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To: Kelly Hoyt

Date: 07.19.2018

From: Matthew Hammer, Assistant Attorney General *mg*

The following Policy has been submitted to this office for review:

Policy 151 Code of Conduct (V2 12/12/2017)

Based on said review, I have the following comments:

- NDSU will need to assess the utility of creating a “bullying” policy. Upon review of the proposed policy, it remains unclear to me what this additional language adds that cannot be addressed through existing policies.
- I would caution against adopting this policy for the following reasons:
 1. As written, the policy language is both overly broad and vague. As such, it will be difficult to enforce.
 2. The policy language conflates illegal harassment and behaviors that individuals may take offense to. To the extent that illegal harassment is involved, NDSU has other policies that may be used to address the behaviors. To the extent that the behavior involved is not illegal, there begin to be First Amendment implications in NDSU dictating what employees may or may not say in the workplace. While there are restrictions on what a person may or may not say at workplace, it is ill-advised to attempt to shield employees from what they may believe is an “offensive” environment. Environments can be offensive to some and not be actionable, attempting to dictate otherwise subjects NDSU to potential First Amendment claims, especially if the enforcement of the policy is not content neutral.
 3. The policy language uses legal terminology and constructs and attempts to assign them meaning beyond what the law recognizes – for example, the policy language relies on the definition of a “hostile work environment” as well as the concept of retaliation, and assigns them meaning beyond what the law recognizes. Again, if the behavior in question is illegal, NDSU has other policies it can utilize to address the issues and those policies will appropriately address the concepts of retaliation and hostile work environment. If, however, the behaviors in question are not illegal, these concepts should not factor into the decision making process (i.e. complaining about bullying is not protected activity, nor can there be a “hostile work environment” predicated upon unprotected classifications).

4. Commingling bullying allegations with Equity investigations is ill-advised, especially when the procedures utilized will be the same as those utilized for allegations of illegal discrimination. As indicated above, to the extent that the allegations do not center around a protected class/activity, the legal constructs that guide Equity investigations have no place in the decision making process. I would recommend that the current policy continue to be utilized and that the departments work through these issues with Human Resources.
 5. Adding these additional protections will create a safe harbor for bad employees who may be the source of creating workplace issues in the first place. For example, it is not uncommon for an employee to lodge a complaint when the employee realizes that their employer may take action against them. Adding these additional protections will greatly expand the basis for employee complaints and will only contribute to the misunderstanding of what constitutes retaliation and hostile work environment.
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