
Section 1983 To the Rescue

By Sheldon Eisenberg Esq.



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It can be a cruel “Sophie’s Choice” for animal rescuers: observe in silence deplorable conditions and mistreatment of animals in government run shelters or call attention to the plight of the suffering animals and face the possibility of retaliation that can mean being deprived of the ability to save lives. Sadly, this is not some fictional plot device but the reality that rescuers confront when they seek reform from apathetic or incompetent shelter directors and their staffs or, failing that, meaningful oversight from elected or higher level municipal officers to whom the directors report.

Fortunately, there is a very old legal remedy available to rescuers who find that their advocacy on the front lines has led to the suspension or elimination of their rights to visit, monitor, and rescue animals from these shelters. A federal statute, 42 U.S.C. § 1983, best known simply as “Section 1983,” can and should be applied to stop and punish action by governmental officials or employees to retaliate against or obstruct an activist’s exercise of his or her First Amendment rights in speaking out against conditions in animal shelters.

Section 1983

Congress enacted Section 1983 as part of the Ku Klux Act of April 20, 1871, largely to protect African Americans in the South from the lawlessness that ensued after the conclusion of the Civil War. It is now probably best known in legal circles as the law that individuals invoke when they allege that police or prison officials have mistreated them. A pertinent part of it reads:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .”

In recent years, the courts have said that people have a right to file a claim under Section 1983 when state or municipal governments take action designed to scare or prevent them from exercising their First Amendment rights, or punish them for doing so. The plaintiff must show that all of a few specific conditions, or legal “elements”, exist: The plaintiff’s conduct must be protected by the Constitution, this conduct must have been a “substantial” or “motivating” factor in the defendants’ decision to take action, and the plaintiff must have suffered actual injury.

The Case For Applying Section 1983 To Rescue

There can be no dispute that complaining about abuses or violations of law at shelters is a constitutionally protected right. A rescuer not only has the First Amendment right to speak out against abuses and violations of law committed by a governmental entity, he or she also has a constitutionally protected right to demand that the government correct the wrongs that are identified. This includes the right to threaten to sue or to actually file suit against the shelter.

Government officials rarely admit that they have intentionally meted out punishment beyond the scope of



their legal power; therefore, the law allows plaintiffs to use direct or circumstantial evidence to establish that punishing protected conduct was the government's motive in an action such as suspending adoption rights. Circumstantial evidence may include showing that the rescuer's privileges were withdrawn within a narrow time frame around the time he or she engaged in protected conduct, and that no other explanation or reason was given for the rescuer's punishment.

The last element of the Section 1983 claim, actual injury, can be demonstrated merely by showing that the rescuer has suffered a loss of any governmental benefit or privilege. It is important to emphasize that the loss of a common benefit counts as injury; a rescuer need not establish a legal right to adopt animals or take advantage of any other benefits afforded by a shelter. As the Supreme Court has stated, a government entity "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." Therefore, it should be enough to show, for example, that a person has been deprived of his or

her ability to volunteer at, or to adopt animals from, a shelter.

A question may arise as to whether a volunteer or rescuer needs to wait for a government official to follow through on a threat to retaliate before filing a claim under Section 1983 or whether a threat of retaliation alone is sufficient to trigger one. For example, some volunteers have been told by officials that publicly speaking about a shelter will result in the volunteer being banned. Since the whole point of a Section 1983 retaliation claim is to prevent the "chilling" (discouragement) of constitutionally protected rights, it seems clear enough that a threat of retaliation for exercising those rights, which is specifically designed to obstruct the exercise of those rights, should be sufficient to satisfy the actual injury element of a Section 1983 claim.

Initial Success

These principles were recently applied by a trial court judge in Los Angeles to stop the Los Angeles County Department of Animal Care and Control ("DACC") from retaliating against an animal rescuer who instigated a campaign to call attention to the conditions at DACC

shelters and complain about DACC's failures to comply with California law on holding periods and veterinary care. In response to those complaints and the rescuer's threat to initiate litigation, the rescuer's adoption privileges at DACC shelters were suspended.

The rescuer brought an action against DACC in which she sought, among other things, an order restoring her ability to pull animals from DACC shelters. The Court found that she had established a strong probability of success in a Section 1983 claim; her evidence met the basic requirements. The Court reasoned that the rescuer certainly had a First Amendment right to speak out about perceived abuses of animals and violations of law. The Court also determined that the rescuer had demonstrated the likelihood that her suspension was retaliatory by showing both that the suspension came soon after her public comments and threats of litigation and that the County failed to reveal any basis for it. Significantly, the Court held that the suspension of an animal rescuer's adoption privileges would no doubt discourage such a person from exercising her First Amendment rights and specifically ruled that the opportunity to serve as a volunteer is a protected government privilege. As a result, the Court granted the motion and required the County to restore the rescuer's access to the shelter pending the litigation. The order was made permanent as part of the ultimate settlement of that case.

Conclusion

There would be little hope of progress in improving the conditions at municipal animal shelters if rescuers—the people likely most knowledgeable about those conditions—could be intimidated into remaining silent by the threat of retaliation. Thus, Section 1983 can be a powerful tool not only to obtain justice for people unfairly treated by

government officials, but also to insure that rescuers and animal shelter reformers can continue their critically important work in saving lives and educating the public about our shelter systems. For lawyers in the animal rights and welfare movement,

there is more than a little sense of satisfaction that a statute originally designed to insure the Fourteenth Amendment's promise of equal protection under the law can now help extend the protection of laws to those individuals committed to safeguarding the welfare and rights of the animals entrusted to our care.



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Sheldon Eisenberg is a principal founding partner of the Los Angeles law firm of Eisenberg, Raizman, Thurston, and Wong LLP. For over 25 years, companies from all sectors of the Southern California economy have entrusted their most significant litigation problems to Mr. Eisenberg—from cutting edge technology and telecommunications companies to financial institutions and real estate developers, from Hollywood studios and other entertainment companies to software developers and publishers, and from literary and talent agencies to advertisers and national public relations firms.

He recently represented animal rescuers and animal protection organizations, including the No Kill Advocacy Center, to protect volunteer whistleblowers who document abuses from being fired, defend an animal's right to prompt and necessary veterinary care while in the shelter, and require that shelters offer animals to rescue groups or for adoption, rather than kill them. The case *Nguyen vs. County of Los Angeles* settled in plaintiffs' favor.

Mr. Eisenberg will be leading a workshop on *Litigating No Kill* at the national No Kill Conference 2009 in Washington D.C.