

**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 *{website}* access litigation; creating a civil action for  
3 determining whether litigation that alleges any *{website}* access  
4 violation under the Americans with disabilities act or similar law  
5 constitutes abusive litigation and authorizing penalties for such abusive  
6 litigation.

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

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

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

1 award of attorney fees for the plaintiff. *{The lack of standards issued by*  
2 *the federal department of justice concerning website accessibility under*  
3 *title III of the federal Americans with disabilities act has resulted in the*  
4 *need for this process.}*

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

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

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

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

28 (C) *{the resources available to the defendant to correct the alleged*  
29 *website access violation;*

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

32 ~~(D)}~~*{(E)}* whether the filing party or lawyer filing the litigation is a  
33 resident of this state or is licensed to practice law in this state;

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

38 *{and}*

39 ~~(F) whether a defendant in the litigation that alleges an access~~  
40 ~~violation in good faith attempts to cure such alleged access violation~~  
41 ~~within 30 days after being provided written notice or being served a~~  
42 ~~petition or complaint with sufficient detail to identify and correct any~~  
43 ~~alleged access violation. If the defendant in good faith attempts to cure~~

1 ~~such alleged access violation, there shall be a rebuttable presumption that~~  
2 ~~the subsequent initiation or continuance of litigation that alleges an access~~  
3 ~~violation constitutes abusive litigation; and~~

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

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

22 (c) If the Kansas attorney general determines in writing that the  
23 litigation alleging ~~an~~ ***{a website}*** access violation is not abusive and such  
24 written determination is attached to the petition in the litigation alleging ~~an~~  
25 ***{a website}*** access violation, there shall be a rebuttable presumption that  
26 such litigation is not abusive.

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

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

41 (f) As used in this section:

42 (1) "Access violation" means any allegation that a public  
43 accommodation does not provide sufficient access under the federal

1 Americans with disabilities act, chapter 39, 44 or 58 of the Kansas Statutes  
2 Annotated, and amendments thereto, or any other similar allegation under  
3 state or federal law;

4 (2) "public accommodation" means the same as defined in 42 U.S.C.  
5 § 2000 et seq. For the purposes of this section, "public accommodation"  
6 includes a website operated by a resident of this state; and

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

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

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