

Leonard J. Porto III
XXXXXXXXXXXXXXXXXXXX
P.O. Box 354
Corona Del Mar, CA 92625
XXXXXXXXXXXXXXXXXXXX
In Propria Persona

United States District Court
Central District of California
Southern Division

Leonard J. Porto III,
Plaintiff,
v.
CITY of LAGUNA BEACH, a political entity;
CITY of LAGUNA BEACH MARINE
SAFETY DEPARTMENT, a political entity;
MARINE SAFETY CHIEF MARK
KLOSTERMAN,
LIFEGUARD TRAVIS LOWREY,
LIFEGUARD THOMAS F. McGERVEY,
LIFEGUARD MIKE SCOTT,
individually and in their official capacity;
CITY of LAGUNA BEACH POLICE
DEPARTMENT, a political entity;
POLICE OFFICER ALFRED COLLAZO,
POLICE OFFICER RYAN DOMINGUEZ,
POLICE OFFICER MICHAEL DONOHUE,
POLICE OFFICER ZACH MARTINEZ,
individually and in their official capacity;
DOES 1 through 10,
Defendants.

Case Number:
SA CV 08547 DOC (MLGX)

PLAINTIFF'S
FIRST AMENDED COMPLAINT
FOR:
DAMAGES
DECLARATORY RELIEF
INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

COMES NOW the Plaintiff, Leonard J. Porto III, In Propria Persona,
and hereby complains of the Defendants, and each of them, jointly and
severally, upon information and belief, and respectfully alleges before this
honorable Court:

JURISDICTION and VENUE

1. This Complaint is for damages in an amount to be determined at trial, including declaratory and injunctive relief, against Defendants for violation of Plaintiff's federal and state constitutional, civil, and common law rights pursuant, but not limited to, 42 U.S.C §§ 1983, 1985(3), & 1986.

2. Jurisdiction is based on 28 U.S.C. §§ 1331, & 1343, 1 through 4.

3. Supplemental jurisdiction of this honorable Court is invoked to hear and decide claims arising under state law pursuant to 28 U.S.C § 1367.

4. Venue is proper under 28 U.S.C. 1391, as a substantial part of the events or omissions giving rise to the claim occurred within this honorable court's judicial district.

PARTIES

Plaintiff

5. Plaintiff Leonard J. Porto III is a U.S. citizen residing in Orange County, California. Mr. Porto is an experienced rescue certified scuba diver.

Defendants

6. Defendant City of Laguna Beach is a political entity in the County of Orange, California, that on information and belief, receives federal funds.

7. Defendant City of Laguna Beach Police Department is a political entity in the County of Orange, California.

8. Defendants Alfred Collazo, Ryan Dominguez, Michael Donohue, and Zach Martinez are City of Laguna Beach Police Officers.

9. Defendant City of Laguna Beach Marine Safety Department is a political entity in the County of Orange, California.

10. Defendant Mark Klosterman is the employed chief of the City of Laguna Beach Marine Safety Department.

11. Defendants Travis Lowrey, Thomas McGerver, and Mike Scott, are all lifeguards employed by the City of Laguna Beach Marine Safety Dept.

12. DOES 1 through 10 refer to persons or entities that engaged in, were aware of, participated in, and/or directed the acts alleged herein. Plaintiff is unaware of the true names and capacities of Defendants DOES 1 through 10, therefore sues those defendants by fictitious names. Plaintiff will seek leave to amend this Complaint to reflect true names and capacities.

13. At all times relevant to this complaint, including several years prior, all Defendants were acting within the scope of their employment for the City of Laguna Beach, and under color of law. They are sued in both their official and individual capacity for damages. They acted recklessly and in bad faith, knowing their conduct violated well established and settled law, and demonstrated a callous indifference to the state and federally protected rights of Plaintiff. Plaintiff is entitled to recover punitive damages against them individually. As a result of deprivation of constitutional rights by these “stalking horses”, Plaintiff suffered damages in the form of pain and suffering, for which he seeks compensatory damages against defendants in their official as well as individual capacity. All Defendants are persons.

FACTUAL ALLEGATIONS

14. During a span of several years prior to this Complaint, Plaintiff has consistently warned City lifeguards and police officers “as stalking horses” that their custom, policy, and practice of issuing citations to divers and harassing divers by confrontational questioning, were in violation of Plaintiff’s constitutional and civil rights. Marine Safety Officer Calle Allison was present during at least two of these incidents, joining in courteous and polite conversation with Plaintiff in length concerning those rights.

15. On Monday, July 2nd, 2007, at approximately 4 p.m., nearing low tide, Plaintiff and a friend, Mr. James Dodge, travelled underwater from Boater’s Canyon (also known as Fisherman’s cove) to Shaw’s cove in Laguna Beach, California. Plaintiff and Mr. Dodge are both advanced and

1 rescue certified divers, trained by multiple internationally recognized
2 agencies, and are insured members of the Divers Alert Network (DAN).
3 Each has completed over 300 dives. Plaintiff and Mr. Dodge initiated
4 contact with and advised the lifeguard on duty they would not be returning
5 to boater's canyon after their dive, and would be exiting at Shaw's cove.

6 16. Plaintiff and Mr. Dodge were confronted upon their exit from the
7 ocean by lifeguards, police and other individuals. Plaintiff suggested
8 conversation continue at Laguna Sea Sports, where Plaintiff's vehicle was
9 parked. After Plaintiff walked to his parked vehicle at Laguna Sea Sports to
10 remove his scuba gear, the Defendants, and Mr. Dodge, arrived at Laguna
11 Sea Sports parking lot. Plaintiff's first thought was to call an attorney.

12 17. Four separate demands were made by Plaintiff to contact his
13 attorney, Mr. Robert A. Garretson, by cell phone. Plaintiff was permitted to
14 contact his attorney by a police officer after the fourth demand. Officer
15 Michael Donohue then committed assault and battery against Plaintiff by
16 removing Plaintiff's cell phone out of Plaintiff's hand and placing him in a
17 pain compliance hold, effectively and unlawfully arresting Plaintiff.

18 18. After Plaintiff's attorney arrived on the scene, Officer Alfred Collazo
19 cited Plaintiff for violating Laguna Beach Municipal Code (LBMC) §
20 18.21.030B, recorded on the Notice to Appear # LG57510 as "failure to obey
21 lifeguard (diving)", a misdemeanor violation.

22 19. Officer Collazo was not present during the alleged violation at
23 Boater's Canyon. Mr. Thomas F. McGervey, the lifeguard alleging "failure to
24 obey" was not present during issuance of the citation at Laguna Sea Sports.

25 20. After arriving at Laguna Sea Sports, Mr. Garretson, a licensed
26 California attorney and certified diver, observed the citation process. On a
27 subsequent day, a lifeguard present during the citation process admitted to
28 Mr. Garretson that Plaintiff was intentionally targeted for citation.

21. The City Police Department refused two requests for a police report made in person by Plaintiff and Mr. Garretson. Plaintiff has been required to appear at two arraignment hearings on August 15th, 2007, and October 3rd, 2007. On both dates, the City did not provide the necessary paperwork to the court, preventing Plaintiff from “having his day in court”, resulting in the misdemeanor charge left “as a hanging fire” over Plaintiff.

22. Mr. Dodge was not cited, though present with Plaintiff.

23. Defendant lifeguard Mr. McGervey signed a Statement of a Private Person's Citizens Arrest for violation of LBMC § 05.14.105, "Disobeying a lifeguard". This code section does not exist.

24. This contrasts with Defendant Officer Colazzo’s citation for violating LBMC § 18.21.030B, “failure to obey lifeguard (diving)”.

25. The County D.A. “declined to prosecute in the interest of justice”.

I

PLAINTIFF'S CLAIM UNDER 42 U.S.C. §§1983, 1986 AGAINST OFFICER
MICHAEL DONOHUE IN HIS OFFICIAL AS WELL AS INDIVIDUAL
CAPACITY AND THE CITY OF LAGUNA BEACH FOR MUNICIPAL
LIABILITY

26. At all times Defendant officer acted under color of state law, as a City of Laguna Beach Police Officer.

27. In his capacity as a police officer, this Defendant, on July 2nd, 2007, intentionally deprived Plaintiff of his fourth amendment constitutional right to be free from unreasonable search and seizure. Defendant subjected Plaintiff to excessive use of force by removing Plaintiff's cell phone from him while in conversation with his attorney, and inflicting a pain compliance hold upon Plaintiff. Negligence allowed the violation.

28. Defendant, by using such unreasonable and excessive force, caused injury and damage to Plaintiff.

29. Defendant knowingly interfered with Plaintiff's attorney/client communication.

30. As a proximate cause of said deprivation of constitutional rights, the Plaintiff suffered damages in the form of pain and suffering, for which he seeks compensatory damages against the defendant in his official as well as individual capacity.

31. The conduct of this defendant was reckless and demonstrated a callous indifference to the federally protected rights of Plaintiff, entitling Plaintiff to recover punitive damages against him individually.

II

CLAIM AGAINST THE CITY OF LAGUNA BEACH

FAILURE TO TRAIN POLICE OFFICERS

32. Plaintiff repeats and re alleges paragraphs 6 through 13, as if expressly set forth at length.

33. The training program of the City of Laguna Beach Police Department was not adequate to prevent its officers from using excessive force or violating Plaintiff's rights.

34. The failure to provide proper training was a proximate cause setting into motion the deprivation of the Plaintiff's rights protected by the Fourth Amendment of the Constitution, as set forth in claim one.

III

CLAIM UNDER 42 U.S.C. §§ 1983, 1985, & 1986 AGAINST LIFEGUARD

THOMAS McGERVEY IN HIS OFFICIAL AS WELL AS INDIVIDUAL

CAPACITY AND THE CITY OF LAGUNA BEACH FOR MUNICIPAL

LIABILITY

35. Plaintiff repeats and re alleges paragraphs 6 through 13, as if expressly set forth at length.

36. Plaintiff was unlawfully placed under citizen's arrest by Mr.

1 McGervey, and falsely accused of disobeying Mr. McGervey, who lacked any
2 definably clear and compelling reason for arresting Plaintiff based on a non
3 existent LBMC § 05.14.105. Negligence allowed the violation.

4 **IV**

5 **CLAIM AGAINST THE CITY OF LAGUNA BEACH**

6 **FAILURE TO TRAIN LIFEGUARDS**

7 37. Plaintiff repeats and re alleges paragraphs 6 through 13, as if
8 expressly set forth at length.

9 38. The training program of the City of Laguna Beach Marine Safety
10 Department was not adequate to train Defendant lifeguards in how and
11 when to close beaches or perform citizen's arrests based on specific written
12 or published guidelines.

13 39. City of Laguna Beach Marine Safety Department Chief Mark
14 Klosterman was deliberately indifferent to the need to train and certify his
15 tower lifeguards as divers. It is custom, practice, or policy to not require
16 dive certification for tower lifeguards. The failure to provide proper training
17 was a proximate cause setting into motion the deprivation of the Plaintiff's
18 constitutionally protected rights.

19 **V**

20 **VIOLATIONS OF THE FIRST AMENDMENT**

21 *"Congress shall make no law . . . abridging the freedom of speech . . . or the right*
22 *of the people peaceably to assemble, and to petition the Government for a redress of*
23 *grievances". (U.S.C.A. Const. Amend. 1)*

24 40. Plaintiff repeats and re alleges paragraphs 6 through 13, as if
25 expressly set forth at length.

26 41. Plaintiff's right of free association is violated by the prohibition of
27 solo diving in LBMC § 18.21.030.

28 42. Plaintiff was punished for exercising free speech by criticizing

the City lifeguard's actions for several years, while enjoying the pursuit of ocean related recreational activity.

43. Forcibly removing Plaintiff's cell phone without warning or reason, knowing Plaintiff was speaking with his attorney, violates free speech.

44. Plaintiff is forbidden to assemble with others to instruct or teach, specifically in diving, during the hours most conducive to instruction on City beaches for four summer months every year by LBMC § 18.21.050, lacking any clearly defined or compelling reason for these restrictions.

45. Plaintiff's right to travel between coves in the City was violated by LBMC § 18.21.030.

VI

VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

"No Person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." (U.S.C.A. Const. Amend. 5)

No state shall ". . . deny to any person within its jurisdiction the equal protection of the laws." (U.S.C.A. Const. Amend. 14)

46. Plaintiff repeats and re alleges paragraphs 6 through 13, as if expressly set forth at length.

47. Plaintiff has been charged with a misdemeanor for allegedly violating an unconstitutionally vague LBMC § 18.21.030b, as applied to Plaintiff, and a non existent LBMC § 05.14.105. Plaintiff suffered an unjustified citizen's arrest, lacking definably clear or compelling safety concerns.

48. The City attempted to inflict an excessive penalty upon Plaintiff, given the minor nature of alleged violation.

49. City dive ordinances are unconstitutionally vague, as applied to divers trained and certified by internationally recognized agencies.

///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

2

3
4

5
6
7

8
9

10

11

12

13

14

15

16

17

- 18
19
20
21
22
23
24
25
26
27
28

prosecute “in the interest of justice”.

h. Requiring Plaintiff to resort to litigation to prevent further abuse.

i. Intimidating Plaintiff with a show of force by Defendants on several occasions, resulting in deep anxiety, vulnerability, and loss of reputation, if Plaintiff chose to continue diving in the City.

j. Causing the anxiety, anguish, and humiliation, over several years, of facing confrontational City lifeguards and police.

k. Damaging Plaintiff’s passion for diving in the City’s unique coves.

IX

SELECTIVE AND VINDICTIVE ENFORCEMENT, CONSPIRACY

56. Plaintiff repeats and re alleges paragraphs 6 through 13, as if expressly set forth at length.

57. Plaintiff and Mr. Dodge were associating as divers to travel under the navigable waters of the City between two adjacent coves.

58. Plaintiff and Mr. Dodge entered and exited the ocean together, were both confronted at Shaw’s Cove and the parking lot of Laguna Sea Sports together, yet Plaintiff only was placed under citizen’s arrest and cited.

59. On a subsequent day, a lifeguard present at Laguna Sea Sports during the citation process admitted to Mr. Garretson that Plaintiff was specifically and intentionally targeted for citation.

60. Several Defendants knowingly conspired to have Plaintiff cited by police, lacking any legitimate public safety issue at the time. Plaintiff’s dive buddy, Mr. Dodge, was not placed under citizen’s arrest, nor was he cited.

61. Plaintiff was targeted for punishment for exercising free speech in criticizing lifeguard and police actions spanning several years.

62. Plaintiff was required under threat of arrest to face two arraignments.

63. The County D.A. had refused to prosecute “in the interests of justice”.

X

**VIOLATION OF THE CALIFORNIA CONSTITUTION AND CALIFORNIA
COASTAL ACT**

"....Access to the navigable waters of this state shall be always attainable for the people thereof". Article 10, § 4, California Constitution.

"Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone". California Public Resources § 30001.5(c)

64. Plaintiff repeats and re alleges paragraphs 6 through 13, as if expressly set forth at length.

65. Plaintiff's rights to access beaches and navigable waters, as protected by the California Constitution and California Coastal Commission regulations, were violated when the lifeguards closed the beaches of the City for an indefinite period of time, lacking any legitimate or definably clear and compelling safety issue at the time of Plaintiff's dive, and at other times spanning several years.

66. Plaintiff's right to access public trust lands was violated by the citation and arrest issued on July 2nd, 2007.

67. Plaintiff's right to access public trust lands is violated by the prohibitions of LBMC § 18.21.050 against teaching and instruction.

68. The City of Laguna Beach lacks authorization from the Coastal Commission to close beaches for indefinite periods.

69. The Coastal Commission retains original permit jurisdiction over submerged and public trust lands.

XI

VIOLATION OF THE NINTH AMENDMENT

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".

(U.S.C.A. Const. Amend. 9)

70. Participation in, and the pursuit of, recreational sports, such as scuba diving, is protected activity.

71. Individual quality of life demands the liberty to pursue the happiness experienced in recreational sport activity.

72. Plaintiff was punished, lacking any legitimate or definably clear and compelling reason, by the “stalking horses” of the City while engaging in protected activity.

PRAYER FOR RELIEF

I. Damages

- a. Compensatory damages in an amount to be determined at trial.
- b. Punitive damages in an amount to be determined at trial, sufficient in sum to deter Defendants from further abuse of Plaintiff.
- c. Costs and reasonable attorney fees.
- d. Additional and further relief as the Court deems just and equitable.

II. Declaratory Relief

- a. A declaration that recognizes scuba instruction occurring in a public forum as constitutionally protected free speech.
- b. A declaration that pursuit of, or engagement in, recreational activity such as scuba diving, is constitutionally protected.
- c. A declaration recognizing City diving ordinances violate state and federal rights.

I. Injunctive Relief

Enjoin Defendants from enforcing the following LBMC ordinances:

- a. **Disobeying a Lifeguard** - LBMC (§ 18.04.105)
- b. **Hazardous Skin Diving and Scuba Diving** - LBMC (§ 18.21.030a & b)
- c. **Scuba and Skin Diving Classes Restricted to Certain Hours** - LBMC (§ 18.21.050)
- d. **Penalty for Violations** - LBMC (§ 18.21.060)

Dated September 22nd, 2008

DEMAND FOR JURY TRIAL

Respectfully submitted:

BY _____

Leonard J. Porto III, Plaintiff, *pro se*

XXXXXXXXXXXXXXXXXX