

HOUSE BILL 540

By Matlock

AN ACT to amend Tennessee Code Annotated, Title 29 and Title 39, relative to actions against local government units and local public servants.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 29, is amended by adding Sections 2 through 6 of this act as a new, appropriately designated chapter.

SECTION 2. This chapter shall be known and may be cited as the "Local Government Interference Protection Act."

SECTION 3. The general assembly finds the following:

(1) There has been a rising number of lawsuits filed, and statements made that threaten lawsuits, against local governments in this state, challenging on establishment clause grounds the practices of commencing meetings of legislative bodies or school-related events with voluntary, non-denominational prayers, or displaying replicas of historically significant documents on public property;

(2) The supreme court of the United States has ruled that the establishment clause of the first amendment to the United States constitution requires that government neither advance nor inhibit religion;

(3) Article 1, Section 3, of the constitution of Tennessee provides that "no preference shall ever be given, to any religious establishment or mode of worship";

(4) The United States supreme court and federal courts have further ruled that legislative prayer is a unique practice that is historically accepted, and is constitutionally permissible, in large part, because of its historical acceptance;

(5) The supreme court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), the only opinion in which the supreme court has addressed the issue of legislative

prayer, found that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country";

(6) The Marsh court ruled that a legislative body may begin its public meetings with a non-denominational prayer; provided, that the government ensures that its public recitation does not proselytize listeners, advance or endorse one religion or disparage another, or otherwise affiliate the government with any specific faith or belief;

(7) The increase in lawsuits challenging prayer and invocations in public meetings and the display of historical documents has resulted in rising legal costs, including substantial attorney fee awards to plaintiffs, incurred by local governments to defend against such claims;

(8) The threat of costly litigation expenses, and the potential loss of taxpayer money, resulting from such claims seriously interferes with the efficient and economical operation of local governments;

(9) The purpose of this chapter is to create a safe harbor for local governments desiring to avoid needless litigation and to encourage them to adopt a resolution or written policy governing invocation practices to the extent permissible under the establishment clause; and

(10) The general assembly finds that affording local governments adequate prelitigation notice and a reasonable period of time to cure an alleged violation is a narrowly tailored method to balance a claimant's interest in having meaningful access to the courts with the potential, substantial harm of burdensome litigation that diminishes the local government and the courts' scarce resources.

SECTION 4. As used in this chapter, unless the context otherwise requires:

(1) "Claimant" means any person asserting an alleged violation of the establishment clause without or prior to filing an establishment clause claim, or any person filing an establishment clause claim against a local government unit or local public servant;

(2) "Establishment clause" means the portion of article 1, section 3 of the constitution of Tennessee that prohibits laws respecting an establishment of religion or mode of worship;

(3) "Establishment clause claim" or "claim" means any allegation or contention asserted in support of or in opposition to any complaint, lawsuit, or other pleading filed in any state or federal court of this state, and which claim alleges a violation of the establishment clause;

(4) "Local government unit" means any municipality, county, including any county having a metropolitan form of government, or school district in this state. "Local government unit" includes any governing body, court, board, commission, committee or department of a municipality, county, or school district;

(5) "Local public servant" means any official, employee, member, or agent of a local government unit; and

(6) "Person" means any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust.

SECTION 5.

(a)

(1) At least sixty (60) days prior to any claimant filing an establishment clause claim against a local government unit or local government servant, the claimant or the claimant's attorney shall provide written notice of the potential claim to the local government unit or local public servant who the claimant intends to name as a defendant. No such action shall be commenced until such notice has been provided.

(2) The written notice shall be provided to the local government unit or local public servant by certified mail, return receipt requested.

(3) The written notice shall state:

(A) The state constitutional provision of which the local government unit or local public servant's policy, practice, action or custom is alleged to be in violation;

(B) The specific facts that constitute the alleged violation of the constitutional provision, including the policy, practice, action or custom that caused the alleged violation; provided, that the facts shall be in sufficient detail to permit the local government unit or local public servant to understand the basis upon which a violation is claimed;

(C) That, prior to the expiration of the sixty-day period referred to in subdivision (b)(1), a local government unit or local public servant which receives notice in accordance with this section shall respond in any one (1) of the methods described in Section 5(b); and

(D) That the local government unit or local public servant should contact legal counsel regarding any questions about the notice or the local government unit or local public servant's rights under state law.

(b) Beginning with the date of notice, the local government unit or local public servant shall have sixty (60) days to respond by certified mail, return receipt requested, to the claimant, and shall state one (1) of the following:

(1) That a policy, practice, action or custom will be altered, or a resolution or written policy will be implemented, to bring the local government unit or local public servant into compliance with the establishment clause;

(2) That the local government unit or local public servant challenges the validity of the alleged violation. The local government unit or local public servant may also state a rebuttal to the allegations;

(3) That the alleged violation identified by the claimant is the same or similar to previous alleged violations that have been corrected to comply with the establishment clause, and that the policy, practice, action or custom has been altered, or a resolution or written policy has been implemented, to bring the local policy, practice, action or custom into compliance. The local government unit or local public servant shall also attach evidence that verifies the policy, practice, action or custom; or

(4) That the alleged violation is the same as a previous allegation that was determined not to be a violation.

(c)

(1) If the local government unit or local public servant responds in the manner described in subdivision (b)(1), the local government unit or local public servant shall have one hundred twenty (120) days to alter its policy, practice, action or custom, or implement a resolution or written policy, to bring the policy, practice, action or custom into compliance with the establishment clause. The one-hundred twenty-day period shall begin on the date the claimant receives a response from the local government unit or local public servant. A response pursuant to subdivision (b)(1) shall be inadmissible in any future lawsuits based on the same facts filed against the local government unit or local public servant.

(2) If, within the one-hundred twenty-day period, the local government unit or local public servant has not taken action described by subdivision (b)(1) to bring the policy, practice, action or custom into compliance with the establishment clause, the claimant may file an establishment clause claim; provided, that the claimant submits the affidavit and accompanying documentation required by Section 6 of this act.

(3)

(A) If the local government unit or local public servant has taken action described by subdivision (b)(1) within the one-hundred twenty-day period prescribed by subdivision (c)(1), no establishment clause claim may be brought against the local government unit or local public servant.

(B)

(i) If the local government unit or local public servant takes action as described in subdivision (b)(1) in response to a written notice and the claimant disputes the constitutional validity of the action taken, the claimant shall send a second written notice by certified mail, return receipt requested, stating why the claimant believes the action taken fails to correct the alleged violation. The local government unit or local public servant shall have an additional thirty (30) days after the date of the second written notice to bring the policy, practice, action or custom into compliance with the establishment clause.

(ii) If, within the thirty-day period, the local government unit or local public servant does not take action as described in subdivision (b)(1), the claimant may file an establishment clause claim; provided, that the claimant submits the affidavit and accompanying documentation pursuant to Section 6 of this act.

(iii) If the local government unit or local public servant takes action described in subdivision (b)(1) within the thirty-day period prescribed by subdivision (c)(3)(B)(i), no claim may be brought against the local government unit or local public servant.

(4) If a claimant files an establishment clause claim prior to the expiration of the one-hundred twenty day period, or otherwise fails to comply with the requirements of this section or Section 6 of this act, the claimant shall not be entitled to receive, and the court shall order the claimant to pay, any litigation expenses, including attorney's fees, discretionary costs, and other costs.

(d) If the local government unit or local public servant responds pursuant to subdivision (b)(2), the claimant may file an establishment clause claim, subject to any applicable statute of limitations, any time after receipt of the response by the local government unit or local public servant.

(e) When notice is provided pursuant to this section, the statute of limitations applicable to any action asserting an establishment clause claim shall be extended for a period of one hundred fifty (150) days from the date of expiration of the statute of limitations.

(f) Notices provided pursuant to this section shall not be used to request the production of documents for purposes of litigation or to request public records from the local government unit or local public servant.

SECTION 6.

(a) Any claimant or claimant's attorney filing an establishment clause claim in any state or federal court of this state that names any local government unit or local public servant as a defendant shall:

(1) File an affidavit with the claim certifying that the claimant or the claimant's attorney has provided notice prior to filing the establishment clause claim as required by Section 5 of this act; and

(2) Attach the following documentation to the affidavit:

(A) A list of all lawsuits alleging violations of that portion of the first amendment to the United States constitution that prohibits laws respecting an establishment of religion, or article 1, section 3 of the constitution of Tennessee, or both, previously filed by the claimant and the claimant's attorney against other local government units or local public servants in this state within the previous twenty-four (24) months, which shall set forth the final disposition of these prior lawsuits, and if dismissed, the grounds for the dismissal; and

(B) Evidence establishing compliance with Section 5(a)(2), as follows:

(i) The certificate of mailing from the United States postal service stamped with the date of mailing; and

(ii) The copy of the notice sent; provided, it is not necessary that the addressee of the notice sign or return the return receipt card that accompanies a notice sent by certified mail for service to be effective.

(b) The court may, upon motion, grant an extension within which to file an affidavit or documentation for good cause shown.

(c) Under any of the following circumstances, the establishment clause claim shall, upon motion, be dismissed with prejudice:

(1) The notice of the claim is not provided in accordance with Section 5 of this act;

(2) The affidavit or accompanying attachments are not filed in accordance with Section 6 of this act; or

(3) The claim is duplicative of, or is the same or similar to, any count or contention in any lawsuit alleging violations of that portion of the first amendment to the United States constitution that prohibits laws respecting an establishment of religion, or article 1, section 3 of the constitution of Tennessee, or both, previously filed by the claimant or the claimant's attorney against other local government units or local public servants in this state within the previous twenty-four (24) months, and all of the previous lawsuits were dismissed on the ground that the claimant failed to establish that there was no set of circumstances under which the challenged policy, practice, action or custom may be implemented in a manner that comports with the establishment clause of the constitution of the United States or this state.

(d) The administrative office of the courts shall develop an affidavit form to effectuate the purposes of this section.

SECTION 7. Tennessee Code Annotated, Title 39, Chapter 16, Part 5, is amended by adding the following as a new section:

39-16-517.

(a) For purposes of this section, "local government unit" and "local public servant" has the same meaning as defined in Section 5 of this act;

(b) A person commits an offense who intentionally, without or prior to the filing of a complaint, lawsuit, or other legal action in any federal or state court of this state communicates, in writing or by electronic communication, with a local government unit or local public servant in a repetitious manner with the intent to influence, persuade, or induce the local government unit or local public servant to terminate, halt or cease a particular policy, practice, action or custom and the person:

(1) Intends the communication to be a threat of initiating legal action against the local government or local public servant challenging the particular policy, practice, action or custom, and a reasonable person would perceive the communication to be a threat of initiating legal action; or

(2) Makes a threat within the communication to initiate legal action against the local government or local public servant challenging the policy, practice, action or custom.

(c) A violation of this section is a Class A misdemeanor, punishable only by a fine of two thousand five hundred dollars (\$2,500).

(d) The offense described in this section shall not apply to a person providing a written notice to a local government unit or local public servant pursuant to Section 5 of this act.

SECTION 8. This act does not affect rights and duties that matured, liabilities or penalties that were incurred, or proceedings begun before its effective date.

SECTION 9. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 10. For the purposes of the administrative office of the courts developing an affidavit form, this act shall take effect upon becoming a law, the public welfare requiring it. For all other purposes, this act shall take effect July 1, 2013, the public welfare requiring it, and shall apply only to actions filed on or after July 1, 2013.