Affirmed and Opinion filed August 1, 2023.

In The

Fourteenth Court of Appeals

NO. 14-20-00745-CV

ROBERT HAYMAN, Appellant

V.

EKRAM KHAN A/K/A EKRAMUL KHAN, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 20CV0554

O P I N I O N

In this appeal, we are asked to decide whether the Texas Citizens Participation Act (TCPA) applies to counterclaims that are purportedly based on or in response to certain racist statements directed at appellee at his place of employment and attributed to appellant, the employer. Robert Hayman sued Ekram Khan a/k/a Ekramul Khan for breach of a promissory note. In response, Khan brought numerous counterclaims based on allegations that he was discriminated against because of his race and religion. Hayman moved to dismiss all but one of Khan's counterclaims

under the TCPA claiming that the alleged statements and communications were exercises of free speech. Hayman appeals the trial court's denial of the motion by operation of law. Concluding that Hayman's alleged statements and communications were not made in connection with a "matter of public concern" as contemplated by the TCPA, we affirm the trial court's denial of the motion to dismiss.

Background

Hayman filed this lawsuit for breach of a promissory note, alleging that Khan defaulted by failing to timely pay all sums due. Khan answered Hayman's lawsuit and brought eighteen counterclaims[1] alleging that he was previously employed by Hayman and his company and during his employment he was "harassed and discriminated against . . . because of his Indian descent and Muslim beliefs." Khan alleged that the harassment and discrimination occurred on a daily basis and included:

- Pointing a gun at Khan;
- Stating, "Indians don't understand things and we should get rid of them";
- Sending disparaging emails about Khan, producing a video mocking him, criticizing his performance, and accusing him of wrongdoing;
- Calling Khan a "vampire machine" and "stupid";

[1] Khan alleged the following counterclaims in his answer: (1) wrongful termination; (2) harassment based upon race; (3) discrimination based upon race; (4) harassment based upon religion; (5) discrimination based upon religion; (6) retaliation; (7) failure to take all reasonable steps to prevent harassment, discrimination, and retaliation; (8) intentional infliction of emotional distress; (9) defamation; (10) breach of fiduciary duty; (11) breach of duty of loyalty; (12) fraud; (13) conversion; (14) money had and received; (15) unjust enrichment; (16) intentional interference with contractual relations; (17) failure to pay wages; and (18) breach of covenant of good faith and fair dealing.

- Criticizing Khan for talking too much and laughing at him during presentations, stating, "[h]e is going to go through every fucking button" and the client "is probably pulling his hair out," and his "kids probably go to sleep so easily," and asking him, "[w]hat the fuck are you talking about?"; and

- Constantly making fun of Khan's race and religious beliefs.

Khan also alleged that Hayman retaliated against him for complaining of these purported events.

In response, Hayman filed a TCPA motion to dismiss all Khan's counterclaims except fraud, along with a motion for partial summary judgment on all Khan's counterclaims. The trial court rendered a take nothing summary judgment on the counterclaims, but the TCPA motion was denied by operation of law. This interlocutory appeal followed.

Standard of Review

We review the trial court's ruling on a TCPA motion to dismiss de novo. *Dallas Morning News v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019). Once a motion to dismiss is filed, a burden-shifting mechanism goes into effect. *In re Lipsky*, 460 S.W.3d 579, 586–87 (Tex. 2015) (orig. proceeding). Our review requires a three-step analysis. *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018). Initially, the moving party must demonstrate that the legal action is based on or is in response to the movant's exercise of the right of free speech, to petition, or of association. *See* Tex. Civ. Prac. & Rem. Code § 27.005(b). If the movant meets its burden, the nonmoving party must establish by clear and specific evidence a prima facie case for each essential element of its claim. *See id.* § 27.005(c). If the nonmoving party satisfies that requirement, the burden shifts back to the movant to establish an affirmative defense or other ground on which it is entitled to judgment as a matter of law. *Id.* § 27.005(d). If the movant meets its burden in this third step, the trial

court must dismiss the action. *See id.*

Discussion

As an initial matter, we address Khan's apparent arguments that (1) Hayman was required to preserve error on his challenge to the trial court's denial of the TCPA motion by operation of law and (2) the recently amended TCPA should not be applied to the alleged communications and statements.[2] The denial of a TCPA motion by operation of law is expressly appealable under the statute. Tex. Civ. Prac. & Rem. Code § 27.008(a). Hayman was not required to take any additional steps to appeal after the motion was denied by operation of law. *See id.*; *see also* Tex. Civ. Prac. & Rem. Code § 51.014(a)(12) (authorizing interlocutory appeal of order denying TCPA motion to dismiss). Moreover, the prior version of the statute only continues to control cases filed before September 1, 2019.[3] In this case, Hayman filed his suit after September 1, 2019. Therefore, the amended act is applicable to this case. We next turn to the issues presented by Hayman.

Hayman challenges the trial court's denial of his motion to dismiss on the grounds that (1) the TCPA applies because Khan's claims were based on or in response to the exercise of the right to free speech in connection with a matter of public concern, (2) Khan failed to establish by clear and specific evidence a prima facie case for each essential element of his claims, and (3) the claims are barred by the applicable statutes of limitations.

[2] These arguments are not a model of clarity, but Khan seems to take issue with the fact that Hayman did not file a motion to reconsider and the trial court did not indicate whether it believed the TCPA applies. Khan also asserts the prior version of the TCPA should control for statements made prior to the amendment.

[3] The 86th Legislature recently amended the TCPA. Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011. Amended by Acts 2019, 86th Leg., ch. 378 (H.B. 2730), § 1, eff. Sept. 1, 2019; 2019 Tex. Gen. Laws 684.

The TCPA is popularly known as the Texas Anti-SLAPP statute, referring to "Strategic Lawsuits Against Public Participation." *Bandin v. Free & Sovereign State of Veracruz de Ignacio de la Llave*, 590 S.W.3d 647, 649 (Tex. App.—Houston [14th Dist.] 2019, pet. filed); *Toth v. Sears Home Improvement Prods., Inc.*, 557 S.W.3d 142, 149 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Despite this moniker, the legislature did not impart the traditional remedies associated with SLAPP suits or use that term in the TCPA. *Bandin*, 590 S.W.3d at 649.

The TCPA is intended "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." Tex. Civ. Prac. & Rem. Code § 27.002; *Cox Media Grp., LLC v. Joselevitz*, 524 S.W.3d 850, 859 (Tex. App.—Houston [14th Dist.] 2017, no pet.). It "protects citizens from retaliatory lawsuits that seek to intimidate or silence them" from exercising their First Amendment freedoms and provides a procedure for the "expedited dismissal of such suits." *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). We construe the act liberally to effectuate its purpose and intent fully. *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017) (per curiam); *Bandin*, 590 S.W.3d at 650 (citing Tex. Civ. Prac. & Rem. Code § 27.011(b)).

Does the TCPA Apply to Khan's Counterclaims?

Hayman contends in his first issue that the TCPA applies because Khan's counterclaims are based on or in response to Hayman's exercise of his right to free speech. Tex. Civ. Prac. & Rem. Code § 27.005(b). Khan argues that the alleged discriminatory and racist statements were in a private setting where the parties were discussing internal business affairs and that such statements do not fall within the act's definition of communications made in connection with matters of "public

concern." We agree.

To assert a motion to dismiss under the TCPA, Hayman was required to show "by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of . . . the right of free speech." *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam) (citing Tex. Civ. Prac. & Rem. Code § 27.005(b)). Under the TCPA, exercise of the right of free speech is defined as a communication made in connection with a matter of public concern. Tex. Civ. Prac. & Rem. Code § 27.001(3). A matter of public concern is 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." *Id.* § 27.001(7).

We recognize that the applicable definition of "matter of public concern" is narrower now than at the act's inception. *See Vaughn-Riley v. Patterson*, No. 05-20-00236-CV, 2020 WL 7053651, at *3 (Tex. App.—Dallas Dec. 2, 2020, no pet.) (mem. op.) (citing S.J. of Tex., 86th Leg., R.S. 2023-24 (May 17, 2019)). Specifically, the Legislature substantively amended the definition of "matter of public concern" in 2019 and deleted the "good, product, or service in the marketplace" and "environmental, economic, or community well-being" language from the definition. *See* Tex. Civ. Prac. & Rem. Code § 27.001(7); *see also Vaughn-Riley*, 2020 WL 7053651, at *3 (noting that legislative history of definition of "matter of public concern" reflected legislature's intent to narrow TCPA's scope in 2019 amendments).

Communications are a matter of public concern when they can "be fairly considered as relating to any matter of political, social or other concern to the community" or when it "is a subject of general interest and of value and concern to

the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011). "The arguably 'inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern.'" *Id.* (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)). Deciding whether speech is of public or private concern requires us to examine the "content, form, and context" of that speech, "as revealed by the whole record." *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)).

Though private conversations are sometimes covered by the act, *e.g.*, *ExxonMobil Pipeline Co.*, 512 S.W.3d at 896, *Lippincott*, 462 S.W.3d at 509-10; to fall within the "matter of public concern" category, a communication must have public relevance beyond the private or personal interests of the parties. *Creative Oil & Gas v. Lona Hills Ranch*, 591 S.W.3d 127, 136 (Tex. 2019). Thus, a private dispute affecting only the fortunes of the private parties involved is simply not a "matter of public concern" under any tenable understanding of those words. *See id.* at 134-37. When the communication involved does not itself relate to a matter of public concern, the assertion that the communication *could* result in a matter of public concern is beyond the reach of the act. *Erdner v. Highland Park Emergency Ctr., LLC*, 580 S.W.3d 269, 276 (Tex. App.—Dallas 2019, pet. filed) (citing *Nguyen v. Hoang*, 318 F. Supp. 3d 983, 1001 (S.D. Tex. 2018)). As the supreme court recently reiterated, communications that are merely "related somehow to one of the broad categories" set out in the statute but that otherwise have no relevance to a public audience are not "communications made in connection with a matter of public concern." *McLane Champions, LLC v. Houston Baseball Partners LLC*, No. 21-0641, --- S.W.3d ---, 2023 WL 4306378, at *6 (Tex. June 30, 2023). "Under the TCPA, the communication on which the suit is based must have some relevance to a public audience." *Id*. at *7.

In analyzing whether or not the act applies to a claim, we start with the plaintiff's pleadings, which is the "best and all-sufficient evidence of the nature of the action." *See Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017); *see also* Tex. Civ. Prac. & Rem. Code § 27.006(a) (pleadings are evidence in TCPA cases). We cannot "blindly accept" attempts by the movant to characterize the claims as implicating protected expression. *See Sloat v. Rathbun*, 513 S.W.3d 500, 504 (Tex. App.—Austin 2015, pet. dism'd).

In this case, Khan's counterclaims involve alleged statements by Hayman's employees disparaging Khan based on his Indian descent and Muslim beliefs. These alleged statements all arose out of Khan's employment with Hayman and were made in the workplace.[4] Hayman attempts to invoke the TCPA's free speech protections by arguing that the alleged communications and statements at issue were a valid exercise of free speech because they necessarily involved "race, national-origin, and religious discrimination and retaliation." We, however, cannot broadly sweep an employer's allegedly racially discriminatory statements about an employee in the course of employment under the enhanced protections of the TCPA; such statements about a single individual that do not relate the public at large are beyond the reach of the act. *See Erdner*, 580 S.W.3d at 276.

[4] A party to a legal action may file a TCPA motion to dismiss if the action is based on or in response to *that party's* exercise of the statutorily enumerated rights. *See* Tex. Civ. Prac. & Rem. Code § 27.003(a). Based on the plain language of Khan's counterclaims, he did not allege that *Hayman* made any of the offending statements that we are told implicate the TCPA. Instead, Khan attributed the statements to "employees," a category of persons that was not alleged to include Hayman because Hayman was alleged to be the *employer*, not an *employee*. On appeal, however, Khan has not argued against TCPA applicability on the ground that Hayman did not make the statements in question. Therefore, we presume that Khan interprets his own pleading as sufficiently broad to attribute the alleged statements to Hayman personally.

We hold that Hayman's alleged communications were not made in connection with a matter of public concern because an individual employer's racist comments, expressed in a private company about a single employee, are not likely to impact a larger part of the community or have broader relevance to a public audience outside the company. *See, e.g.*, *McLane Champions, LLC*, 2023 WL 4306378 at *6; *Beard v. McGregor Bancshares, Inc.*, No. 05-21-00478-CV, 2022 WL 1076176, at *6 (Tex. App.—Dallas Apr. 11, 2022, no pet.) (mem. op.) (holding TCPA did not apply when comments were personal attacks stemming from a private dispute and speech had no connection to the broader community); *Yu v. Koo*, 633 S.W.3d 712, 723 (Tex. App.—El Paso 2021, no pet.) (holding statements about the circumstances of allegedly wrongful termination by private employer were not matters of public concern); *Vaughn-Riley*, 2020 WL 7053651, at *3 (holding TCPA did not apply when there was no evidence that subject of communication was "of general interest and of value and concern to the public"); *Morris v. Daniel*, 615 S.W.3d 571, 578 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (holding TCPA did not apply because "the safety and education of a single child is not a public concern unless it has some relevance to a broader public audience"); *Pickens v. Cordia*, 433 S.W.3d 179, 184 (Tex. App.—Dallas 2014, no pet.) (holding TCPA did not apply because communication was merely a personal account of defendant's life and did not implicate broader community concerns), *disapproved of on other grounds by Hersh v. Tatum*, 526 S.W.3d 462 (Tex. 2017); *see also Miranda v. Byles*, 390 S.W.3d 543, 554 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (explaining in defamation context that matter can be a public issue because people in the public are discussing it or because people other than the immediate participants in the controversy are likely to feel the impact of its resolution).

There is no doubt that race, national origin, and religion are "subject[s] of

general interest and of value and concern to the public." *See City of San Diego, Cal. v. Roe*, 543 U.S. 77, 83-84 (2004); *see also Snyder*, 562 U.S. at 453. But Hayman's statements were not speaking about race or religion in this country, nor was he speaking about these subjects generally. *See Pickens*, 433 S.W.3d at 184 (although communication touched on matters that could be of public concern, the communication was not "a general purveyor of information on those subjects"). Further, it is irrelevant that the public at large *could* have an interest in the racially motivated statements because the statements themselves do not relate to a matter of public concern. *See Erdner*, 580 S.W.3d at 276. The statements were made in a private setting, about one individual, to a limited group of people—not to a public audience.

Moreover, to qualify as a matter of public concern under the act, a communication must "regard" "a matter of political, social, or other interest to the community" or "a subject of concern to the public." "Regarding" means "with respect to" or "concerning." *See Anadarko Petroleum Corp. v. Houston Cas. Co.*, 573 S.W.3d 187, 197 (Tex. 2019) ("'as regards' means 'concerning' or 'with respect to'") (citing New Oxford American Dictionary (3d ed. 2010) (defining "as regards" as "concerning, with respect to") and Webster's New Collegiate Dictionary (9th ed. 1981) (defining "as regards" as "with respect to: CONCERNING")). In the present context, a racially motivated statement by an employer to an employee in the workplace "regards" a subject of concern to the public only in the theoretical sense that racism generally is undisputedly of public concern. The alleged communications here, however, are alleged to *constitute* racial or religious discrimination or to *create* a hostile work environment. Is Hayman contending that he enjoys a TCPA-protected, if not constitutionally protected, right to make racially discriminatory statements to his employees on the job? Such statements have long been proscribed

by employment laws in Texas and elsewhere. The ruling he seeks would allow an employer to enjoy refuge behind the act's enhanced procedural protections when the employer is alleged to have made racially discriminatory slurs to or about an employee in the course of employment. The TCPA protects citizens from retaliatory lawsuits that seek to silence or intimidate them from exercising their rights in connection with matters of public concern. *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding). Khan's claims based on racially offensive statements by his employer do not reasonably fall into that group.

Under the applicable statutory definitions, the guidance from the U.S. Supreme Court, and the TCPA opinions from our sister courts, we conclude that Hayman's alleged communications were not made in connection with a matter of public concern and therefore do not qualify as an exercise of the right of free speech under the act. Accordingly, we overrule Hayman's first issue and do not reach the remaining issues. *See* Tex. Civ. Prac. & Rem. Code § 27.005(b); *see also Krishna Fin. Ltd. v. Elvis B. Foster, P.C.*, No. 14-19-00038-CV, 2020 WL 1181840, at *1 (Tex. App.—Houston [14th Dist.] Mar. 12, 2020, no pet. h.) (mem. op.) ("[T]he movant must satisfy its initial burden of demonstrating . . . that the legal action is based on, relates to, or is in response to the movant's exercise of the right of free speech, the right to petition, or the right of association.").

Conclusion

We conclude that the TCPA does not apply to an employer's allegedly racist comments expressed in a private company about a single employee. Thus, Hayman has not shown that the actions alleged in Khan's counterclaims are based on, in response to, or related to Hayman's exercise of the right of free speech. The trial court did not err in denying appellant's TCPA motion to dismiss. We affirm the court's order.

/s/ Frances Bourliot
Justice

Panel consists of Justices Jewell, Bourliot, and Poissant.