COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

TEACHERS FEDERAL CREDIT UNION,	§	
	§	No. 08-18-00200-CV
Appellant,	§	Appeal from the
v.	§	384th District Court
	§	Of El Paso County, Texas
SALVADOR ESQUIVEL,	§	(TC#2018DCV2083)
Appellee.	§	

O P I N I O N

In this interlocutory appeal, Appellant, Teachers Federal Credit Union ("TFCU"), appeals the trial court's denial of its Motion to Dismiss Pursuant to the Texas Citizens Participation Act (the "Act"). Appellee, Salvador Esquivel, sued TFCU for wrongful termination based on age, sex, and disability discrimination. TFCU filed a motion to dismiss under the Act, asserting Esquivel's claims were based on or related to TFCU's exercise of free speech and free association as defined under the Act.

Because we find TFCU failed to show by a preponderance of the evidence Esquivel's suit is based on, related to, or in response to its exercise of free speech or free association, we affirm the denial of Appellant's Motion to Dismiss.

BACKGROUND

Esquivel is a sixty-two year-old man who was terminated from his employment with TFCU after, according to TFCU, a series of subpar performance reviews in his position as compliance supervisor. In his amended petition, Esquivel asserts TFCU subjected him to a hostile work environment and unnecessarily and unfairly "scrutinized" and "disciplined" him because of his sex, age, and disability.

The parties include lengthy conflicting factual recitations in their briefs not necessary to recount in full here. Esquivel asserts TFCU's account of his alleged faulty job performance is false and TFCU fabricated issues to discriminate and retaliate against him. TFCU posits Esquivel's long history of poor performance reviews and negative feedback supported his supervisor's decision to terminate him for cause. More importantly, the parties disagree about the applicability of the Act to Esquivel's lawsuit, which necessitates our review of this case. For context, we provide some additional factual background below.

Employment History

In the period leading up to his termination, Esquivel was a Compliance Supervisor with TFCU. According to TFCU, a Compliance Supervisor's duties included oversight of TFCU's enforcement of Bank Secrecy Act ("BSA") regulations.

While employed with TFCU, Esquivel experienced a heart attack. He alleges his history of heart issues affected many of his major life activities. Esquivel claims his work history at TFCU was excellent and he consistently received good evaluations. However, when TFCU made Elizabeth Zamora its Vice President of Compliance in April 2015, he alleges his former positive job reviews suddenly took a downturn. He also asserts Zamora mocked him for his health condition and mentioned it when he complained of being assigned excess work duties.

Esquivel complained another employee, Mayra Velarde, was treated more favorably by Zamora, despite her repeated mistakes while doing her job. Esquivel believes Velarde was treated more favorably because she is a woman. He claims he was disciplined for mistakes Velarde made, alleging Velarde was not disciplined for her errors. Zamora continued to degrade Esquivel's job responsibilities and was progressively demoted until his termination on December 13, 2016. He asserts he was replaced by a younger, lesser-qualified female.

TFCU's brief paints a different picture. TFCU describes a suboptimal employment history beginning June 2014—approximately two years before Zamora became his supervisor. Specifically, TFCU asserts Esquivel's previous supervisor counseled him on his follow-through in completing a number of small projects; his 2013-2014 employment appraisal scored in the category of "needs improvement;" and, in 2014, he was placed on a Development Action Plan to address performance deficiencies as supervisor. Esquivel was also issued a written warning for failing to meet deadlines in February of 2015, and another in May of 2015 for failing to adhere to policies and procedure. According to TFCU, all of the foregoing instances occurred prior to Zamora assuming responsibility as his supervisor.

When Zamora became his supervisor, her first documented criticism of Esquivel was a verbal warning in January 2016 for failure to manage his department's completion of the Online University Compliance exams. He was coached by Zamora in March the same year regarding his ability to resolve personnel issues among his team members. In May, Esquivel was warned about alleged misrepresentations he made about an interaction he had with another employee. Following this warning, which TFCU claims was the second of its kind, Esquivel was required to meet weekly with Zamora "to ensure open lines of communication and leadership standards were being met."

According to TFCU, during Esquivel's meeting with Zamora regarding the warning, he casually mentioned, for the first time, his heart condition. TFCU claims he never sought accommodation or any change in duties because of this condition.

In June of 2016, Esquivel received another "needs improvement" score on his performance appraisal. Categories requiring improvement, pursuant to the appraisal, included, "'Accountability,' 'Communication,' 'Leadership,' 'Teamwork and Cooperation,' 'Professionalism,' 'Initiative,' 'Focus,' 'Attention to Detail,' and 'Productivity.'" As a result of his performance appraisal score, Esquivel was placed on a Development Action Plan for six months. The Development Action Plan required Esquivel's improvement in seven areas by the end of its term.

When Esquivel was terminated on December 13, 2016, TFCU determined he had shown "minimal to no progress" in completing the expectations outlined in the Development Action Plan. This, in combination with a number of other alleged issues beginning in early 2013 and discussed in detail in TFCU's brief, ultimately led to Esquivel's termination.

Procedural History

A. Esquivel's Original Petition and TFCU's Original Answer

Esquivel filed his original petition on June 5, 2018, alleging age, disability, sex discrimination, and retaliation. His initial pleading does not cite to any statutory authority upon which his claims are founded, with the exception of his damages allegation, which cites to Rule 47(c)(1) of the Texas Rules of Civil Procedure.

TFCU filed its original answer on June 28, 2018. Included in its answer are special exceptions, including the exception of Esquivel's failure to include the filing date of his charge of

discrimination and/or date of issuance of any notice of rights from a state or federal agency. It also specially excepts Esquivel's failure to mention whether his discrimination and retaliation claims are brought under state and/or federal statute(s).

B. TFCU's [Original] Motion to Dismiss

On August 10, 2018, TFCU filed its first motion to dismiss under the Act. In its motion, TFCU argued Esquivel's lawsuit was "based on, related to, or in response to TFCU's exercise of its right of free speech on a matter of public concern, or its right of association," and thus, under the Act, warranted dismissal. Specifically, according to TFCU, because Esquivel's suit involved "communications among TFCU management and/or employees regarding the decision to end his employment," the Act was implicated. TFCU's motion also contends Esquivel is unable to make a prima facie showing of each essential element of his employment discrimination claim, which is required to avoid dismissal under the Act.

In support of its motion, TFCU attached an affidavit from Eliana Avila, its Vice President of Human Resources at its Rojas Branch in El Paso, Texas. Attached to the affidavit and authenticated as business records are twenty-four documents regarding Esquivel's employment with TFCU. These documents range from the counseling Esquivel received from his previous supervisor in June 2014, to the June 15, 2017 "Charge of Discrimination" filed with the EEOC.

C. Esquivel's Amended Petition and TFCU's Amended Motion to Dismiss

On August 21, 2018, Esquivel amended his petition to include references to the federal statutes upon which his claims are based. His amended petition is otherwise identical to his original petition.

TFCU filed an amended motion to dismiss on September 28, 2018. Substantively, the amended motion is virtually identical to the original motion, except for additional case law references and arguments addressing what TFCU believed to be newly-added federal claims. In addition, TFCU attached Esquivel's responses to request for disclosure and answers to interrogatories, along with the EEOC charge as purported evidence of Esquivel's failure to timely file his lawsuit. These three additional attachments were not included as evidence in TFCU's original motion to dismiss.

D. Esquivel's Response to TFCU's Amended Motion

Esquivel responded to TFCU's motion on October 29, 2018. Esquivel asserts the Act does not apply because the Supremacy Clause gives priority to the "federal anti-discrimination and federal anti-retaliation laws" that form the basis of Esquivel's claims given they are in conflict with the Act. Further, Esquivel argues TFCU has failed to meet its burden of showing the Act's applicability. Even if TFCU could satisfy its burden, Esquivel maintains he is able to make a prima facie showing of each essential element of its cause of action, and TFCU is unable to establish the same regarding a defense to those claims.

Esquivel also lodged objections to nearly all of TFCU's exhibits, with the exception of his EEOC charge, and his responses to TFCU's discovery.

E. TFCU's Supplement to its Amended Motion

The day before the scheduled hearing, TFCU filed a supplement to its amended motion to dismiss. The supplement consisted solely of an affidavit from Ms. Avila dated September 27, 2018— executed three days prior to the hearing—which TFCU concedes was inadvertently left out of its amended filing. Avila's affidavits in the original and amended motions are identical,

except the amended motion affidavit authenticating Esquivel's discovery products as business records.

F. TFCU's Amended Motion Denied

The trial court denied TFCU's amended motion by written order. TFCU timely filed this appeal.

DISCUSSION

TFCU presents three issues for review:

1. Whether TFCU met its burden showing Esquivel's claim was a legal action based on, related to, or in response to TFCU's exercise of its right of free speech on a matter of public concern and/or right of association pursuant to the Act;

2. Whether Esquivel established by clear and specific evidence a prima facie showing of each essential element of his employment discrimination claim as required by the Act; and

3. Whether TFCU satisfied its burden of proof on a valid defense to Esquivel's claims.

Dismissal under the Act

The stated purpose of the Act "is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury."[1] TEX.CIV.PRAC.&REM.CODE ANN. § 27.002. Where a "legal action is based on, relates to, or is in response to a party's exercise" of one of the

[1] All references to the TCPA are to the version that applies to this dispute. The TCPA was amended in 2019. Act of May 17, 2019, 86th Leg., R.S., ch. 378, 2019 TEX.GEN.LAWS 684. These amendments do not apply to this case. *See id.* §§ 11–12, 2019 TEX.GEN.LAWS at 687 (providing that amendments apply to actions filed on or after September 1, 2019). Because the amendments were not made retroactive, the prior definition applies to this appeal. *See Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC.*, 591 S.W.3d 127, 129 (Tex. 2019)("The prior version of the statute continues . . . to control cases filed before September 1, 2019.").

enumerated rights, the aggrieved party may seek dismissal of the action by filing a motion to dismiss. *Id.* at § 27.003(a).

A. Standard of Review

A trial court's ruling on a motion to dismiss under the Act is reviewed *de novo*, as is the court's determination on the statutory interpretation of the Act. *See Darnell v. Rogers*, 588 S.W.3d 295, 300 (Tex.App.—El Paso 2019, no pet.)(*citing Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019)); *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018). "The court first examines whether the defendant invoked the [Act] by showing, by a preponderance of the evidence, that the plaintiff's claim 'is based on, relates to, or is in response to the [Defendant's] exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association.'" *Darnell*, 588 S.W.3d at 300, (*citing* TEX.CIV.PRAC.&REM.CODE ANN. § 27.005(b)). If the movant meets its burden, the court then looks to whether the plaintiff has "establishe[d] by clear and specific evidence a prima facie case for each essential element of the claim in question." TEX.CIV.PRAC.&REM.CODE ANN. § 27.005(c); *see Darnell*, 588 S.W.3d at 300-01. If the nonmovant fails to meet its burden under the second step, its claim must be dismissed. TEX.CIV.PRAC.&REM.CODE ANN. § 27.005(b). However, if the nonmovant meets its burden under the second step, the third step still requires dismissal if the movant demonstrates by a preponderance of evidence "each essential element of a valid defense to the nonmovant's claim." TEX.CIV.PRAC.&REM.CODE ANN. § 27.005(d).

In deciding the applicability of the Act and, if necessary, whether the nonmovant has met its burden of producing clear and specific evidence of each essential element of its claim, a court is required to look to the pleadings and all affidavits, both supportive and opposing, which state

the facts supporting the liability or defense at issue. TEX.CIV.PRAC.&REM.CODE ANN. § 27.006(a). Further, if available, a court may consider evidence produced by either party in support of its position, although neither party is required to produce evidence beyond its pleadings and affidavits if doing so can satisfy its burden under the statute. *See In re Lipsky*, 460 S.W.3d 579, 590-591 (Tex. 2015); *S&S Emergency Training Solutions, Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018).

In its first issue, TFCU asserts Esquivel's claim is a legal action based on, related to, or in response to TFCU's exercise of its right of free speech on a matter of public concern and/or its right of association, and thus falls within the purview of the Act. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 27.003(a). Under the Act, a "legal action" can be a lawsuit or a single cause of action, among other things. TEX.CIV.PRAC.&REM.CODE ANN. § 27.001(6); *see Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 892 (Tex. 2018). It is apparent Esquivel's lawsuit constitutes a "legal action" as defined by the Act. The primary questions we must address are whether that legal action is based on, related to, or in response to TFCU's exercise of its right of free speech or association.

B. Does the Act apply to Esquivel's claims of discrimination and retaliation based on TFCU's right of free speech?

Whether a claim is based on, related to, or in response to a party's exercise of the right of free speech requires analysis of two components: (1) whether the party makes a communication, and (2) whether such communication is made in connection with a matter of public concern. TEX.CIV.PRAC.&REM.CODE ANN. § 27.001(3).[2]

[2] Esquivel contends TFCU's amended motion to dismiss is untimely because it was filed 60 days after Esquivel's service on TFCU. Because we find the Act inapplicable to Esquivel, the timeliness of the motion is not directly relevant to our inquiry. For the purposes of our analysis, we assume without deciding TFCU's amended motion was timely filed.

1. Communication

A "communication" under the Act is "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." TEX.CIV.PRAC.&REM.CODE ANN. § 27.001(1). Case law defines "communication" under the Act as very broad, encompassing "[a]lmost every imaginable form of communication, in any medium[.]" *Adams*, 547 S.W.3d at 894.

TFCU asserts Esquivel's pleadings alone show by a preponderance of the evidence his lawsuit is based on, related to, or is in response to its exercise of the right of free speech or association. It is unclear to which allegations TFCU specifically refers, but several sentences in Esquivel's amended petition reference what are presumably communications made by TFCU, including the following:

- [D]efendant retaliated against Plaintiff for seeking accommodation by subjecting him to a hostile work environment;
- Defendant scrutinized, unfairly and untruthfully disciplined Plaintiff; and
- Defendant continued to discriminate against Plaintiff, including making fun of his physical condition.

Avila's supplemental affidavit authenticated a number of supporting documents attached to TFCU's amended motion. We are permitted to look at "supporting and opposing affidavits stating the facts on which the liability or defense is based," TEX.CIV.PRAC.&REM.CODE ANN. § 27.006(a), although we do not find it necessary to do so under these circumstances. It is clear from Esquivel's amended petition alone his claims are based on, related to, or in response to communications made by TFCU. We therefore move on to the second portion of our inquiry.

2. Matter of Public Concern

Under the Act, a matter of public concern "includes an issue related to":

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

TEX.CIV.PRAC.&REM.CODE ANN. § 27.001(7).[3] The communication need not be public in order to be covered by the Act as a matter of public concern; private communications are also covered under the plain language of the statute. *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017). Further, the communication(s) at issue need not have "more than a 'tangential relationship' to" the specified matters of public concern. *Id.* It is not required under the Act the communications upon which a legal action is based specifically discuss matters of public concern. *Id.* at 900-01. However, the Act does not cover communications of *any* kind; the Act has limits. *See In re IntelliCentrics, Inc.*, No. 02-18-00280-CV, 2018 WL 5289379, at *4 (Tex.App.—Fort Worth October 25, 2018, no pet.)(mem. op.)(acknowledging the Act casts a wide net but recognizing the statute's reach has limits); *Erdner v. Highland Park Emergency Center, LLC*, 580 S.W.3d 269, 276 (Tex.App.—Dallas 2019, pet. denied). When the communication involved does not itself relate to a matter of public concern, the assertion the communication could *result* in a matter of public concern is beyond reach of the Act. *See Erdner*, 580 S.W.3d at 276, (*citing Nguyen v. Hoang*, 318 F.Supp.3d 983, 1001 (S.D. Tex. 2018)).

[3] *See* Acts 2019, 86th Leg., ch. 378 (H.B. 2730), § 1, eff. Sept. 1, 2019. The Act now defines a "matter of public concern" as "a statement or activity regarding: (A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity; (B) a matter of political, social, or other interest to the community; or (C) a subject of concern to the public." TEX.CIV.PRAC.&REM.CODE ANN. § 27.001(7)(2019). Because the amendments were not made retroactive, the older definition applies to this appeal.

TFCU explains the BSA requires certain record retention policies and reporting requirements to the federal government in an effort to identify "potential money laundering or violations of the [BSA][.]" As a Compliance Supervisor, Esquivel's job duties included overseeing a number of tasks pursuant to BSA regulations, such as generating currency transaction reports and suspicious activity reports, monitoring anti-money laundering alerts, and inspecting other potential fraud alerts through a monitoring platform called "Verafin." Part of those duties included monitoring the branch's international transactions to ensure adherence to "anti-terrorism and anti-money laundering regulations." In its brief, TFCU alleges the communications at issue are "among TFCU management and/or employees" and discuss topics such as Esquivel's ineffective performance of "supervising the reporting of FinCen Suspicious Activity Reports ('SARs'), Currency Transaction Reports ('CTRs'), anti-money laundering measures ('AMLs'), among other things, pursuant to the Bank Secrecy Act ('BSA')[.]"

To support its argument that these are matters of public concern, TFCU reasons SARs "are critical to the nation's ability to utilize financial information to combat terrorism, terrorist financing, money laundering, and other financial crimes," and cites to the portion of the IRS's website that describes reporting requirements for small businesses. The IRS's webpage on this issue describes how law enforcement agencies rely on reports filed by banking institutions and businesses to "identify, detect and deter" money laundering. TFCU also references the National Credit Union Administration's website outlining reporting requirements of certain types of transactions to comply with the BSA. TFCU argues communications between its employees and a number of federal agencies are also linked to Esquivel's allegations, and in fact, that Esquivel's lawsuit concerns *any* communications related to reporting under the BSA.

Because the BSA was created, in part, to identify and deter money laundering—which may be connected to "a criminal enterprise, terrorism, tax evasion or other unlawful activity," according to TFCU's position, *see Ratzlaf v. United States,* 510 U.S. 135, 138 (1994)—TFCU claims health and safety, community well-being, the government, and a good, product or service in the marketplace, are necessarily implicated. In support of its arguments, TFCU directs this Court to three cases where the communications at issue *were* deemed to be matters of public concern.

In *Hicks v. Grp. & Pension Adm'rs, Inc.*, 473 S.W.3d 518 (Tex.App.—Corpus Christi 2015, no pet.), a potential third-party administrator of the local school district's health insurance plan, "GPA," sued Hicks, a member of the Corpus Christi Medical Center's board. *Id.* at 524. After discovering GPA was the likely recipient of the contract following a call for bids, Hicks warned the school district via email that due to her experience with GPA, she believed they were extremely difficult to work with. *Id.* at 524. As a result, the school district awarded the contract to a different bidder. *Id.* Hicks expressly stated in her emails that district employees would likely be billed for their health care costs due to GPA's "difficult[y]" in submitting timely payments. *Id*. at 530. GPA filed suit against Hicks for, among other things, "defamation/libel, defamation/libel per se, business disparagement, and tortious interference with a prospective business relationship." *Id.* at 524. Hicks filed a motion to dismiss under the Act, which the trial court denied. *Id.* at 524-525. On appeal, the Corpus Christi Court of Appeals determined "Hicks's emails related to the health and economic well-being of CCISD's employees and also related to a 'service' offered by GPA in the marketplace." *Id.* at 530.

Next, we examine *AOL, Inc. v. Malouf*, Nos. 05-13-01637-CV & 05-14-00568-CV, 2015 WL 1535669 (Tex.App.—Dallas Apr. 2, 2015, no pet.)(mem. op.). There, an AOL employee wrote

and published an online article about a dentist who built a water park in his backyard while "charged with defrauding state taxpayers of tens of millions of dollars in a Medicaid scam[.]" *Id.* at *1 [Internal quotes omitted]. The subject dentist, Malouf, sued the author and AOL for defamation, claiming they falsely represented he was guilty of the alleged fraud. *Id.* AOL moved to dismiss under the Act and the trial court denied its motion. *Id.* at *2. The Dallas Court of Appeals held the article's allegations of Malouf being charged with Medicaid fraud constituted a "communication [] connected with matters of health or safety, government, and community well-being." *Id.* at *2, (*citing* TEX.CIV.PRAC.&REM.CODE ANN. § 27.001(7); *Shipp v. Malouf*, 439 S.W.3d 432, 438-39 (Tex.App.—Dallas 2014, pet. denied); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 81 (Tex.App.—Houston [1st Dist.] 2013, pet. denied)). It also held the communication related to Malouf's delivery of dental services in the marketplace. *Id.*, (*citing Avila v. Larrea*, 394 S.W.3d 646, 655 (Tex.App.—Dallas 2012, pet. denied)). AOL met its burden under the Act to prove by a preponderance of the evidence that Malouf's claims fell under the wide net of the Act, and the burden shifted to Malouf to show by clear and specific evidence a prima facie case for each element of his claims. *Id.* at *3. The Dallas Court of Appeals did not expound on its reasoning for such findings, other than citing to other cases with similar facts. *Id.* at 3. However, it is clear how a dentist allegedly providing unnecessary services in an effort to fraudulently collect payments from Medicaid involves health and safety, the government, and community well-being.

Finally, we turn to *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890 (Tex. 2018). In *Adams*, a Plano, Texas, resident wrote a blog post and subsequent email about Starside Custom Builders' alleged malfeasance in its development of a common area in Adams's neighborhood. *Id.*

at 892-93. Starside's owner and CEO was one of three members on the neighborhood HOA's board, and a personal recipient of Adams's vitriol in both the blog post and email. *Id.* at 893. Starside sued Adams for defamation. *Id.* at 892. Adams moved to dismiss pursuant to the Act, which was denied. *Id.* at 893-94. The Dallas Court of Appeals affirmed the denial, reasoning that because the statements at issue mentioned only the entity that preceded Starside before its bankruptcy, the claims could not have been based on Starside's services in the marketplace because Starside's name was never mentioned. *Id.* at 894. The Texas Supreme Court disagreed and undertook an in-depth analysis of whether the communications at issue dealt with a matter of public concern. *See id.* at 894-95.

First, it determined the communications dealt with Starside's products or services in the marketplace as both a homebuilder and developer. *Id.* at 894. The blog entry "claimed that Starside's predecessor, Bentley, 'took a prime Plano location' and 'made life miserable for' homebuilders, subcontractors, and home buyers." *Id.* It also accused Starside's CEO of a number of untoward, if not overtly criminal, acts. *Id.* Adams's email details his feud with the HOA over ownership and landscaping of the neighborhood's common area, and claims the HOA board was "controlled by" Starside's CEO. *Id.* at 895. One of Starside's primary businesses as a developer, it alleged in its petition, was to "develop[] the natural beauty of the neighborhood." *Id.* [Internal quotes omitted]. The Texas Supreme Court determined issues related to Starside's products or services in the marketplace were plainly raised by its allegations against Adams in its Petition arising out of Adams's blog post and email.[4] *Id.* Adams's alleged defamatory statements also satisfied the Act's definitions of issues "related to" "government" and "environmental, economic,

[4] The Texas Supreme Court rejected the Dallas Court of Appeals' reasoning that because the allegations were against Starside's predecessor entity, they did not concern Starside's services in the marketplace. *Adams*, 547 S.W.3d at 895.

or community well-being," according to the Supreme Court. *Id*. at 896. His claims that Starside allegedly violated city code by clear-cutting trees in the common area fell under the Act's definition of "matter of public concern" as being related to "government" and/or "environmental, economic, or community well-being." *Id.* Additionally, because the neighborhood in question was a "small residential community," Adams's allegations against Starside as the developer and at least some influence over the HOA "likely concerns the well-being of the community as a whole[,]" since HOAs "wield substantial, quasi-governmental powers in many neighborhoods." *Id.*

We examine each of these "public concern" elements in turn.

a. Health or Safety

In *Memorial Hermann Health System v. Khalil*, No. 01-16-00512-CV, 2017 WL 3389645, at *5-6 (Tex.App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied)(mem. op. on reh'g), one of our sister courts in Houston found a physician's job performance, as it related to whether she was competent to fulfill her duties as a doctor administering patient care, was a matter of public concern involving health or safety. In its companion case in federal court, *Khalil v. Memorial Hermann Health System*, No. H-17-1954, 2017 WL 5068157, at *5-6 (S.D. Tex. Oct. 30, 2017)(mem. & order), the Southern District of Texas found the hospital-defendant met its burden in proving the Act applied to a physician's state-law age discrimination claim in federal court. The Southern District applied the same analysis used by the First District since both the state law tort claims and the discrimination claim in federal court involved the same communications and subject matter. *Id.*

The First Court of Appeals in *Khalil* discussed *Lippincott* out of the Texas Supreme Court. *See Memorial Hermann Health System*, 2017 WL 3389645, at *5, (*citing Lippincott v. Whisenhunt*,

462 S.W.3d 507, 508-509 (Tex. 2015)). The facts in *Lippincott* closely mirror *Khalil*, involving communications regarding a certified registered nurse anesthetist and concerns over his job performance. *See Lippincott*, 462 S.W.3d at 508-09. Specifically, administrators of a surgical group authored several emails to various recipients regarding reports Whisenhunt, among other things, was "endanger[ing] patients for his own financial gain[.]" *Id.* The emails detailed allegations "Whisenhunt 'failed to provide adequate coverage for pediatric cases,' administered a 'different narcotic than was ordered prior to pre-op or patient consent being completed,' falsified a scrub tech record on multiple occasions, and violated the company's sterile protocol policy." *Id.* at 510. Whisenhunt sued the administrators for defamation, tortious interference with existing and prospective business relations, and conspiracy to interfere in business relations. *Id.* at 509. The Texas Supreme Court found the emails which Whisenhunt's claims were based implicated the "health or safety" prong of the Act's definition of "matter of public concern," and reaffirmed its position "the provision of medical services by a health care professional constitutes a matter of public concern." *Id.*, (*citing Neely v. Wilson*, 418 S.W.3d 52, 70 n.12 & 26 (Tex. 2013) *and* TEX.CIV.PRAC.&REM.CODE ANN. § 27.001(7)).

In each of the foregoing cases, the communications that form the basis of the respective plaintiffs' claims dealt with their provision of healthcare services to patients, which the Texas Supreme Court explicitly considers matters of public concern due to the potential implications of health and safety for the public. *See, e.g., Lippincott*, 462 S.W.3d at 509, *Neely*, 418 S.W.3d at 70 n.12 & 26. Texas courts also acknowledge communications regarding the welfare of children involve the "health or safety" prong of the public concern inquiry. *See DeAngelis v. Protective Parents Coalition*, 556 S.W.3d 836, 852 (Tex.App.—Fort Worth 2018, no pet.)(*citing Watson v.*

Hardman, 497 S.W.3d 601, 607 (Tex.App.—Dallas 2016, no pet.)). Similarly, in *Hicks*, communications questioning whether the health care claims of employees of Corpus Christi Independent School District would be timely and properly reimbursed is relevant to the health and safety of a large group of individuals. *Hicks*, 473 S.W.3d at 530.

We cannot draw such a conclusion to the case at hand. The communications at issue involve Esquivel's alleged deficiencies in overseeing the BSA regulations imposed on credit unions, which TFCU alleges put it at risk for government-imposed penalties. However, it is unclear how this risk to TFCU implicates health and safety under the Act in the same way other courts have determined. "Health and safety" issues raised in the foregoing cases involved the literal, physical, or conceivably, mental health and safety of individuals. While we do not read those additional terms into the Legislature's definition, we cannot overlook the obvious distinction from the facts in this case. TFCU attempts to make the connection between Esquivel's duties of overseeing BSA compliance and the BSA's goals to thwart money laundering, and in some cases, combat terrorism and other criminal enterprises. However the communications referenced in Esquivel's lawsuit, whether explicitly in his pleadings or attached as evidence to TFCU's motion, describe only a possible risk to TFCU of criminal and civil sanctions from his actions, and in no way associate the health and safety of individuals. The communications describe additional training required on the Verafin system and areas where his leadership is lacking, and in two instances, describe a situation where a policy under the BSA was not followed. We find no relationship, even tangential, between the issues Esquivel allegedly experienced at work and the health and safety of the public, TFCU's members, or any individual.

Based on our review of the evidence in the light most favorable to the nonmovant, we do not find the "health or safety" prong of the public concern inquiry satisfied under these facts.

b. Economic or Community Well-Being[5]

Few cases define what communications sufficiently relate to economic well-being to implicate the Act. *See, e.g., ExxonMobil Pipeline Co.*, 512 S.W.3d at 898-901 (failure of employee to properly gauge equipment, which could have resulted in overflow, was a matter involving environmental, economic and community well-being); *Schimmel v. McGregor*, 438 S.W.3d 847, 859 (Tex.App.—Houston [1st Dist.] 2014, pet. denied)(speech concerning a city's purchase of flood-damaged homes, which would have lowered neighboring property values, related to economic well-being). Even a communication implicating the economic interest of a party at issue does not satisfy the Act's definition. *See Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132 (Tex. 2019). "Community well-being" means those matters "affect[ing] the well-being of the community at large or at least a subset of its residents." *Caliber Oil & Gas, LLC v. Midland Visions 2000*, 591 S.W.3d 226, 240 (Tex.App.—Eastland 2019, no pet.)(*citing Schmidt v. Crawford*, 584 S.W.3d 640, 651 (Tex.App.—Houston [1st Dist.] 2019, no pet.)). When the speech at issue relates to a matter of "political, social, or other concern to the community," or if it "is a subject of legitimate news interest[,]" it deals with a matter of public concern and is thus protected by the Act. *Baumgart v. Archer*, 581 S.W.3d 819, 826 (Tex.App.—Houston [1st Dist.] 2019, pet. denied)(*quoting Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). The cases TFCU cites in its brief involve communications related to community well-being, and dealt

[5] TFCU does not address how community, economic or environmental well-being is implicated in this case. We presume, for obvious reasons, that it does not believe the facts of this case involve the well-being of the environment. Thus, we look only at community well-being and economic well-being.

with serious allegations against the petitioners, such as federal fraud charges and multiple violations of city ordinances and failure to pay contractors by a local developer.

Here, the communications relate solely to an employer's view of its employee's poor performance. The fact that his job predominantly involved oversight of compliance with federal regulations is immaterial under these particular facts. At best, the communications involved TFCU's well-being from a compliance standpoint, but this does not affect the economic or community well-being of the general public. As previously discussed, the possibility that the communication could *result* in a matter of public concern is beyond reach of the Act. *See Erdner*, 580 S.W.3d at 276, (*citing Nguyen*, 318 F.Supp.3d at 1001).

TFCU has not met its burden to show the communications at issue pertain to economic or community well-being.

c. The Government

"A communication is related to the 'government' when it is about governmental misconduct, direct conduct by the government, such as purchasing property, or the operation of the government." *Caliber Oil & Gas, LLC*, 591 S.W.3d at 241 [Internal citations omitted]. Although TFCU is required to abide by federal regulations regarding compliance with BSA reporting regulations, the communications involving Esquivel's performance at TFCU are not about governmental misconduct, direct conduct by the government, or the operation of government. Rather, the communications are about Esquivel's lack of proficiency in programs that help TFCU maintain compliance under the BSA.

The communications at issue here are not related to "the government" to be considered a matter of public concern under the Act.

d. A Good, Product, or Service in the Marketplace

There is little dispute credit unions provide products and services in the marketplace in a general sense. However, in order for a communication to be a matter of public concern under this final point, the communication must be connected in some way to an "audience of potential buyers or sellers." *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 134 (Tex. 2019). "Construing the [Act] to denote that all private business discussions are 'a matter of public concern' if the business offers a good, service, or product in the marketplace or is related to health or safety is a potentially absurd result that was not contemplated by the Legislature." *Forget About It, Inc. v. BioTE Medical, LLC*, 585 S.W.3d 59, 68 (Tex.App.—Dallas 2019, pet. denied)(*quoting Erdner*, 580 S.W.3d at 277).

The communications surrounding Esquivel's termination do not mention the services TFCU provides to the marketplace, with perhaps one exception, which is one line in a six-page performance appraisal from May 30, 2014, which discusses a single occasion where Esquivel used "a hard tone of voice" while on the phone with a credit union member. This single instance is not the basis of Esquivel's claim, nor does it appear tangentially related to Esquivel's termination. The communications do not link Esquivel's alleged actions to TFCU's provision of services in the marketplace or otherwise allude to them. Compliance with the BSA may be an integral part of TFCU's operations; however, TFCU has not connected how one employee's wanting performance in overseeing others in his department—a department that deals with internal compliance rather than customer concerns)—affects the services TFCU provides to its members, or otherwise, to an "audience of potential buyers or sellers." *See Creative Oil & Gas, LLC*, 591 S.W.3d at 134.

TFCU has not satisfied its burden to prove the communications at issue relate to TFCU's services in the marketplace as contemplated by the Act.

Under the facts we are presented within this case, and based on a holistic review of the pleadings and the evidence submitted by the parties, we find the communications made by TFCU regarding Esquivel's dismissal are not related to any matter of public concern as defined by the Legislature under the Act. We therefore hold TFCU has not satisfied its burden of proving by a preponderance of the evidence the claims asserted by Esquivel are based on, related to, or in response to its exercise of the right of free speech.

C. Does the Act apply to Esquivel's claims of discrimination and retaliation based on TFCU's right of association?

TFCU further alleges Esquivel's claims are based on, related to, or in response to its right of association. The Act defines the right of association as requiring "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." TEX.CIV.PRAC.&REM.CODE ANN. § 27.001(2). The Act does not require the communication involve a public purpose, and to satisfy the movant's initial burden, it may even constitute what would otherwise be improper or unprotected speech. *See MVS Int'l Corp. v. Int'l Advertising Solutions, LLC*, 545 S.W.3d 180, 194 (Tex.App.—El Paso 2017, no pet.)(acknowledging the absurdity of such a potential result); *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 205 (Tex.App.—Austin 2017, pet. dism'd).

Having already decided Esquivel's case is related to communications by and among TFCU employees, we shift our analysis to whether the communications satisfy the remainder of the Act's definition. Interpretation of the "right of association" under the Act includes purely private communications with no public purpose, and encompasses communications among co-

conspirators in furtherance of criminal or tortious activity, which would have an "anomalous result." *MVS Int'l Corp.*, 545 S.W.3d at 194. At least one of our sister courts has found, in order for the communication to trigger a right of association, it must also involve the public or citizen's participation. *See Forget About It, Inc.*, 585 S.W.3d at 66-67 (holding "it would be illogical for the [TCPA] to apply to situations in which there is no element of public participation")(*quoting Dyer v. Medoc Health Services, LLC*, 573 S.W.3d 418, 426 (Tex.App.—Dallas 2019, pet. denied). The Fort Worth Court of Appeals provided a well-reasoned analysis of the Legislature's intended scope of the definition of "right of association" in *Kawcak v. Antero Resources Corp.*, 582 S.W.3d 566 (Tex.App.—Fort Worth 2019, pet. denied). The Fort Worth Court focused on the dictionary definition of "common," which they described as shared interests among associating individuals. *See id.* at 575-576. Based on their survey of definitions, the Fort Worth Court of Appeals held "common interests" as defined under the Act required the interests be common to more than two people, requiring commonality among the public at large, or at least a group. *Id.* at 575.

The Texas Supreme Court has set forth statutory construction of the Act, and we must "'give effect to the Legislature's intent, which requires us to first look to the statute's plan language[,]" and, where unambiguous, "'interpret the statute according to its plain meaning.'" *ExxonMobil Pipeline Co.*, 512 S.W.3d at 899, (*citing Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008)). Courts may not "'judicially amend a statute by adding words that are not contained in the language of the statute,'" nor "improperly narrow[] the scope of the [Act] by ignoring [its] plain language[.]'" *ExxonMobil Pipeline Co.*, 512 S.W.3d at 900, (*citing Lippincott*, 462 S.W.3d at 508). We are therefore hesitant to adopt the Fort Worth Court of Appeals' precise reasoning, although we consider it well-founded.

With two exceptions, the communications included as evidence in TFCU's Amended Motion involve communications between only one person—Esquivel's immediate supervisor and Esquivel himself. The first exception is a memorandum from Zamora to Esquivel regarding alleged misrepresentations Esquivel made to Zamora about a conversation he had with another employee, the precise context of which is unclear from the evidence. The second exception is an email chain between another TFCU employee and Zamora discussing dates Esquivel received training on various subjects and programs, which was requested by Zamora and received the day prior to Esquivel's termination.

Communications between others are referenced in the evidence provided by TFCU, including meetings or training sessions with other team members, but those communications cannot reasonably be interpreted as forming the basis of or relating to Esquivel's claims. We further decline to find communications between Esquivel and his supervisor as satisfying the definition of "right of association" under the Act. Additionally, neither of the two exceptions in this case appear to be "between individuals who join[ed] together to collectively express, promote, pursue, or defend common interests." TEX.CIV.PRAC.&REM.CODE ANN. § 27.001(2). Rather, they merely provide evidence of two instances where Zamora received information from another employee upon request. The fact this exchange of information relates in some way to Esquivel does not automatically equate to Zamora and the other individual(s) being joined together regarding a common interest. Absent something more, the circumstances of Zamora and the other individual(s) being employees of TFCU at the time the communications were made or exchanged does not alone indicate a common interest under the Act. TFCU asks us to draw a connection

between individuals simply because of their shared place of employment at a point in time. We decline to do so.

Having determined TFCU did not meet its burden, the burden does not shift to Esquivel to establish by clear and specific evidence a prima facie case for each essential element of his claims. We therefore need not reach TFCU's second and third issues.

CONCLUSION

The pleadings before us and the evidence provided by TFCU do not indicate the communications at issue involve matters related to public concern. Esquivel's former position as a compliance supervisor for TFCU required his proficiency in a number of systems and protocols to adequately supervise his subordinates and ensure TFCU remained in compliance with the BSA regulations. Communications regarding an alleged lack of proficiency in those areas does not implicate the "health and safety," "government," "economic, environmental, or community well-being," or "goods and services in the marketplace" elements of the Act's "matter of public concern" as defined by the Legislature and Texas case law.

We acknowledge the Act's breadth prior to its 2019 amendment; however, we cannot discount the purpose of the statute, which we do not believe would be achieved by finding its application to the facts of this case. *See* TEX.CIV.PRAC.&REM.CODE ANN. § 27.002. Moreover, the very few employment discrimination cases applicable to the Act are in this Court's opinion, distinguishable from the facts of the instant case.

We hold TFCU did not meet its burden in proving by a preponderance of the evidence that Esquivel's lawsuit is based on, related to, or in response to its exercise of the right of free speech or its right of association. TFCU's motion was properly denied.

Having overruled Appellant's first issue, which obviates the need to determine its remaining two issues, we affirm.

February 26, 2021

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Barajas, C.J., Senior Judge, and Larsen ,J., Senior Judge
Barajas, C.J., Senior Judge (Sitting by Assignment)
Larsen, J., Senior Judge (Sitting by Assignment)