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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GOOD NEWS EMPLOYEE ASSOCIATION et al, No C-03-3542 VRW

ORDER

Plaintiffs,

v

JOYCE M HICKS et al,  
Defendants.

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Before the court is defendants' motion for summary judgment. Doc #40. For the reasons that follow, the court GRANTS defendants' motion, thus adjudicating plaintiffs' claims for retrospective relief. The court sua sponte dismisses plaintiff's claims for prospective relief for lack of jurisdiction.

I

Plaintiffs Regina Rederford ("Rederford") and Robin Christy ("Christy") bring suit pursuant to 42 USC § 1983 and other statutes for violations of various putative rights in the course of

1 the removal of a flyer they had posted around their office in the  
2 Oakland Community and Economic Development Agency (CEDA). The  
3 flyer, which promoted their unincorporated association, the Good  
4 News Employee Association (GNEA), called on readers to "Preserve  
5 Our Workplace With Integrity," and explained that GNEA "is a forum  
6 for people of Faith to express their views on contemporary issues  
7 of the day. With respect for the Natural Family, Marriage and  
8 Family values." Melaugh Decl (Doc #43) Ex D. Plaintiffs contend  
9 in their complaint (Doc #1) that the removal of this flyer violated  
10 their rights under the United States Constitution, the California  
11 Constitution and municipal law.

12           Named as defendants are Joyce Hicks ("Hicks"), who was a  
13 deputy executive director in CEDA, Robert Bobb ("Bobb"), who was  
14 Oakland's City Manager, and the City of Oakland (the "City")  
15 itself. Defendants filed a motion pursuant to FRCP 12(b)(6) to  
16 dismiss plaintiff's complaint for failure to state a claim (Doc  
17 #13) and a motion pursuant to FRCP 41(b) to dismiss the case for  
18 failure to prosecute (Doc #25). By order dated March 16, 2004, the  
19 court granted both motions in part. Doc #32. Remaining in the  
20 case is a claim against Hicks and Bobb, in both their individual  
21 and official capacities, for violation of plaintiffs' right to  
22 freedom of speech under the First Amendment to the United States  
23 Constitution. Plaintiffs seek both retrospective and prospective  
24 relief. Defendants now move for summary judgment. Doc #40.

25           The facts are not in material dispute. GNEA's stated  
26 purposes are "[t]o celebrate our Faith and Liberties by preserving  
27 the integrity of the Natural Family, Marriage and Family values";  
28 "[t]o provide a forum for people of faith to express their views on

1 contemporary issues of the day"; and "[t]o oppose all views that  
2 seek to redefine the Natural Family and Marriage." Melaugh Decl  
3 (Doc #43) Ex D. In its "Statement of Faith," GNEA explains that  
4 "we believe the Natural Family is defined as a man and a women  
5 their children by birth or adoption, or the surviving remnant  
6 thereof (including single parents)"; that "[w]e believe Marriage is  
7 defined by a union between a man and a woman according to  
8 California state law"; and that "[w]e believe in Family Values that  
9 promote abstinence, marriage, fidelity in marriage and devotion to  
10 our children." Id. Plaintiffs' deposition testimony confirms the  
11 anti-homosexual import of their definitions of "natural family,"  
12 "marriage" and the meaning of the flyer's exhortation to "preserve  
13 our workplace with integrity." See, e g, Melaugh Decl (Doc #43) Ex  
14 A (Rederford Depo) at 8:8-22, 9:3-6, 37:1-41:1, 48:25-49:10,  
15 135:22-136:13, 146:22-147:6, 194:1-4; id Ex C (Christy Depo) at  
16 19:1-19, 24:14-21, 38:2-18.

17           The flyer came to the attention of Judith Jennings  
18 ("Jennings"), a lesbian employee in CEDA who used the copy machine  
19 near which the flyer was posted. Jennings Decl (Doc #41) ¶6;  
20 Melaugh Decl (Doc #43) Ex A (Rederford Depo) at 130:21-131:6.  
21 Jennings felt "targeted" and "excluded." Jennings Decl (Doc #41)  
22 ¶7. Shortly after seeing the flyer, Jennings spoke with Rederford,  
23 whose name and phone number (along with Christy's) appeared on the  
24 flyer. Id ¶8. This conversation left Jennings "feeling anxious  
25 about working in the same office as [plaintiffs]" and she "could  
26 not believe that [she] worked with someone who condemned  
27 homosexuals like [her] so much." Id ¶9. Jennings and Rederford  
28 worked near one another and spoke with some frequency. Id ¶¶3, 8,

1 11; Melaugh Decl (Doc #43) Ex A (Rederford Depo) at 75:15-25.  
2 After the conversation, Jennings was "scared," did not talk to  
3 Rederford any more and their "relationship really changed." Id at  
4 78:8-17, 130:24-131:6; Jennings Decl (Doc #41) ¶9. Jennings  
5 decided to complain to the city attorney's office. Id ¶10. She  
6 complained not only about the flyer, but also about earlier  
7 episodes of distribution of anti-homosexual materials, at least one  
8 of which involved plaintiffs. Id ¶¶4-5.

9 Jennings' complaint was investigated by Joanne Braddock  
10 ("Braddock"), who was the administrative services manager in CEDA,  
11 and Calvin Wong ("Wong"), who was the director of building services  
12 in CEDA. Braddock Decl (Doc #4) ¶¶2-3. They interviewed Jennings,  
13 who seemed "upset and distraught" and "visibly nervous and shaken,"  
14 id ¶3, and Braddock discovered the flyer posted in several  
15 locations other than near the copier, id ¶4. "After the  
16 investigation was complete, [Braddock] received an order from the  
17 City Attorney's office to take the \* \* \* flyer down. The  
18 Plaintiffs' flyer violated AI 71." Id ¶5. "AI 71" is an  
19 abbreviation for "Administrative Instruction 71," a personnel  
20 policy promulgated by the City Manager of Oakland, entitled "Equal  
21 Employment Opportunity / Anti-Discrimination / Non-Harassment  
22 Policy and Complaint Procedure." Lively Decl (Doc #52) Ex 1.13.

23 Plaintiffs acknowledge that they have alternative  
24 channels open to them to communicate their message. For example,  
25 Rederford acknowledges that she was not restricted from expressing  
26 her views on marriage or gay rights outside the workplace, over  
27 lunch or on a break. Melaugh Decl (Doc #43) Ex A (Rederford Depo)  
28 at 141:5-18. Nor were plaintiffs prohibited from organizing GNEA,

1 and Rederford acknowledges that she was told "she could announce  
2 [her] group" through the City's e-mail system if she removed  
3 "verbiage that could be offensive to gay people" from her  
4 announcement. Id at 141:19-142:21. See also Melaugh Decl (Doc  
5 #43) Ex C (Christy Depo) at 27:10-21.

6 Defendants' roles in the removal of the flyer were  
7 minimal. Bobb, as City Manager, was the final authority responsible  
8 for approving administrative instructions, including AI 71.  
9 Melaugh Decl (Doc #43) Ex E (Bobb Depo) at 10:5-20. Bobb does not  
10 know and has never met plaintiffs. Id Ex A (Rederford Depo) at  
11 72:24-25; id Ex C (Christy Depo) at 26:18-19; id Ex E (Bobb Depo)  
12 at 14:9-16. There is no evidence that Bobb participated in removal  
13 of the flyer.

14 Hicks may have spoken once to Rederford in casual  
15 conversation; she does not know Christy and Christy does not know  
16 her. Id Ex A (Rederford Depo) at 71:6-72:2; id Ex C (Christy Depo)  
17 at 26:22-23; id Ex F (Hicks Depo) at 8:20-25. Hicks believes that  
18 Wong ordered that the flyer be taken down, id at 35:8-25; Hicks  
19 does not recall that she ordered that the flyer be taken down, id  
20 at 36:1-2; and plaintiffs provide no evidence to contradict this  
21 account. Indeed, it appears that the flyer was removed on January  
22 3, 2003, and Hicks, who was on vacation at the time, did not return  
23 to the office until Monday, January 6, 2003. Id at 168:21-169:5.  
24 Although as a matter of heirarchy, Braddock and Wong reported to  
25 Hicks, who in turn reported to Bobb, there is no evidence that Bobb  
26 or Hicks directed or influenced Braddock's, Wong's or the City  
27 Attorney's actions or decisions with respect to taking the flyer  
28 down.



1 that might affect the outcome of the suit under the governing law  
2 will properly preclude the entry of summary judgment." Id. And  
3 the burden of establishing the absence of a genuine issue of  
4 material fact lies with the moving party. Celotex Corp v Catrett,  
5 477 US 317, 322-23 (1986). When the moving party has the burden of  
6 proof on an issue, the party's showing must be sufficient for the  
7 court to hold that no reasonable trier of fact could find other  
8 than for the moving party. Calderone v United States, 799 F2d 254,  
9 258-59 (6th Cir 1986). Summary judgment is granted only if the  
10 moving party is entitled to judgment as a matter of law. FRCP  
11 56(c).

12 The nonmoving party may not simply rely on the pleadings,  
13 however, but must produce significant probative evidence supporting  
14 its claim that a genuine issue of material fact exists. TW Elec  
15 Serv v Pacific Elec Contractors Ass'n, 809 F2d 626, 630 (9th Cir  
16 1987). The evidence presented by the nonmoving party "is to be  
17 believed, and all justifiable inferences are to be drawn in his  
18 favor." Anderson, 477 US at 255. "[T]he judge's function is not  
19 himself to weigh the evidence and determine the truth of the matter  
20 but to determine whether there is a genuine issue for trial." Id  
21 at 249.

22 The evidence presented by both parties must be  
23 admissible. FRCP 56(e). Conclusory, speculative testimony in  
24 affidavits and moving papers is insufficient to raise genuine  
25 issues of fact and defeat summary judgment. Thornhill Publishing  
26 Co, Inc v GTE Corp, 594 F2d 730, 738 (9th Cir 1979). Hearsay  
27 statements found in affidavits are inadmissible. Japan Telecom,  
28 Inc v Japan Telecom America Inc, 287 F3d 866, 875 n1 (9th Cir

1 2004) .

3 III

4 Plaintiffs' complaint prays specifically for prospective  
5 declaratory and injunctive relief; it does not specifically seek  
6 damages. But the court assumes that plaintiffs also seek  
7 retrospective relief, for they seek a declaration "that the actions  
8 of Defendants in refusing to grant Plaintiffs the right to \* \* \*  
9 inform \* \* \* on private employee time are invalid and  
10 unconstitutional," Compl (Doc #1) at 12, and a major heading in  
11 their opposition to defendants' motion for summary judgment is  
12 "defendants are not immune from damages in this case." Pls Opp  
13 (Doc #46) at 17:2. Accordingly, the court will consider whether  
14 retrospective relief is available as against the named defendants.  
15 Defendants are named in both their individual and official  
16 capacities. As this distinction is significant for awards of  
17 retrospective relief, the court will consider individual capacity  
18 liability first and then turn to official capacity liability.

20 A

21 "Government officials sued in their individual capacities  
22 under § 1983 may raise the affirmative defense of qualified  
23 immunity \* \* \*. Qualified immunity generally protects government  
24 officials in the course of performing the discretionary duties of  
25 their offices." Butler v Elle, 281 F3d 1014, 1021 (9th Cir 2002)  
26 (citing Harlow v Fitzgerald, 457 US 800, 818 (1982)). The question  
27 of qualified immunity is a question of law to be determined by the  
28 trial court. Siegert v Gilley, 500 US 226 (1991). "The first step

1 in evaluating a qualified immunity defense is to determine whether  
2 the plaintiff has shown that the action complained of constituted a  
3 violation of his or her constitutional rights." Butler, 281 F3d at  
4 1021 (citing Sonoda v Cabrera, 255 F3d 1035, 1040 (9th Cir 2001)).  
5 If the court is satisfied that a constitutional violation occurred,  
6 "the second step is to determine: (1) whether the violated right  
7 was clearly established, and (2) whether a reasonable public  
8 official could have believed that the particular conduct at issue  
9 was lawful." Id.

10           The court need not reach the second prong of the  
11 qualified immunity inquiry because, even assuming that someone  
12 violated plaintiffs' First Amendment rights, Hicks and Bobb -- the  
13 only named defendants in this suit -- are not responsible for such  
14 a violation. Supervisory officials are not liable under 42 USC §  
15 1983 for the actions of subordinates under any theory of vicarious  
16 liability. Hansen v Black, 885 F2d 642, 645-46 (9th Cir 1989)  
17 (citing Pembauer v City of Cincinnati, 475 US 469, 479 (1986)). "A  
18 supervisor may be liable if there exists either (1) his or her  
19 personal involvement in the constitutional deprivation, or (2) a  
20 sufficient causal connection between the supervisor's wrongful  
21 conduct and the constitutional violation." Id (citing Thompkins v  
22 Belt, 828 F2d 298, 303-04 (5th Cir 1987)). The former option is  
23 foreclosed because plaintiffs have come forward with no evidence  
24 establishing the personal involvement of Hicks or Bobb in the  
25 removal of the flyer. The latter option is the appropriate inquiry  
26 in an official capacity suit, and to this the court now turns.

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1 B

2 As the Hansen court explained:

3 Supervisory liability exists even without overt  
4 personal participation in the offensive act if  
5 the supervisory officials implement a policy so  
6 deficient that the policy itself is a  
7 repudiation of constitutional rights and is the  
8 moving force of the constitutional violation.

9 Id (citing Thompkins, 828 F2d at 304) (internal quotation marks  
10 omitted). It is primarily on this "policymaker" theory of  
11 liability that plaintiffs rest their case. A suit against Hicks  
12 and Bobb in their official capacities as policymakers (which the  
13 court accepts that they are for purposes of this motion) is in  
14 effect a suit against the City, the municipality for which they  
15 make policy. See Hawaii v Gordon, 373 US 57, 58 (1963).

16 In the seminal case establishing municipal liability  
17 under § 1983, the Supreme Court explained "it is when execution of  
18 a government's policy or custom, whether made by its lawmakers or  
19 by those whose edicts or acts may fairly be said to represent  
20 official policy, inflicts the injury that the government as an  
21 entity is responsible under § 1983." Monell v Dep't of Social  
22 Services, 436 US 658, 694 (1978). Though plaintiffs attempt  
23 artfully to argue around the rule that § 1983 does not recognize  
24 the common law tort doctrine of respondeat superior, see Pls Opp  
25 (Doc #46) at 18-20, the Supreme Court has repeatedly held that  
26 Monell "rejected the use of the doctrine of respondeat superior."  
27 City of Saint Louis v Praprotnik, 485 US 112, 121 (1988).

28 Following Monell, the concept of policymaker liability  
was refined somewhat, and the court should at this point  
distinguish between two flavors of policymaker liability. There

1 are, on the one hand, policies that are developed ex ante, approved  
2 by the lawmaking or other policymaking authority, and then applied  
3 prospectively. See, e g, Monell, 436 US at 660-61 ("The gravamen  
4 of the complaint was that the Board and the Department had as a  
5 matter of official policy compelled pregnant employees to take  
6 unpaid leaves of absence before such leaves were required for  
7 medical reasons."). On the other hand, there are suits in which  
8 the defendant, in his capacity as policymaker, has made a one-time  
9 decision -- as, for example, when a plaintiff has sought redress  
10 through an appeal, which terminates with the policymaker's  
11 decision, cf Praprotnik, 485 US 112, 127 ("[W]hen a subordinate's  
12 decision is subject to review by the municipality's authorized  
13 policymakers, they have retained the authority to measure the  
14 official's conduct for conformance with their policies."), or when  
15 the policymaker made some other decision tailored to plaintiff's  
16 situation, see, e g, Pembauer, 475 US at 476-77 (rejecting a court  
17 of appeals decision that a "single, discrete decision" made by a  
18 prosecutor and sheriff "on \* \* \* one occasion" was insufficient to  
19 establish official capacity liability).

20 This distinction is significant, because plaintiffs  
21 cannot rest their case on the Pembauer and Praprotnik line of  
22 cases: Bobb and Hicks had no involvement at the time of the  
23 flyer's removal, nor is there evidence that they later, at  
24 plaintiffs' urging, reviewed and approved the propriety of removing  
25 the flyer. The only policymaking action plaintiffs can point to is  
26 the promulgation of AI 71 as prospective policymaking. As a  
27 threshold matter, the court observes that Hicks does not seem to  
28 have had the authority to make policy like AI 71, and accordingly

1 cannot be held liable as a policymaker. See Praprotnik, 485 US  
2 139-40 (citing Pembauer, 475 US 481-83) (discussing a hypothetical  
3 official who is a policymaker with respect to some matters and not  
4 others). But the court will assume, arguendo, that Hicks and Bobb  
5 are both properly regarded as policymakers with respect to the  
6 promulgation of AI 71.

7 As the Hansen court explained, for a policy to be a  
8 violation of a plaintiff's constitutional rights, it must be "so  
9 deficient that the policy itself is a repudiation of constitutional  
10 rights and is the moving force of the constitutional violation."  
11 885 F2d at 646 (quoting Thompkins, 828 F2d at 304). This  
12 requirement was announced even in Monell, which noted that in that  
13 case "official policy" had been established "as the moving force of  
14 the constitutional violation." 436 US at 694. The Ninth Circuit  
15 has explained that "to be a moving force behind [an] injury, \* \* \*  
16 the identified deficiency in the [policy must be] closely related  
17 to the ultimate injury. The plaintiff's burden is to establish  
18 that the injury would have been avoided" had the policy been  
19 different. Gibson v County of Washoe, 290 F3d 1175, 1196 (9th Cir  
20 2002) (internal quotation marks and citations omitted). This  
21 question of causation is a matter for the jury, see *id.*, and may not  
22 be well-suited to resolution on summary judgment. Accordingly, the  
23 court will assume (for purposes of this motion only) that AI 71  
24 bears the required nexus to the violation plaintiffs claim.

25 The question, then, is whether plaintiffs' rights were in  
26 fact violated. As the court discussed at length in its order on  
27 defendants' motion to dismiss, Doc #32, this is a case about speech  
28 by a government employee, and accordingly, it is controlled by

1 Pickering v Board of Education, 391 US 563 (1968), and its progeny.  
2 The court assumes familiarity with its prior order and the law  
3 discussed therein. The court concluded that the speech in question  
4 -- i e, the message of the flyer -- touches on a matter of public  
5 concern and was a substantial or motivating factor in the removal  
6 of the flyer. 3/16/04 Order at 20:16-22:18. Defendants do not  
7 dispute those conclusions and the court sees no reason to revisit  
8 them.

9 The court next concluded that the remaining issue in the  
10 Pickering test -- "whether defendants have [shown] that their  
11 interests as employers outweigh plaintiffs' interests in making the  
12 speech" -- was "close," but, recognizing that the question was  
13 presented in the context of a motion to dismiss, "agree[d] with  
14 plaintiffs that defendants have not met their burden, at least at  
15 this stage of the proceedings." Id at 22:19-23:2. Now that the  
16 case has progressed to summary judgment, the court may undertake a  
17 better-informed analysis of this question of law. The court set  
18 out the legal standard in some detail in its prior order:

19 [Employee] speech [on a matter of public  
20 concern] must be analyzed by "the Pickering  
21 balance[, which] requires full consideration of  
22 the government's interest in the effective and  
23 efficient fulfillment of its responsibilities  
24 to the public." [Connick v Myers, 461 US 138,  
25 151 (1938)]. The Court, quoting Justice  
26 Powell's separate opinion in Arnett v Kennedy,  
27 416 US 134, 168 (1974), stated that:

28 [T]he Government, as an employer,  
must have wide discretion and control  
over the management of its personnel  
and internal affairs. This includes  
the prerogative to remove employees  
whose conduct hinders efficient  
operation and to do so with dis-  
patch. Prolonged retention of a  
disruptive or otherwise

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unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Connick, 461 US at 151. In evaluating the government's interest in preventing workplace disruption, the Court considered the impairment of "close working relationships," the "manner, time, and place in which [the message] is delivered" and whether the employee's speech "arises from an employment dispute concerning the \* \* \* application of [office] policy to the speaker \* \* \*." Id at 151-53. The Court also emphasized that the government employer did not need "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." Id at 152. Taking these factors into consideration, the Court concluded that Myers' interest in being able to ask the question regarding political pressure was outweighed by the government's considerable interest in proscribing behavior that "would disrupt the office, undermine [its] authority, and destroy close working relationships." Id at 154.

Subsequently, the Ninth Circuit has interpreted Pickering and Connick to require the governmental employee to show that: (1) her speech was on a matter of public concern and thus was constitutionally protected; and (2) that the speech in question was a "substantial or motivating factor" for the adverse employment action. Pool v Vanrheen, 297 F3d 899, 906 (9th Cir 2002). If the employee fails to demonstrate that the speech addresses a matter of public concern, then the claim should be dismissed without further inquiry. See Moran v State of Washington, 147 F3d 839, 846 (9th Cir 1998). Should the employee make the first two showings, the employer then must show that its "legitimate administrative interests" in promoting workplace efficiency outweigh the employee's interest in freedom of speech. Pool, 297 F3d at 906. The inquiry into the protected status of speech is one of law, not of fact. Id.

3/16/04 Order at 18:14-19:28 (some alterations in original).

On plaintiffs' side of the balance is their interest in

1 speaking. This interest is slight, as the restriction placed on  
2 their speech under the facts at bar was quite limited: Plaintiffs  
3 were prohibited from posting a particular flyer on an office  
4 bulletin board. Plaintiffs themselves acknowledge that no  
5 restriction has been placed on their speech outside of work (by,  
6 for example, threatening them with termination if they speak  
7 outside the workplace). They further acknowledge that they can  
8 discuss their views with co-workers as they wish at appropriate  
9 times (at lunch, on a break).

10 Plaintiffs further acknowledge that they were told they  
11 would be permitted to broadcast the existence of their group,  
12 subject to certain editorial restrictions. There are in addition a  
13 wide variety of alternative channels available to plaintiffs, and  
14 defendants' policy appears to be the sort of "manner, time and  
15 place" limitation that the Court implicitly approved in Connick.  
16 461 US at 152.

17 Plaintiffs press the argument that their speech was  
18 chilled by Hicks' circulation to all CEDA employees in late  
19 February of AI 71 and a memo reminding them that noncompliance  
20 could result in discipline. This, however, does not amount to an  
21 adverse employment action and would be germane only to the question  
22 of prospective relief. Accordingly, the court finds that, for  
23 purposes of retrospective relief, plaintiffs have a limited  
24 interest in the suppressed speech.

25 Defendants' countervailing interest is also modest. As  
26 the court's recitation of the law makes clear, workplace disruption  
27 is the touchstone of the employer's interest in the Pickering  
28 balance. Here, there is no dispute that Rederford and Christy's

1 co-worker Jennings was disturbed by the flyer, nor is there dispute  
2 that removal of the flyer was the direct result of the  
3 investigation of Jennings' complaint. But whether the particular  
4 sensitivity of a single coworker amounts to cognizable workplace  
5 disruption under Pickering is far from clear. Furthermore, the  
6 bulk of Jennings' disquiet appears to have stemmed from her  
7 conversation with Rederford, an event that may have been  
8 precipitated by the flyer, but was nonetheless separate from the  
9 flyer. That said, the flyer appears to have been the root of a  
10 dust-up of sorts in the office -- a Pickering disruption writ  
11 small.

12           The investigation of Jennings' complaint of harassment  
13 may conceivably be a form of workplace disruption. There is little  
14 detail in the record about the extent (in hours, for example) to  
15 which this disrupted Braddock and Wong in the performance of their  
16 normal duties, but it is undisputed that their investigation  
17 required at least an interview with Jennings, contact with the city  
18 attorney and drafting of a brief memorandum report. Of course,  
19 this sort of work -- smoothing over employee grievances to maintain  
20 workplace harmony -- is part of a supervisor's job description. In  
21 a sense, Braddock and Wong's efforts were "all in a day's work."

22           Defendants also urge that the City has an interest in  
23 enforcing its anti-harassment policies and complying with state and  
24 local anti-harassment law. While these policies doubtless serve  
25 noble purposes, the court is not convinced that these policies are  
26 independent interests weighing in the public employer's favor in  
27 the Pickering balance, for four reasons. First, the status of AI  
28 71 as official policy pursuant to state law is irrelevant; it

1 should go without saying that the First Amendment is a federal  
2 constitutional provision to which state and local laws must yield.  
3 See US Const Art VI cl 2. Second, the notion of enforcing a policy  
4 or law for its own sake is foreign to the Pickering analysis, which  
5 requires the court to focus on reasonable predictions of workplace  
6 disruption. It may be that the policy or law is aimed at avoiding  
7 workplace disruption; but if that is so, then the efficacy of the  
8 policy or law -- not its simple existence -- is the interest that a  
9 defendant brings to the court. Third, it is bootstrapping to argue  
10 that a public employer has a legitimate interest in enforcing the  
11 very policy or law a plaintiff attacks as unconstitutional in its  
12 application to him. Indeed, if the policy or law is  
13 unconstitutional in some application, the state has no legitimate  
14 interest in enforcing it in that context. And fourth, had  
15 plaintiffs' flyer been removed in the absence of actual or  
16 predicted workplace disruption -- i e, if defendants' justification  
17 was enforcement of AI 71, standing alone -- this case would more  
18 clearly present as a case of state enforcement of ideological  
19 orthodoxy. But as it stands, there is an element of maintaining a  
20 reasonably harmonious workplace in the face of strongly held  
21 opposing beliefs.

22           Having laid out plaintiffs' and defendants' competing  
23 interests, the court must strike the balance called for by  
24 Pickering. Neither side has presented a strong case. But, the  
25 facts being undisputed, the court must resolve the question of law  
26 posed by Pickering. The interests on both sides are slight: On  
27 the one hand, defendants' restriction of plaintiffs is far from a  
28 wholesale muzzling, but on the other hand, the suppressed speech

1 was not patently inflammatory "fighting words." To be sure, it  
2 caused friction in the workplace, but there is a difference between  
3 episodes of friction -- which are the daily incidents of life in a  
4 pluralistic society -- and disruption -- which impairs the  
5 government's ability to discharge its duties to its citizens. The  
6 City must tread carefully when it exercises its authority to  
7 suppress its employees' speech.

8           Because the flyer plainly addresses a matter of public  
9 concern, it is defendants' burden to show that the City's interest  
10 outweighs plaintiffs' interest. Pool, 297 F3d at 906. This  
11 balance must be resolved in the City's favor for two reasons.  
12 First, plaintiffs' interest in this particular channel of  
13 communication is vanishingly small. It is undisputed that  
14 plaintiffs may promote GNEA outside of work and may do so even at  
15 work under proper conditions. Plaintiffs do not have a privileged  
16 First Amendment interest in communicating their message to their  
17 officemates, for their First Amendment rights derive from their  
18 status as citizens, not their status as employees. Their right to  
19 speak to their coworkers at CEDA is no greater than the right of a  
20 citizen at large to speak his message to CEDA employees -- which is  
21 to say, plaintiffs have little rights at all in the particular  
22 channel they chose.

23           The second reason that defendants prevail is that their  
24 response to Jennings' complaint -- removal of the flyer without any  
25 adverse employment action against plaintiffs -- was a narrowly  
26 tailored and proportionate response to the actual workplace  
27 disruption or, perhaps better described, distraction. An actual  
28 adverse employment action against plaintiffs would very likely not

1 be justified on these facts, and the City would be well to consider  
2 this for the future. But the City does have an "administrative  
3 interest" in avoiding situations that distract employees from their  
4 jobs. See Pool, 297 F3d at 906. Pickering counsels that public  
5 employers must, of necessity, be afforded some leeway in fixing  
6 their employees' attention on their tasks, free from upset stemming  
7 from public controversies having no bearing on the work of the  
8 employer.

9           Finally, the court addresses an argument for equal  
10 treatment that plaintiffs press -- albeit without offering support  
11 in the case law. See, e g, Pls Opp (Doc #46) at 5:17-23  
12 (complaining of "double standards"; the refusal to treat  
13 "exclusionary slurs such [as] 'homophobes'" as violations of AI 71;  
14 and a failure "to accommodate views concerning homosexuality [held]  
15 by \* \* \* religious adherents"). Plaintiffs' disparate treatment  
16 argument, while superficially appealing, is simply not recognized  
17 by Pickering and its progeny, and with good reason: Intervention  
18 by a court in restrictions on employee speech under Pickering's  
19 balancing test already carries a substantial risk of interference  
20 with government operations; to inquire further into allegations of  
21 disparate treatment in restrictions of different employees' speech  
22 would remit the disciplinary operations of public agencies to the  
23 micromangement of the courts. In other words, Pickering draws a  
24 line: So long as a public employee's speech is restricted only  
25 when the employer presents an overbalancing concern of workplace  
26 disruption, a court will defer to the employer's decision,  
27 irrespective whether the employer has responded in kind to similar  
28 speech.

1 In sum, the court concludes that plaintiffs' First  
2 Amendment rights were not abridged by the removal of the flyer.

3  
4 IV

5 Plaintiffs also seek prospective relief, specifically, an  
6 "[i]njunction restraining Defendants from prohibiting Plaintiffs  
7 from \* \* \* communicating at their workplace" and a declaration of  
8 "the rights and other legal relations of the parties to the subject  
9 matter here in controversy." Compl (Doc #1) at 12-13. In essence,  
10 plaintiffs want guidance about what they can and cannot post around  
11 the office. The court does not dispense this sort of advice.

12 The only concrete controversy plaintiffs have presented  
13 to the court is the controversy over the flyer in the copy room.  
14 On the undisputed facts of that incident -- considering plaintiffs'  
15 alternative channels of communication, the form of their speech and  
16 the ensuing events in their workplace -- the court has concluded  
17 that plaintiffs' First Amendment rights were not violated. To the  
18 extent that plaintiffs seek to put other scenarios before the  
19 court, their challenge is unripe: Plaintiffs offer no details of  
20 the flyers they wish to post or other workplace speech they wish to  
21 make, and they offer no evidence regarding the workplace disruption  
22 that might (or might not) ensue. At most, plaintiffs point to  
23 Hicks' memo of February 20, 2003, as a threat of termination, but a  
24 reminder in a widely circulated memo that compliance with policy is  
25 a condition of employment can hardly be taken as a concrete and  
26 imminent chill on protected expression or an individually directed  
27 threat of adverse employment action. Moreover, defendants have  
28 both moved on to other jobs, and plaintiffs offer no evidence that



1 judgment (Doc #40) with respect to plaintiffs' claims for  
2 retrospective relief, and sua sponte dismisses plaintiffs' claims  
3 for prospective relief pursuant to FRCP 12(h)(3). The clerk is  
4 DIRECTED to close the file and terminate all motions.

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6 IT IS SO ORDERED.

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8 \_\_\_\_\_ /s/ \_\_\_\_\_

9 VAUGHN R WALKER

10 United States District Chief Judge  
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