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## Policies Governing Employment Discrimination and Harassment in the Judicial Branch

Several federal laws, including Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), and Section 501 of the Rehabilitation Act (Section 501), protect members of the federal workforce from employment discrimination. Together, these laws prohibit discrimination on the basis of race, color, religion, sex, national origin, age (40 years and older), and disability. They cover various forms of discrimination, including discriminatory harassment. These three statutes account for the vast majority of federal employment discrimination claims. Each applies to most federal employees and job applicants in the executive branch. Substantively, the laws also apply to the legislative branch though the Congressional Accountability Act (CAA). (The CAA incorporates Title I of the Americans with Disabilities Act, which applies the same standards as Section 501 to nonfederal employers.) These laws largely do not apply to judicial branch employees.

In the absence of statutory standards, the judiciary follows its own internal policies when faced with allegations of employment discrimination. In addition, any person who believes that a federal judge (other than a Supreme Court Justice) has discriminated against them may file a complaint under the Judicial Conduct and Disability Act (JCDA). This In Focus describes these protections and procedures. It highlights some of the key ways in which they differ from legal protections and procedures covering executive branch workers. (Legislative branch employees have access to different procedures for employment discrimination than executive branch employees. These differences are outside the scope of this In Focus.)

### Judiciary Policy

The judiciary's Workplace Conduct and Protections policy covers employment discrimination in the judicial branch. It adopts a Model Employment Dispute Resolution (EDR) Plan that each federal district and circuit court must implement. Several judiciary components, including the Supreme Court and the Administrative Office of the U.S. Courts, are exempt and covered by different policies.

### Scope of Employment Discrimination Protections

The Workplace Conduct and Protections policy protects covered persons from discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age (40 years and over), and disability. The policy incorporates the forms of discrimination prohibited by Title VII, the ADEA, and Section 501, including discriminatory harassment that creates a hostile work environment and an employer's failure to provide reasonable religious or disability accommodations. Additionally, the policy forbids "abusive

conduct," that is, any "pattern of demonstrably egregious and hostile conduct not based on a protected category . . . that unreasonably interferes with an employee's work and creates an abusive working environment."

With respect to the persons covered, the Workplace Conduct and Protections policy is broader than federal employment discrimination law in some respects and narrower in others. Federal employment discrimination statutes generally do not apply to unpaid interns in the executive branch. The judiciary's policy expressly covers unpaid workers, including unpaid interns, externs, and volunteers. Title VII, the ADEA, and Section 501 apply more broadly than judicial policy in that they protect all applicants for employment in covered agencies. The judiciary's antidiscrimination policy covers only applicants who have been interviewed.

Substantively, the judiciary's policy and the federal employment discrimination laws protect similar groups and cover similar incidences of discrimination. One difference is that the judiciary expressly prohibits gender, gender identity, and sexual orientation discrimination. Federal statutory law is less explicit. In *Bostock v. Clayton County*, the Supreme Court interpreted Title VII to prohibit at least some kinds of sexual orientation and gender identity discrimination, but those terms do not appear in Title VII's text, and *Bostock's* precise scope is not entirely clear.

Another significant distinction is the judiciary's prohibition on "abusive conduct" toward employees. Federal antidiscrimination law does not reach any action, no matter how hostile, offensive, or harmful, that is not based on a protected trait (such as race, sex, age, or disability).

### Remedies and Procedures for Resolving Claims

The Model EDR Plan establishes the process for resolving many judicial employment discrimination claims. (Certain persons generally covered by the Workplace Conduct and Protections policy, including judges, cannot seek relief under the Plan, and offices of the federal public defender use a separate but similar EDR plan.) The Model EDR Plan tasks three offices with primary responsibility for handling claims covered by the Plan: court-level EDR coordinators, circuit-level directors of workplace relations, and the National Office of Judicial Integrity. The offices have some overlapping authority but distinct roles. For example, each office can provide confidential guidance and referrals, but only EDR coordinators and directors of workplace relations are directly involved in resolving complaints. Employees may choose which office to reach out to.

There are three options available to resolve a complaint:

- Confidential informal advice and counseling; however, confidentiality may yield, for example, in cases of “reliable information of wrongful conduct that threatens the safety or security of any person” or “that is serious or egregious such that it threatens the integrity of the Judiciary.”
- An assisted resolution, which is a “flexible” process seeking informal resolution, such as through mediation or facilitated discussions. For complaints against a judge, the chief judge of the district or circuit court coordinates a response and takes appropriate action. Otherwise, the EDR coordinator or circuit director coordinates the response and the unit executive (i.e., the circuit or district court executive, clerk of court, or other top executive officer) resolves the matter. The parties must state in writing if assisted resolution was successful.
- A formal complaint, which must be submitted within 180 days of the misconduct. The chief judge of the circuit oversees formal complaints against judges. Otherwise, the chief judge of the appropriate court appoints another judge as the presiding judicial officer (PJO). The PJO must allow for some discovery and decides what written submissions to accept and whether to hold a hearing. The federal rules of evidence do not apply to any such hearing. The PJO can dismiss a case for several enumerated reasons or on other “appropriate grounds.” They must issue a written decision after any hearing. A party may appeal that decision to the judicial council of the circuit. Decisionmakers are to be guided by federal employment discrimination law “as appropriate.”

In contrast to these judicial branch procedures, administrative procedures for executive branch employment discrimination claims are set forth in regulations by the Equal Employment Opportunity Commission (EEOC). Certain distinctions from the Model EDR Plan include that the EEOC procedures impose more and different administrative deadlines on both the employee and the agency, and the EEOC regulations are, generally speaking, much more detailed and allow less discretion by decisionmakers. Executive branch employees may elect to have their cases heard by an administrative judge and may appeal agency-level decisions to the EEOC, an independent federal agency. Judicial employees do not have access to administrative judges or appellate review outside of the judicial council of their circuit. Executive branch employees may also seek review in court. Judicial branch employees may not.

Remedies for judicial employees are different than those available in the executive branch. Employees in both branches may receive a substantive remedy—for example, a change in position, accommodation, or record modification. Both executive and judicial branch employees may receive some back pay and attorneys’ fees, but on different terms. Unlike executive branch employees, judiciary employees may not receive compensatory damages.

## Judicial Conduct and Disability Act

While the judiciary’s Workplace Conduct and Protections policy provides procedures for judicial branch employees seeking individual relief for workplace misconduct, it does not include punitive measures intended to hold alleged wrongdoers accountable. One federal law that addresses federal judges’ conduct, the JCDA, allows any person to file a complaint alleging a federal judge has “engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.” (The JCDA also addresses claims that a judge is unable to discharge their official duties; those provisions are beyond the scope of this product.)

The judiciary’s Rules for Judicial-Conduct and Judicial-Disability Proceedings establish standards and procedures for addressing JCDA complaints. Under these rules, any person may file a complaint with the clerk of the court of appeals of the relevant circuit, alleging that a federal judge (other than a Supreme Court Justice) has engaged in misconduct. The rules define cognizable misconduct as, among other things, abusive or harassing behavior—which includes sexual harassment and creating a hostile work environment—as well as intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, nation origin, age, or disability.

As set out by the JCDA and accompanying rules, a multi-level process first involves review by the chief judge of the circuit. As that judge deems necessary, the process may include investigation by a special committee, review by the judicial council of a circuit, and possible review by the Judicial Conference of the United States. The JCDA establishes administrative appeal procedures for complainants or judges aggrieved by final orders. No orders are reviewable in court; an aggrieved party cannot file a lawsuit to appeal a final JCDA order.

The JCDA empowers the judicial council to take appropriate action to respond to a complaint. Potential actions as described by the statute may include, among other things, private or public censure or reprimand, a request that the judge voluntarily retire, or referral to the Judicial Conference to determine whether impeachment proceedings are warranted.

## Congressional Proposals for Reform

The Judiciary Accountability Act of 2021 (JAA) is one proposal that addressed judicial branch employment discrimination. Among other things, it would have prohibited discrimination based on race, color, religion, sex (including sexual orientation or gender identity), age, and disability in judicial branch personnel actions. Injured employees would have been able to seek compensatory damages and other remedies. The JAA would not have allowed employees to go to court for most claims, and its enforcement mechanisms and, to some extent, remedies diverged from those available in the executive branch.

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**Abigail A. Graber**, Legislative Attorney  
**Whitney K. Novak**, Legislative Attorney

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