

Texas Justices Dump Exxon Row Under Free Speech Law

By Jess Krochtengel

Law360, Dallas (February 24, 2017, 7:15 PM EST) -- The Texas Supreme Court on Friday said an ExxonMobil Corp. worker's defamation suit, based on communications about his alleged failure to measure a petroleum storage tank, should be dismissed under a state free speech law because the comments were in connection with a matter of public concern.

The court, reversing a Fifth Court of Appeals decision, held that communications between ExxonMobil Pipeline Co. supervisors about former employee Travis Coleman and statements used for employee instruction at a monthly safety meeting are protected under the Texas Citizens Participation Act, a state law designed to curb strategic lawsuits against public participation, or SLAPP suits.

Coleman was fired after being accused of falsifying a report on the storage level of a petroleum tank that he allegedly did not check but claimed to have accurately recorded, and he sued the company and supervisors for defamation and business disparagement based on statements they made about the tank check.

The lower court in May 2015 held that the communications between Exxon supervisors about Coleman had only a "tangential relationship" to health, safety, environmental and economic concerns, and were instead related only to a personnel matter. It rejected Exxon's argument that the case should have been dismissed.

But the Supreme Court justices said the TCPA does not require that the statements specifically mention health, safety, environmental or economic concerns, nor does it require more than a tangential relationship to them. TCPA applicability requires only that the defendant's statements are "in connection with issues related to health, safety, environmental, economic and other identified matters of public concern chosen by the Legislature," the court said, quoting the statute.

"Coleman's final argument, in which he suggests the Legislature meant 'in connection with' to suggest something more than a tenuous or remote relationship, fails to rehabilitate the court of appeals' improper narrowing of the TCPA and instead highlights the error in the court of appeals' analysis," the justices said. "We do not substitute the words of a statute in order to give effect to what we believe a statute should say; instead, absent an ambiguity, we look to the statute's plain language to give effect to the Legislature's intent as expressed through the statutory text."

The court did not hear oral argument in the case. Its decision relied heavily on a 2015 case, *Lippincott v. Whisenhunt*, which involved communications about a doctor's services. In *Lippincott*, the court held that

communications don't have to be made publicly to fall under the TCPA and found that the comments about the doctor's performance were a matter of public concern.

In Coleman's case, the court found parallels, saying that although the statements were private and among Exxon employees, they concerned the worker's alleged failure to gauge a tank — a process completed at least in part to reduce the potential environmental, health, safety and economic risks associated with noxious and flammable chemicals overfilling and spilling onto the ground.

"We believe the decision correctly interprets the statute in accordance with its terms and the court's prior decisions," Exxon spokesman Aaron Stryk said Friday.

"We disagree with but respect the court's opinion," said Chad Baruch of Johnston Tobey Baruch PC, who represents Coleman.

Exxon is represented by Nina Cortell, Jason Bloom and Alicia Calzada of Haynes and Boone LLP.

Coleman is represented by Chad Baruch of Johnston Tobey Baruch PC, Eliot Shavin and Donald Mark Steadman.

The case is ExxonMobil Pipeline Co. et al. v. Coleman, case number 15-0407, in the Supreme Court of Texas.

--Editing by Sara Ziegler.