

Anti-SLAPP Legislation and the First Amendment



Introduction

Strategic lawsuits against public participation (SLAPP) are a tool often used to intimidate or silence critics with expensive legal proceedings. Governments, companies, or individuals may use lawsuits, or even the threat of a lawsuit, to punish those who have exercised their First Amendment rights. Plaintiffs do not file SLAPP suits with any intention to win them. Anti-SLAPP laws aim to prevent these unnecessary and often costly lawsuits that have no objective other than to waste opponents' money and to intimidate them, especially as these lawsuits can have a chilling effect on constitutionally-protected speech. However, anti-SLAPP legislation must be tailored to allow legitimate lawsuits to continue, while preventing abuses of the system.

Understanding the Issue

Under most anti-SLAPP statutes, the person who is being sued can motion to strike the case because it involves speech on a matter of public concern. Simply put, anti-SLAPP legislation is about protecting citizens' constitutionally-protected right to free speech. Victims, whistleblowers, and those who feel they have been wronged should not be afraid to voice their concerns. Speaking freely about matters of public concern is a cornerstone of the American system. As George Orwell remarked in an unpublished preface to his book *Animal Farm*, "if liberty means anything at all, it means the right to tell people what they do not want to hear."

SLAPP and Kentucky

While SLAPP cases are rare, they have happened in Kentucky. In 2013, a coal miner in Kentucky faced an ominous lawsuit after sounding the alarm on unsafe working conditions in the mines. Reuben Shemwell publicly claimed that he had been fired because he raised concerns about these working conditions, a claim the coal company rejects. In an attempt to silence Shemwell, and any future whistleblowers, the coal company filed a lawsuit against him.

Key Points

- ▶ Strategic lawsuits against public participation (SLAPP) often stifle legitimate, constitutionally protected free speech.
- ▶ SLAPP suits have been used to silence legitimate dissent and intimidate whistleblowers.
- ▶ Anti-SLAPP laws can help appropriately tailor courts attention to only legitimate cases.
- ▶ Kentucky is 1 of only 17 states that does not have any anti-SLAPP protections.

Shemwell was essentially being sued for exercising his First Amendment rights. Fortunately, in this case, the court affirmed Shemwell's right to express his concerns and rebuked the coal company.

During the #MeToo era, SLAPP lawsuits have been used to silence allegations of sexual assault. While victims and survivors may feel the best place to voice their claims is in public discourse, those they have accused may try to silence them. In Kentucky, women who shared their stories of sexual assault online could very easily be sued for defamation. Regardless of the validity of their claims, these women would face a lengthy and expensive process before any truth could be uncovered.

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Recently, a woman in Tennessee was protected by the state's anti-SLAPP law after she discussed a man she once rejected on a dating app a private, invite-only Facebook group. The man filed a defamation lawsuit, after showing up at her house and intimidating her by banging on the windows and door. Because of Tennessee's anti-SLAPP law, the case was quickly thrown out, and the woman recouped her attorney's fees.

Unfortunately, not every case ends as cleanly as Shemwell's – these cases can exhaust hours of court resources and cost defendants a significant amount in legal fees. If Shemwell's case was not thrown out quickly, or if he was unable to recoup attorney's fees, he would be out a tremendous amount of money. Future employees who may wish to speak on matters of public concern may be deterred from doing so if they feel their speech will not be sufficiently protected.

Most states currently have some type of anti-SLAPP legislation or case law on the books. Very few states have no laws protecting public discourse with such a law. Kentucky is currently one of those states. Ohio is Kentucky's only neighboring state that does not have an anti-SLAPP law. The Public Participation Project, an organization dedicated to defending free speech, gives Kentucky an F ranking.

Legislative Recommendations

It is important to remember that anti-SLAPP legislation does not stop lawsuits that may involve slander, libel, or otherwise harmful speech. In fact, anti-SLAPP legislation would allow courts to more easily identify the serious cases that deserve their time, energy, and resources and to weed out the cases that may bog down the system.

Kentucky should pass an anti-SLAPP statute that is narrowly tailored and focuses on making the court system more effective. Many anti-SLAPP statutes around the country require the plaintiff to show a probability that they will prevail in the suit, meaning they must show that they have evidence that could result in a favorable verdict. If the plaintiff cannot meet this burden, the suit is dismissed, and many statutes allow the defendants to recoup attorney's fees from the plaintiff.

In order to protect public discourse in the Commonwealth, Kentucky needs an anti-SLAPP law. This law should establish procedures for dismissing legal actions filed in response to a party's exercise of its right to free speech, right to petition, or right of association. The venue in which the speech is conducted should not limit the lawsuit. The law must also allow for an immediate appeal as a matter of right. To account for costs, the petitioning party should have to pay the defendant's attorney's fees if dismissal is granted, and the responding party would cover the fees if the motion was found to be frivolous or filed solely for the purpose of unnecessary delay.

Conclusion

Freedom of speech is a cornerstone of liberty and essential to American democracy. While the protection of this right at times requires the quashing of harmful untruths like libel, this must be done with a scalpel not a sledgehammer. Unfortunately, left unchecked, SLAPP lawsuits represent an increasingly threatening sledgehammer. A properly-tailored anti-SLAPP law can appropriately direct our courts' attention away from cases brought in order to silence legitimate free speech and refocus that attention on those cases in which someone has truly been wronged.