

PROVIDING QUALITY LEGAL SERVICES TO EMPLOYERS
ACROSS IOWA

I Heard it Through the Grapevine: Dealing with Rumors on Social Media

Iowa Municipal Managers Institute
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SOCIAL MEDIA



“Internet technology continues to develop at an ever accelerating rate. What is new today is likely to be old, if not tomorrow, within a year or so, perhaps months. The law struggles to keep up.”

Vincent v. Story Cnty., No. 4:12-cv-00157-RAW (S.D. Iowa Jan. 14, 2014)

EMPLOYMENT ISSUES



- **When hiring, should you check applicants' social media?**
 - **Leave to a non-decision maker.**
 - **Give applicants notice.**
- **Get a policy.**
 - **We need a policy for employees' personal use of social media AND for your city's social media.**

EMPLOYMENT ISSUES



- **NLRA Section 7 Considerations**
 - Section 7 provides employees with the right to engage in “concerted activities” for the purpose of “mutual aid or protection.” This is the right to discuss wages, hours, and other terms/conditions of employment.
 - *Chipotle v. NLRB* (2016)
 - Employee posted critical tweets:
 - Criticized extra charge for guacamole.
 - Criticized how employees were treated (specifically responded to a customer thanking Chipotle for free food and commented how poorly the employees were paid).
 - NLRB considered these tweets concerted activity; they were visible to others and educated the public/created sympathy for hourly workers at Chipotle.

EMPLOYMENT ISSUES



- Chipotle v. NLRB Takeaway?
 - Avoid broad prohibitions on employees' use of social media, including use of City materials/logo. Narrowly construe those restrictions.
 - Narrowly construe prohibitions on confidential information/inaccurate information. Give examples.
 - A policy that you cannot post disparaging comments about the City is too broad.
 - Use a disclaimer, but it might not save you.
 - You can prohibit employees from representing that they are making a statement on your behalf.
 - You can require that employees' social media contain a statement that their views are their own, not the City's.

SOCIAL MEDIA RUMORS



- **What should your policy contain?**

- City social media is a limited public forum—not an open forum to allow unlimited discussion of any topic.
- List specific subjects/types of comments that will not be allowed (i.e., defamatory comments, solicitations, discriminatory/harassing comments, threats, obscene/vulgar/profane comments.
- Have a “final say” person regarding what’s posted, what’s “liked,” etc.
- Reserve the right to remove any content that violates your policy or the law, but retain that content for a certain time period.
- Reserve the right to deny access to your social media for anyone who violates your policies or the law.
- Require employees representing the City on social media to identify themselves as representatives of the City.

SOCIAL MEDIA RUMORS



- **What to do if a rumor arises:**
 - **Have someone appointed to handle rumors/social media issues.**
 - Remember social media is on 24/7.
 - Know your local “rumor” pages.
 - **Know when to respond and how to respond.**
 - Difference between a personal response and a press release.
 - **When you respond, be clear about the City’s position. Get out accurate information ASAP.**
 - **Know when to involve legal counsel.**
 - Is there a risk of litigation?
 - Discrimination/harassment/retaliation involved?
 - Does it involve an employment issue?

FIRST AMENDMENT ISSUES

Speech is protected if it involves a matter of public concern.

What is a matter of public concern?

“Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.”
***Connick v. Myers*, 461 U.S. 138 (1983).**

FIRST AMENDMENT ISSUES

Test to Balance Rights of Government Employees with their Rights for Free Speech

“(1) the need for harmony in the work place; (2) whether the government's responsibilities require a close working relationship; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.”

Thompson v. Shock, 852 F.3d 786 (8th Cir. 2017)

FIRST AMENDMENT ISSUES

What is not a matter of public concern?

- An employee questionnaire pertaining to the confidence and trust employees have in their supervisor, level of office morale, need for grievance committee. *Connick v. Myers*, 461 U.S. 138 (1983).
- Speech that serves the personal interests of the speaker. *Morgan v. Robinson*, 881 F.3d 646 (8th Cir. 2018).
- Disparaging comments made due to personal animosity in intraoffice communications. *Vincent v. Story Cnty., Iowa*, (S.D. Iowa Jan. 14, 2014).

FIRST AMENDMENT ISSUES

What is a matter of public concern?

- Speech that relates to any matter of political social or other concern to the community or when it is a subject of legitimate news interest. *Morgan v. Robinson*, 881 F.3d 646 (8th Cir. 2018)
- Speech that criticizes a public official in that capacity. *Id.*
- Child abuse. *Hemminghaus v. Missouri*, 756 F.3d 1100 (8th Cir. 2014).
- A “like” of a Facebook post criticizing an investigation (even after employees were told not to comment on the investigation). *Vincent v. Story Cnty., Iowa*, (S.D. Iowa Jan. 14, 2014).

FIRST AMENDMENT ISSUES

Unprotected Speech

- **Fighting Words: Speech intended to inflame another and that will likely incite physical retaliation.**
- **Obscenity.**
- **Child Pornography.**
- **Defamatory Speech (Libel/Slander).**
- **Speech Used to Commit a Crime (Perjury, Harassment).**
- **Threats.**
- **Conduct Regulations (laws related to speech as long as they are content neutral and not directed at expression of certain ideas are generally ok).**

PRIVACY AND SOCIAL MEDIA



**For questions on
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