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A Slap at Employment Law? A Look at the Impact of Texas Citizens Participation Act in 2017

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By **W. Gary Fowler**
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Participation Act (TCPA), a law that, generally speaking, is designed to protect the free expression rights of ordinary citizens. Recent court decisions surrounding this law have broad implications for employment law and are likely to lead to the use of the TCPA in employment defamation, trade secrets, noncompetition agreements, and even discrimination and retaliation cases.

Adopted in 2011, the TCPA is Texas' version of an anti-SLAPP law. Also found in many other states, these laws bar the use of "strategic lawsuits against public participation"—lawsuits designed to retaliate or deter free speech by using litigation as a weapon.

Much litigation around the TCPA concerns how much of a connection the defendant must show to free speech, petition or association. Some appeals courts took the view that the rights protected by the TCPA extend only to activity protected by the First Amendment. In this view, the TCPA would not extend to private disputes where, it was argued, the constitutional rights of speech, association or petition were not involved. Other courts took the position that the TCPA should be interpreted according to the plain meaning of the statutory text—i.e., a strict, but expansive, reading of the four corners of the TCPA's definitions.

This fundamental difference on the scope of the TCPA was largely resolved in the Texas Supreme Court's opinion in *ExxonMobil Pipeline v. Coleman*. Employee Travis Coleman sued Exxon for defamation, contending that his employment was terminated based upon the alleged

falsehood of communications surrounding his work performance. Specifically, *Coleman* was assigned to record the fluid volume of petroleum products in storage tanks each night. Coleman allegedly failed to gauge a tank and then reported that he did. Exxon fired him, and Coleman sued.

Exxon moved to dismiss under the TCPA. The district court denied the motion, and the Court of Appeals affirmed. The Supreme Court reversed, holding that because the alleged communications were made in connection with a matter of public concern—safety of petroleum products—the employer, Exxon, successfully established TCPA applicability. The court specifically rejected the idea that the speech involved must rise to the level of constitutional protection to fall within the TCPA. Relying upon its earlier decision in *Lippincott v. Whisenhunt*, the Supreme Court stated that, when construing the right of free speech within the TCPA's meaning, "the plain language of the act merely limits its scope to communications involving a public subject—not communications in a public form." Here, the communications among the employer's supervisors and its investigator were communications within the TCPA because they concerned public safety and Exxon's process to reduce the potential environmental, health, safety and economic risks associated with petrochemicals.

The right of free association, as defined in the TCPA, was at issue in another case decided this year, *Elite Auto Body v. Autocraft Bodywerks*. (A petition for review with the Supreme Court is pending.) In that case, the Austin Court of Appeals considered the applicability of the TCPA when two employees left employment and joined a competitor. The former employer sued, contending that the employees took and used trade secrets to the benefit of the new employer. The trial court denied the motion, but the appeals court reversed. Based on *Coleman*, the court held that the employees' actions involved communications concerning the right of free association. The court noted that the communications protected by the TCPA were "not confined solely to speech that enjoys constitutional protection." The court held that communications to convey the alleged trade secrets or to induce the plaintiff's employees to leave and work for the new employer involved the right of free association.

In August this year, the Houston Court of Appeals, First District, decided another case involving the TCPA in the employee context. In *Memorial Hermann Health System v. Khalil*, the plaintiff employee sued Memorial Hermann, arguing that statements made in peer review were defamatory and that his discharge was due to age discrimination. The court found that the communications involved free speech and matters of public concern and that the TCPA applied. The court noted that whether a privately employed person satisfactorily performs her job is generally not a matter of public concern for First Amendment purposes, but the TCPA's broader definition includes statements concerning a health care professional's competence. The court relied upon the Supreme Court's 2015 opinion in *Lippincott*, in which a similar conclusion was reached about comments on the proper performance of services by a nurse anesthetist.

These three cases decided this year promise a broader expansion of the TCPA to other areas of employment law. While *Coleman*, *Memorial Hermann*, and the 2015 decision in *Lippincott*, all involved defamation claims, similar arguments could be made to apply the TCPA to discrimination suits. For example, *Coleman* and *Memorial Hermann*, suggest TCPA can be applied to any discrimination case where the employer contends that the legitimate reason for termination was based on health, safety or environmental reasons. Similarly, the reference to public concern matters including "a good, product or service in the market place" could reach almost any case involving an employee who the employer alleges to have provided poor service or an inferior product in the marketplace. Likewise, employers wishing to enforce a

noncompetition agreement or suspecting the use of trade secrets may wish to think twice after the decision in Elite Auto Body.

Dallas attorney W. Gary Fowler is board certified in labor and employment law and leads the labor and employment practice at Jackson Walker.

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