

Senate Substitute for HOUSE BILL No. 2016

AN ACT concerning civil actions and civil procedure; enacting the act against abusive website access litigation; creating a civil action for determining whether litigation that alleges any website access violation under the Americans with disabilities act or similar law constitutes abusive litigation and authorizing penalties for such abusive litigation.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) (1) This section shall be known and may be cited as the act against abusive website access litigation.

(2) The purpose of this section is to restrict abusive litigation while allowing for meritorious litigation. It has long been declared to be the policy of this state pursuant to the Kansas act against discrimination, K.S.A. 44-1001, et seq., and amendments thereto, that people with disabilities must be assured equal opportunities to full access to public accommodations and that they are empowered to enforce the right to equal access through litigation, if necessary. The legislature recognizes, however, that in a small minority of cases, the use of litigation to assert the right to equal access is being abused for the primary purpose of obtaining an award of attorney fees for the plaintiff instead of remedying the alleged access violation. This small minority of cases often involve an alleged lack of equal access to a public accommodation's internet site and are almost always filed in another state's court system against smaller Kansas businesses. In most cases, the litigation is filed without notifying the public accommodation of the alleged violation, attempting to resolve the issue pre-litigation and providing a reasonable opportunity for the public accommodation to revise its website to remedy the alleged access violation. In order to address the abuse of the legal system by litigants claiming lack of equal access to websites under state and federal anti-discrimination statutes, the state intends to provide a process to curb abusive litigation to mitigate the harms that abusive litigation perpetuates. The state, however, intends that this process shall not be used to preclude a person with a disability from asserting their right to equal access to a public accommodation under the law either as an individual or as a class through litigation in a court in this state brought in good faith to remedy an alleged equal access violation and not for the primary purpose to obtain an award of attorney fees for the plaintiff. The lack of standards issued by the federal department of justice concerning website accessibility under title III of the federal Americans with disabilities act has resulted in the need for this process.

(b) (1) Pursuant to chapter 60 of the Kansas Statutes Annotated, and amendments thereto, the attorney general, on behalf of a class of residents under K.S.A. 60-223, and amendments thereto, that is subject to litigation that alleges any website access violation and any resident of this state that is subject to litigation that alleges any website access violation may file a civil action in any court of competent jurisdiction within this state against the party, attorney or law firm that initiated such litigation for a determination as to whether or not such litigation alleging a website access violation is abusive litigation.

(2) In determining whether any litigation that alleges any website access violation constitutes abusive litigation, the trier of fact shall consider the totality of the circumstances to determine if the primary purpose of the litigation that alleges a website access violation is obtaining a payment from a defendant due to the costs of defending the action in court. For the purposes of making this determination, the trier of fact may assess the following factors and any other factors the trier of fact deems relevant:

(A) The number of substantially similar actions filed by the same plaintiff, lawyer or law firm or the history of such plaintiff, lawyer or law firm in bringing frivolous litigation or other litigation declared by a court to be abusive litigation in the past 10 years;

(B) the number of full-time employees employed by the defendant and the resources available to the defendant to engage in the litigation;

(C) the resources available to the defendant to correct the alleged website access violation;

(D) whether the jurisdiction or venue where the action is brought is a substantial obstacle to defending against the litigation;

(E) whether the filing party or lawyer filing the litigation is a resident of this state or is licensed to practice law in this state;

(F) the nature of settlement discussions and the reasonableness of settlement offers and refusals to settle. The application of such settlement information shall only be used as provided by this section and shall not otherwise alter the rules of evidence applicable to such court; and

(G) whether any factors under K.S.A. 60-211(b), and amendments thereto, exist in the litigation and whether sanctions are appropriate under K.S.A. 60-211(c), and amendments thereto.

(3) Except as provided further, if the defendant in the litigation that alleges a website access violation in good faith attempts to cure the alleged violation within 30 days after being provided written notice or being served a petition or complaint with sufficient detail to identify and correct the alleged violation, there shall be a rebuttable presumption that the subsequent initiation or continuance of litigation that alleges a website access violation constitutes abusive litigation. There shall not be a rebuttable presumption that such litigation is abusive litigation if the alleged website access violation is not corrected, as determined by the court, within 90 days after being provided written notice or being served a petition or complaint with sufficient detail to identify and correct the alleged violation. The trier of fact shall not determine whether such litigation is abusive litigation until after such 90-day period expires or the alleged violation is corrected, as determined by the court, whichever occurs first.

(c) If the Kansas attorney general determines in writing that the litigation alleging a website access violation is not abusive and such written determination is attached to the petition in the litigation alleging a website access violation, there shall be a rebuttable presumption that such litigation is not abusive.

(d) If the trier of fact determines that an initiator of an action under subsection (b) is a defendant in abusive litigation, the court may award reasonable attorney fees and costs in bringing the action under subsection (b) as well as defending against the abusive litigation to be paid by the party bringing the abusive litigation. In addition, the court may award punitive damages or sanctions not to exceed three times the amount of attorney fees awarded by the court.

(e) At the conclusion of the litigation alleging a website access violation, the court shall review any determination that litigation is abusive and any award of attorney fees under the Kansas rules of professional conduct to determine the reasonableness of the award before issuing a judgment. The results obtained in the litigation alleging a website access violation shall be weighed heavily, particularly if the litigation was resolved in favor of the plaintiff.

(f) As used in this section:

(1) "Access violation" means any allegation that a public accommodation does not provide sufficient access under the federal Americans with disabilities act, chapter 39, 44 or 58 of the Kansas Statutes Annotated, and amendments thereto, or any other similar allegation under state or federal law;

(2) "public accommodation" means the same as defined in 42 U.S.C. § 2000 et seq. For the purposes of this section, "public accommodation" includes a website operated by a resident of this state; and

(3) "resident of this state" means any person residing in Kansas and any entity that has filed with the Kansas secretary of state's office pursuant to chapter 17 of the Kansas Statutes Annotated, and amendments thereto.

(g) If the federal department of justice issues standards concerning website accessibility under title III of the federal Americans with disabilities act, the attorney general shall certify to the secretary of state that such standards have been issued. Upon receipt of such certification, the secretary of state shall cause a notice of such certification to be published in the Kansas register. The provisions of this section shall expire on the date such certification is published in the Kansas register.

Sec. 2. This act shall take effect and be in force from and after its publication in the Kansas register.

I hereby certify that the above BILL originated in the House,
and passed that body

HOUSE concurred in _____
SENATE amendments _____

Speaker of the House.

Chief Clerk of the House.

Passed the SENATE _____
as amended _____

President of the Senate.

Secretary of the Senate.

APPROVED _____

Governor.