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SJC-13077

IN THE MATTER OF PAUL M. SUSHCHYK.

Suffolk. May 7, 2021. - March 23, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,
& Georges, JJ.

Judge. Commission on Judicial Conduct.

Formal charges filed in the Supreme Judicial Court on February 25, 2020.

A hearing was held before a hearing officer appointed by this court, a report was submitted by the hearing officer to the Commission on Judicial Conduct, and a report and recommendation for discipline was submitted by the commission to this court.

Howard V. Neff, III, for Commission on Judicial Conduct.
Michael P. Angelini for the respondent.

BY THE COURT. In this case, we decide whether to adopt the report and recommendation of the Commission on Judicial Conduct (commission) concerning Judge Paul M. Sushchyk (respondent). After a three-day evidentiary hearing and receipt of a report from a hearing officer, the commission concluded that the

respondent engaged in an intentional, nonconsensual, and unwelcome touching of a trial court employee while at a court-sponsored event and then provided inconsistent and knowingly false statements during the resulting investigation and hearing. For this, the commission recommends that the respondent be censured publicly, ordered to pay the commission's costs, and suspended without pay for a reasonable time to permit the executive and legislative branches to consider, if they wish, whether the respondent should retain his judicial office.

For the reasons discussed below, we suspend the respondent without pay for a reasonable time or until further order of this court.

Background. We take the following facts from the commission's factual findings, as supported and supplemented by evidence apparent from the record.

On April 25 and 26, 2019, the respondent attended the Probate and Family Court's annual spring conference. The complainant, a field coordinator for the Probate and Family Court, also attended to assist at the event. Before the conference, the two had met once in person and also had communicated electronically, all in a professional capacity.

On the first evening of the conference, the complainant and the respondent were at a restaurant with other conference attendees. The complainant sat on a stool at a high-top table

in the bar area of the restaurant with three colleagues. She saw the respondent make his way toward their table; he approached her from behind. As the respondent passed behind her stool, the complainant felt a hand grabbing her left buttock and squeezing it for several seconds. The respondent then joined the group at the complainant's table, standing directly to the complainant's left, and eventually offered to buy everyone at the table a drink.

Shocked and unsure what to do, the complainant did not visibly react to being grabbed and after approximately between ten to fifteen minutes excused herself from the table and made her way out of the restaurant. Prior to leaving, she did not reveal to anyone what had occurred, although she tried to alert one of her colleagues at the table by raising her eyebrows and giving the colleague "pointed looks." The colleague recalled that the complainant gave her "a particular look with her eyes . . . very wide-eyed" about five minutes after the colleague observed the respondent pass behind the complainant and approach the table, but the colleague did not understand what the complainant was attempting to communicate.

Upon leaving the restaurant, the complainant got in her car and immediately sent a text message to her sister, which stated, "OMG. I think one of the judges grabbed my butt on purpose." After her sister responded, the complainant continued, "He's

also carrying a hip flask, so maybe just fell? Except it was a distinct pinch." Earlier, the respondent had shown the complainant and her colleagues at the table a flask he was carrying. Then, in a text message exchange with two friends following the second day of the conference, the complainant wrote, "I just attended a conference for judges and while at the bar after dinner one of the newer judges full palmed my ass. I am still reeling a bit today from it. Kinda thought maybe it was a mistake until today he spent the day hovering uncomfortably around me."¹

Several days later, the complainant reported the incident to the Chief Justice of the Probate and Family Court Department and provided him with a written statement, alleging, "[S]omeone grabbed my left buttock while I was seated on a stool at the [restaurant] during the Probate and Family Court's Spring Judicial Conference. I believe the person who grabbed me was [the respondent] because he had recently come over to the table where I was seated and was the only person directly behind me at the time of the grab." In the statement, she went on to describe a "grab [that] lasted a few seconds and felt like it was made using a full hand."

¹ The complainant testified that the respondent moved his chair uncomfortably close to her during a lunchtime presentation on the second day of the conference. He denied hovering around the complainant.

Approximately a week later, the Chief Justice of the Probate and Family Court met with the respondent and presented him with the complainant's written statement. After reading it, the respondent responded, "I couldn't have done something like that. I wouldn't do something like that. I would never hurt anyone, especially a woman." Ten days later, he submitted a written statement in response to the allegations, understanding that it would be sent to the Chief Justice of this court. In it, he now recalled having unintentionally touched the complainant. According to the statement, he had gone to the bathroom after finishing a drink at the table with the complainant and her colleagues. While returning to the table, he explained, "I was somewhat unsteady on my feet, feeling the effects of past hip replacement surgery, the long day . . . , the evening meal and the alcohol consumed. I recall that as I began to pass by [the complainant], to steady myself, I placed my hand in the direction of her chair and came into momentary contact with a portion of her lower body."

In July 2019, the commission, having received a complaint regarding the incident and determining that there was adequate reason to proceed, prepared a statement of allegations and presented it to the respondent. In a written response, the respondent stood by his prior version of events and added, "It would be tempting to acknowledge that I purposely grabbed [the

complainant's] buttocks and to offer my apology for having done so, but I have no such recollection and therefore cannot do so. However, I do not dispute that I had physical contact with [her] and I acknowledge that it was inappropriate. I regret what occurred and I apologize to [her] for it." He attached a letter of apology to his response and asked that it be given to the complainant.

In February 2020, the commission filed formal charges in this court against the respondent, and the court appointed a retired associate justice of the Superior Court to preside over the statutorily required hearing. See G. L. c. 211C, § 7 (1). At the hearing, the complainant testified, "As [the respondent] passed behind me, I felt him grab, slide his hand under my left buttock and grab me." The respondent also testified and, contrary to his prior written statements, denied having any physical contact, intentional or unintentional, with the complainant on the evening in question.² When asked to explain his prior statements, he replied, "I did not think that [the complainant] would lie. In attempting to rationalize what she said and recalling the events of the evening, I could then only conclude that there was a possibility that I may have had some

² After denying at the hearing that he had any contact with the complainant, intentional or unintentional, the respondent went on to allow that there "may have been" some "accidental" contact, although he could not recall any.

fleeting contact with her. Not intentional contact. Not purposeful contact. But something that had occurred."

Following the hearing, the hearing officer submitted to the commission a report with proposed findings and recommendations. See G. L. c. 211C, § 7 (8). The commission then drafted a report and recommendation for submission to this court, adopting all but one of the hearing officer's factual findings. See G. L. c. 211C, § 7 (9)-(10).

In the report and recommendation, the commission concluded that the respondent engaged "in an intentional, nonconsensual, and unwelcome touching of [the complainant's] buttock." It also concluded that the respondent was not "forthright" in his original written response to the complainant's allegations and, instead, "generated a statement he knew to be false in which he invented out of whole cloth a version of events in which [the complainant's] very clear perception of what happened to her person was to be dismissed as misimpression or an exaggeration." The commission further concluded that the respondent's testimony at the hearing, specifically, his "reworked denials" of the complainant's allegation and "problematic" explanation for his prior false statement, was a "further instance of his failure to be truthful in this matter." As a result, the commission recommended that the respondent be censured publicly, ordered to

pay the commission's costs, and suspended without pay for a reasonable time.

Discussion. 1. Sufficiency of the evidence. The commission has the burden in these proceedings to prove the charges against the respondent by clear and convincing evidence. See G. L. c. 211C, § 7 (4). This standard "is not without teeth. It is a greater burden than proof by a preponderance of the evidence, but less than the proof beyond a reasonable doubt required in criminal cases. The evidence must be sufficient to convey a high degree of probability that the contested proposition is true" (quotations and citations omitted). Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 309 (2015). The respondent argues that not only is there not clear and convincing evidence of any wrongful conduct on his part, but there also is "no evidence." He further argues that the hearing officer's conclusions, adopted by the commission, clearly are erroneous. We disagree.

The respondent first argues that the finding that he intentionally touched the complainant's buttock cannot stand because there is no direct eyewitness testimony, including from the complainant, to support it. He further notes that there was evidence admitted at the hearing, including from the complainant, that other people were present and "milling about" in the bar area behind where the complainant sat and, while the

complainant estimated that the "grab" lasted from five to fifteen seconds,³ no one testified to seeing him stop behind her for even a moment before approaching the table. "If there is any clear and convincing evidence in this matter," he concludes, "it is that if anyone pinched or grabbed [the complainant], that person was not [the respondent]."

Although it is true that there was no direct evidence that the respondent touched the complainant, there was sufficient circumstantial evidence from which a fact finder could determine that there was a high probability the judge, and not someone else, did so.⁴ It is undisputed that the respondent passed behind the complainant -- the respondent and two of the complainant's colleagues confirmed as much -- and she maintained that he did so at the same moment the unwanted touching

³ When asked at the hearing how long the "grab" lasted, the complainant replied, "Geesh. I don't know, 5, 10, 15 seconds, something along those lines." Previously, at her deposition, she had indicated "one to two seconds."

⁴ A criminal defendant's guilt can be established beyond a reasonable doubt based on circumstantial evidence alone. See, e.g., Cramer v. Commonwealth, 419 Mass. 106, 110 (1994) ("Circumstantial evidence is sufficient to establish guilt beyond a reasonable doubt, even for the conviction of the highest crimes"). It stands to reason, therefore, that the commission likewise may rely on circumstantial evidence to prove judicial misconduct by the lesser standard of clear and convincing evidence. See Adoption of Keefe, 49 Mass. App. Ct. 818, 825 (2000) (if circumstantial evidence sufficient to establish guilt for highest crimes, it is sufficient in child custody cases).

occurred. She testified at the hearing that she noticed the respondent coming toward her table. As noted above, she further testified, "As he passed behind me, I felt him grab, slide his hand under my left buttock and grab me." She "paused" before she turned around⁵ and saw the respondent behind her over her left shoulder, but was "aware" of her surroundings and, while it is possible there were other people in the area behind her, "[t]here was no one else directly behind [her] at that time that [she] kn[ew] of."

There is also the fact that, ten days after first being made aware of the allegations by the Chief Justice of the Probate and Family Court, the respondent created and submitted a fictional version of events wherein he admitted to touching the complainant on the evening in question but tried to pass it off as unintentional. Subsequently, he reaffirmed that version of events when he responded to the statement of allegations received from the commission. As the hearing officer concluded, this "evinces a consciousness of guilt" and "suggests that he did what he was accused of doing and sought to minimize his culpability for it." In criminal cases where the evidence is

⁵ When asked at the hearing how long she "paused" before turning around, the complainant replied, "I don't know. I don't know. If I had to guess, it was a few seconds." Previously, at her deposition, she said she "paused for a few seconds I mean, within [thirty] seconds."

wholly circumstantial, we have noted that "significant" evidence of consciousness of guilt, such as providing a false statement in an effort to exculpate oneself, can carry great weight. See Commonwealth v. Fitzpatrick, 463 Mass. 581, 593 (2012), citing Commonwealth v. O'Laughlin, 446 Mass. 188, 202-203 (2006).

Likewise, the respondent's initial, admittedly fictional response to the allegations can, and clearly did, carry great weight in these judicial misconduct proceedings, where the burden of proof is lower.

The respondent argues in his brief in this court that the finding that he was not truthful is "baseless," and he attempts to sidestep the issue altogether by noting he was not charged formally with being dishonest. However, at the evidentiary hearing the respondent admitted that the version of events he provided in his written responses to the complainant's allegations was not true.⁶ Any reasonable person in his position

⁶ In his brief, the respondent suggests that "he realized that the person with whom he had unintentional contact as he returned from the mens' room could not have been" the complainant after "[b]eing reminded that [the complainant] had left the [restaurant]" prior to that. The suggestion is that his original version of events was true, but that he simply was mistaken when it came to identifying the person at the restaurant whose "lower body" he came in contact with when he went to steady himself on his return from the bathroom. The suggestion is not consistent with his testimony at the evidentiary hearing, wherein, as noted supra, he suggested that he created his original version of events because he "did not think that [the complainant] would lie" and "could then only

should have known he would be held accountable for his admittedly false statement notwithstanding the fact that there was no additional charge alleging untruthfulness. In fact, the hearing officer and the commission went on to find that the respondent's original version of events was "invented out of whole cloth" and, as discussed infra, considered his intentional misrepresentations in making findings of fact and deciding what sanction to recommend. Simply put, the finding that the respondent was not truthful is anything but baseless. Rather, it is squarely before us in the present proceedings, not only in relation to what, if any, sanction should be imposed, but also as significant evidence of the respondent's consciousness of guilt.

The respondent also argues that the hearing officer's conclusion, adopted by the commission, that the complainant "gave a cogent, credible, consistent account of what occurred" clearly is erroneous. In support of this argument, the respondent suggests the complainant was inconsistent in her description of the unwanted touching, which, in his opinion, became increasingly "exaggerat[ed]" over time from a "grab," to a "distinct pinch," to a "full palm," to "a grab [that] lasted a few seconds and felt like it was made using a full hand," and,

conclude that there was a possibility that [he] may have had some fleeting contact with her."

at the hearing, to "slid[ing] his hand under my left buttock and grab[bing] me." Again, we disagree.

The hearing officer, who observed the witnesses and was in the best position to weigh all the evidence, was free to weigh the testimony as she thought fit. See Matter of a Minor, 484 Mass. 295, 302 (2020) (hearing judge in best position to weigh evidence, assess credibility of witnesses, and make findings of fact, and reviewing court accepts findings unless clearly erroneous); Matter of King, 409 Mass. 590, 604-605 (1991) (hearing officer not required to accept contrary evidence). Ultimately, she concluded, and the commission agreed, "Based on [the complainant's] testimony and my observations of her over the hours she testified, including during rigorous cross-examination, I believe her. The variations in accounts highlighted in defense of [the respondent] do not detract from the believability of her version of events." Having reviewed the same record and the same "variations" in the complainant's accounts, we cannot conclude that this conclusion clearly was erroneous.

In summary, we agree with the hearing officer and the commission that the evidence was sufficient to establish, by the standard of clear and convincing evidence, both that the respondent engaged in an intentional, nonconsensual, and unwelcome touching of the complainant and that he then knowingly

provided a false version of events after being confronted with the complainant's allegations.⁷

2. Sanction. As this court has stated in prior judicial misconduct proceedings, the "appropriate disposition of disciplinary matters of this type depends on the particular circumstances." Matter of Murphy, 452 Mass. 796, 803 (2008), quoting Matter of Larkin, 368 Mass. 87, 91 (1975). Having that in mind, we begin by considering the respondent's misconduct.

First, the seriousness of the respondent's intentional, nonconsensual, and unwelcome touching of the complainant speaks for itself. The gravity of that act is compounded by the respondent's station as a Probate and Family Court judge, the complainant's subordinate position within that court, and the fact that the incident occurred at a court-sponsored event. As the hearing officer explained:

"That the incident occurred at a Court event, sponsored and conducted by the Court, makes it even more troubling. The judicial and other court-employed attendees at the conference were there because of their official positions, whether or not they were then performing their usual job responsibilities. The group seated at the table was part of a structure in which a judge occupies a position of

⁷ As previously noted, the hearing officer and the commission both concluded that the respondent also was not truthful in his testimony at the evidentiary hearing. We are troubled by that, as well. As the hearing officer appropriately stated, "One problem with lying is once it begins, it's hard to know when it ends." The respondent's dishonesty at the inception of this matter made it difficult thereafter to take him at his word.

unique power. In that structure, the people who provide support function as subordinates, in that their role is mainly defined by what a judge needs to perform [his or her] duties. [The complainant] and [her colleagues] at the table are high-level professionals who must be afforded the respect, courtesy and deference due them and owed all Trial Court employees. [The respondent's] conduct was not in keeping with the dignity, regard and professionalism he owed them and his position."

Additionally, the respondent's misconduct is aggravated by his intentional misrepresentation. He was untruthful in a statement to the Chief Justice of the Probate and Family Court, which he knew would be sent to the Chief Justice of this court, and he repeated that fabrication in his response to the statement of allegations against him. As the hearing officer explained:

"[The respondent's] written account to the Chief Justice contained deliberate falsehoods, as [he] admitted at hearing. The suggestion that his initial account of inadvertent, fleeting touching was concocted in deference to his belief in [the complainant's] veracity, fails to recognize that his written version of events was a fiction that excuses his wrong-doing and falsely attacks [the complainant's] perception of reality. If [the respondent] indeed knew he did not do as [the complainant] claimed, he was required to tell that truth rather than invent a tale. The path he chose supports the conclusion that he was attempting [to] evade responsibility for his act."

Judges will not be penalized for defending themselves before the commission, but they must not make deliberately false statements in the process. See Matter of Curry, 450 Mass. 503, 532 (2008) (in attorney discipline case, "[a] separate aggravating factor was the marked lack of candor [the attorney] showed during the

disciplinary proceedings" [quotation omitted]); Matter of King, 409 Mass. at 610 (in judicial misconduct case, aggravating factors included "a general pattern of questionable candor in the Judge's testimony indicating that he engaged in some stonewalling of the inquiry"). To again quote the hearing officer, the respondent's intentional misrepresentation "is wholly inconsistent with the oath of office and ethical conduct required of a judge."

In sum, the respondent's intentional wrongdoing -- both the unwanted touching of the complainant and the lying that followed -- violated the canons of judicial conduct. See, e.g., S.J.C. Rule 3:09, Canon 1, Rule 1.2 (2016) ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"); S.J.C. Rule 3:09, Canon 2, Rule 2.16 (A) & comment 1 (2016) ("A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary authorities" as it "instills confidence in judges' commitment to the integrity of the judicial system and the protection of the public"). His misconduct warrants discipline. See G. L. c. 211C, § 2 (5) (b), (d), (e) (judge may be disciplined for "willful misconduct in office;" "conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer, whether in office or outside of

judicial duties, that brings the judicial office into disrepute;" or "any conduct that constitutes a violation of the codes of judicial conduct or professional responsibility"). Accordingly, what remains to be determined is the appropriate discipline.

As mentioned supra, the commission has recommended, most prominently, that the respondent be suspended without pay for a reasonable time to permit the executive and legislative branches to consider, if they wish, whether the respondent should retain his judicial office.⁸ The respondent, in turn, argues that such a sanction is "greatly excessive." He notes that he has already been removed from judicial duties for more than two years while this matter has been pending. In addition, he suggests that he has been "broadly" and "publicly" vilified and embarrassed during the course of these proceedings. As such, he maintains that no further sanctions are warranted. We agree that the sanction recommended by the commission is severe and one that, fortunately, has rarely been warranted. See, e.g., Matter of

⁸ In Matter of Bonin, 375 Mass. 680, 711 (1978), we noted that the question whether a judge "should continue to serve . . . is one which is not assigned to the judicial department under the Constitution of the Commonwealth." However, we further recognized that, pursuant to our constitutional and statutory powers of supervision over the courts, we could, when we deemed it appropriate, suspend a judge for a reasonable time to allow the executive and legislative branches to consider, if they so desired, whether a judge should continue in office. Id. at 711-712.

Bonin, 375 Mass. 680, 711-712 (1978); In re: Estes, Sup. Jud. Ct., No. OE-136, Order (May 24, 2018). Nonetheless, we also agree that this is one of those rare cases where the sanction is justified by the misconduct.⁹

As this court has previously acknowledged, "[t]hat the standards imposed on judges are high goes without saying.

⁹ The respondent argues that the discipline recommended by the commission in this case is disproportionate to that imposed in certain other judicial misconduct proceedings. However, the previous dispositions on which he relies did not involve the unique combination of misconduct at issue here: the intentional, nonconsensual, and unwelcome touching of a trial court employee while at a court-sponsored event, followed by dishonesty during the resulting investigation and hearing. Cf. Matter of Brown, 427 Mass. 146, S.C., 427 Mass. 1015 (1998); Matter of King, 409 Mass. 590 (1991); Commission on Judicial Conduct, Superior Court Judge Reprimanded by Commission on Judicial Conduct (June 9, 2010), <https://www.mass.gov/news/superior-court-judge-reprimanded-by-commission-on-judicial-conduct> [<https://perma.cc/38HG-GM9L>]; Commission on Judicial Conduct, Judge Robert F. Murray Disciplined by the Commission on Judicial Conduct (Nov. 28, 2005), <https://www.mass.gov/news/judge-robert-f-murray-disciplined-by-the-commission-on-judicial-conduct> [<https://perma.cc/AV27-9XZR>]; Commission on Judicial Conduct, Appeals Court Judge Reprimanded by Commission on Judicial Conduct (Mar. 19, 2004), <https://www.mass.gov/news/appeals-court-judge-reprimanded-by-commission-on-judicial-conduct> [<https://perma.cc/C6KE-9HMK>]. Moreover, as noted supra, although "dispositions in prior proceedings and dispositions in other jurisdictions generally may offer some guidance, the appropriate resolution in these matters depends on the particular circumstances. Because none of our earlier cases is on point, our prior judicial disciplinary decisions provide little guidance in reaching a conclusion on the facts presented in this proceeding." In re: Estes, Sup. Jud. Ct., No. OE-136, Order, at 3 (May 24, 2018). Instead, we have considered the facts presented, as well as the arguments of the parties, and deemed the sanction previously imposed in cases such as Estes's to be warranted.

Because of the great power and responsibility judges have in passing judgment on their fellow citizens, such standards are desirable and necessary and there should be strict adherence to them. Failure on the part of even a few judges to comply with these standards serves to degrade and demean the entire judiciary and to erode public confidence in the judicial process." Matter of Morrissey, 366 Mass. 11, 16-17 (1974) ("Anyone who is unwilling to accept and abide by such [high standards] should not aspire to or accept the great honor and the grave responsibility of serving on the bench"). When, as in the present case, a judge strays from those high standards, we are mindful that the discipline we impose must "serve[] to give assurance to the public that such conduct will not be tolerated and that the judiciary itself is ever ready to carry out the corrective process when necessary." Id. at 17. See In re: Estes, Sup. Jud. Ct., No. OE-136, Order, at 3 ("Because deference to the judgments of our courts requires that courts maintain the public's trust and confidence, our disposition must assure the public that judges are held to high standards and that the judiciary is worthy of the trust and confidence necessary in a society governed by law").

Here, the respondent has been found to have committed serious acts of misconduct "that implicate fundamental principles of integrity . . . and respect for the judicial

office." Id. He has brought "undeserved discredit to the administration of justice in the Commonwealth." Matter of Larkin, 368 Mass. at 91-92. "The sanction we impose is severe not because we seek to punish [the respondent] severely, but because, like the [hearing officer and the c]ommission, we seriously question whether he can command the respect and authority essential to the performance of his judicial function." In re: Estes, Sup. Jud. Ct., No. OE-136, Order, at 5.

Conclusion. The respondent is suspended without pay for a reasonable time to permit the executive and legislative branches to consider, if they wish, whether he should retain his judicial office.¹⁰ See Matter of Markey, 427 Mass. 797, 804-805 (1998) (discussing our authority to suspend judge without pay). If requested, the commission shall be permitted to share with the executive and legislative branches any nonimpounded material that has been provided to this court in connection with the present matter. A copy of this decision shall be delivered to the Governor and the Legislature.

So ordered.

¹⁰ We do not adopt the commission's recommendations that the respondent be censured publicly and ordered to pay the commission's costs because we believe the objectives of those sanctions effectively have been achieved by the sanction we have imposed.