

**PROPOSED CHANGES TO CODE OF CONDUCT FOR U.S. JUDGES  
AND JUDICIAL CONDUCT AND DISABILITY RULES**

**Hearing before the Judicial Conference of the United States**  
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My name is Alyssa Peterson and I am a third-year student at Yale Law School. Thank you to Judge Erickson, Judge Scirica, and members of the Committees on Codes of Conduct and Judicial Conduct and Disability for permitting me to testify today. I have accepted a district court clerkship offer for 2020 and offer my testimony as an individual who will be governed in the future by the judiciary's revised procedures for addressing judicial misconduct.

My testimony will focus on potential improvements to Canon 3 of the Judicial Code of Conduct for U.S. Judges and Rule 4 of the Judicial Conduct and Disability Rules. Although Title VII and other employment discrimination laws do not apply to the judiciary, I will endeavor to highlight principles from Title VII and state court decisions that could serve as models for potential reform.

### **The Judicial Conference Could Strengthen Canon Three through Clarifications to the Reasonable Person Standard**

As a student that would stand to benefit from reforms, I strongly support the inclusion of Canon 3(B)(4), which explicitly classifies harassment, abusive behavior, and retaliation as forms of judicial misconduct.<sup>1</sup> The canon is accompanied by revised commentary clarifying that judges should not tolerate behavior that is reasonably interpreted as judicial misconduct.<sup>2</sup>

The “reasonably interpreted” standard is appropriately protective of judicial employees and I recommend that it be preserved in the final rules. However, I also recommend that the judiciary clarify that the standard should be viewed from the perspective of a reasonable person in the judicial employee's position. Adopting such a standard would have several benefits. First, it would account for the power dynamics between judges and judicial employees by judging harassment from the perspective of a reasonable person in a subordinate role.<sup>3</sup> Second, it would have the beneficial effect of encouraging judges to account for the ways in which their actions are viewed by subordinates. Moreover, as the 9<sup>th</sup> Circuit recognized in *Ellison v. Brady*, failing to formally account for the perspective of a reasonable victim could have the effect of reinforcing current discriminatory attitudes.<sup>4</sup> Accordingly, I recommend that the judiciary clarify its commentary on this issue.

### **Rule Four of the Judicial Conduct and Disability Rules Would Be Improved through Recognition of Non-Sexual, Gender-Based Conduct**

I also strongly support this committee's effort to revise Rule 4 of the Judicial Conduct and Disability Rules. Rule 4(a)(3) is particularly promising, as it outlines broad protections for

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<sup>1</sup> Proposed Changes to the Code of Conduct for U.S. Judges, at 7-8.

<sup>2</sup> *Id.* at 11.

<sup>3</sup> A number of state and federal courts have adopted an analogous “reasonable woman” standard in the context of Title VII and analogous state laws. *See* Ann C. McGinley, *Reasonable Men*, 45 CONN. L. REV. 1, 5 (2012) (collecting cases where state and federal courts have applied reasonable women standards to hostile environment claims).

<sup>4</sup> 924 F.2d 872, 879 (9th Cir. 1991).

judicial employees who experience misconduct on the basis of their identity.<sup>5</sup> Although much of the discussion around judicial conduct has focused on sexualized harassment, I applaud the Judiciary Conference’s recognition that judicial misconduct may also include discrimination based on race, gender identity, sexual orientation, religion, national origin, age, and disability status. These protections are particularly critical for women of color and other multiply-marginalized groups whose claims “cannot be understood as resulting from discrete sources of discrimination.”<sup>6</sup> Rule 4(a)(3) is also well-crafted insofar as it clarifies that the list of protected classes is not intended to be exhaustive.<sup>7</sup>

Rule 4(a)(2) would also increase protections for judicial employees in a number of important respects. First, the commentary associated with the rule recognizes that abusive and harassing behavior constitutes misconduct, regardless of the gender of the victim or the perpetrator.<sup>8</sup> However, I am concerned that Rule 4(a)(2)(a)’s focus on sexualized abuse may inadvertently create the mistaken impression that non-sexual harassment is not covered by the rules. To address this issue, I recommend that the committee replace references to “sexual harassment” to “sex-based” harassment. Although it is true that gender-based harassment could be captured as sex discrimination under Rule 4(a)(3), which addresses discrimination more broadly, the limitation of harassment to “sexual” conduct reifies the harmful conception that harassment is limited solely to instances of sexual desire. Moreover, I also recommend that the judiciary reiterate that Rule 4(a)(2)(c)’s prohibition on hostile work environments includes a wide range of unprofessional conduct that can undermine the judiciary’s commitment to treating its employees with dignity, fairness, and respect.<sup>9</sup> Although sexual harassment has taken center stage in national conversations on this issue, it is critical to recognize that nondiscriminatory but abusive behaviors, such as berating judicial employees in chambers, can also foster a demeaning workplace environment.

In order to improve the clarity of the policy, I also recommend that the Judicial Conference add language and examples to better communicate what constitutes prohibited behavior. The Washington Supreme Court recently released a new “Harassment-Free Workplace” policy that defines three different situations in which harassment may arise and then provides a list of prohibited behavior.<sup>10</sup> This list, while not exhaustive, provides specific examples of visual, verbal, nonverbal, and physical conduct that the Court’s policy prohibits. The Equal Employment Opportunity Commission also provides examples of abusive conduct within its definitions.<sup>11</sup> By providing similar examples, the Judicial Conference can help judicial employees understand their rights. Moreover, I also recommend the Judicial Conference clarify, through the provision of examples, that judges should not engage in abusive, non-sexual conduct, such as publicly ridiculing a judicial employee.

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<sup>5</sup> Proposed Changes to the Rules for Judicial-Conduct and Judicial-Disability Proceedings, at 13.

<sup>6</sup> Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

<sup>7</sup> Proposed Changes to the Rules for Judicial-Conduct and Judicial-Disability Proceedings, at 15.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> I have appended a copy of the court’s policy to this testimony.

<sup>11</sup> See *Harassment*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/harassment.cfm> (last visited Oct. 25, 2018); *Retaliation*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N <https://www.eeoc.gov/laws/types/retaliation.cfm> (last visited Oct. 25, 2018).

## **The Judicial Conference Should Expand the Definition of Retaliation in Rule 4**

Additionally, although I support this committee's efforts to incorporate explicit protections against retaliation, it is concerning that Rule 4(a)(4) addresses itself only to individuals who participate in the complaint process or report misconduct.<sup>12</sup> As we know, very few people report harassment to the judiciary.<sup>13</sup> Absent further reforms, reporting rates are likely to remain low, which will limit the number of individuals who are protected against retaliation by participating in a process.

In order to correct this issue, I urge this committee to also afford protection against retaliation to individuals who oppose misconduct. Title VII adopts this model and bars retaliation against individuals who participate in proceedings as well as individuals who oppose discriminatory practices.<sup>14</sup> Accordingly, the Judicial Conference could strengthen the proposed rules by adding an opposition clause. The rules could also include examples of behavior that could constitute retaliation, such as taking action that would be materially adverse to an employee or dissuade others from reporting judicial misconduct.

Thank you for the opportunity to testify.

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<sup>12</sup> Proposed Changes to the Rules for Judicial-Conduct and Judicial-Disability Proceedings, at 13.

<sup>13</sup> See *Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary Before the S. Judiciary Comm.*, 115th Cong. 106 (2018) (statement of James C. Duff, Director, Administrative Office of the U.S. Courts) (noting that judicial employees filed zero complaints in 2016).

<sup>14</sup> 42 U.S.C. § 2000e-3(a) (prohibiting retaliation against an individual "because he has opposed any practice made an unlawful practice").