

Response to ASUW Judicial Council Request for Interpretation Appeal

Tuesday, November 28, 2023, 9:00 PM

To: Senator Saint

CC: Chief Judicial Officer, ASUW President, ASUW Vice President and Pro Staff

Senator Saint,

On September 26, 2023 you submitted a request for interpretation to the ASUW Judicial Council. They shared their response to your request on October 11, 2023. Subsequently, you submitted a judicial council appeal to me via email on October 12, 2023.

Given the questions raised in your request had direct connection to existing university policy, I sought advisement from the Office of General Counsel on whether ASUW Judicial Council's interpretation of ASUW Bylaws § 5.02(1)(C) and § 5.02(1)(D) is correct. Their answer was likely not. ASUW Bylaw § 5.02(1)(C) appears overly broad and risks infringing upon the freedom of expression rights of ASUW members/students. Below is their analysis.

1. Constitutional Restriction on Freedom of Expression in § 5.02 (1) (C)

In response to Senator Saint's first argument, that § 5.02 (1) (C)'s vagueness restricts freedom of expression, the Judicial Council disagreed and found "no issues" leaving the section as written. In their finding against vagueness, the Judicial Council determined that ASUW members are employees of the University and subject to the Department of Education's prohibition on discrimination. They further determined that government entities may limit or impose restrictions on the free expression of their employees, and by voluntarily agreeing to conform with ASUW's code of ethics, § 5.02 (1) (C) does not unlawfully restrict ASUW members' free expression.

While this is accurate, the Judicial Council adopted the Cambridge Dictionary definition of discrimination which is overly broad and not narrowly tailored to what is allowable under federal law. The Cambridge Dictionary defines discrimination as, "to treat a person or particular group of people differently, especially in a worse way from the way in which you treat other people, because of their race, gender, sexuality, etc."

Discrimination for institutions of higher education that accept federal funding is prohibited by the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Title II of the Americans with Disabilities Act. The Department of Education, along with the Office for Civil Rights (OCR), enforces these federal statutes and gives guidance on how to comply with the laws.

Specifically, OCR has stated, "[n]o OCR regulation should be interpreted to impinge upon rights protected under the First Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights."

The protection of civil rights within the University is overseen by the Equal Opportunity and Response Office and governed by the Equal Opportunity, Harassment, and Nondiscrimination Standard Administrative Policy and Procedure ("UW Policy"). This UW Policy is used for implementing federal law, and thus, is the appropriate definition regarding discrimination. It states,

Pursuant to University Regulations 4-2 (Discrimination and Harassment) and 4-3 (Title IX and Sexual Misconduct), UW does not discriminate against any employee, applicant for employment, student, or applicant for admission on the basis of: race, gender, religion, color, national origin, disability, age, protected veteran status, sexual orientation, gender identity, genetic information, creed, ancestry, political belief, or any other protected category under applicable local, state, or federal law.

The UW Policy covers nondiscrimination in both employment and access to educational opportunities. Therefore, any member of the UW community, including ASUW members, whose acts deny, deprive, or limit the educational or employment access, benefits, and/or opportunities of any member of the UW community, guest, or visitor on the basis of that person's actual or perceived membership in the protected classes listed above is in violation of the UW Policy on nondiscrimination.

By adopting the Cambridge Dictionary's definition of discrimination instead of the federally recognized definition, ASUW By-Law § 5.02 (1) (C) is overly broad and could infringe upon protected First Amendment rights to free speech.

Additionally, and not mentioned within the Judicial Council's finding, language cannot be acted upon or sanctioned without due process or it risks running afoul of violating First Amendment rights. Currently, the language in § 5.02 (1) (C) of the ASUW By-Laws restricts language and actions that "may" discriminate. This allows for potential sanctions before a finding by EORR, which is overbroad and could infringe upon an ASUW member's First Amendment rights.

Further, the prohibition against language to "discredit any individual" within ASUW By-Law § 5.02 (1) (C) is also problematic. Discrediting individuals or groups is not a valid reason to restrict speech. It is a content-based restriction that is not narrowly drawn to promote a compelling state interest. Therefore, the language prohibiting speech that would discredit an individual is not a legitimate limitation on free speech.

Due to the potential unconstitutional restriction on free speech, we would advise that the ASUW By-Law § 5.02 (1) (C) be reversed, and this issue be remanded to ASUW for revision of the language to ensure federal compliance.

2. § 5.02 (1) (C) and §5.02 (1) (D) Contradiction.

The Judicial Council found that § 5.02 (1) (C) and §5.02 (1) (D) are not contradictory. They stated "[o]nly those words or actions targeted toward specific individuals or groups violate §5.02(1)(c)." In addition to adopting the Cambridge Dictionary definition of discrimination, they then further stated that "[o]nce a person speaks out or acts against an individual based on these characteristics, their view becomes discrimination."

The Judicial Council distinguishes between having different "views" and actual discrimination based on the above definition. They state that § 5.02 (1) (C) and §5.02 (1) (D) are "directed toward speech or actions that discriminate *against* an individual or group." The Judicial Council emphasize that the sharing of controversial opinions among ASUW members without targeting an individual or group is not a violation of § 5.02 (1) (C), and therefore, not contradictory of §5.02 (1) (D).

The Judicial Council's interpretation of discrimination as "targeted" words or actions "against an individual or group" is likely still too broad and could, in fact, lead to a potential contradiction of §

5.02 (1) (C) and §5.02 (1) (D) of the ASUW By-Laws. However, considering the potential infringement on the Freedom of Expression within § 5.02(1)(C), whether § 5.02 (1) (C) and §5.02 (1) (D) are contradictory is moot. Ultimately, a revision of §5.02(1)(C) to adhere to First Amendment principles would likely cure the defect or contradiction between these sections.

Based on the guidance offered, I hereby grant the appeal and refer this matter to the ASUW Senate for review and revisions via their processes to ensure compliance with federal law and university policy as well as consistency with other sections of the ASUW By-Laws. Further, I would encourage the removal of the language on “discrediting individuals” in § 5.02(1)(C) be officially removed from the ASUW By-Laws.

Please let me know if you have any questions about my response to your appeal.

Regards,

Ryan O'Neil

Dean of Students & Associate Vice President of Student Affairs