

A rare victory for the homeless

Berkeley woman's challenge leads to repeal of unconstitutional loitering ordinance.

From the East Bay Community Law Center

The City of Berkeley has repealed a 1946 loitering ordinance after its constitutionality was challenged in court by a woman who is homeless and disabled. Although a law school graduate, Kim Nemirow, had no intention of repealing a law when she sat on a blanket in Berkeley's Willard Park in April 2007 with her wheelchair nearby. But, when Berkeley Police issued her a citation for loitering, Nemirow fought back and won. On July 8, 2008, the City Council voted to repeal the ordinance. "It makes it a little more difficult to criminalize homeless people," Nemirow says about the repeal.

A member of the Berkeley Mental Health Commission, who has been intermittently homeless, Nemirow was relaxing on the grass in Willard Park when she was approached by police in April 2007. Although there were other people in the park at the time, Nemirow was singled out by an officer who asked what she was doing there and told her to move along. The officer went on to warn Nemirow that if she did not move fast enough, he and another officer would help her move. She prepared to leave, gathered her belongings, and got into her wheelchair. Still, the officer issued Nemirow a citation for a violation of Berkeley Municipal Code section 13.36.040: "It is unlawful for any person to loiter about any school or public place at or near which schoolchildren attend."

Although Nemirow was not the only visitor in the park, she was the only person cited. "I was in an impossible situation where there was no place for me even to rest," she says. "I just felt I had to do something," Nemirow concluded. So, she sought the legal assistance of Attorney Osha Neumann at East Bay Community Law Center to challenge the citation in court and ask that the charges be dismissed on the grounds that the ordinance was unconstitutional.

In successfully arguing the case, Neumann cited a 1990 opinion by the current Berkeley Assistant City Attorney, Matthew Orebic, in which he acknowledged that such loitering laws are "void for vagueness" and "encourage arbitrary and discriminatory enforcement." The City of Berkeley did not oppose Nemirow's motion to dismiss the case. The court dismissed the charges against her. The City Attorney agreed to ask the Berkeley City Council to pass an ordinance rescinding the loitering ordinance, which it did on July 8. Now that the ordinance has been repealed, Nemirow says, "I'm glad, but the problem of attitude and policy remains."

Neumann, who provides citation defense for people who are homeless, said, "I appreciate that the City Council moved quickly to repeal this antiquated ordinance. These kinds of laws remain in the statute books long after their shelf life." He continued, "This one just didn't make any sense at all. What the heck are parks for, if not for loitering? It's only poor people who loiter. The rich never loiter. They just engage in leisure time activities."

The East Bay Community Law Center was founded in 1988 by students at the University of California, Berkeley, School of Law. Today, the Law Center is the East Bay's largest provider of free legal services and a nationally-recognized teaching clinic. Each year more than 5,000 community members receive free legal advocacy from more than 100 students under the supervision of more than a dozen full-time Law Center staff attorneys. Law students come from Berkeley Law and from law schools around the country to train at the Law Center and provide assistance to clients in the areas of housing, health care, immigration, income, community reentry, and economic justice. Visit the Web Site, www.ebclc.org.

Copyright © 2008 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**