

# Management Alert



## Academic Boycotts and Anti-Discrimination Laws: Tips to Protect Academic Employers

The Middle East is undoubtedly a complicated political region. When Israel gained independence in 1948, the Arab League began a boycott targeting Israel and companies doing business with it. But over the decades, the Arab League boycott weakened, as Israel signed peace treaties with Egypt and Jordan, and the United States' Office of Antiboycott Compliance took legal measures against the boycotters.

In 2005, anti-Israeli activists sought to reinvigorate the boycott, by launching the "Boycott, Divestment and Sanctions" ("BDS") campaign. This movement asks people and businesses to cease contact with Israel (and, to some extent, Israelis) until Israel accedes to various demands that include withdrawing from disputed territory. Overall, BDS did not achieve much support.

But BDS has recently made gains in American academia, even though academic institutions are historically a bastion for the open exchange of diverse and opposing ideas and beliefs. This past Spring, the Association for Asian American Scholars unanimously approved a resolution boycotting Israeli academic institutions. And, in mid-December 2013, the much larger American Studies Association ("ASA") followed suit.

Much has been written regarding the academic boycott campaign against Israel. But very little has been written about the risks that the boycott campaign poses for educational institutions as *employers*. Federal statutes such as Title VII, and most state and local laws, protect against national origin discrimination. To the extent that boycott proponents advocate treating Israeli scholars differently, or even absent such direct advocacy against individual scholars (as opposed to institutions), such calls evidence a possible animus towards one's national origin, as they may be publicly broadcasting their discriminatory intent. Indeed, in an analogous context, a French court recently fined anti-Israel activists for "provocation to discrimination," because they advocated boycotting Israeli products in supermarkets.

### Do the anti-Israel boycotters boycott Title VII?

In the United States, the major boycotts to date are largely directed against institutions, and affect just a few individuals. The ASA's boycott, for instance, singles out only "Israeli academic institutions" and "scholars who are expressly serving as representatives or ambassadors from those resolutions." It purports to exempt "individual Israeli scholars engaged in ordinary forms of academic exchange." Additionally, compliance with the boycott is voluntary, because the ASA cannot require its members to do anything.

But even these kinds of boycotts pose risks to employers. For example, would a proposed visiting professor from Tel Aviv University be a "representative" of his institution, or just an individual scholar "engaged in ordinary forms of academic exchange"? And would a boycott proponent fight against hiring such a person, based on the boycott? The ASA does not say. At most, it merely asks its members to "act according to their convictions" when dealing with "complex matters." Those "convictions," to the extent that they lead to a decision-maker at a university reaching an employment decision about an Israeli candidate, can quickly lead to the university's own liability for national origin discrimination.

Needless to say, this could cause serious problems for academic employers. In most employment cases, it is rare for a plaintiff to find direct evidence of discriminatory intent. But, arguably, a professor's endorsement of the ASA or other organizations calling for a boycott, or his or her public statements favoring boycotts that target Israelis, could provide precisely this kind of evidence. Even worse, some university departments belong to groups such as the ASA on a department-wide basis. In an employment litigation, these institutional memberships could be interpreted — rightly or wrongly — as a tacit endorsement by the university itself of anti-Israeli discrimination. These positions can easily bleed into intra-departmental decisions having nothing to do with Israeli academics. It is, in fact, easy to imagine that boycott-favoring faculty serving on tenure committees might consciously or subconsciously take into account an American professor's religion as an indicator of their views on Israel, quickly leading to religious discrimination claims. And, even where a decision not to hire or promote a particular faculty member had nothing to do with a boycott and everything to do with legitimate professional failures, skillful lawyers will have been handed ample ammunition to question the true motivation.

## Tips for employers

The problem is real. And yet the very academic freedom that renders academic boycotts inappropriate also serves to protect those who call for such boycotts. So what is an academic employer to do to defend itself from employment claims arising out of anti-Israel boycotts? Here are some pointers:

- Drop institutional memberships in organizations that advocate anti-Israel boycotts. Six universities have already dropped their ASA memberships: Bard College, Brandeis, Indiana University, Kenyon College, Penn State Harrisburg, and University of Texas-Dallas. Another eleven have denied ever being ASA members in the first place (despite the ASA listing them as such). Many other universities have publicly stated their opposition to the boycott. While individual professors may choose to espouse highly-charged positions even if they risk bordering on discrimination, employers should not.
- Consider carefully who is serving on hiring committees, tenure committees, and in other roles where they will have "decision-making" power.
- Publicly reiterate where necessary that the university as a whole will not discriminate or tolerate discrimination against any group or national origin.
- Similarly make it clear that shunning a colleague based on his or her national origin violates the university's hostile work environment policies.
- Discipline professors who ignore this warning, and refuse to interact with Israelis (or any other national origin, race, or religion).
- Thoroughly investigate any disparate treatment or harassment complaints raised by professors and students.

These measures will not provide total immunity to an academic employer. But they will go a long way towards minimizing risk, while promoting equal treatment for all, regardless of national origin. Neither the law, nor any sensible university, would tolerate a boycott of African-Americans, Jews, or homosexuals. Academic employers must be equally vigilant with regard to boycotts that target national origin.

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