

SLAPP Your Opponents:

What Employment Lawyers Need to Know About the Anti-SLAPP Statute

Mark J. Oberti
Ed Sullivan
OBERTI SULLIVAN LLP
712 Main Street, Ste. 900
Houston, Texas 77002
713-401-3555
mark@osattorneys.com
ed@osattorneys.com

Joseph Y. Ahmad
Kelsi S. White
AHMAD, ZAVITSANOS, ANAIPAKOS,
ALAVI & MENSING P.C.
1221 McKinney St., Ste. 2500
Houston, Texas 77010
713-655-1101
joeahmad@azalaw.com
kwhite@azalaw.com

Charles Sturm
STURM LAW PLLC
712 S. Main St., Ste. 900
Houston, Texas 77002
713-955-1800
csturm@sturmlaw.com

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The Anti-SLAPP Statute: An Overview and Refresher

Texas Anti-SLAPP Statute

- ▶ A powerful motion to dismiss found in Texas Civil Practice & Remedies Code Chapter 27 (“The Texas Citizens’ Participation Act or “TCPA”)
- ▶ Applies to any legal action that is:
 - ▶ “based on”
 - ▶ “relates to” or
 - ▶ “is in response to”

A party’s exercise of:

- ▶ Right of free speech
 - ▶ Right to petition
 - ▶ Right of association
- ▶ Not limited to particular causes of action and “legal action” defined broadly
 - ▶ Lawsuit, cause of action, petition, complaint, cross-claim, counterclaim, any other judicial pleading or filing requesting legal or equitable relief
 - ▶ Includes Rule 202 petitions. *Int’l Ass’n of Drilling Contractors v. Orion Drilling Co.*, 512 S.W.3d 483, 492 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *In re Elliot*, 504 S.W.3d 455, 457 (Tex. App.—Austin 2016, orig. proceeding)

Rights Protected by Anti-SLAPP

- ▶ Right of Free Speech
 - ▶ Any communication in connection with a “matter of public concern”
 - ▶ “A matter of public concern” includes an issue related to:
 - ▶ Health or safety;
 - ▶ Environmental, economic, or community well-being;
 - ▶ Government;
 - ▶ Public official or public figure; or
 - ▶ Good, product, or service in the marketplace
- ▶ Communications do not have to be made publicly. *Lippincott v. Whisenhunt*, 462 S.W.3d 507 (Tex. 2015)

Rights Protected by Anti-SLAPP

- ▶ Right to Petition
 - ▶ **Proceedings.** A communication in or pertaining to any kind of judicial or government proceeding or meeting
 - ▶ **Government review.** A communication connected with an issue under consideration or review by government or that is reasonably likely to encourage such consideration and review
 - ▶ **Public participation.** Communication that enlists public participation in an effort to effect consideration of an issue by the government
 - ▶ **Anything else.** Any other communication that falls within right to petition the government under U.S. and Texas Constitution

Rights Protected by Anti-SLAPP

- ▶ Right of Association
 - ▶ A communication between individuals who join together to collectively express, promote, pursue, or defend common interests

Anti-SLAPP Carve-Outs

- ▶ **Commercial speech.**

- ▶ An action “brought against a person primarily engaged in the business of selling or leasing goods or services,”
 - ▶ “if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is the actual or potential buyer or customer”

- ▶ Enforcement action brought by attorney general, district attorney, etc.

- ▶ Action for bodily injury, wrongful death, survival or statements made regarding that action

- ▶ Action brought under Insurance Code or arising out of insurance contract

Anti-SLAPP's Procedural Weapons

- ▶ Motion must be filed within 60 days of service and brings case to a screeching halt:
 - ▶ Discovery is suspended, with a limited exception
 - ▶ “Specific and limited discovery” relevant to motion if Court allows it on showing of good cause
 - ▶ Motion is set for hearing within 60 days of filing
 - ▶ 90 days if docket conditions require it
 - ▶ 120 days if Court allows discovery
 - ▶ Court must rule within 30 days of hearing or otherwise denied by operation of law
 - ▶ Interlocutory appeal available if motion denied and trial court proceedings stayed

Anti-SLAPP's Procedural Weapons

▶ Sanctions, Fees, and Costs

- ▶ If motion to dismiss is granted, the Court “**shall**” award sanctions, fees, and costs against the plaintiff.
 - ▶ No separate requirement that the Plaintiff’s case was frivolous
- ▶ If motion to dismiss is denied, the Court “**may**” award fees and costs (not sanctions) to the Plaintiff if the motion was frivolous or brought for the purpose of delay
- ▶ You cannot avoid fees and sanctions by dropping claims once an Anti-SLAPP Motion to Dismiss is filed.
 - ▶ *James v. Calkins*, 446 S.W.3d 135, 144 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

The Burdens of Proof

10

- ▶ Defendant must show by a “**preponderance of evidence**” that the Anti-SLAPP Statute applies
- ▶ Plaintiff must show “**clear and convincing evidence**” of a prima facie case
 - ▶ Includes relevant circumstantial evidence. *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015)
- ▶ If Plaintiff meets this burden, the defendant can still show a “**preponderance of evidence**” supports each element of a defense

The Broad Reach of the Anti-SLAPP Statute and Its Application in Employment Cases

Right to Free Speech and Association:

Elite Autobody v. Autocraft Bodywerks,
520 S.W.3d 191, 194, 206 (Tex. App.—Austin 2017, pet. denied)

- ▶ Facts: Former employer sues former employees and new employer for trade secret misappropriation, breach of fiduciary duty, and conspiracy.
- ▶ Basis for Motion to Dismiss: Employees and new employer sought to dismiss because claims were in response to and based on right of free speech and right to petition.
 - ▶ Alleged “communications” where trade secrets were shared
 - ▶ Communications involved the association of the employee and his new employer

Right to Free Speech and Association:

Elite Autobody v. Autocraft Bodywerks,
520 S.W.3d 191, 194, 206 (Tex. App.—Austin 2017, pet. denied)

- ▶ Court of Appeals Holding: The Anti-SLAPP Statute applies because the claims were based on the defendants' communications, in which they allegedly shared trade secrets, and their right to associate with each other and their new employer.
 - ▶ Based on the Texas Supreme Court's analysis in *Exxon Mobil v. Coleman*, up next
- ▶ Implication: Most trade secret claims will fall under the Anti-SLAPP Statute.

Right to Free Speech and Disgruntled Employees: Exxon Mobil v. Coleman, 512 S.W.3d 895 (Tex. 2017)

14

- ▶ Facts: Former employee sued his employer and two supervisors for defamation, alleging that he was terminated because his supervisors made false statements about his job performance (gauging petroleum storage tanks).
- ▶ Basis of Motion to Dismiss: Exxon and the supervisors moved to dismiss because the defamation claims were based on the supervisors' right to free speech and right of association.
- ▶ Court of Appeals Holding: The Anti-SLAPP Statute did not apply because the statements about job performance were not sufficiently related to a matter of public concern and the "association" between his supervisors was not related to public participation.

Right to Free Speech and Disgruntled Employees: Exxon Mobil v. Coleman, 512 S.W.3d 895 (Tex. 2017)

15

- ▶ Texas Supreme Court Holding: The Anti-SLAPP Statute applied because the statements about gauging tanks related to potential environmental, health, and safety risks. The Court did not address the right of association holding.
- ▶ Takeaway: The Anti-SLAPP Statute protects statements that are tangential or remote to the actual scope of constitutional rights.
 - ▶ Reasoning here would also work for wrongful-termination claims

SLAPPING Disputes Between Former and New Employers

Abatecola v. 2 Savages Concrete Pumping, LLC,
No. 14-17-00678-cv, 2018 WL 3118601 (Tex. App.—Houston [14th Dist.], no
pet. h.)

- ▶ Facts: Two men own a concrete pumping company, and one of them leaves to go work for a competitor company. His former partner and the company sue him, the competitor, and its owners for violations of his non-compete agreement and tortious interference with customer contracts. Prior to the hearing on the Anti-SLAPP Motion, the plaintiffs non-suit various parties so that only the claim by the company against its competitor remains.
- ▶ Basis for Motion to Dismiss: The competitor argued that the tortious-interference claims against it were based on the exercise of the right of free speech and right of association.
- ▶ Trial Court Holding: The Anti-SLAPP Statute did not apply to a case involving non-compete and non-disclosure agreements, and further the commercial speech exception applied. The court awarded fees to the plaintiff because the competitor “should have known of the exclusion.”

SLAPPING Disputes Between Former and New Employers

Abatecola v. 2 Savages Concrete Pumping, LLC,
No. 14-17-00678-cv, 2018 WL 3118601 (Tex. App.—Houston [14th Dist.], June 26, 2018, no pet. h.)

▶ Appellate Court Holdings:

- ▶ There is no subject-matter exemption for non-compete agreements or non-disclosure agreements in the Anti-SLAPP Statute.
- ▶ The Anti-SLAPP Statute applies to the tortious-interference claims (right of free speech and association).
- ▶ The commercial speech exemption did not apply to claims based on the hiring of the employee under the new Texas Supreme Court case, *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684 (Tex. 2018), up next.
- ▶ The commercial speech exemption did apply to claims based on communications that defendant-competitor had with its own customers.
- ▶ The burden of proof for application of an exemption is “preponderance of the evidence.”
- ▶ The trial court needed to decide the motion to dismiss related to non-suited claims for purposes of determining sanctions, fees, and costs.
- ▶ Fees can only be awarded on a finding that a motion to dismiss is frivolous or solely intended for delay.

SLAPPING Disputes Between Former and New Employers

Abatecola v. 2 Savages Concrete Pumping, LLC,

No. 14-17-00678-cv, 2018 WL 3118601 (Tex. App.—Houston [14th Dist.], June 26, 2018, no pet. h.)

► Note:

- Former employee did not move to dismiss under Anti-SLAPP, but arguably claims based on non-compete and non-disclosure are also based on right of free speech and association.
- Prima facie case *may* be easier on non-compete, depending on how clear the competition is, but you can arguably force the court to decide enforceability of non-compete prior to MSJ stage

The Commercial Speech Exception, Castleman v. Internet Money Ltd. 546 S.W.3d 684 (Tex. 2018)

- ▶ Resolved a divide among the lower courts about when the commercial-speech exemption applied

The Anti-SLAPP Statute does not apply “to a legal action brought . . .

- ▶ against a person primarily engaged in the business of selling or leasing goods or services,
- ▶ if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.”
- ▶ Unclear: Made to customers of whom? The Defendant? The Plaintiff?

The Commercial Speech Exception, Castleman v. Internet Money Ltd. 546 S.W.3d 684 (Tex. 2018)

- ▶ Most courts said the defendant's commercial statements have to be directed at the defendant's actual or potential buyers or customers, not the plaintiff's buyers or customers or public
- ▶ The minority of courts said as long as there were statements intended for an actual or potential buyer or customer that arose out of the sale or lease of goods or services, then the exemption applied
 - ▶ Did NOT need to be the defendant's statements towards the defendant's customers

The Commercial Speech Exception, Castleman v. Internet Money Ltd. 546 S.W.3d 684 (Tex. 2018)

- ▶ Facts: Castleman has an online middleman business and hires O'Connor to provide virtual-assistant services to process and fulfill orders. Castleman later alleges that O'Connor over-ordered products and lost him around \$8,000, which O'Connor will not pay. Castleman complains about O'Connor's business online, and O'Connor sues him for defamation.
- ▶ Basis of Motion to Dismiss: Castleman's statements online were in exercise of his right of free speech, and the commercial speech exemption does not apply because the statements were not about *Castleman's* goods or services or directed at *Castleman's* customers.
- ▶ Court of Appeals Holding: The commercial speech exemption did apply because it is not limited to statements a defendant makes to its own actual or potential customers. It is broader than that. (Minority Position)

The Commercial Speech Exception, Castleman v. Internet Money Ltd. 546 S.W.3d 684 (Tex. 2018)

- ▶ Texas Supreme Court Holding: The majority position is correct.

“Focusing on the text and context of the TCPA's commercial-speech exemption, we construe the exemption to apply when (1) the defendant was primarily engaged in the business of selling or leasing goods, (2) the defendant made the statement or engaged in the conduct on which the claim is based in the defendant's capacity as a seller or lessor of those goods or services, (3) the statement or conduct at issue arose out of a commercial transaction involving the kind of goods or services the defendant provides, and (4) the intended audience of the statement or conduct were actual or potential customers of the defendant for the kind of goods or services the defendant provides.”

- ▶ The exemption did not apply to Castleman's conduct because his statements were not related to his sale of his goods or services but instead were related to his status as a customer of O'Connor's services.

Right to Petition and Administrative Proceedings:
Porter-Garcia v. The Travis Law Firm,
2018 WL 4027023 (Tex. App—Houston [1st Dist.], no pet. h.)

- ▶ Facts: The TWC decided two employees were owed wages from a law firm. The law firm sought judicial review of that decision and sued the employees for breach of contract, fraud, and theft. The law firm said the employees were supposed to make up any missed work time other than 3 paid sick leave days a year. They were paid for work they missed and did not make up.
- ▶ Basis of Motion to Dismiss: The employees sought to dismiss the case because it based on, related to, and in response to their right to petition the TWC to resolve wage disputes

Right to Petition and Administrative Proceedings:
Porter-Garcia v. The Travis Law Firm,
2018 WL 4027023 (Tex. App—Houston [1st Dist.], no pet. h.)

- ▶ Holding: The Anti-SLAPP Statute applied, but the law firm met its prima facie burden on breach of contract. It did not on fraud or theft. In particular, for fraud, the plaintiff did not have evidence the defendants made knowingly false statements to induce the plaintiff to pay them their wages.

“ . . . Had they ‘not filed the wage claim[s], the Firm would not have been legally compelled to pay the unpaid wages’ and ‘thus there is a direct connection between the damages claimed by the Firm . . . and [the] administrative proceeding conducted by [the] TWC.’”

Responsive Lawsuits/Counterclaims:
Serafine v. Blunt,
466 S.W.3d 352 (Tex. App.—Austin 2015, no pet.)

Not an employment case, but one of the limited cases on counterclaims and the right to petition

- ▶ Facts: Neighbors Serafine and the Blunts were in a property dispute. The Blunts brought a tortious-interference counterclaim against Serafine, alleging her filing of the lawsuit interfered with the contract they had with a drainage and foundation company, and a fraudulent-lien counterclaim.
- ▶ Basis of Motion to Dismiss: Serafine sought to dismiss the counterclaims as in response to her right to petition.

Responsive Lawsuits/Counterclaims:
Serafine v. Blunt,
466 S.W.3d 352 (Tex. App.—Austin 2015, no pet.)

- ▶ Holding: The Anti-SLAPP Statute applied to the tortious interference counterclaims based on Serafine’s filing of a lawsuit and the fraudulent-lien counterclaim, and the Blunts could not show “clear and convincing evidence” to support those claims.
- ▶ Potential Limitation: The Blunts’ counterclaims explicitly complained of “the filing of this lawsuit” and the filing of a lien “in relation to this case”
 - ▶ Does not mean that any counterclaim is “in response to” a right to petition

Procedural and Appellate Issues

Does the Anti-SLAPP Statute apply in federal court?

28

Diversity Cases

- ▶ The Fifth Circuit has assumed without deciding that the Anti-SLAPP Statute applies in diversity cases as substantive law. *Cuba v. Pylant*, 814 F.3d 701, 706 n.6 (5th Cir. 2016)
 - ▶ Based on *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 169 (5th Cir. 2009), where the Louisiana Anti-SLAPP statute was deemed substantive.
 - ▶ Footnote 6 suggests that perhaps the procedural rules surrounding the Anti-SLAPP statute (i.e. discovery stays, quick hearings, timetables for ruling, and interlocutory appeals) will not apply in federal court, even if the substantive right exists

Does the Anti-SLAPP Statute apply in federal court?

29

District courts have applied the Anti-SLAPP Statute to dismiss claims.

- ▶ *Khalil v. Memorial Hermann Health System*, No. H-17-1954, 2017 WL 5068157 (S.D. Tex. Oct. 30, 2017) (Rosenthal, J.)
 - ▶ Dismissing state-law discrimination claims based on Anti-SLAPP Statute
- ▶ *Charalambopoulos v. Grammer*, No. 3:14-cv-2424-D, 2015 WL 390664 (N.D. Tex. Jan. 29, 2015) (Fitzwater, J.)
 - ▶ Dismissing negligence, fraud, intentional infliction of emotional distress, malicious prosecution, and defamation in part
 - ▶ Recognizing that some of the statute's procedural rules were not binding on the court though

One district court has gone the other way.

- ▶ *Rudkin v. Roger Beasley Imports, Inc.*, No. A-17-CV-849-LY, 2017 WL 6622561 (W.D. Tex. Dec. 28, 2017) (Austin, M.J.)
 - ▶ Holding that the Anti-SLAPP Statute is only procedural and not applicable in a diversity case

Discrimination Claims and the Right to Free Speech

Mathiew v. Subsea 7,

No. 4:17-cv-3140, 2018 WL 1515264 (S.D. Tex. Mar. 9, 2018)

30

- ▶ Facts: Employee sued for race discrimination in federal court, alleging she was denied training, a raise, and then terminated, and the employer moved to dismiss under the Anti-SLAPP Statute.
- ▶ Basis for Motion to Dismiss: When her employer “verbally advised” her she was terminated for poor performance and had internal communications about terminating her, it was exercising its right to free speech. It claimed the communications related to matters of “economics” and a “good, product, or service in the marketplace.”

Discrimination Claims and the Right to Free Speech

Mathiew v. Subsea 7,

No. 4:17-cv-3140, 2018 WL 1515264 (S.D. Tex. Mar. 9, 2018)

- ▶ Holding:

- ▶ The Defendants failed to show the communications were related to a “matter of public concern,” even if they related to “economics.”
- ▶ Alternatively, the Anti-SLAPP Statute does not apply in federal court because:
 - ▶ It is procedural and in conflict with Federal Rules; and
 - ▶ The Supremacy Clause bars its application to federal claims.

Necessary Evidence

- ▶ Pleadings and affidavits

- ▶ *In re Lipsky*, 460 S.W.3d 579, 587 (Tex. 2015)

“However, to satisfy the TCPA, ‘a plaintiff must provide enough detail to show the factual basis for its claim,’ including how the defendants ‘damaged the plaintiff.’’ [G]eneral allegations that merely recite the elements of a cause of action ... will not suffice.’ Additionally, ‘[b]are, baseless opinions do not create fact questions, and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the TCPA.’”

- ▶ *Abatecola v. 2 Savages Concrete Pumping, LLC*, 2018 WL 3118601 (Tex. Ap.—Houston [14th Dist.] June, 26, 2018, no pet. h.) (citing *In re Lipsky*, above)

- ▶ Beware of claims requiring you to prove knowledge and intent (fraud, tortious interference) as it will be hard to do without discovery
 - ▶ *Abatecola v. 2 Savages Concrete Pumping, LLC*, 2018 WL 3118601 (Tex. Ap.—Houston [14th Dist.] June, 26, 2018, no pet. h.)
 - ▶ Tortious-interference claim based on hiring of employee in violation of non-compete was dismissed because no “clear and specific” evidence that employer knew of non-compete prior to hiring employee
 - ▶ Court disregarded the evidence of cease-and-desist letter sent the day after the employee was hired
- ▶ Remember a Rule 202 Petition is also subject the Anti-SLAPP Statute.

No Judicial End-Runs Around the Anti-SLAPP Statute

Reeves v. Harbor America Central, Inc.

552 S.W.3d 389 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.)

- ▶ Facts: The plaintiff had a non-compete, non-disclosure and non-solicit agreement and started a competing company. He sued his former employer for unpaid commissions, and the employer countersued for breach of contract, trade secret misappropriation, conversion, and breach of fiduciary duty. The employer alleged the plaintiff and another employee had made plans to start a competing company and that it had lost a customer to the plaintiff's new company.
- ▶ Basis of Motion to Dismiss: The plaintiff moved to dismiss the counterclaims because they were based on his right to associate with his colleague to start a new business.

No Judicial End-Runs Around the Anti-SLAPP Statute

Reeves v. Harbor America Central, Inc.

552 S.W.3d 389 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.)

▶ Trial Court Holding: Denied.

“This motion is set for oral argument . . . But the court is taking it up now because no oral argument or briefing is required, and further because the motion is being used as an excuse not to participate in discovery ordered by the Court and agreed to by the parties in a binding Rule 11 agreement. The [TCPA] as a matter of law does not allow a party to avoid contractual obligations such as the ones at issue here.”

▶ Appellate Court Holding: On remand, the trial court has to conduct the step-by-step analysis under the statute.

Fees and Sanctions Nuts and Bolts

36

- ▶ The Court must award fees if it grants the Motion
 - ▶ Defendant's request for fees needs to be supported with sufficient evidence
 - ▶ Attach an affidavit and bills to your motion
 - ▶ Prepare supplemental evidence of fees to bring to hearing if additional fees are incurred prior to and in preparation of hearing
 - ▶ Request sanctions to deter the plaintiff from bringing similar actions
- ▶ The Court may award fees if it denies the Motion if it finds the motion is frivolous or intended solely for delay
 - ▶ Frivolous: no arguable basis in law or fact.
 - ▶ *McDonald v. Houston Dairy*, 813 S.W.2d 238, 239 (Tex.App.—Houston [1st Dist.] 1991, no writ) (not an anti-SLAPP case); *De La Vega v. Taco Cabana, Inc.*, 974 S.W.2d 152, 154 (Tex.App.—San Antonio 1998, no pet.) (referring to “no arguable basis in law or fact as “well established” definition of frivolous)

Appeal Nuts and Bolts

37

- ▶ If a motion is denied, the defendant is entitled to an interlocutory appeal.
- ▶ If the motion is granted, the plaintiff is not entitled to appeal unless it disposes of all claims and is a final judgment
 - ▶ *Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881, 887 (Tex. App.—Houston [1st Dist.] 2015, no pet.)
- ▶ The appeal is expedited so it must be filed 20 days after the order is signed or denied by operation of law. CPRC 27.008(b); TRAP 26.1 (b)
 - ▶ Beware of denial by operation of law 30 days after the hearing triggering appellate deadline.
- ▶ The interlocutory appeal automatically stays trial court proceedings. CPRC 51.014(b)

Takeaways: SLAPP Proofing Your Lawsuit

SLAPP Proofing Your Lawsuit

39

- ▶ Avoid shotgun approach to claims
 - ▶ Even if one claim survives, you will be on the hook for fees and sanctions related to the others
- ▶ Evaluate claims that are based on communications (speech), relationships between individuals (association), or government or judicial proceedings (petition)
 - ▶ Flag any factual allegations relating to the above and evaluate evidence to support claim
- ▶ Plan ahead and conduct fact investigation and initial discovery with your client on the front-end
 - ▶ Trade secret cases: forensics, proof of trade secret status, letters to defendants
 - ▶ Non-compete cases: cease-and-desist letters, communicate with defendants to learn what they know
 - ▶ Tip: Treat the case like you are preparing to request a TRO and need evidence to show a probable right to recover
- ▶ Avoid bare-bones pleading
 - ▶ Detail in petition can help head-off an Anti-SLAPP Motion

Takeaways: When to SLAPP

SLAPP-able Fact Patterns for Employment Lawyers

- ▶ Trade secret misappropriation
- ▶ Non-compete agreements
- ▶ Breach of fiduciary duty
- ▶ Conspiracy/Knowing Participation/Aiding and Abetting
 - ▶ Often in the context of non-compete and trade secret misappropriation claims
- ▶ Wrongful termination (contract, illegal act, etc.)
- ▶ Tortious-interference claim from a former employer against a new employer
- ▶ Employer counterclaim to employment discrimination lawsuit
- ▶ State-law discrimination claims
- ▶ Anytime you have two dueling lawsuits:
 - ▶ Filing of a lawsuit in one jurisdiction in response to a pending lawsuit in another jurisdiction