

Senate Substitute for HOUSE BILL No. 2016

By Committee on Judiciary

3-22

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

6

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

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

10 (2) The purpose of this section is to restrict abusive litigation while
11 allowing for meritorious litigation. It has long been declared to be the
12 policy of this state pursuant to the Kansas act against discrimination,
13 K.S.A. 44-1001, et seq., and amendments thereto, that people with
14 disabilities must be assured equal opportunities to full access to public
15 accommodations and that they are empowered to enforce the right to equal
16 access through litigation, if necessary. The legislature recognizes, however,
17 that in a small minority of cases, the use of litigation to assert the right to
18 equal access is being abused for the primary purpose of obtaining an
19 award of attorney fees for the plaintiff instead of remedying the alleged
20 access violation. This small minority of cases often involve an alleged lack
21 of equal access to a public accommodation's internet site and are almost
22 always filed in another state's court system. In most cases, the litigation is
23 filed without notifying the public accommodation of the alleged violation,
24 attempting to resolve the issue pre-litigation and providing a reasonable
25 opportunity for the public accommodation to revise its website to remedy
26 the alleged access violation. In order to address the abuse of the legal
27 system by litigants claiming lack of equal access under state and federal
28 anti-discrimination statutes, the state intends to provide a process to curb
29 abusive litigation to mitigate the harms that abusive litigation perpetuates.
30 The state, however, intends that this process shall not be used to preclude a
31 person with a disability from asserting their right to equal access to a
32 public accommodation under the law either as an individual or as a class
33 through litigation in a court in this state brought in good faith to remedy an
34 alleged equal access violation and not for the primary purpose to obtain an
35 award of attorney fees for the plaintiff.

36 (b) (1) Pursuant to chapter 60 of the Kansas Statutes Annotated, and

1 amendments thereto, the attorney general, on behalf of a class of residents
2 under K.S.A. 60-223, and amendments thereto, that is subject to litigation
3 that alleges any access violation and any resident of this state that is
4 subject to litigation that alleges any access violation may file a civil action
5 in any court of competent jurisdiction within this state against the party,
6 attorney or law firm that initiated such litigation for a determination as to
7 whether or not such litigation alleging an access violation is abusive
8 litigation.

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

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

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

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

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

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

30 (F) whether a defendant in the litigation that alleges an access
31 violation in good faith attempts to cure such alleged access violation
32 within 30 days after being provided written notice or being served a
33 petition or complaint with sufficient detail to identify and correct any
34 alleged access violation. If the defendant in good faith attempts to cure
35 such alleged access violation, there shall be a rebuttable presumption that
36 the subsequent initiation or continuance of litigation that alleges an access
37 violation constitutes abusive litigation; and

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

41 (c) If the Kansas attorney general determines in writing that the
42 litigation alleging an access violation is not abusive and such written
43 determination is attached to the petition in the litigation alleging an access

1 violation, there shall be a rebuttable presumption that such litigation is not
2 abusive.

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

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

17 (f) As used in this section:

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

23 (2) "public accommodation" means the same as defined in 42 U.S.C.
24 § 2000 et seq. For the purposes of this section, "public accommodation"
25 includes a website operated by a resident of this state; and

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

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