

Discrimination and Harassment Policy

Employees-at-will and contracted employees are protected by both state and federal laws which prohibit discrimination in the workplace. Claims filed with North Dakota's Department of Labor are clearly on the rise. On the national level, the U.S. Equal Employment Opportunity Commission (EEOC) recently announced that almost 100,000 workplace discrimination charges were filed with the federal agency nationwide during the 2011 fiscal year, the second highest level ever, and monetary relief obtained for victims totaled approximately \$364.7 million excluding monetary relief obtained through litigation.

WHAT IS DISCRIMINATION?

North Dakota law defines discrimination as an act that results in unequal treatment of a protected class and that adversely affects enjoyment of employment or labor union membership. The protected classes include:

- a. Race, color, and national origin;
- b. Religion;
- c. Sex;
- d. Age;
- e. Physical or mental disability;
- f. Marital status;
- g. Public assistance status; or
- h. Participation in lawful acts off the employer's premises during non-working hours.

The term "discrimination" also includes sexual harassment ([NDCC 14-02.4-02](#)).

State and federal law prohibits discriminatory practices in any aspect of employment, including the following:

- a. Hiring and firing;
- b. Denying employment opportunities to a person because of marriage to or association with an individual of a particular race, religion, national origin, or an individual with a disability.
- c. Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities, or based on myths or assumptions about an individual's genetic information;
- d. Compensation, assignment, or classification of employees;
- e. Transfer, promotion, layoff, or recall;
- f. Job advertisements;

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- g. Recruitment;
- h. Testing;
- i. Use of company facilities;
- j. Training and apprenticeship programs;
- k. Fringe benefits;
- l. Pay, retirement plans, and disability leave;
- m. Other terms and conditions of employment.

Law also prohibits:

- a. Harassment on the basis of race, color, religion, sex, national origin, disability, genetic information, or age;
- b. Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
- c. Discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

WHAT ARE MY EEOC ENFORCEMENT RESPONSIBILITIES AS AN EMPLOYER?

POST NOTICE

Employers are required to post notices to all employees advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading. EEOC's sample notice, [Equal Employment Opportunity is the Law](#), is provided.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) also requires employers to post notice of uniform service members' right to be free from discrimination and retaliation, reemployment rights, and health insurance protection rights. The U.S. Department of Labor has developed a sample notice to ensure compliance: [Your Rights Under USERRA](#).

DEVELOP A POLICY

It is strongly recommended, or in some cases required, that public employers develop discrimination and harassment complaint policies. RETURN TO TABLE OF CONTENTS PAGE 31 OF 79

Reasons:

- a. The U.S. Supreme Court has ruled that failure to establish an anti-harassment policy with effective grievance mechanisms "will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment."
- b. [NDCC 14-02.4-19](#) states: "A person whose collective bargaining agreement, employment contract, or public employee rights provides a process through which recourse for discriminatory acts is available must exercise that process to completion before commencing an action under this section, and if that process provides for judicial review by statutory appeal or through special proceedings, then that process must be followed to completion." In other words, state law requires an employee to seek redress through his/her employer's policy before filing a complaint through the Department of Labor or in court.

In addition to discrimination and harassment policies, many employers develop a discrimination and harassment complaint form to assist with investigating internal complaints. [The University of North Dakota has developed a sample form](#).

(NOTE: Public schools are required to develop non-discrimination and anti-harassment policies under several federal laws. See www.ed.gov/policy/rights/reg/ocr/index.html for more details. The North Dakota School Boards Association has developed a [model procedure](#) to assist schools with compliance. State law also requires public schools to adopt a policy on bullying, which should be applicable to both students and staff. See [NDCC 15.1-19-17](#) through [NDCC 15.1-19-22](#) for more details.

Other entities receiving federal funds should check with the state or federal agency from which such funds are disseminated to determine if they are required to adopt harassment and discrimination grievance procedures.)

Discrimination policies should contain:

a. An explanation of rights afforded to employees under civil rights laws

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b. An internal complaint filing procedure

c. An explanation of the right to file a complaint with the ND Department of Labor or in state court. The process for filing a discrimination complaint with the ND Department of Labor is outlined in the [How to File a Discrimination Complaint in North Dakota Brochure](#).

A discussion of key components in a harassment policy is [included in this chapter](#). RETURN TO TABLE OF CONTENTS PAGE 32 OF 79

SEXUAL HARASSMENT

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 and North Dakota law.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment; unreasonably interferes with an individual's work performance; or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances including, but not limited to, the following:

a. The victim, as well as the harasser, may be a woman or a man.

b. The victim does not have to be of the opposite sex.

c. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker or a non-employee.

d. The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.

e. Unlawful sexual harassment may occur without economic injury to or discharge of the victim.

f. The harasser's conduct must be unwelcome.

The North Dakota Department of Labor has developed a brochure to help employers and employees identify and respond to sexual harassment: [Sexual Harassment in the Workplace](#).

SEXUAL HARASSMENT CHECKLIST

a. ADOPT A POLICY THAT:

i. Defines sexual harassment, using examples. [See 14-02.4-02 \(6\)](#) for the definition in state law;

ii. Prohibits sexual harassment;

iii. Contains a reporting procedure with several reporting options.

(NOTE: It is essential that the complaint procedure contains several filing options so that a complainant is not required to file a complaint with the alleged harasser); RETURN TO TABLE OF CONTENTS PAGE 33 OF 79

iv. Contains a prompt, thorough, and impartial investigation procedure;

v. Identifies possible consequences;

vi. Prohibits retaliation.

b. POST THE POLICY CONSPICUOUSLY AND PROVIDE EVERY EMPLOYEE WITH A COPY

c. PROVIDE IN-SERVICE TRAINING FOR ALL EMPLOYEES AND SUPERVISORS

d. DEVELOP A COMPLAINT FORM (See UND's sample harassment complaint form.)

e. CONDUCT THE INVESTIGATION

Do not make any assumptions before the investigation. Avoid the "knee-jerk" reaction of going right to the accused and saying: "You didn't do it, did you?"

Rather, establish a sequence of interviews:

i. Complainant first;

ii. Eyewitnesses or others identified by the complainant;

iii. Others who may have "been in the area" or have some information;

iv. The accused (near the end of the investigation);

- Plan the interview using a checklist of questions based on investigation;

- Notify accused of meeting;

- Permit a "representative" to be present if termination could result. Make no decisions of guilt during the interview, unless an admission is made by the employee;

- Ensure responses are voluntary; do not physically prevent accused from leaving the interview;

v. Consider whether administrative leave (or suspension) is necessary during the completion of the investigation. See sample suspension letter. Administrative leave is voluntary for school personnel and is usually with pay, while suspension requires unanimous board action and may be without pay if the employee is ultimately terminated. (**NOTE:** School employers should review NDCC 15.1-15-10 if suspension is being considered for a licensed staff member.)

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v. Witnesses and others identified by the accused.

(**NOTE:** When available, interviewers who are the same sex as the victim may be preferred to conduct sexual harassment interviews.)

f. DOCUMENT ALL INTERVIEWS

After the interviews are completed:

i. Prepare statements, after the interview, for signature of the witnesses. Offer to make any changes, if necessary. If the witness refuses to sign, note this on the statement.

ii. It is advisable to have someone witness the signing of the statement.

g. MAKING THE DECISION i. A preliminary decision should be made once the investigation is complete.

ii. A meeting with the accused should be held to discuss the results, including the penalty under consideration, if any. The employer should present the preliminary report and allow the employee to respond.

iii. A written memorandum should be prepared after the meeting, containing the following:

- Nature of the charges and the evidence supporting those charges;

- The employee's response to the charges;

- The conclusions reached. If the evidence is inconclusive, then directives and the right to reopen should be identified. If no wrongdoing is found, that should also be documented. See sample Memo of No Wrongdoing;

- Discipline to be imposed or recommended (e.g., termination) and a clear statement prohibiting any retaliation. See sample [Memo of Wrongdoing](#); and
- A request for written questions, if the employee has any, to be submitted within a specified period of time.

It should be noted that the test for sufficiency of the disciplinary measures taken is whether the inappropriate behavior **stops**. If it does not, then the action taken (viewed from the lofty perspective of hindsight) was **not sufficient**. RETURN TO TABLE OF CONTENTS PAGE 35 OF 79

h. PREVENTING RETALIATION

Two steps are essential if public employers are to avoid liability for a separate cause of action for retaliation, especially where a sexual harassment complaint is unfounded:

- i. Emphasize retaliation will **not** be tolerated; and
- ii. Follow up to determine if retaliation is occurring after a complaint has been received and investigated.

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. Inservice programs for all employees are invaluable. They should clearly communicate to employees that sexual harassment will not be tolerated. Employers can do so by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains. The "ostrich approach" to this workplace problem is a very costly, ill-advised option for public employers. For more information on developing policy and conducting a sexual harassment investigation, see [Section V of EEOC Notice 915.002](#).

DISABILITY DISCRIMINATION

It is noteworthy that disability discrimination claims constituted over one-fourth of all discrimination complaints filed in 2011, according to the EEOC. Federal and state law prohibits an employer from treating an applicant/employee with a disability or a perceived disability (that is not transitory and minor) unfavorably or less favorably due to that disability. Law also prohibits discrimination of an applicant/employee who has a relationship with a disabled individual (e.g., husband with a disabled wife).

Employers must provide "reasonable accommodations" to applicants/employees with disabilities unless doing so would cause undue hardship. A definition of "reasonable accommodations" and the procedure for granting them are essential and discussed at www.eeoc.gov/policy/docs/accommodation.html. A [reasonable accommodation](#) from the University of North Dakota is also provided for use by public employers. request form

NOTE: 2008 amendments to ADA (ADAAA) substantially expanded the definition of disability. [Click here for more details](#), and 2010 amendments modified ADA accessible design standards ([click here for more details](#)).