ARIZONA JUDICIAL COUNCIL

Date Action Requested:	**Type of Action Requested:**	**Subject:**
June 18, 2018	_X_ Formal Action/Request __ Information Only __ Other	**Proposed ACJA § 1-304: Discrimination and Harassment**

FROM: David Withey, Chief Counsel, AOC

Discussion: A judicial branch policy on sexual harassment in the workplace was first issued by administrative order of the chief justice in 1992 to provide a consistent policy statement for all of the courts in the state and direction regarding the contents of local court policies. The proposed judicial branch policy on discrimination and harassment updates this 1992 policy to extend to all types of harassment in the workplace with specific attention to sexual harassment as currently recommended by the EEOC. If adopted it will reemphasize the judicial branch policy against discrimination and harassment and require each local court to review its policy on this subject to ensure compliance with this code section.

Significant new or changed provisions: New and expanded definitions of "discrimination," "harassment," "sexual harassment," "workplace," and "retaliation." Required elements of local court policies track EEOC recommendations.

Committees actions and comments:
Committee on Juvenile Court – Approved.

Commission on Minorities in the Judiciary – Approved with recommendation to add a definition of "retaliation." Done.

Committee on Superior Court – Approved with recommendation to add provision on false reporting as was contained in the administrative order and additional amendments. False reporting provision was added and amendments made except reference to local court facilities as "branch facilities."

Committee on Limited Jurisdiction Courts – Approved with recommendation to conform the list of the prohibited bases for discrimination and harassment to the ABA Model Code of Judicial Conduct. The Arizona Code of Judicial Conduct and Code of Conduct for Judicial Employees already conform to the model code in this respect. Done.

Arizona Commission on Access to Justice – Commented that leadership, accountability, and ongoing training are essential to successful implementation of this policy statement.

Controversial issues: None

RECOMMENDED COUNCIL ACTION:

Recommend approval as presented.

ARIZONA CODE OF JUDICIAL ADMINISTRATION

Part 1: Judicial Branch Administration
Chapter 3: Judicial Officers and Employees
Section 1-304: Discrimination and Harassment

Proposal Cover Sheet

1. Effect of the proposal: A judicial branch policy on sexual harassment in the workplace was first issued by administrative order of the chief justice in 1992 to provide a consistent policy statement for all of the courts in the state and direction regarding the contents of local court policies. The proposed judicial branch policy on discrimination and harassment updates this 1992 policy to extend to all types of harassment in the workplace with specific attention to sexual harassment as currently recommended by the EEOC. If adopted it will reemphasize the judicial branch policy against discrimination and harassment and require each local court to review its policy on this subject to ensure compliance with this code section.

2. Significant new or changed provisions: New and expanded definitions of "discrimination," "harassment," "sexual harassment," "workplace," and "retaliation." Required elements of local court policies track EEOC recommendations.

3. Committees actions and comments:

Committee on Juvenile Court – Approved.

Commission on Minorities in the Judiciary – Approved with recommendation to add a definition of "retaliation." Done.

Committee on Superior Court – Approved with recommendation to add provision on false reporting as was contained in the administrative order and additional amendments. False reporting provision was added and amendments made except reference to local court facilities as "branch facilities."

Committee on Limited Jurisdiction Courts – Approved with recommendation to conform the list of the prohibited bases for discrimination and harassment to the ABA Model Code of Judicial Conduct. The Arizona Code of Judicial Conduct and Code of Conduct for Judicial Employees already conform to the model code in this respect. Done.

Arizona Commission on Access to Justice – Commented that leadership, accountability, and ongoing training are essential to successful implementation of this policy statement.

4. Controversial issues: None

5. Recommended action or motion: Recommend approval by Arizona Judicial Council at its June 18, 2018 meeting.

ARIZONA CODE OF JUDICIAL ADMINISTRATION
Part 1: Judicial Branch Administration
Chapter 3: Judicial Officers and Employees
Section 1-304: Discrimination and Harassment

A. Policy. It is the policy of the Arizona Judicial Branch that discrimination and harassment, including sexual harassment, in the workplace is prohibited. Employment discrimination and harassment based on race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation is forbidden. Accordingly, harassment by judicial branch employees shall be grounds for disciplinary action, up to and including dismissal. Harassment by judges is grounds for action under the rules of the Commission on Judicial Conduct. Harassment by vendor employees shall be grounds for termination of vendor contracts.

It is the responsibility of every judge and judicial branch employee to strive to create a work environment free of harassment and discrimination. As required by the Code of Judicial Conduct and the Code of Conduct for Judicial Employees, all judges and judicial branch employees are expected to avoid bias, prejudice and harassment in the performance of their duties, to treat other judicial branch employees, court users, and the public with dignity and respect, and to comply with this policy.

Sexual harassment is sex discrimination which violates individual rights and state and federal law. Sexual harassment is also a form of misconduct which undermines the integrity of the employment relationship and of the court itself. All judges and judicial branch employees must be able to work in an environment that is free from unsolicited and unwelcome sexual overtures and innuendo. Sexual harassment debilitates morale and interferes with productivity. Therefore, sexual harassment is unacceptable conduct in the workplace.

B. Definitions. In this section, the following definitions apply:

"Discrimination" is differing treatment of an individual, involving any term or condition of employment, based on that individual's race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. Discrimination based on these protected classes is prohibited by state and federal law. Courts have held discrimination against an individual because of sexual orientation or because of gender identity, including transgender status, is discrimination because of sex in violation of Title VII.

"Harassment" is verbal or physical conduct or any form of communication that is directed at an individual because of his or her race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation and that is sufficiently severe, pervasive, or persistent to have the purpose or effect of creating a hostile environment. Courts have held harassment of an individual because of sexual orientation or because of gender identity, including transgender status, is harassment because of sex in violation of Title VII.

"Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, other verbal or physical conduct or any other form of communication of a sexual nature when:

1. Submission to that conduct or communication is made an explicit or implicit term or condition of obtaining or continuing employment.

2. Submission to or rejection of that conduct or communication by an individual is used as a factor in employment decisions affecting the individual.

3. The conduct or communication has the purpose or effect of substantially interfering with an individual's employment or of creating an intimidating, hostile, or offensive environment.

Sexual harassment may involve relationships of unequal power. Such situations might contain elements of coercion, such as when compliance with requests for sexual favors becomes a criterion for granting or denying privileges or for favorable or unfavorable treatment on the job; however, sexual harassment also might involve relationships among peers, such as when repeated unwelcome advances or unwelcome sexual comments by one co-worker toward another co-worker has a harmful effect on the latter's ability to perform his or her job. Sexual harassment also might involve employee behavior directed at non-employees or non-employee behavior directed at employees. Sexual harassment may occur when it is directed at members of the opposite gender or when it is directed at members of the same gender.

"Workplace" is any location where a judge or an employee is present due to court employment; including locations outside the courthouse or court office, travel to and from those locations, and court sponsored events.

"Retaliation" is an adverse action (e.g., termination, denial of promotion, refusal to hire, unjustified discipline or evaluation, etc.) taken against an individual to deter protected activity or for engaging in protected activity. Protected activity consists of: (1) opposing conduct reasonably believed to constitute discrimination, including harassment, which violates a nondiscrimination statute, this code section, or court policy; (2) reporting such conduct; or (3) testifying, assisting, or participating in any manner in an investigation or other proceeding related to a discrimination complaint.

C. **Duty to Report.** Employees, applicants, and other persons discriminated against or harassed or who have personal knowledge of discrimination or harassment by judges or judicial branch employees in the course of their duties or by anyone in court facilities are responsible for promptly reporting such conduct in accordance with the procedures applicable to each court. Each employee has an affirmative duty to maintain a workplace free of discrimination, harassment, and intimidation. Any form of retaliation against an individual for reporting discrimination or harassment truthfully to the best of that person's knowledge is prohibited and shall be grounds for disciplinary action, which may include termination. A false and malicious report of harassment, discrimination or retaliation (as opposed to a report that,

even if erroneous, is made in good faith) will be the subject of appropriate disciplinary action.

D. Implementation. Judges and court administrators responsible for the administration of each court shall implement this policy individually or in conjunction with other courts or other governmental entities in the same county or jurisdiction by adopting policies and procedures that are approved by the presiding judge of the county and contain, at a minimum, the following elements:

1. Effective dissemination of this policy and local procedures to every employee by such means as posting in areas highly visible to employees, publication on the court website, and inclusion in employee orientation materials and education materials on this subject.

2. An explanation of the prohibited conduct, including all forms of unlawful harassment, including race, color, gender (both sexual and non-sexual), age, national origin, disability, and religion.

3. A reporting system, available to persons who might experience discrimination or harassment and those who might observe discrimination or harassment, that provides multiple avenues to report in an easily accessible manner.

4. Referral to the Commission on Judicial Conduct for investigation of alleged misconduct of a judge.

5. Clear reporting and investigation procedures.

6. A prompt, thorough, and impartial investigation of employees conducted by a trained investigator.

7. A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with thorough and impartial investigative and disciplinary processes.

8. Assurance of immediate and appropriate corrective action and that the reporting and investigated employees will be informed of the investigation result.

9. Assurance that a reporting or witnessing employee will be protected from retaliation.

E. Education. The Administrative Office of the Courts through its Education Services Division shall provide educational opportunities for judges and judicial branch employees regarding this policy statement. Presiding judges of each county shall ensure additional educational opportunities are offered for judges and judicial branch employees within their county regarding this policy and local policies and procedures. Judges, managers, and supervisors must receive education regarding their role and responsibility to identify discrimination and harassment and to take appropriate action pursuant to this policy and local procedures.