

How Employers Can Prevent And Remedy Antisemitism

By **Amy Epstein Gluck** (November 18, 2022)

The NBA and the Brooklyn Nets recently suspended star player Kyrie Irving for espousing and then not disavowing antisemitism.[1]

Irving promoted a well-known antisemitic documentary on Twitter. Unlike when I tweet about some case or new workplace law to a relatively small network of followers, when Irving tweets, more than 4.6 million people may listen.

Irving's employer, the Nets, ordered him to apologize for promoting the film. He refused and the Nets suspended Irving without pay. The Nets explained,

Such failure to disavow antisemitism when given a clear opportunity to do so is deeply disturbing, is against the values of our organization, and constitutes conduct detrimental to the team.[2]

Why? It's just a movie, one may think.

Not so much. According to The Wall Street Journal, the documentary that Irving posted about includes portraying the Holocaust and murder of 6 million Jews as one of the "major falsehoods" propagated by Jews to "protect their status and power." [3]

Read that again.

The danger of a public figure's public promotion of such antisemitism cannot be understated. It normalizes antisemitism and gives tacit permission for others to do the same.

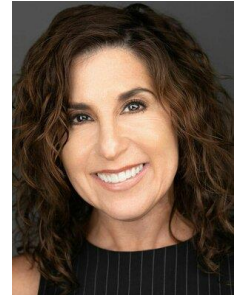
Irving's post to millions of people who may not know the history of antisemitism and the Holocaust carries the added danger of normalizing and popularizing antisemitism.

While his suspension has garnered mixed reactions, on Nov. 10, an independent labor entity called The Labor Organizers filed a charge against the Nets with the National Labor Relations Board alleging that the suspension violates the collective bargaining agreement, of which Irving and other NBA players are members. The Labor Organizers allege that the suspension is merely a tactic to avoid compliance with the waiver protocol set forth in the collective bargaining agreement.

Why did Irving's employer suspend him?

In the face of antisemitism, employers must act promptly to stop and abate the effects of the discrimination. Employers are less likely to be found liable for an employee's discriminatory conduct if they respond reasonably and promptly to complaints.

Did the Nets do that? Maybe. The Washington Post reported that "[t]he Nets had punted on leadership all week." [4] First, the Nets' owner did not suspend or fine Irving once he learned about the Twitter post. Then, team management did nothing about the issue for several days.



Amy Epstein Gluck

Irving finally apologized when he learned he was suspended for five games[5] — too little, too late.[6]

Apparently, the NBA has taken action in the past[7] against players who advance or promote antisemitic beliefs or other beliefs based on harmful stereotypes.[8]

What might antisemitism in the workplace look like?

Title VII of the Civil Rights Act of 1964 prohibits discrimination, harassment and retaliation based on religion.[9] But being Jewish may implicate other protected classes too.

As the federal agency that enforces anti-discrimination laws like Title VII, the Equal Employment Opportunity Commission explained, depending on the facts, antisemitism could involve discrimination, harassment or retaliation related to national origin, race, color or even genetic information.

In other words, antisemitism in the workplace may involve more than religion and the observance of religious customs or the need for religion accommodations.

In *Bonadona v. Louisiana College*, decided by the U.S. District Court for the Western District of Louisiana in 2018, the plaintiff, a Jewish job applicant, based his discrimination and harassment claim on race. There, U.S. Magistrate Judge Mark Hornsby noted that courts have "regularly held that antisemitic harassment and discrimination amount to racial discrimination," and articulated the debate about considering antisemitism a form of racism:

Modern sociologists and anthropologists...debate whether Judaism is a people, a religion, or both. There is no doubt, however, that many people have and continue to view being Jewish as a racial identity. "Jews have been variously perceived as black, Asian, or white, depending on the nature of the perceiver's bias."

Secular Jewish employees may challenge antisemitic discrimination or harassment based on an employer's disparate treatment. For example, an employer that pays a Jewish worker less because the person is Jewish or fails to promote another employee because the person is Jewish discriminates against that person.

Another type of discrimination is job segregation based on an employee's religion or national origin. For example, an employer may not assign a Jewish person a position that does not involve client or customer contact because of client or customer preference — actual or perceived.

Examples of harassment based on religion, or actual or perceived national origin, could be using or ignoring antisemitic slurs or comments, verbal or written, at work; a swastika either in the workplace or on a video platform; trivializing the Holocaust; or, the EEOC noted, circulating conspiracy theories about COVID-19 or vaccines that blame Jews.

What should employers do about antisemitic rhetoric at work?

Here are a few practices employers must uphold.

Be an upstander, not a bystander, when witnessing antisemitism.

Bystander intervention interrupts casual or accepted antisemitism. Encourage reporting and

prohibit retaliation.[10]

Leaders set the workplace culture.

When anti-discrimination measures and a refusal to tolerate harassment comes from leadership, it demonstrates commitment to employees from the C-suite to the mailroom to maintain a culture of respect for all. It says, "we're serious here" and likely a workplace with an organizational culture[11] that results in less discrimination — based on race, religion, national origin, sex or otherwise — and harassment.

Offer clear guidance, education and training.

Employers should provide clear guidance about inappropriate statements and posts on social media. Ensure anti-harassment and anti-discrimination policies include and address antisemitism.

Ensure your workplace is educated about antisemitism and that it is unequivocally unacceptable. Train managers to take complaints about antisemitism seriously.

Investigate any complaints about antisemitism promptly.

Ensure that written policies explain that a prompt, thorough investigation will be undertaken if you receive a complaint about an antisemitic comment or conduct. Employers should follow their own policies, documenting the process each step of the way.

Take swift and decisive corrective action to prevent such conduct.

That may mean suspending or terminating an employee or customer that spouts antisemitic statements or slurs. It depends on the result of your thorough investigation. Anti-discrimination and anti-harassment policies should include clear standards for what type of conduct merits discipline and the types of discipline and enforce it — hold people accountable for misconduct.[12]

Employers must convey that employees will not be retaliated against for reporting antisemitism, and because tone is set at the top, leadership must convey that they will not tolerate antisemitism in the workplace.

Leaders must believe authentically that harassment is wrong, not want it in the workplace, must articulate these beliefs, and hold this same expectation of others in the workplace. Doing nothing about antisemitism in the workplace should not be an option.

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[1] <https://employmentlaw.fisherbroyles.com/2022/01/28/antisemitism-in-the-workplace/>.

[2] <https://www.nba.com/nets/news/statement-from-the-brooklyn-nets-11-03-2022>.

[3] <https://www.wsj.com/articles/how-an-amateur-documentary-got-onto-amazon-prime-and-led-to-kyrie-irvings-suspension-11667585819>.

[4] <https://www.washingtonpost.com/sports/2022/11/04/kyrie-irving-nets-nba-antisemitism/>.

[5] <https://www.cbssports.com/nba/news/kyrie-irving-issues-instagram-apology-hours-after-nets-suspend-him-for-statements-on-antisemitism/>.

[6] It reminded me of Harvey Weinstein's apology in 2017 following The New York Times' report recounting decades of sexual harassment against women. <https://www.nytimes.com/interactive/2017/10/05/us/statement-from-harvey-weinstein.html>.

[7] <https://www.forbes.com/sites/dereksaul/2022/11/05/kyrie-irving-antisemitism-controversy-nike-latest-to-drop-nba-star/?sh=3c499cf62167>.

[8] <https://www.nytimes.com/2021/03/11/sports/basketball/meyers-leonard-suspended.html>;

<https://www.latimes.com/sports/la-xpm-2011-apr-13-la-sp-kobe-bryant-lakers-20110414-story.html>;

[https://www.nba.com/news/anthony-edwards-fined-40k-nba#:~:text=NEW%20YORK%20\(AP\)%20%E2%80%94%20Minnesota,video%20he%20later%20apologized%20for](https://www.nba.com/news/anthony-edwards-fined-40k-nba#:~:text=NEW%20YORK%20(AP)%20%E2%80%94%20Minnesota,video%20he%20later%20apologized%20for).

[9] <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>.

[10] <https://employmentlaw.fisherbroyles.com/2019/11/08/bystander-intervention-at-work/>.

[11] <http://employmentdiscrimination.fisherbroyles.com/2018/11/a-watershed-moment-eeoc-roadmap-to-preventing-sexual-harassment-and-other-forms-of-harassment/>.

[12] <http://employmentdiscrimination.fisherbroyles.com/2018/11/a-watershed-moment-eeoc-roadmap-to-preventing-sexual-harassment-and-other-forms-of-harassment/>.