

PALESTINE SOLIDARITY LEGAL SUPPORT

LEGAL ADVOCACY FOR HUMAN RIGHTS ACTIVISTS

To: UAW 2865, Joint Council
From: Liz Jackson, Staff Attorney, Palestine Solidarity Legal Support
Re: Legality of Boycott and Divestment, Frequently Asked Questions
Date: September 25 2014

Increasing calls for boycott and divestment of Israeli institutions and U.S. companies that profit from the occupation of Palestine have triggered a backlash of threats including the allegation that this principled position is somehow “illegal.” This is part of a concerted campaign of legal repression designed to intimidate and silence critics of Israel. Palestine Solidarity Legal Support (PSLS) documents the escalating legal repression, which has included smear campaigns, frivolous lawsuits, unconstitutional legislative proposals, and other attempts to restrict speech critical of Israel. UAW 2865 is likely to face similar legal threats. While we have assessed potential threats against UAW 2865 to be baseless, legal claims may nonetheless be filed or threatened.

In anticipation of potential litigation, this document is confidential and attorney-client privileged. The client is UAW 2865 as an entity, and not any individual member or elected officer. Therefore all individual Joint Council members and other Union representatives have a responsibility to maintain this document in confidence.

1. Is a boycott like the academic boycott protected by the First Amendment of the US Constitution? *Yes.*

Boycotts have long played a significant role in U.S. history, and the Supreme Court has held that political and human rights boycotts are protected under the First Amendment. In the landmark civil rights case *NAACP v. Claiborne Hardware Co.*, a local branch of the NAACP boycotted white merchants in Claiborne County, Mississippi to pressure elected officials to adopt racial justice measures. The merchants fought back, suing NAACP for interference with business. Ultimately, the Supreme Court found that “the boycott clearly involved constitutionally protected activity” through which the NAACP “sought to bring about political, social, and economic change.” Justice Stevens concluded that the civil rights boycott constituted a political form of expression under the speech, assembly, association and petition clauses of the First Amendment.

This principle was recently applied to dismiss a lawsuit attempting to block a decision by the Olympia Food Coop to boycott Israeli goods. A court found the boycott to be protected by the First Amendment (or specifically, “free speech and petition in connection with an issue of public concern”).¹

2. Is the academic boycott “religious discrimination”? *No.*

Detractors of the academic boycott allege that singling out Israeli academic institutions amounts to anti-Semitism, that is, discrimination against Jewish people because of their religion or ethnic background. The boycott does not target institutions or individuals based on their Jewish identity. The union’s motivation

¹ For more information, see the Center for Constitutional Rights, case page on *Davis v. Cox*, available at <http://ccrjustice.org/ourcases/current-cases/davis-v-cox>.

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for academic boycott is to oppose all forms of racism, which includes anti-Semitism and anti-Arab racism. UAW 2865 reiterates that while it condemns anti-Semitic and bigoted hate speech, criticism of Israeli state policy is not anti-Semitic.²

To equate criticism of the Israeli state, or a boycott of Israeli state institutions, with anti-Semitism is as absurd as calling criticism of or sanctions against the Iranian government anti-Muslim or anti-Persian, and as illogical as classifying criticism of the Chinese occupation of Tibet as hateful against people of Chinese ethnicity. Common sense makes clear the distinction between anti-Jewish bias (based on the race, ethnicity or religious identity of Jewish people as individuals or as a group) and criticism of Israeli state institutions. The Department of Education Office for Civil Rights also recognizes the distinction (See FAQ # 8, below).

Those who wish to mislabel criticism of Israel as anti-Semitic often cite a definition of anti-Semitism purportedly used by the “U.S. State Department” or the “European Union” (EU). This definition classifies speech or actions that “target the state of Israel” as a manifestation of anti-Semitism.³ According to the definition, actions that “demonize,” “delegitimize,” or apply a double standard to Israel, are anti-Semitic. This [re]definition is also a departure from historical definitions of anti-Semitism, and it came about as a political project of Zionist organizations.⁴ The definition is fraught with enormous ambiguity, something that under First Amendment jurisprudence is likely to “chill” speech. If applied to restrict or punish political speech in the U.S., it would violate the First Amendment. The “Double Standard” prong of the definition is especially pernicious, for it would logically apply to bar criticism of any nation’s policies unless all nations who have engaged in similar conduct are equally criticized.

Proponents have made dubious claims that the United States Department of State and other international bodies have “adopted or endorsed”⁵ this definition. But the redefinition lacks legal authority; it was erased from the EU website because it was never an official document,⁶ and has limited authority within the US State Department.

3. Is the academic boycott “national origin” discrimination? *No.*

The academic boycott also does not target individuals based on their Israeli nationality; it targets *Israeli institutions because of their ties to state policy*. The individuals who could be affected by the boycott are those who directly represent Israeli state institutions in an official capacity. There are many Israelis – the vast majority of the country’s citizens – who would not be subject to the academic boycott called for by Palestinian civil society. To be especially clear: Israeli academics are not subject to boycott if they are not explicitly representing

² UAW 2865 has emphasized the difference between criticism of Israel and criticism of Jewish identity in the past. See email to UAW 2865 Members, August 3, 2012, “Sign the Petition! Protect Free Speech Rights at the UC”.

³ See, <http://www.brandeiscenter.com/images/uploads/resource/antisemitism.pdf>

⁴ The content of the [re]definition was largely drafted in 2004 by Kenneth S. Stern of the American Jewish Committee, who sought to redefine anti-Semitism to include any opposition to the existence of Israel as an exclusively Jewish state. See Kenneth S. Stern, *Proposal for a Redefinition of Antisemitism*, THE STEPHEN ROTH INSTITUTE FOR THE STUDY OF CONTEMPORARY ANTISEMITISM AND RACISM (July 2005), available at <http://www.tau.ac.il/Anti-Semitism/asw2003-4/porat.htm>.

⁵ See, for example, H.R. 35, Reg. Sess. (Ca. 2011-2012).

⁶ JTA, *EU drops its 'working definition' of anti-Semitism*, The Times of Israel, December 5, 2013, available at <http://www.timesofisrael.com/eu-drops-its-working-definition-of-anti-semitism/#ixzz37qJRBuJL>

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Israeli institutions. According to the Palestinian Boycott Committee, the coordinating body of Palestinian civil society who has called for the boycott, “Mere institutional affiliation to the Israeli academy is therefore not a sufficient condition for applying the boycott.”⁷ For example, the American Studies Association (ASA), whose membership voted to endorse the academic boycott, has affirmatively reached out to Israeli academics to present at the ASA’s national conference as individuals.

4. Is the academic boycott “employment discrimination”? *No.*

The UAW resolution on boycott and divestment is not intended, and should not be interpreted or applied to seek to influence the hiring or other employment decisions of the UC, or individual academics or UAW members.

5. Is the boycott “illegal” under federal anti-boycott laws? *No.*

You may hear the allegation that boycotts against Israeli institutions violate federal anti-boycott laws. This is an attempt to distract from the issue of Israeli human rights violations. Boycott campaigns that initiate from civil society – including an academic boycott – *were not covered* by what is known as the “federal anti-boycott law.”⁸ That act of Congress was a rider to legislation regulating US exports and it was intended to counter participation in the Arab League’s boycott of Israel. Specifically, the anti-boycott law prohibited participation in a boycott in cooperation *with a foreign country*. In no way did that legislation apply to boycotts undertaken as a matter of social, political or moral conscience; nor could it, under core First Amendment principles that protect boycotts undertaken to protest foreign or domestic governmental policies or actions. Moreover and regardless, *that legislation expired more than twenty years ago* and should not be enforceable unless Congress reenacts it.

6. Does academic freedom guarantee Graduate Student Instructors the right to support boycott of Israeli institutions without retribution? *Yes.*

Even while there is debate about whether an academic boycott of Israeli institutions promotes or restricts academic freedom overall, *there is no controversy as to whether academic freedom rights protect individuals from adverse employment consequences due to their support for the boycott*. A common tactic that has been used against academics who are supportive of BDS involves pressure by off-campus organizations urging university administrators to condemn BDS and punish individuals who support it. Academic freedom rights are protected by a [myriad of UC policies](#),⁹ and the American Association of University Professors’ 1940

⁷ Academic Boycott Guidelines, Boycott National Committee, See more at:

<http://www.bdsmovement.net/activecamps/academic-boycott#sthash.Zqx4kpWv.dpuf>

⁸ Export Administration Act (“EAA”) of 1979. For more information, please see the memo from the National Lawyers Guild, [Impact of Federal Anti-Boycott and Other Laws On BDS Campaigns](#), October 2009, analyzing the application of anti-boycott law to BDS campaigns, *available at*

http://palestinelegalsupport.org/download/bds/boycott/NLG_BDS_legal_memo.pdf

⁹ List of University of California Policies and Academic Personnel Manual provisions protecting student and faculty academic freedom rights, *available at* <http://senate.ucsc.edu/committees/caf-committee-on-academic-freedom/Academic-Freedom-Information/Appendix-BUCPolicyonAcademicFreedom.pdf>

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Statement of Principles on Academic Freedom and Tenure.¹⁰ If the UC were to violate these policies in response to pressure campaigns, it would be subject to legal action.

The UC would violate these policies if it were to punish faculty, graduate student teaching instructors, or students for their support for BDS (or other political expression). The UC would also violate these rights if it were to direct UAW members to avoid the subject of Israel and Palestine in the classroom. If you believe the UC is restricting speech on Palestine/Israel, implicitly or explicitly, please notify the union immediately.

7. Does UAW's boycott resolution violate the UC Course Content Policy? *No.*

The Brandeis Center, a right-wing Israel advocacy organization, has accused UAW 2865 of stating its intention to violate the UC Regents [Policy on Course Content](#)¹¹ (also known as the Regents Policy on Academic Freedom) by encouraging members to teach about Palestine. The Brandeis Center, in a letter to President Napolitano, claimed that “Teaching undergraduate students one-sided propaganda” about Israel and Palestine “do not constitute education but unabashed political indoctrination, which is expressly forbidden by the UC Regents.”¹² Indeed, the UC policy prohibits “misuse of the classroom ... for political indoctrination,” but this is interpreted by the UC to mean that the University, as a State instrumentality, cannot take a position in support of or opposition to a ballot measure or candidates for political office. In interpreting the Policy on Course Content, the UC continues to apply the 1970 guidance from UC President Charles J. Hitch, which stated, in pertinent part, “scholarly instruction and research on politics is not only appropriate but desirable.”¹³

The UC cannot restrict speech in the classroom or elsewhere on campus based on the content of the views expressed under its own free speech policies, and under the U.S. and California constitutions. UAW members, like all graduate student instructors and other faculty, have academic freedom to teach about Palestine in the classroom, to be critical of Israel, and to support boycott and divestment.

8. What should I do as an individual to enforce my academic freedom rights and protect myself against backlash?

¹⁰ American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, available at, <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>

¹¹ University of California Board of Regents Policy 2301: Policy on Course Content, available at <http://regents.universityofcalifornia.edu/governance/policies/2301.html>.

¹² Brandeis Center Joins AMCHA Criticism of UAW 2865's BDS Statement, August 13 2014, <http://brandeiscenter.com/blog/brandeis-center-joins-amcha-criticism-of-uaw-2865s-bds-statement/>

¹³ September 18, 1970 Policy Guidance from UC President Charles J. Hitch, Restrictions on the Use of University Resources and Facilities for Political Activities, page 4, available at, <http://policy.ucop.edu/doc/1200368/FacilPolitActiv>. The full passage reads, “There are well-recognized difficulties in interpreting what is political. In today's disturbed social climate, what is political at one time may not be political at another. Supporting or opposing candidates or propositions in elections is clearly political, but there are grey areas in relation to issues. A distinction must also be drawn between political activity on the one hand, and instruction and research on politically related subjects on the other; certainly, scholarly instruction and research on politics is not only appropriate but desirable. There must be an examination of all the facts and circumstances surrounding an activity and, in the last analysis, the campus administrator must be responsible for determining its appropriateness.”

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In this context of repression of views sympathetic to Palestinians, supporters of UAW's boycott and divestment initiative may take a few precautions to inoculate themselves against potential backlash. The AMCHA initiative has ominously published a list of UAW members who it alleges support the boycott and divestment initiative. AMCHA is a right-wing Israel advocacy organization in California known for public smear campaigns against individual academics who publicly support boycott and divestment or are perceived as critical of Israel or supportive of Palestinian rights. UAW members who are publicly supportive of the boycott and divestment initiative, or who teach classes in Middle East studies departments, could be targeted with negative teaching evaluations, complaints to faculty advisors or department chairs, or public smear campaigns.

Consider notifying your advisor, department chair, and any faculty for whom you work as an instructor about the BDS campaign. Let them know about your support for the initiative (or perceived support), and the context of repression. Request to be notified immediately of any complaints made against you. If you have a concern, contact the union, who will work with legal support to respond.

9. Does the UAW Boycott Resolution create a “hostile environment”? No.

The Brandeis Center has also falsely accused UAW 2865 of creating a “hostile environment” for Jewish students on campus. The U.S. Department of Education (DOE) has investigated and repeatedly rejected the claims made by the Brandeis Center and other right wing Israel advocacy organizations alleging that advocacy for Palestinian rights subjects Jewish students to a hostile environment. The DOE has dismissed several claims under Title VI of the Civil Rights Act against UC Berkeley, UC Santa Cruz, UC Irvine, and Rutgers University. The DOE issued written letters explaining that the allegations were not actionable because the activities complained of (testimony in support of a divestment resolution, scholarly lectures, advocacy programming, mock check points, verbal disagreements about Israel and Palestine, and other similar activity) are constitutionally protected First Amendment expression. The DOE recognized that the speech and activities alleged to be anti-Semitic were in fact based on political viewpoint, not on race, ethnicity or national origin.¹⁴

You may hear accusations that UAW 2865's boycott and divestment proposal makes Jewish students feel “unsafe.” Of course, UAW 2865 strongly opposes all efforts to coerce, intimidate, or otherwise threaten the physical safety of any student. There have not been, nor does UAW 2865 expect that there will be, any threat to the safety of any students as a result of this proposal. These claims rely on the conflation of criticism of Israel with Judaism, and presuppose the close identification of all Jewish people with the state of Israel. In fact, many Jewish students and faculty at UC, including many UAW members urging adoption of this resolution, are critical of Israel. Criticism of the state policies of any government, no matter how sharp the criticism, is not to be confused with criticism of, or bias against the dominant religions or ethnicities of that country. (See, above, FAQ #2.) Criticism of Israel does not put anyone's physical safety at risk, even if it puts their political beliefs in question.

Furthermore, the DOE has made it clear that it is not the responsibility of campus authorities to protect students from political speech they find to be offensive or hurtful to their own beliefs. In each dismissal, the DOE wrote, "In the university environment, exposure to such robust and discordant

¹⁴ For more information and to view DOE dismissal letters, see <http://ccrjustice.org/newsroom/press-releases/victory-student-free-speech,-department-of-education-dismisses-complaints>.

expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience."

10. Does an organization risk its tax-exempt status by supporting a boycott? *No.*

You may also hear the false allegation that the union is violating its tax-exempt status by supporting a boycott. A non-profit organization that endorses an academic boycott remains fully compliant with IRS requirements for tax-exempt status. First, even if it becomes a time-consuming internal controversy, the endorsement of a boycott is hardly a substantial activity of the union. Nothing in the adoption of this resolution will divert the UAW from continuing to carry on its mission to represent graduate student workers in collective bargaining. Most importantly and *obviously*, a non-profit organization does not compromise its fundamental educational (and tax-exempt qualifying) purpose just because it has expressed a political position on a controversial issue. Secondly, academic boycott for the purposes of human rights accountability, even if it raises controversial issues related to academic freedom, is fundamentally an educational activity, consistent with the organization's tax-exempt educational purpose. Third, the boycott is in line with US public policy against racial discrimination in education. The boycott challenges the complicity of Israeli state educational institutions in actions that discriminate against Palestinians. The union's support for BDS no more undermines its tax-exempt status than statements issued by tax-exempt organizations in the 1980s and 1990s explaining why they had decided to boycott or divest from South Africa.

11. Are there any legal considerations specific to divestment?

Divestment resolutions must respect what's called fiduciary duty, which is the duty of trustees or managers of a fund to manage assets entrusted to them for the benefit of the assets' owners and the intended beneficiaries of the fund. Unless divestment would deprive a fund of any possibility of investing in a broad universe of otherwise suitable investment alternatives, it is not a breach of this fiduciary duty to divest for human rights reasons. When making investment and divestment decisions, trust fund managers may consider reasons related to human rights in addition to considering profit, loss, and risk factors. Federal regulations, in fact, allow divestment based on socially responsible investing (SRI) criteria where alternative investments of equal value to the properties to be divested are available. There is also a good argument that fiduciaries are obligated to divest from companies profiting from the Israeli occupation because, due to increasing political pressure, such companies may be financially risky investments.

A divestment resolution does not disturb trustees' fiduciary duty and discretion as long as: (1) there are alternative investments of equal value available to replace divested properties, as determined by fund trustees; and, (2) the resolution does not dictate to fund trustees when or how to divest or identify the specific replacement(s) for divested assets. The UAW 2865 divestment proposal is naturally confined within these guidelines because UAW 2865 does not have the power to dictate to the UC Regents or the UAW International whether and how to divest its funds.

12. Does the BDS initiative take away from UAW 2865's primary function? *No.*

As a social justice union, UAW 2865 can and should engage its members in political solidarity with workers in other parts of the world. In this sense, the political discussion is part of the core function of the

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union. That said, the BDS discussion will not in any way limit or affect the representative functions of the union, including which grievances the union pursues and the union's position on tenure disputes, etc.

13. Why are we seeing so many legal threats? *There is a concerted and growing national campaign to repress Palestinian human rights activism through legal intimidation.*

The legal arguments that opponents of BDS are making aim to distract and deflect the conversation away from Israeli human rights violations and the rights of the Palestinian people, and to intimidate those advocating for justice. Legal bullying has escalated in the United States as the movement for Palestinian rights has grown and as pro-Israel groups seek to shift the discussion away from Palestinian rights to focus on how criticism of Israeli policy impacts those who identify with and support Israel's policies against Palestinians. [Palestine Solidarity Legal Support](#) was formed in response to this escalating repression. The majority of more than 250 repression incidents that PSLS has documented since we launched in 2013 targeted academic discussion or political activity occurring on college campuses where Palestinian rights activism is focused.

14. What support is available to those who face legal threats?

If you have a specific concern, please contact the Local 2865, who is working with the union's legal counsel and Palestine Solidarity Legal Support.