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13 Attorneys for Plaintiff

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 WALTER B. HOYE, II,
17 Plaintiff,
18 v.
19 CITY OF OAKLAND,
20 Defendant.

NO.: C07-06411 CRB

**SECOND AMENDED COMPLAINT
FOR CIVIL RIGHTS VIOLATION
AND INJUNCTIVE AND
DECLARATORY RELIEF;**

DEMAND FOR JURY TRIAL

- 1. 42 U.S.C. § 1983 [Free Speech]
- 2. 42 U.S.C. §1983 [Equal Protection]
- 3. California Constitution, Art. I, §2
- 4. California Constitution, Art. I, §7
- 5. California Civil Code §52.1

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22 Plaintiff alleges as follows:

23 1. Plaintiff Walter B. Hoye, II, is a natural person. Motivated by his moral, religious,
24 and political beliefs, plaintiff has regularly engaged in pro-life, anti-abortion speech activities within
25 the City. These speech activities include hand-to-hand leafleting, education about abortion, and
26 holding signs which say things like “God loves you & your baby / Let us help you”. All of these
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1 activities occur on public sidewalks or other public fora, where he can convey his message to the
2 public.

3 2. Defendant CITY OF OAKLAND ("City") is a municipal corporation organized under
4 the laws and Constitution of the State of California, and is a corporate entity capable of suing and
5 being sued. Defendant City maintains and operates the City of Oakland Police Department which,
6 in the first instance, is responsible for the enforcement of the ordinance in question and the arrest of
7 person alleged to have violated it.

8 3. **JURISDICTION:** This Court has jurisdiction over this action pursuant to Title 28
9 U.S.C. §§1331 and 1343(3) in that the controversy arises under the United States Constitution and
10 under 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202. This Court has authority to award
11 attorneys fees pursuant to 42 U.S.C. §1988. Plaintiff further invokes the supplemental jurisdiction
12 of this Court under 28 U.S.C. §1367(a) to hear and adjudicate state law claims. Each and all of the
13 acts (or threats of acts) alleged herein were done by defendants, or their officers, agents, and
14 employees, under color and pretense of the statutes, ordinances, regulations, customs and usages of
15 the City of Berkeley.

16 4. **INTRADISTRICT ASSIGNMENT:** Venue is proper in this district under 28 U.S.C.
17 §1391(b) because a substantial part of the events giving rise to the claims in this action occurred in
18 this district.

19 5. On or about December 18, 2007, the City adopted Municipal Code Chapter 8.50,
20 entitled "Access to Reproductive Health Care Facilities" (herein the "original ordinance"). On
21 December 18, 2007, Plaintiff filed this action challenging the constitutionality of the original
22 ordinance. Following a hearing on Plaintiff's Application for Temporary Restraining Order, the City,
23 through its attorneys, agreed not to enforce the original ordinance and to amend that ordinance. On
24 February 5, 2008, the City amended Chapter 8.50. A copy of the amended ordinance (hereinafter
25 the "Ordinance") is attached to this Amended Complaint as Exhibit A.

26 6. Violation of the Ordinance is a criminal misdemeanor under §4(a).
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1 7. The law enforcement arm of the City is the Oakland Police Department (“OPD”). It is
2 the OPD which actually interprets, enforces, and arrests persons who have allegedly violated the
3 Ordinance.

4 8. The OPD has a set of regulations which supposedly govern its enforcement of the
5 Ordinance. The regulations are contained in a “Training Bulletin”, the current version of which is
6 dated May 1, 2008, and attached hereto as Exhibit B.

7 9. In practice, OPD enforces and interprets the Ordinance in various and conflicting ways,
8 with the effect a person can never be particularly sure whether their conduct will or will not be
9 charged as a violation of the Ordinance. Some of the interpretations violate the constitutional
10 norms set forth in *Hill v. Colorado*, 530 U.S. 703 (2000), for example:

11 A. On March 25, 2008, at approximately 8:30 a.m. in front of an abortion clinic, an OPD
12 officer explained to plaintiff and others present that the Ordinance created a “moving bubble zone”
13 so that any time plaintiff was standing within 100 feet of the clinic, he had to move more than 8 feet
14 away from any person who approached him or was going into the clinic. The police were clear that
15 failure to abide by this interpretation would make plaintiff subject to arrest for violation of the
16 ordinance. Plaintiff’s counsel communicated to the City attorney this interpretation, and the City
17 attorney has never communicated back to plaintiff’s counsel that such is not the official policy of the
18 OPD. While on May 29, 2008, an attorney for the City stated in a legal brief that “[t]he Ordinance
19 expressly applies only when speakers . . . approach individuals near the clinic – not when they
20 merely remain stationary”, the City has offered no assurance that the OPD has changed its policy to
21 conform to the City’s legal briefing.

22 B. On May 13, 2008, shortly after 10:00 a.m. in front of an abortion clinic, an OPD officer
23 told plaintiff that he was not allowed to approach *or be within* 8 feet of escorts, clinic personnel, or
24 clients. The officer intended for plaintiff to understand that merely being within 8 feet of escorts,
25 clinic personnel, or clients within the 100’ zone would result in his arrest. Plaintiff’s counsel has
26 informed the City attorney of this OPD interpretation, and the City attorney has never denied that
27 such is the official policy of the OPD. While on May 29, 2008, an attorney for the City stated in a
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1 legal brief that “[t]he Ordinance expressly applies only when speakers . . . approach individuals near
2 the clinic – not when they merely remain stationary”, the City has offered no assurance that the
3 OPD has changed its policy to conform to the City’s legal briefing.

4 C. On June 3, 2008, between 9:10 a.m. and 9:31 a.m. in front of an abortion clinic, a
5 witness observed two different clinic escorts, whom plaintiff alleges on information and belief are
6 volunteers, approaching within 8 feet of persons entering the clinic and speaking to them without
7 obtaining their consent. The witness called OPD at 9:34 a.m. to report this apparent violation of the
8 Ordinance. The dispatching officer asked for descriptions of the alleged offenders and also asked if
9 one was a certain male “because if he is there, there is an ordinance against him and he should not
10 be there.” At around 10:05 a.m. Officer V. Johnson responded. After learning of the situation, the
11 Officer responded that the escorts were “professional people” so it was permissible for them to
12 approach patients. The next day the witness again spoke with Officer Johnson who said he was not
13 filing an official report about the incident. Officer Johnson stated that his supervisor, who is
14 Sergeant David Elzey, explained that volunteer clinic escorts were “protected individuals” who
15 could not be charged with violating the Ordinance by approaching clients to converse. On June 5,
16 2008, plaintiff’s counsel communicated Sgt. Elzey’s interpretation to the City attorney via email.
17 The City attorney responded back to the email but did not in any way deny or discount the policy
18 set forth by Sgt. Elzey.

19 10. Plaintiff has already been arrested once for allegedly violating the Ordinance and is at
20 risk to be arrested again. Plaintiff contends that he is the individual whom the OPD dispatcher
21 specifically noted as to whom the ordinance was against, and that the police will arrest him
22 according to the interpretations they have given as set forth above. The OPD itself, has never
23 disavowed any of the three interpretations mentioned in the preceding paragraph, and the City
24 attorney has not disavowed the last interpretation. Plaintiff reasonably fears that he will be arrested
25 by OPD for conduct which is not prohibited by the Ordinance and/or otherwise protected by the
26 U.S. Constitution.

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1 11. The OPD has an unwritten policy exempting from the reach of the Ordinance any
2 person who approaches and speaks to clients for the purposes of encouraging them to use clinic
3 services. That same unwritten policy holds that plaintiff is to be arrested if he approaches and speaks
4 to clients for the purposes of encouraging them to choose options other than utilizing clinic services.
5 This is a form of content and viewpoint discrimination.

6 12. The Ordinance, both as written and as enforced by defendant, is content- and viewpoint-
7 based, abuses governmental power, denies free speech in a traditional public forum, does not further
8 any important or substantial government interest, and imposes restrictions that are greater than
9 necessary to further any government interest asserted.

10 13. Specifically but not exclusively, the ordinance is content-based because the main
11 purpose in enacting it was to suppress speech of a certain content and because it differentiates
12 speech based on the content of the speech. This includes, without limitation, the fact that the
13 ordinance elevates commercial speech over non-commercial speech by restricting “protest,
14 education, and counseling” but not other forms of speech such as panhandling and vending.

15 14. Specifically but not exclusively, the Ordinance is not narrowly tailored to serve any
16 significant governmental interest and imposes restrictions that are greater than necessary to further
17 such interests because, on its face and as applied, it restricts uninvited approaches as well as
18 unwanted and unwelcome approaches.

19 15. Any interest advanced by defendant to support the Ordinance is related to the
20 suppression of constitutional and statutory rights and is also minor compared to the infringement of
21 rights worked by the Ordinance.

22 16. Unless and until defendants are restrained by order of this Court, defendants, acting
23 through their officers, servants, agents and employees, will enforce the Ordinance.

24 17. Unless and until this Court declares the Ordinance unconstitutional, defendant, acting
25 through its officers, servants, agents and employees, will enforce the Ordinance.

26 18. All of the acts of the defendant, its officers, agents, servants, and employees, as alleged
27 herein, were done or are threatened to be done under color and pretense of the statutes, ordinances,
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1 regulations, customs, official policies, official procedures, and usages of the City of Oakland and the
2 State of California.

3 19. Plaintiff is suffering irreparable injury from the enforcement and threat of enforcement of
4 the Ordinance, and will continue to suffer irreparable injury until the threat of enforcement is lifted.

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6 **FIRST CAUSE OF ACTION**

7 **(42 U.S.C. § 1983: FREE SPEECH AND DUE PROCESS)**

8 20. Plaintiff incorporates by reference all preceding paragraphs as if fully restated here.

9 21. The Ordinance is an unconstitutional abridgment on its face, and as applied or threatened
10 to be applied, of the plaintiff's affirmative rights to freedom of speech under the United States
11 Constitution, First and Fourteenth Amendments.

12 22. The Ordinance, on its face and as applied or threatened to be applied, is an
13 unconstitutionally overbroad restriction on expressive activity.

14 23. The Ordinance, on its face and as applied or threatened to be applied, is an
15 unconstitutionally vague restriction on expressive activity.

16 24. The Ordinance, on its face and as applied or threatened to be applied, is a content-based
17 and viewpoint-based restriction on speech.

18 25. The Ordinance, on its face and as applied or threatened to be applied, does not serve a
19 significant governmental interest.

20 26. The Ordinance, on its face and as applied or threatened to be applied, does not leave
21 open ample alternative channels of communication.

22 27. The Ordinance, on its face and as applied or threatened to be applied, is neither narrowly
23 tailored nor the least restrictive means to accomplish any permissible governmental purpose sought
24 to be served by the legislation.

25 28. The Ordinance fails to adequately advise, notify, or inform persons threatened with
26 possible prosecution for violation of their requirements. Therefore, the Ordinance is
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1 unconstitutionally vague, on its face and as applied or threatened to be applied, in violation of the
2 due process guarantee of the Fourteenth Amendment to the United States Constitution.

3 29. The Ordinance is an irrational and unreasonable statute, imposing unjustifiable
4 restrictions on the exercise of protected constitutional rights. Because the Ordinance is irrational
5 and unreasonable, its application violates the due process guarantee of the Fourteenth Amendment
6 to the United States Constitution

7 30. The Ordinance, on its face and as applied or threatened to be applied, violates the Equal
8 Protection Clause of the Fourteenth Amendment to the United States Constitution and similar
9 guarantees in the California State Constitution by denying plaintiff free speech rights allowed to
10 others in similar situations and other protections of state and federal law.

11 **SECOND CAUSE OF ACTION**

12 **(42 U.S.C. SECTION 1983: EQUAL PROTECTION)**

13 31. Plaintiff incorporates by reference paragraphs 1 – 30 as if fully set forth herein.

14 32. The Ordinance, on its face and as applied or threatened to be applied, violates the Equal
15 Protection Clause of the Fourteenth Amendment. Specifically but not exclusively, the Ordinance
16 creates three classes: Persons entering abortion clinics, persons wishing to communicate with those
17 entering abortion clinics for the purposes of encouraging them to use clinic services, and persons
18 wishing to communicate with those entering abortion clinics for the purposes of encouraging them
19 to choose options other than utilizing clinic services.

20 33. These classifications have a direct bearing on the fundamental interest in free speech.
21 The City has no compelling interest justifying the creation of these classes and cannot show that
22 these classifications are necessary to serve any legitimate governmental interest.

23 34. The Ordinance singles out persons approaching abortion clinics as a class to be
24 specifically isolated from speech, and correspondingly burdens the speech of that class of persons
25 wishing to encourage them to choose options other than utilizing clinic services. These
26 classifications have a direct bearing on the fundamental interest in free speech. The City has no
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compelling interest justifying the creation of these classes and cannot show that these classifications are necessary to serve any legitimate governmental interest.

**THIRD CAUSE OF ACTION
(VIOLATION OF CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 2)**

35. Plaintiff incorporates paragraphs 1- 34 as if fully set forth herein.

36. The Ordinance, on its face and as applied or threatened to be applied, violates Article I, Section 2 of the California Constitution.

**FOURTH CAUSE OF ACTION
(VIOLATION OF EQUAL PROTECTION, CALIFORNIA CONSTITUTION
ARTICLE I, SECTION 7 AND ARTICLE IV, SECTION 16)**

37. Plaintiff incorporates paragraphs 1- 36 as if fully set forth herein.

38. The Ordinance, on its face as applied or threatened to be applied, violates Article I, section 7 and Article IV , section 16 of the California Constitution.

**FIFTH CAUSE OF ACTION
(VIOLATION OF CALIFORNIA CIVIL CODE §52.1)**

39. Plaintiff incorporates paragraphs 1- 38 as if fully set forth herein.

40. The Ordinance, on its face and as applied or threatened to be applied, interferes with plaintiff's exercise of the right to free speech and to assembly guaranteed by the First Amendment of the United States Constitution and Article I, §2 of the California Constitution, his right to be free from unlawful search and seizure guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §13 of the California Constitution, his rights under California's Unruh Act to be free from unlawful discrimination, and his equal protection rights under the 14th Amendment to the United States Constitution. This was and is a violation of California Civil Code §52.1.

1 41. Unless enjoined by this Court, defendants will continue to infringe plaintiff's
2 constitutionally protected rights and thereby cause irreparable injury, as damages alone cannot fully
3 compensate plaintiff for the ensuing harm. This threat of injury from continuing violations requires
4 injunctive relief.

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7 WHEREFORE, plaintiff prays that this Court:

8 (a) Enter judgment against the defendant;

9 (b) Award nominal damages against the defendant and in favor of the plaintiff;

10 (c) Enter a declaratory judgment declaring the acts of the defendant to be a violation of
11 plaintiff's constitutional rights to freedom of speech, equal protection, and due process;

12 (d) Issue a declaratory judgment declaring that Oakland Municipal Code Chapter 8.50 is
13 unconstitutional on its face;

14 (e) Issue a declaratory judgment declaring that Oakland Municipal Code Chapter 8.50 is
15 unconstitutional as enforced and as applied;

16 (f) Issue a temporary restraining order, and a preliminary and permanent injunction
17 enjoining defendants, their agents, servants, employees, officers and the City of Oakland Police
18 Department from enforcing Oakland Municipal Code Chapter 8.50;

19 (g) Award plaintiff costs, interest and reasonable attorneys' fees for this action pursuant to
20 42 U.S.C. §1988 and other relevant statutes; and,

21 (h) Order such other and further relief as the Court deems just and proper under the
22 circumstances.

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25 Dated: February 4, 2009



26 MICHAEL MILLEN, ESQ.
27 ATTORNEY FOR PLAINTIFF

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JURY DEMAND


Plaintiff hereby requests a jury trial in this matter.

Dated: February 4, 2009



MICHAEL MILLEN, ESQ.
ATTORNEY FOR PLAINTIFF

Approved as to Form and Legality


City Attorney

FILED
OFFICE OF THE CITY CLERK
OAKLAND

08 JAN 17 AM 3:10

AMENDED

OAKLAND CITY COUNCIL

Ordinance No. **12860** C.M.S.

Introduced by Councilmembers Nancy J. Nadel, Jane Brunner, and Jean Quan

**AN ORDINANCE AMENDING TITLE 8 OF THE CITY OF
OAKLAND MUNICIPAL CODE BY ADDING A NEW
CHAPTER, 8.50, ENTITLED "ACCESS TO REPRODUCTIVE
HEALTH CARE FACILITIES," AND NEW SECTIONS 8.50.010
THROUGH _____, TO PROTECT ACCESS TO
REPRODUCTIVE HEALTH CARE FACILITIES AND
CREATING A PRIVATE RIGHT OF ACTION FOR
VIOLATIONS OF THIS CHAPTER**

WHEREAS, safe and unimpeded access to reproductive health care services is critically and uniquely important to the public health, safety, and welfare so that persons desiring or needing access to such services should not be intimidated, hampered, impeded, harassed, or restrained from obtaining those services; and

WHEREAS, persons attempting to access reproductive health care facilities to obtain reproductive health care services have been subject to harassing or intimidating activity from extremely close proximity, tending to hamper or impede their access to those facilities and services; and

WHEREAS, such activity in close proximity subverts the right to privacy of those seeking reproductive health care services, a right that is protected by the United States Constitution and the Freedom of Access to Clinic Entrances Act, U.S.C.S. Section 248, and is explicitly guaranteed in California's Constitution, Article I, Section 1, including the right to seek and obtain all health care services permitted under the laws of this State; and

WHEREAS, such activity interferes with a person's right to seek reproductive health care services and counseling which such persons are entitled to seek and obtain; and

WHEREAS, offices and facilities that have patient stays of shorter duration may be more vulnerable to such subversion of rights on account of the layout and design of their facilities and parking areas as well as their staff deployment; and

Ex. A

WHEREAS, the facilities with the fewest resources for providing adequate security and safety to individuals seeking access to reproductive health services are those not affiliated with hospitals; and

WHEREAS, the adverse physiological and emotional effects created by such harassing or intimidating activities may pose health risks, interfere with medical treatment, diagnosis or recovery, or cause persons to delay or forego medical treatment; and

WHEREAS, this Ordinance does not preclude all protesting, picketing, demonstrating, leafleting, or educational activities near a facility providing reproductive health care services, and in particular, is not intended to preclude any lawful picketing, leafleting, and/or free speech, but is a necessary content-neutral time, place, and manner restriction intended to reconcile and protect the rights of persons rendering or seeking reproductive health care with the First Amendment rights of demonstrators; and

WHEREAS, existing federal and state laws do not adequately protect the rights of those seeking or providing reproductive health care services; now, therefore

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

Chapter 8.50 is added to the Oakland Municipal Code to read as follows:

Sec	Title and Purpose
Sec	Definitions
Sec	Prohibited Harassment of Individuals Seeking Access to Health Care Facilities
Sec	Enforcement
Sec	Accommodation of Competing Rights
Sec	Severability

Section 1. Title and Purpose. This chapter shall be known as the “access to reproductive health care facilities ordinance.” The City Council finds that every person in the City of Oakland has a basic and fundamental right to privacy protected by the United States Constitution and explicitly guaranteed in California’s Constitution, Article 1, Section 1, including the right to seek and obtain all health care services, permitted under the laws of this State. Central to this right is the need to secure access to all reproductive health care services. Access to these services is a matter of critical importance not only to the individual, but also to the health and welfare of all residents of the City of Oakland and the region. Intentional efforts to harass an individual or prevent that individual from exercising his or her right to seek and obtain reproductive health care services are therefore contrary to the interests of the people of Oakland.

This Ordinance is not intended to create any limited, designated, or general public fora. Rather it is intended to protect those who seek access to constitutionally protected reproductive health services from conduct which violates their rights.

Section 2. Definitions.

- a. “Reproductive health services” refers to all medical, surgical, counseling, referral, and informational services related to ~~the human reproductive system, including services during pregnancy or~~ the termination of a pregnancy, whether such services are provided in a clinic, physician’s office, or other facility other than a licensed hospital, but not if provided at a clinic or other facility owned and/or operated by a licensed hospital.
- b. “Reproductive health care facility” refers to a facility licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2 of the Health and Safety code or any other facility that provides ~~primarily~~ reproductive health services that is not licensed as a hospital, and is not owned, and/or operated by a licensed hospital.
- ~~e.~~ ~~“Primarily” means 51% or more of the services provided.~~
- ~~d.~~ “Harassing” means the non-consensual and knowing approach within eight feet of another person or occupied motor vehicle for the purpose of passing a leaflet or handbill, to display a sign to, or engage in oral protest, education, or counseling with such other person in a public way or on a sidewalk area within 100 feet of the entrance of a reproductive health care facility.
- ~~e.~~ “Interfering” means to restrict a person’s freedom of movement or access to or egress from a reproductive health care facility.
- ~~e.~~ “Counseling” means engaging in conversation with, displaying signs to, and/or distributing literature to individuals seeking access to, passage from, or services within the reproductive health care facility, ~~in an effort to harass, intimidate, or persuade that individual not to access such reproductive health services.~~
- ~~f.~~ “Eight feet” shall be measured from any extension of the body of the individual seeking access to, passage from, or services within the reproductive health care facility, and/or the exterior of any occupied motor vehicle, to any extension of the body of, or any sign or object held by another person.
- ~~g.~~ “Providing reproductive health services” shall include doctors, nurses, any employee of a reproductive health care facility and volunteers who, with the consent of the reproductive health care facility, assist in conducting patients of such facility safely into the facility.

Section 3. Prohibited Harassment of Individuals Seeking Access to Health Care Facilities.

- a. It shall be unlawful to use force, threat of force, or physical obstruction to intentionally injure, harass, intimidate, or interfere with or attempt to injure, harass, intimidate, or interfere with any person because that person will be, is, or has been, providing or obtaining reproductive health services.
- b. Within 100 feet of the entrance of a reproductive health care facility, it shall be unlawful to willfully and knowingly approach within eight (8) feet of any person seeking to enter such a facility, or any occupied motor vehicle seeking entry, without the consent of such person or vehicle occupant, for the purpose of counseling, harassing, or interfering with such person or vehicle occupant ~~in connection with seeking reproductive health services, or for the purpose of interfering with that person's or vehicle occupant's obtaining or providing reproductive health services.~~
- c. Within 100 feet of the entrance of a reproductive health care facility, it shall be unlawful to willfully and knowingly approach within eight (8) feet of any person seeking to enter such a facility, or any occupied motor vehicle seeking entry, for the purpose of injuring or intimidating such person or vehicle occupant in connection with seeking reproductive health services.

Section 4. Enforcement.

- a. Any person who shall be convicted of a violation of subsection 3 above shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the County jail for not more than one year, or by a fine not to exceed two thousand dollars (\$2,000), or by both such fine and imprisonment.
- b. Civil Remedies:
 - i. Any person providing, seeking to provide, or seeking reproductive health services who is aggrieved by conduct prohibited by this ordinance may commence a civil action in the Courts of the State of California.
 - ii. In any action commenced under subparagraph a. of this subsection, the court may award appropriate relief, including temporary, preliminary, or permanent injunctive relief and compensatory and exemplary damages and reasonable fees for attorneys and expert witnesses. With respect to damages, at any time before final judgment, plaintiff may elect to recover, in lieu of compensatory damages, an award of statutory damages in the amount of \$5,000 per violation.

Section 5. Accommodation of Competing Rights. In adopting this legislation, the Oakland City Council recognizes both the fundamental constitutional right to assemble peacefully and to demonstrate on matters of public concern, as well as the right to seek and obtain health care. This legislation promotes the full exercise of these rights and strikes an appropriate accommodation between them.

Nothing in this Ordinance shall be construed to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the United States Constitution, the California Constitution or any federal or California statute.

Section 6. Severability. If any part, provision, or clause of this Ordinance or the application thereof to any person or circumstance, is held to be invalid by a court of competent jurisdiction, all other provisions and clauses hereof, including the application of such provisions and clauses to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

IN COUNCIL, OAKLAND, CALIFORNIA, FEB 5 2008

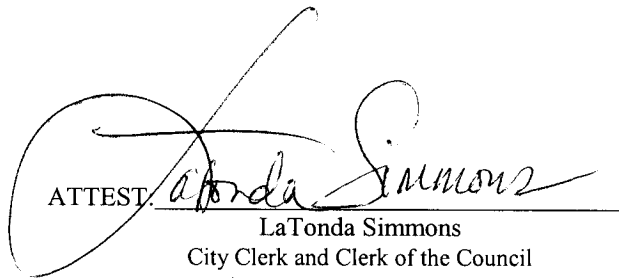
PASSED BY THE FOLLOWING VOTE:

AYES – BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, and
PRESIDENT DE LA FUENTE - 8

NOES – 0

ABSENT – 0

ABSTENTION – 0

ATTEST. 
LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California

Introduction Date: **JAN 15 2008**

Date of Attestation: February 8, 2008

CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney
John A. Russo
City Attorney
Vicki Laden

May 28, 2008

(510) 238-3601
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(510) 238-4941

Via Electronic Filing

The Honorable Charles R. Breyer
U.S. District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Walter B. Hoye, II v. City of Oakland*
U.S. District Court Case No. C07-06411 CRB
Our File No. X03107

Dear Judge Breyer:

The City of Oakland files the attached Training Bulletin in response to the Court's directive.

Very truly yours,

JOHN A. RUSSO
City Attorney

A handwritten signature in black ink, appearing to read 'Vicki Laden', with a long, sweeping underline.

By:
VICKI LADEN
Supervising Deputy City Attorney

Enclosure

Ex. B

TRAINING



BULLETIN

Effective Date:
1 May 08

Index Number: V-M.1
Alpha Index: Bubble Ordinance

Evaluation Coordinator: BFO Deputy Chief
Automatic Revision Cycle: 3 Years

"Department Training Bulletins shall be used to advise members of current police techniques and procedures and shall constitute official policy."

BUBBLE ORDINANCE

INTRODUCTION

On February 5, 2008, the City Council passed Ordinance No. 12860, hereafter referred to as the "Bubble Ordinance," protecting access to reproductive health care facilities. As stated in the Ordinance, safe and unimpeded access to reproductive health care services is critically and uniquely important to public health, safety, and welfare. Harassing and intimidating behavior has adverse physiological and emotional effects, such as interfering with medical treatment, diagnosis or recovery, or causing persons to delay or forego medical treatment. The "Bubble Ordinance" protects persons attempting to access reproductive health care facilities, and those who provide reproductive health care services, from such harassing or intimidating behavior, as defined in the Ordinance and explained in detail below.

PROTECTED INDIVIDUALS

The Ordinance protects patients or persons seeking reproductive health care services, doctors, nurses, employees of a reproductive health care facility, and volunteers (escorts) who assist with the ingress and egress of patients to such facilities.

PROHIBITED BEHAVIOR

The Ordinance is comprised of three (3) sections defining prohibited behavior under the Ordinance. Section 3(a) prohibits the following types of behavior, regardless of where the behavior occurs:

- Use of force;
- Threat of force;
- Physical obstruction to intentionally injure, harass, intimidate, or interfere with a person who is or will be providing or obtaining reproductive health services; or
- Attempting to injure, harass, intimidate, or interfere with a person who is or will be providing or obtaining reproductive health services.

Section 3(b) and 3(c) provide a "bubble" of protection for those seeking or providing reproductive health services. It prohibits certain behavior that occurs within 100 feet of the entrance of a reproductive health facility. This includes all entrances to the facility, not just the main entrance. The Ordinance makes it unlawful to:



Bubble Ordinance, Index Number V-M.1

- Willfully and knowingly approach within eight (8) feet of any person seeking to enter or exit a reproductive health care facility, without the consent of such person, for the purposes of counseling, harassing or interfering with such person;
- Willfully and knowingly approach within eight (8) feet of any occupied motor vehicle seeking entry to a reproductive health care facility, without the consent of such person, for the purposes of counseling, harassing or interfering with such person;
- Willfully and knowingly approach within eight (8) feet of any person seeking to enter or exit a reproductive health care facility for the purposes of injuring or intimidating such person seeking reproductive health services; or
- Willfully and knowingly approach within eight (8) feet of any occupied motor vehicle seeking entry to a reproductive health care facility for the purposes of injuring or intimidating such person seeking reproductive health services.

“Harassment” is defined as:

Non-consensual and intentional approach within eight (8) feet of another person or occupied motor vehicle in a public way or on a sidewalk area within 100 feet of the entrance of a reproductive health care facility for the purposes of:

- passing a leaflet or handbill;
- to display a sign to; or
- to engage in oral protest, education, or counseling with such person.

“Interfering” is defined as:

Restricting “a person’s freedom of movement or access to or egress from a reproductive health care facility.” In other words, the Ordinance prohibits interference with both entrance to and exit from the facility.

“Counseling” is defined as:

- Engaging in conversation with;
- Displaying signs; or
- Distributing literature.

Finally, the eight (8) foot “bubble” is measured from any extension of the body of the individual seeking access to, passage from, or services within the health care facility and/or the exterior of any occupied motor vehicle, to any extension of the body of, or any sign or object held by another person.

“Approach,” though not defined in the Ordinance, means to come near or nearer to.

“Intimidate,” though not defined in the Ordinance, means any act reasonably calculated to make a person timid, force him/her into action or deter from some action by inducing fear or physical or emotional harm.



EXAMPLES OF PROHIBITED BEHAVIOR

Prohibited behavior includes, but is not limited to:

- Non-consensual approach within eight (8) feet of an individual/patient seeking reproductive health care services to hand the patient a leaflet. (within 100 feet of the facility)
- Non-consensual approach within eight (8) feet of an escort of an individual/patient seeking reproductive health care services by displaying a sign. (within 100 feet of the facility)
- Non-consensual approach within eight (8) feet of an individual/patient seeking reproductive health care services to speak with (engage in oral protest, education, or counseling) of a patient or escort. (within 100 feet of the facility)
- Non-consensual approach within eight (8) feet of an occupied car or other motor vehicle to pass a leaflet, display a sign to, or speak with the occupant. (within 100 feet of the facility)
- Engaging in harassing or intimidating behavior toward a patient, employee, or volunteer of the reproductive health care facility.
- Blocking access to or exit from a reproductive health care facility.

CIVIL PENALTIES

The Ordinance provides for a private right of action in civil court. A court may award appropriate relief for violation of the statute, including temporary, preliminary, or permanent injunctive relief and compensatory and exemplary damages and reasonable fees for attorneys and expert witnesses. A plaintiff may elect to recover statutory damages in the amount of \$5,000 per violation instead of compensatory damages.

CRIMINAL PENALTIES

Any person convicted of violating the Ordinance is guilty of a misdemeanor punishable by imprisonment in the County jail for not more than one (1) year, or by fine that does not exceed two thousand (\$2,000), or by both such fine and imprisonment.

ENFORCEMENT ACTION

The Ordinance shall be enforced by citing the violator with Oakland Municipal Code Section 8.50.010 utilizing one of the following procedures:

1. Private Person Arrest Request

The responding member shall receive the violator from the private person and:

- Issue a citation in accordance with the provision of Department General Order (DGO) M-7, CITATIONS FOR ADULT MISDEMEANORS or DGO O-3, PROCESSING JUVENILE OFFENDERS; **OR**



Bubble Ordinance, Index Number V-M.1

- If not eligible for a citation, take the violator into physical custody.

2. On-View

Any member who witnesses a violation of this Ordinance shall detain the violator (if circumstances permit), complete a preliminary investigation (including any appropriate statements from the "victim" or other witnesses), and take appropriate enforcement action.

3. Offense Report

Officers shall complete a Crime Report to document all complaints, including instances in which insufficient evidence exists to make an arrest. These reports play a key role in establishing grounds for future civil action. Officers shall route a copy of any report for offenses occurring at a reproductive health clinic to the Intelligence Division.

The Intelligence Division, shall provide a copy of the offense report to the F.B.I. Bay Area Counterterrorism Task Force.

REPORTING REQUIREMENTS

The Anti-Reproductive Rights Crime Bill requires the monthly reporting of crimes defined under 423.1 PC & 13776 PC to DOJ. These violations can include crimes against persons regardless of where the crime occurred when a nexus to a reproductive facility can be established.

To meet the mandates outlined in this Act, the Attorney General is requesting all law enforcement agencies to comply with the following reporting requirements beginning on July 1, 2002:

- Personnel taking a report shall collect information relating to each violation of 423.2 PC subsections (a), (c), and (e), and prepare and submit an Anti-Reproductive-Rights Crimes (ARRC) Data Collection Worksheet (BCIA 8371) with the Offense Report.
- The Records Division shall collect all Data Collection Worksheets and prepare an ARRC Summary Worksheet (BCIA 8370) for each 423.2 PC subsections (a), (c), and (e) crime by the 10th day of each month for the preceding month.

Submit only the Summary Worksheet and complete the section provided for "negative reporting" when there are no violations of 423.2 PC subsections (a), (c), and (e) occurring within the month.

Forms and instructions are attached to this Training Bulletin or may be downloaded from <http://clew.doj.ca.gov> (Requires opening an account with password).

PROOF OF SERVICE
Walter B. Hoye, II v. City of Oakland
U.S. District Court Case No. C 07-06411 CRB

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is City Hall, One Frank H. Ogawa Plaza, 6th Floor, Oakland, California 94612. On date shown below, I served the within documents:

City of Oakland Training Bulletin: Bubble Ordinance

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California, addressed as set forth below.
- by causing personal delivery by messenger of the document(s) listed above to the person(s) at the address(es) set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by causing such envelope to be sent by Federal Express/Express Mail.
- by e-mail or electronic transmission, I caused the document(s) listed above to be sent to the person(s) at the address(es) set forth below.

Via Email:

Michael Millen
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119 Calle Marguerita, Suite 100
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Attorney for Plaintiff
WALTER B. HOYE, II

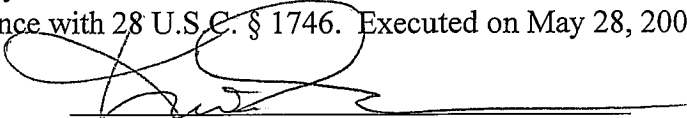
Via U.S. Mail

Catherine Short, Esq.
Life Legal Defense Foundation
P.O. Box 1313
Ojai, CA 93024
Telephone: (805) 640-1940

Attorney for Plaintiff
WALTER B. HOYE, II

I am readily familiar with the City of Oakland's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the United State of America that the foregoing is true and correct in accordance with 28 U.S.C. § 1746. Executed on May 28, 2008, at Oakland, California.



Kristin Ericsson