

Know Your Rights
Legal Tools to Fight Hate
June 23, 2022

Introduction

CIJA's fifth annual Legal Conference, presented jointly with UJA Federation of Greater Toronto, Montreal's Federation CJA, and the Jewish Federation of Greater Vancouver, took place on February 15, 2022. It gathered international and local legal experts who offered their perspectives on concrete legal remedies to antisemitism in the context of a dangerous rise in antisemitism felt in all spheres of society.

Following the conference, we produced the current guide to help both lawyers and the larger legal community navigate and combat antisemitism when they encounter it.

Recognized Canadian and International experts tackled topics such as:

- What can a union member do when their union is antisemitic?
- What can an employee facing antisemitism in the workplace do?
- What are the legal tools at our disposal?

This guide is the result of the discussions from individual conference sessions that, from local and international perspectives, explored several issues pertaining to the global surge in antisemitism. We are grateful to all participants and panelists for contributing to this critical conversation about legal remedies to combat antisemitism, a form of hatred that impacts all global citizens, and not just members of the Jewish community. We hope you find this guide useful.

- The CIJA Team

The information provided in this document does not, and is not intended to, constitute legal advice; instead, all content is provided general informational purposes only. Please contact a lawyer or other legal representative for advice on any legal or employment matter.

What do you do when you encounter antisemitism at work?

Advice for employees:

- Context is vital when faced with antisemitic comments.
- Look to the company's anti-harassment code or other policies.
- Raise the incident with HR or managers as appropriate.
- If the harassment continues, a last resort is a complaint to the Human Rights Tribunal, civil courts or, if the employment relationship had become no longer tenable, and if in QC, employees can assert a constructive dismissal complaint.

Advice for employers:

- Speak up unequivocally.
- Provide guidance about how to respond to inappropriate statements.
- Have a clear policy about religious accommodations and educate employees about them.
- Address antisemitism in diversity training and policies.
- If an employer hears that an employee suffered comments that are hateful or antisemitic at the colleague level, the employer has a responsibility to stamp out harassment in the workplace. The employer must investigate antisemitic and hateful comments, even if there were no formal complaints.
- Employers are responsible for employees' conduct in the office – and sometimes beyond. They must take meaningful steps to ensure these issues do not arise or are taken care of. They must not condone the conduct or appear to do so. If they witness it, or ought to know it is happening, they must act immediately.

Scenario 1: Inappropriate comments during a job interview:

Future employer says: "as part of the pre-employment search, the company looks at social media profiles, and we looked at yours. What is the March of the Living?". Candidate responds that it is a trip to be educated about the facts of the Holocaust. The interviewer responds that it 'sounds like indoctrination.' Toward the end of the interview, the interview explains the company is inclusive and has many Muslim employees.

Advice related to Scenario 1:

- The company searching the social media footprint is not unlawful but, if it reveals too much protected info – race, colour, sexual identity etc. – that's a problem. March of the Living participation could be relevant to a candidate's suitability. It's the comment that is unnecessary and unlawful.
- If denied employment, the candidate could complain and ask for a review. Human Rights legislation would apply. The candidate could also request an application or them file. If they refuse to disclose it, there are other means to acquire it.
- A comment regarding diversity is usually fine but, in this case, in this context, it's problematic.
- Legal practitioners in E&L law should be engaged to provide tools to help human resources staff learn how to conduct lawful interviews.

Scenario 2: Inappropriate comments from a co-worker. What should we do when our coworkers become hostile – in the context of geopolitics? Would harsh comments about Israel – it’s racist etc. – qualify as antisemitic for employment purposes?

A Jewish employee gets complimented by a co-worker on their Star of David necklace. The employee explained she bought it from a market in Jerusalem. The conversation then became awkward, and the co-worker became less friendly. A few days later, the co-worker says Israel stole Palestinian homes in what is now Israel and adds that Israel should not exist. They rarely interacted after that exchange.

Advice related to scenario 2:

- The context of the question is important. If the comment is directed at a Jewish employee and / or is a political comment only focusing on Israel, the comment may be considered antisemitic.
- The frequency of these comments is also important. Is it part of a series of comments or a pattern of behaviour against a Jewish employee? Constant targeting with micro-aggressions against a Jewish employee will lead to the employee feeling targeted.
- Unfortunately, context considerations must also be given to whether it is worth filing a complaint with human resources. Some situations are serious and do require an escalation, and some may not be worth escalating into a larger matter. Context, comfort, and personal assessment of the situation are important.
- The IHRA working definition of antisemitism is an important tool in helping determine if a comment is antisemitic; but the IHRA definition alone is not legally binding and not a complete solution.

Scenario 3: Company openly supports BDS

A company hosts a cocktail every Friday afternoon. A Human Resources manager sends an email: “In recognition of Ben & Jerry’s decision to support BDS, FinanceCo is pleased to offer Ben & Jerry ice-cream this evening.” If an employee is upset by this case of employer-sanctioned behaviour, what can they do?

Advice related to Scenario 3:

- If intentionally directed, the comment is antisemitic and should be escalated to HR, and the employee should refer to the company’s human resources toolkits, anti-harassment code, or other policies.
- If that fails, the employee can complain to the Human Rights Tribunal, civil courts or, if the employment relationship had become no longer tenable, and they were in QC, benefiting from a free attorney, they could assert a constructive dismissal complaint with the Employment Standards.
- Employers should provide guidance about how to respond to inappropriate statements, have a clear policy about religious accommodations, educate employees about them, and address antisemitism in diversity training and policies.

Scenario 4: Non-respect of religious holiday / lack of reasonable accommodations. What can be done if it is made difficult to observe Jewish holidays?

An employee at a company notes that an upcoming meeting conflicts with Passover. The employee asks the supervisor for permission to miss the meeting and that it be recorded so they can catch up. The employee is told that this request will not go over well with the bosses, and the employee should 'check their religious observance at the door.' The supervisor insinuated that, if they do not attend the meeting, they may not be selected for coveted assignments.

Advice for Scenario 4:

- This goes beyond refusal to let them observe the holiday. Saying, 'Check your religious observance at the door,' can be the basis for a constructive dismissal or human rights claim. The comment was a direct violation of the Human Rights code
- If someone is Jewish and has a holiday, they must be accommodated. Religious employees – not just Jews – must, within reason, be accommodated.
- Sometimes, workload or being short-staffed will be an excuse to refuse accommodation, which is a more subtle form of discrimination.
- An employee must show that, after they refused to work on a holiday, it resulted in documented negative consequences.

Scenario 5: A Jewish employee, Linda, comes to work and finds a small gift on their desk. When she opens it, it's a copy of *Mein Kampf* with a note saying, 'I hope you enjoy this as much as I did.' And then, at an after-work social gathering, one of the colleagues tells a joke about 'the difference between Anne Frank and a boy scout. The boy scout comes back from camp.' Linda overhears and confronts them by saying it is offensive. She's told to lighten up. Does the employee have enough to start legal action against the employer or co-workers?

Advice on Scenario 5:

- This situation is overt, and the employee should escalate this matter to their employer. Overt antisemitism like this is not normally systemic to a company. Companies are generally not racist or discriminatory.
- Employers are responsible for employees' conduct in the office – and sometimes beyond. They are expected to take meaningful steps to ensure these issues do not arise or are taken care of quickly. They must not condone the conduct or appear to do so.
- If employers witness them, or ought to know incidents like this are happening, they must act by announcing that these types of comments are not acceptable. Then they need to impose training – if only to have a written record that they have taken steps – a shield against future allegations.
- This scenario depicts overt antisemitism. When less overt, when employers get a sense of the beginnings of antisemitism, they need to get ahead of it, including bringing in trainers on unconscious bias.

Scenario 6: Wrongful termination due to complaining about antisemitic behaviour. A Jewish employee has had to endure what they perceive as antisemitic behaviour from the company they work at and from coworkers. The employee has asked HR for their anti-harassment policy. They subsequently called a meeting where the employee is fired for “not fitting with company culture.” This sounds like wrongful termination. Is it?

Advice on Scenario 6:

- This is wrongful termination, and the employee will have recourse in civil courts and under Labour Standards code of their province.
- The employee should discuss this matter with a legal representative.

Scenario 7: Alternative resources. A Jewish employee has had to endure what they perceive as antisemitic behaviour from the company they work at and from coworkers, but they do not have the financial means to start legal procedures. What resources are there for employees who may be on lower income? Are there other resources before legal actions?

Advice on Scenario 7:

- The CIJA Legal Task Force is a place to start, and there are other organizations, such as the Ontario Human Rights Support Centre, that would be responsive.
- Other resources include complaints to Occupational Health and Safety complaints or to the and Human Rights Tribunal.
- Employment lawyers can provide guidance for these matters and may take files on contingency.
- The Human Rights Board is accommodating toward self-represented litigants. There is no loser-pay policy as there would be in civil matters. It is emotionally draining, however, and takes a long time.

Scenario 8 : Antisemitic comments made from a third party (for example a client) while at work. What if an employee was on a call and an important client made an antisemitic remark? What should the employee do?

Advice on Scenario 8:

- Complaints about antisemitic or other hateful comments should be treated like sexual harassment complaints.
- If the employee is uncomfortable with the remark and does not wish to continue engaging with the client, they should tell their employer.
- If, after being told, the employer forces the employee to continue working with the client, that would constitute the basis of a Human Rights complaint.

Scenario 9: How Unions deal or fail to deal with antisemitism. When there are many complaints – BDS statements, pro-Palestinian / anti-Israel rallies with ties to Hamas at a Union, can ***Jewish*** employee simply leave their union, give up membership, and stop paying dues?

Advice on Scenario 9:

- Dues are mandatory in most cases – even if you did not vote to join or your Union is not doing much for you. Agreements mandate dues for all employees. The only exception is religious objection where, if the Board is satisfied that joining a Union is counter to their religion, they can agree to pay dues to a mutually agreed charitable organization, but it continues to count as dues in a tax return.
- If there are antisemitic incidents that are worker on worker, document them and report them to a supervisor to get them on record – and get advice from the Union rep. In some cases, speak to the offender with Union rep as a witness. Contact the Human Rights office of the Union.
- If the incident is in the workplace, ask the employer to get involved – before filing an official grievance. Refer to commitment of employer to provide an emotionally safe environment.