

**A Primer for
Protecting the
Legal Rights of
Rescuers &
Animal Shelter
Volunteers**



**SECTION 1983
TO THE RESCUE**

A PUBLICATION OF THE NO KILL ADVOCACY CENTER

SECTION 1983 TO THE RESCUE



A Primer for Protecting the Legal Rights of Rescuers & Animal Shelter Volunteers



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.

Sheldon Eisenberg is a partner with the law firm of Drinker Biddle & Reath, LLP.



Sample Letter to Public Officials

JANE DOE, Animal Shelter Volunteer
1234 Main Street, Anytown, USA 98765

January 1, 2015

Dear Mayor & Members of the City Council:

County Animal Control (CAC) has just released a new “Volunteer Code of Conduct” which includes the policy that volunteers may not “engage in any activity or communication that may cause harm to the reputation of CAC.” Violation of that policy could result in “dismissal.” This policy violates the constitutional rights of volunteers. 42 U.S.C. § 1983 states, in relevant part,

Every person who, under color of any statute, ordinance, regulation, custom, or usage... 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.

It is a violation of Section 1983 for a state or municipal government to take action designed to prevent or intimidate people from exercising their First Amendment rights, or punish them for doing so, and there can be no dispute that complaining about inhumane conditions at animal shelters is a constitutionally protected right. In fact, it appears that CAC’s new policy was specifically enacted in response to complaints by volunteers and others about just such conditions.

A rescuer or volunteer not only has the First Amendment right to speak out against inhumane practices 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. 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.”

These principles were recently applied in a legal action brought by a rescuer who was terminated for calling attention to similar conditions at Los Angeles County Department of Animal Care & Control shelters. (*No Kill Advocacy Center vs. County of Los Angeles*, L.A. Superior Court Case No. BS112581). Significantly, the Court found that plaintiff’s suspension would no doubt discourage such a person from exercising her First Amendment rights and specifically ruled, following a line of established federal precedent, that the opportunity to serve as a volunteer is a protected government privilege. As a result, the Court required the County to restore the rescuer’s access to the shelter. In the case of CAC, the agency has enacted rules specifically indicating that volunteers will be terminated for exercising those rights.

In addition, a Federal Judge in Maryland more recently ruled that a volunteer, rescuer, or any other member of the public cannot be banned from a government shelter simply because he or she has criticized shelter management, complained about the policies and practices of the shelter, or posted information online that officials believe is unflattering to the shelter: <http://trib.in/1Ip0BnI>. In the case of CAC, the agency has enacted rules specifically indicating that volunteers will be terminated for exercising those rights.

Because CAC’s volunteer policies are so obviously contrary to our country’s fundamental principles of liberty and clearly unconstitutional, we are requesting that you order the Director of CAC to withdraw the illegal policy.

Very truly yours,

Jane Doe

ANIMAL FACILITIES CANNOT SILENCE VOLUNTEERS, JUDGE RULES:

Maryland Judge Rules Animal Facilities Can't Force Volunteers to Sign Nondisclosure Agreements

by William Hageman

Maryland - A judge's ruling in Maryland may make some animal control facilities and shelters think twice about a seldom-discussed policy — forcing volunteers and would-be rescuers to remain silent about any problems they witness.

The case involves a Virginia-based rescue, Fancy Cats, whose volunteers were banned from rescuing animals after an email was distributed in 2013 that was critical of the Baltimore County Animal Services' Baldwin shelter. The rescue was banned, and then sued, claiming its volunteers' freedom of speech rights were being denied.

Maryland U.S. District Judge James Bredar agreed. Last week he ruled that the "opportunity to serve as a volunteer or partner with a government organization" as a rescuer is a constitutionally protected benefit and that volunteers and rescuers have "the right to exercise constitutionally protected free speech, free of a state actor's retaliatory adverse act."

Bredar's decision could have implications around the country. Public animal control facilities often make volunteer candidates sign nondisclosure agreements.



From: <http://trib.in/1Ip0BnI>

THE RIGHT TO SPEAK OUT



Frequently Asked Questions

A volunteer, rescuer, or any other member of the public cannot be banned from a government shelter simply because he or she has criticized shelter management, complained about the policies and practices of the shelter, or posted information online that officials believe is unflattering to the shelter. We not only have the First Amendment right to speak out, we have a constitutionally protected right to demand that the government correct the wrongs that are identified.

Does it apply in every state?

Yes. The First Amendment is a federal constitutional right and 42 U.S.C. 1983, the applicable civil rights statute, is federal law. It applies in all 50 states.

Does it apply to private humane societies or SPCAs?

Keeping in mind that the protections of the First Amendment protect against government intrusion, so long as they receive funding to provide a government function (i.e., animal control contract), Sec. 1983 has been held to apply to both government shelters and private SPCAs. *Allen vs. Pennsylvania Society for the Prevention of Cruelty to Animals*, 488 F.Supp.2d 450 (MD Penn 2007); *Brunette vs. Humane Society of Ventura County*, 294 F.3d 1205 (9th Cir. 2002); and *Snead vs. Society for the Prevention of Cruelty to Animals*, 929 A.2d 1169 (Pa.Sup.Ct. 2007).



Does that include the right to take photographs and video in the shelter?

Yes. Banning photography and video in public areas of the shelter limits free speech. See *Animal Legal Defense Fund vs. Otter*, 2014 WL 4388158*10 (D. Idaho 2014). The taking of a photograph or video is “included with the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.” *ACLU vs. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012). As the ACLU has correctly argued,

“Videotaping and capturing images of poor shelter conditions or neglected animals are indistinguishable from ‘commenting’ or ‘speaking out’ on such conditions.” Volunteers, rescuers, and members of the public have a right to document things they believe are improper. They can also take photographs and videotape to assist in finding animals homes.

What should you do if your government shelter or government-contracted SPCA violates your First Amendment rights?

Find legal representation by contacting your state ACLU office, Legal Aid office, or utilizing the attorney referral program of your state bar association. If you choose not to pursue this legally, you can seek to reform the shelter through political advocacy. Go to nokilladvocacycenter.org to learn more.

A No Kill Nation Is Within Our Reach



If every animal shelter in the United States embraced the No Kill philosophy and the programs and services that make it possible, we would save nearly four million animals who are scheduled to die in shelters this year, and the year after that. It is not an impossible dream.

Also Available:

The Companion Animal Protection Act:
Model Legislation to Improve the Performance & Life-Saving of Animal Shelters

The Animal Rescue Act:
Model Legislation Mandating Lifesaving Collaboration Between Animal Shelters and Rescue Organizations

Ban the Gas Chamber:
Model Legislation Banning the Use of the Gas Chamber by Animal Shelters

The Prevention of Cruelty to Animals Act:
Model Legislation Requiring Animal Shelters & Rescue Groups to Check a Database of Convicted Animal Abusers Before Adopting

There Ought to Be a Shelter Reform Law:
A Step-by-Step Guide to Passing Humane Legislation

The No Kill Revolution Starts with You:
A Step-by-Step Guide to Waging a Political Campaign for Local Shelter Reform

And more at:

nokilladvocacycenter.org

