive in light of incidents in which other employees have received lesser, or no discipline, for similar infractions for which she was charged. She describes the record at OCI as one of “dysfunction and poor management wherein administration engaged in the selective implementation and non-implementation of disciplinary policies and practices.”<sup>150</sup> There is evidence to support this caustic characterization.

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<sup>148</sup> App.Br., p.61; App.R.Br., p.11.

<sup>149</sup> Tr.1230.

<sup>150</sup> App.Br.6.

First, there are the many serious allegations she made in her pre-disciplinary written statement, none of which appear to have been seriously investigated.

She also notes in particular that Sergeant Brian Anderson was only issued a letter of reprimand after he referred to Sanneh, who is from Africa, as “midnight,” despite repeated directives from Lieutenant William Asberry to stop, and asked him for the continent’s zip code so he could “look up its weather.”<sup>151</sup>

Sanneh also complained that when he left OCI after his investigative interview into the “midnight” matter, Anderson followed him all the way to Madison, engaging in threatening driving behavior, including making obscene gestures at him at a stoplight. Although the Fitchburg police officers who investigated told OCI they felt Anderson was lying when he denied Sanneh’s “road rage” claim, Humphreys concluded there was not enough evidence to charge Anderson with either the road rage incident or for lying about it, and overruled Morgan’s recommendation that Anderson be placed on administrative leave in anticipation of being suspended. Shortly thereafter, Sanneh transferred to another facility.<sup>152</sup> There were also reports that Anderson called Z offensive names, referred to some older staff members as “dinosaurs,” (with appropriate gestures), and referred to a female officer as a “dyke,” all of which Anderson denied.<sup>153</sup>

Schoonover was not disciplined at all for using the DOC email system to send a “comedy routine” by self-styled “redneck comic” Jeff Foxworthy called “You May Be A Muslim,” with such entries as, “You may be a Muslim if you refine heroin for a living, but have a moral objection to liquor ... You wipe your butt with your bare hand, but consider bacon unclear ... You think vests come in two styles: bullet-proof and suicide ... Your cousin is President of the United States.” Schoonover sent this material to nine other DOC employees, with the commentary, “Now this is funny.” Schoonover did receive a letter of reprimand for a mildly risqué joke about “two old Jewish guys” and the sexual power of rye bread.<sup>154</sup>

Koester also notes that although fraternization is considered one of the three most serious acts of misconduct in corrections (along with inmate abuse and theft), the food services director was only issued a letter of reprimand for providing special food for his kitchen crew, while the former social services director who gave money to an inmate only received a three-day suspension.<sup>155</sup>

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<sup>151</sup> A.29.

<sup>152</sup> Tr.704-5.

<sup>153</sup> Tr.1441-2. As assistant administrator of the DAI, Humphreys was then Morgan’s supervisor.

<sup>154</sup> R.120, pp.587-91; Tr.1350-1. Koester characterizes Schoonover’s “rye bread” joke as “an anti-Semitic email.” Br., p.42. We do not agree with that description.

<sup>155</sup> Tr.1321, 1324. To comply with the Fair Labor Standards Act, the latter discipline was technically a letter of reprimand in lieu of the suspension.

But other personnel did suffer significant discipline. Buettner was terminated.<sup>156</sup> Asberry was suspended for five days.<sup>157</sup> Blount lost his job as security director for failing to make probationary standards, was demoted to lieutenant and was transferred to the Columbia Correctional Institution.<sup>158</sup>

And while Schoonover's email and Anderson's comments seemingly violated DOC Work Rules #12 and #13, their misconduct had none of the intensity or duration of Koester's harassment of Z. Whether or not a suspension would have been in order for them or any other employee, we do not believe the leniency they received so great as to invalidate Koester's discipline.

The greater weight of the credible evidence is that Koester actively participated in an ongoing effort to harass, demean, intimidate and interfere with Z and other OCI personnel assigned to the second shift. She referred to him as a "snitch," engaged in a demeaning email exchange about him with Mudd, and joined Mudd in mocking him as a "cry baby," and as someone seeking anal intercourse. She also referred to OCI personnel who had transferred from EAS as "fucking fake-timers." These are very serious violations of DOC Work Rules #12 and #13.

The State also offered exhaustive documentary evidence that workplace bullying does major physical damage to the cardiovascular, gastrointestinal, immunological, and musculoskeletal systems.<sup>159</sup> By bullying Z, Koester thus did them bodily harm, in further violation of DOC Work Rule #12.

There is also ample evidence that workplace bullying induces such emotional and psychological stress as to impair an officer's effectiveness and the overall efficiency of the workplace.<sup>160</sup> By bullying Z, Koester thus interfered with his work activities in further violation of DOC Work Rule #13.

Also, 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. Jess cited these repeated violations of DOC Work Rule #6 as further grounds for Koester's termination.

In challenging her termination, Koester correctly notes that the former Personnel Commission did not list truthfulness as one of the three most serious infractions by correctional

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<sup>156</sup> Tr.2293. Buettner appealed, and following hearing the parties agreed to a voluntary resolution under which the termination was rescinded and Buettner was voluntarily demoted to lieutenant and transferred to another facility.

<sup>157</sup> A.30.

<sup>158</sup> A.33; Tr. 2203.

<sup>159</sup> Tr.220-6.

<sup>160</sup> Tr.244, *et seq.*

officers (those being fraternization, inmate abuse, and theft).<sup>161</sup> She complains she was “provided with no warnings or prior discipline” to correct her behavior.<sup>162</sup>

We do not believe correctional officers need to be given warnings that lying about material matters during a disciplinary investigation could be a firing offense. The work rules and the procedures for the investigation itself establish that such misconduct is cause for termination.

Whatever standards the former Personnel Commission held, we believe that correctional officers, like law enforcement officials, are properly held to the highest standard for truthfulness and integrity.

First, they exercise considerable control over the living conditions of the inmates. Officers regularly file conduct or incident reports which could lead to inmate discipline, which could affect an inmate’s release date; simple justice, not to mention institutional calm, requires that those reports be, and be perceived to be, absolutely honest.

The DOC personnel serving as a disciplinary committee must evaluate inmate and staff credibility. For inmates and DOC alike to have confidence in the integrity of the disciplinary process, DOC must ensure that all staff members are entirely credible at all times.

Also, correctional officers routinely sign or provide information for State Justice Department affidavits in state and federal proceedings, including for search warrants and for motions for summary judgment or to dismiss prisoner lawsuits. Department officials apply for warrants in which they warrant their belief in the truthfulness of the officer supplying the narrative; if a department supervisor or administrator cannot attest to an officer’s truthfulness, the officer can no longer fully perform the job. It goes without saying that the judicial system – and the public’s confidence in that system – requires absolute integrity and candor on the part of all official participants. Officers who lie have irreparably damaged their credibility and thus their usefulness.<sup>163</sup>

We reject the notion that Respondent cannot discipline an employee for making false statements. Koester says there is merely a “credibility dispute” between herself and the numerous OCI employees who testified to her misconduct. But our examiner resolved that credibility dispute by concluding that Mitchell, Ross, Tomaszewski, Hakenson, Lapp and the others were telling the truth, and Koester was not. Thus, Respondent was right to conclude that Koester lied during the investigation, as we have done.

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<sup>161</sup> *England v. DOC*, Case No.97-0150-PC (Sept. 23, 1998).

<sup>162</sup> App.R.Br., 7.

<sup>163</sup> Tr.1228-9.

When confronted with these allegations of misconduct, Koester dissembled, denied, and lied. Lying about material facts during a disciplinary investigation is a very serious violation of DOC Work Rule #6. Termination is not excessive punishment for an officer who lies about material facts under disciplinary investigation and at hearing. While there may be circumstances in which leniency is appropriate, our presumption is that such conduct is a firing offense. Nothing in Koester's case requires such a permissive approach.

Koester contends she was fired for her strong union affiliation and activities, her objections to sexual and racist misconduct, and as a result of the altercation she had with Ross over the mourning band.<sup>164</sup>

It is true Koester was an aggressive union representative. It is true that she made allegations of racial and sexual misconduct by other OCI staff, including supervisors. It is true she had an encounter with Ross over black bands on badges to honor Z.

But these are not the reasons Koester was terminated.

Koester was an active participant in creating, and attempting to cover-up, a toxic environment that profoundly impaired the operations at OCI. While her work record was somewhat more than adequate, it was neither of such length nor accomplishment to cause us to excuse her misconduct.

A corrections officer who treats coworkers as Koester treated Z and other EAS transferees, and then lies during an investigation into her conduct, forfeits her right to employment by the Wisconsin Department of Corrections.

Accordingly, we have affirmed Respondent's decision to terminate Appellant Rachel Koester.

Signed at the City of Madison, Wisconsin, this 4th day of March 2015.

#### WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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<sup>164</sup> Tr.2722-3.