

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of IRENE ST. JOHN and U.S. POSTAL SERVICE,
POST OFFICE, Patchogue, NY

*Docket No. 96-2265; Submitted on the Record;
Issued August 9, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established that she sustained an injury in the performance of duty on June 15, 1994 as alleged.

On August 3, 1994 appellant filed a claim alleging that on June 15, 1994, during a physical examination scheduled by the employing establishment, the employing establishment's physician, Dr. Hugh A.C. Packer, sexually assaulted her by touching her breast. By decision dated December 1, 1994 the Office of Workers' Compensation Programs found that appellant had not established that the June 15, 1994 incident occurred as alleged.

Appellant requested reconsideration, and submitted a copy of the February 23, 1996 findings and conclusions of an administrative judge for the Equal Employment Opportunity Commission (EEOC). The administrative judge found that the June 15, 1994 incident occurred as alleged by appellant, and that the employing establishment was directly liable for the hostile environment and sexual harassment. These findings and conclusions would become binding upon the employing establishment 60 days after its receipt, unless the employing establishment modified or rejected the findings and conclusions.

By decision dated June 4, 1996, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision. The Office did not accept the administrative judge's conclusion over its own as to whether the incident occurred as alleged. The Office found that the evidence in the record established that the June 15, 1994 incident did not occur as alleged.

The Board finds that appellant has not established that she sustained an injury in the performance of duty on June 15, 1994 as alleged.

The Board notes that the findings of other federal agencies are not dispositive with regard to questions arising under the Federal Employees' Compensation Act.¹ The Office thus is not bound by the findings and conclusions of the administrative judge for the EEOC, especially as there is no evidence that the findings and conclusions were accepted by the employing establishment. Moreover, the administrative judge did not point to persuasive evidence that the June 15, 1994 incident occurred as alleged by appellant, instead placing the burden on the employing establishment to show that the incident did not occur as alleged.

Under the Act, an employee has the burden of establishing the essential elements of his or her claim.² An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An employee has not met his or her burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.³ Appellant in the present case has not established that the June 15, 1994 incident occurred as she alleged.

The employing establishment and the postal inspection service performed investigations of appellant's allegation that Dr. Packer, the employing establishment's physician, had sexually assaulted her on June 15, 1994 during a fitness-for-duty examination. In a report dated November 30, 1994, a postal inspector stated:

“After various conversations I had with [appellant] regarding allegations of sexual misconduct by Dr. Packer, I made attempts to corroborate her allegations without success. I checked into her allegations that Dr. Packer had a history of sexually abusing employees, and found that there was one complaint against Dr. Packer in 1984, but that it was dropped by the employee after the investigation was concluded. There was no record of other complaints by postal employees against Dr. Packer since that time, or even any recollection of any verbal complaints, except for the allegations made 10 years ago. In addition, a nurse who was present during the examination of [appellant] by Dr. Packer, corroborated Dr. Packer's statement and stated that [appellant] had a normal medical examination. ... My investigation led to the conclusion on my part that there was no evidence or substantiation of the allegations. I closed my investigation.”

¹ *Shelby J. Rycroft*, 44 ECAB 795 (1993).

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Joseph A. Fournier*, 35 ECAB 1175 (1984).

In a report dated November 30, 1994 the employing establishment's manager of human resources stated:

“In the two years I have been in Long Island District, [appellant's] complaint is the first I have heard, despite the fact that Dr. Packer has examined hundreds of employees and applicants. There was complaint of sexual harassment made against Dr. Packer about 10 years ago. The complaint was investigated at that time, and there was no evidence found that Dr. Packer had sexually harassed the complainant. When [appellant's] complaint was made, we also did an investigation. I discussed the allegations with the [employing establishment] to see if there was any basis for action against Dr. Packer. I interviewed Dr. Packer and asked him what happened during the examination of [appellant]. My Senior Injury Compensation Specialist, Mary McDonnell, interviewed Nurse William Gerrity. I called our Area Senior Medical Officer, Yvonnecris Veal, to find out if the procedures described by Dr. Packer for fitness-for-duty examination were in fact the same used by other postal medical officers. I reviewed statements made by [appellant] and Nurse Gerrity. The EEO [equal employment opportunity] Counselor Investigator also conducted an investigation into the allegations. After reviewing all the statements and other records, it appears that Dr. Packer followed standard medical procedures for examining a patient, he had a nurse present in the room during the entire examination, and [appellant] did not refuse the examination.... When [appellant] brought a complaint against Dr. Packer, we took it seriously and investigated it thoroughly. Since all evidence indicates that there was no wrongdoing on the part of Dr. Packer, we have the obligation to exonerate him and allow him to do his job.”

The case record also contains statements dated September 9, 1994 and November 10, 1994 from Dr. Packer. Dr. Packer denied that he sexually harassed, abused or attacked appellant, and noted that a nurse was in attendance at the time of the June 15, 1994 examination, as was his custom whenever he examined a female employee. Dr. Packer then stated:

“The employee did not make any complaints either to me or to the nurse. The first time I heard about her complaint was on September 8, 1994 in an interview with the Human Resources Manager, Ms. Tasula Williams.

“The method of examining the employee was the usual method used by other medical doctors. There was no deviation from the accepted method of examination. For fiscal year 1994, I have according to my records examined over 230 females without having had any complaints.”

The nurse who was present at the June 15, 1994 examination of appellant also submitted two statements. In a statement dated August 30, 1994 this nurse described the routine followed for examining female patients, and stated he had never seen any conduct in Dr. Packer's examinations, which he had attended since May 1986, that was considered inappropriate and had never seen any touching that he considered sexual. In a November 17, 1994 statement, this nurse specifically addressed the June 15, 1994 examination of appellant: “At no time in this

examination did Dr. Hugh Packer touch or act in such a way that was sexual, demeaning or unprofessional to [appellant].”

Against these investigations and statements, there is only appellant’s bare allegation that Dr. Packer touched her breast. Appellant’s contention of prior similar incidents is not substantiated by the evidence in the case record before the Board. Appellant has not met her burden of proof.

The decision of the Office of Workers’ Compensation Programs dated June 4, 1996 is affirmed.

Dated, Washington, D.C.
August 9, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member