

No. 07-0205

In the Supreme Court of Texas

WAFFLE HOUSE, INC.,
Petitioner

v.

CATHIE WILLIAMS,
Respondent

CASE NO. 02-05-00373-CV
FROM THE SECOND COURT OF APPEALS, FORT WORTH, TEXAS

PETITIONER'S POST-SUBMISSION BRIEF

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INTRODUCTION

The Court held oral argument in this case on March 12, 2009. In order to provide a more complete response to certain questions from members of the Court, Petitioner respectfully presents the following arguments and authorities. A transcript of the oral argument is attached as Appendix, and will be cited by page number, *e.g.*, App. 1.

ARGUMENTS & AUTHORITIES

I. Waffle House Preserved The Argument That The Texas Commission On Human Rights Act Is The Exclusive Remedy For Cathie Williams' Sexual Harassment Claim.

JUSTICE WAINWRIGHT and JUSTICE O'NEILL asked whether Waffle House had preserved a "preemption" argument in the trial court and court of appeals, or an argument that the Texas Commission on Human Rights Act ("TCHRA") is the exclusive remedy for sexual harassment. App. 6-7. As a matter of record, Waffle House unambiguously preserved the argument that the TCHRA preempts a negligence cause of action in the trial court and the court of appeals,¹ though Waffle House did not

¹ Waffle House argued that Williams' tort actions were preempted by the Texas Commission on Human Rights Act ("TCHRA") in its motion for new trial and motion JNOV in the trial court. *See* CR2:165, 178-179, 233. These preserved error on appeal. *See Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 450 (Tex. 2004) (motion JNOV sufficient to raise issue of whether IIED action is sustainable for sexual harassment; special exceptions or objection to jury charge not necessary); *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999) (finding "no logical reason to treat a post-verdict legal availability challenge differently than a post-verdict legal sufficiency challenge"). Waffle House continued to preserve the argument in its briefing to the court of appeals. *See* Appellant's Brief at 24 (citing *Zeltwanger* and arguing that "negligent supervision and retention is preempted by statute in an action involving sexual harassment"); *see id.* at 22 (citing *Gonzales v. Willis*, 995 S.W.2d 729, 738-9 (Tex. App.—San Antonio 1999, no pet.) and arguing that "[a]s a matter of law, a plaintiff cannot recover damages in negligence for statutory sexual harassment.").

exclusively rely on this argument.² Whether or the not it is called “preemption,” Waffle House’s argument in the courts below, and in this Court, is that Williams cannot sustain a negligence claim predicated on the facts of this case, which exclusively pertain to alleged acts of sexual harassment.

JUSTICE O’NEILL asked for clarification as to whether Waffle House challenges the sufficiency of the evidence, or the sustainability of the negligence cause of action. App. 3. Respectfully, under this Court’s precedent, it must be both. *Zeltwanger* held that “when the gravamen of the plaintiff’s complaint is for sexual harassment, the plaintiff must proceed solely under a statutory claim unless there are *additional facts*, unrelated to sexual harassment, to support an independent tort claim for intentional infliction of emotional distress.” *Zeltwanger*, 144 S.W.3d at 441 (emphasis added). Though the Court did not call this “preemption,”³ it is at once a challenge to the sustainability of the IIED tort based on the facts of the case, and a holding that there was insufficient evidence to

² This Court has not determined whether TCHRA preempts a common law cause of action. See *Ledesma v. Allstate Ins. Co.*, 68 S.W.3d 765 (Tex. App.—Dallas 2001, no pet.) (holding that TCHRA does not preempt common law claims brought in the same suit as a sexual harassment action, but noting that it is case of first impression in Texas). The Fort Worth Court of Appeals had no precedent as to whether TCHRA preempted a negligence action. Other courts, particularly the San Antonio Court of Appeals, had held that TCHRA did not preempt a common law tort action, though it required that the tort action be supported by independent evidence. *Gonzales v. Willis*, 995 S.W.2d 729, 740 (Tex. App.—San Antonio 1999, no pet.) (“[i]f we allowed a sexual harassment finding to supply the basis for recovery on a negligent hiring claim, the statutory procedures and limitations applicable to such claims would be rendered superfluous.”) Thus, while Waffle House preserved the issue of preemption, it was also necessary and permissible to argue alternate theories due to a lack of binding precedent. This Court, of course, has the authority to create such binding precedent, and Waffle House asks the Court to do so.

³ In concurrence, Justice Hecht stated that the *Zeltwanger* decision was “not based on the exclusive or preemptive nature of another remedy but on the nature of the IIED tort itself.” *Id.* at 451 (Hecht, J., concurring).

support damages for IIED. A tort claim must be based on “independent” evidence, not the same sexual harassment evidence that supports a TCHRA action.⁴

This case presents a similar situation. The negligent supervision and retention torts were pled side-by-side with a TCHRA hostile work environment claim. The gravamen of this action was sexual harassment and there was insufficient independent evidence to support damages for negligent supervision and retention. Williams’ negligence claim is unsustainable under *Zeltwanger* because the conduct that forms the basis of her claims is limited to sexually-related touching, remarks and gestures, to which she claimed she was particularly susceptible due to a history of sexual abuse. If this sexual harassment evidence is subtracted from Williams’ case, there is no legally sufficient evidence of any breach of duty by Waffle House to adequately supervise and retain Eddie Davis and prevent an assault from occurring.

Despite Waffle House’s arguments, the court of appeals refused to address this issue. Instead, the court of appeals issued the first decision in this state to permit recovery for negligent supervision and retention solely based on acts of sexual harassment. The court of appeals turned its back on common law precedent, and went in the opposite direction, inventing and solidifying a method for plaintiffs to have “two bites at the apple,” *see Gonzales*, 995 S.W.2d at 738, by making double use of the same allegedly sexually harassing conduct, whether or not it exceeded the required predicate

⁴ JUSTICE MEDINA had asked what “independent” evidence meant. App. 5. It means the “additional facts” required by *Zeltwanger*; *see also Gonzales*, 995 S.W.2d at 740 (negligent action viable in a sexual harassment case “only if the harassment encompasses misconduct that is independently actionable under the common law, such as battery or intentional infliction of emotional distress”).

for the negligence claim, simple assault. The court of appeals should not be permitted to skirt this issue. For reasons detailed in prior briefing, the resulting opinion creates new common law standards that rob TCHRA of its specific remedy for sexual harassment.

JUSTICE WILLETT asked about the effect of the Court's decision in *City of Waco v. Lopez*, 259 S.W.3d 147 (Tex. July 11, 2008), which was decided nine months after the parties' briefing on the merits in this case was complete.⁵ App. 5. As in *Zeltwanger*, the Court never used the word "preemption" in *City of Waco*, but held that TEX. LAB. CODE § 21.055 provided the "exclusive state statutory remedy" for retaliation. *Id.* at 149. The Court noted that "[t]he issue here is not exclusivity in the strictest sense of the word, but whether the Legislature intended to allow a claimant to elect between two remedial schemes addressing essentially the same conduct but providing different procedures and remedies." *Id.* at 153. The Court held that "irreconcilable and inconsistent regimes" for remedying employer retaliation were untenable, and the more specific and comprehensive anti-retaliation remedy in the TCHRA foreclosed relief under the more general Whistleblower Act.

Likewise, *City of Waco* makes Williams' recovery under a negligence claim for conduct specifically covered by TEX. LAB. CODE § 21.051 unsustainable. Williams' negligence action, which is not subject to the administrative requirements of the statutory action, or the \$300,000 cap on damages, can be sustained only by adding to Texas law an irreconcilable and inconsistent regime for remedying exactly the kind of hostile work

⁵ Waffle House's Reply Brief on the merits was filed November 17, 2007.

environment allegations that are covered by Section 21.051. The negligent supervision and retention actions are made further irreconcilable by the court of appeals' expansive construction of an employer's duties to police interaction between employees. The court of appeals' opinion imposes unfairly burdensome common law duties on employers that are incommensurate with prior cases, without factoring in to the analysis of "reasonableness" any of the defenses that would have been available to Waffle House under the statute. *See* Pet. Brief on the Merits, pp. 10-32; Petitioner's Reply, pp. 1-13.

If the Court follows its precedent in *Zeltwanger* and *City of Waco*, the Court should find that the TCHRA provides the exclusive remedy for the conduct alleged by Williams, and that her negligence claims are therefore unsustainable. To the extent the Court finds negligent supervision and retention are sustainable as an alternate sexual harassment action, the Court should reverse the court of appeals' expansive construction of those torts, and find that, consistent with common law duties to adequately supervise and retain as they existed prior to the decision below, there is legally insufficient evidence that Waffle House breached any duties to Williams. Absent one of these holdings, the Court will let stand a decision that creates a new common law tort of sexual harassment in Texas.

II. The Record Does Not Contain Evidence That Eddie Davis Committed An Assault After He Was Moved; Therefore, There Is Insufficient Evidence Of Negligent Supervision And Retention.

Both JUSTICE BRISTER and CHIEF JUSTICE JEFFERSON asked about the "timeline" of events alleged by Williams, specifically, whether the record shows when

Davis was alleged to commit an assault (bodily touching or threatening, offensive conduct, rather than remarks, gestures or other non-touching conduct), and whether there were assaults after Waffle House managers moved him to a different shift from Williams. App. 3, 18-19. The record does not contain legally sufficient evidence that would have enabled a jury to conclude that Williams met her burden to prove that Davis committed an assault after Waffle House moved him to a separate shift.⁶

Williams' central direct testimony as to Davis' conduct is found in RR7:21-58. This narrative is extremely unclear on dates, and does not set out a readily identifiable timeline. But, it is at least discernable that any acts of actual bodily contact or threatening that could be construed as assaults occurred while Williams and Davis worked together on the nighttime third shift, before Davis was moved to the afternoon second shift.

Williams testified that she first experienced sexual harassment during her first week of work, sometime in early July 2001, when Davis made sexually suggestive comments to her. RR7:21, 114. She first reported her allegations to manager Ossie Ajene a "couple of days" later. RR7:24. Williams testified that Davis pushed her into counter and rubbed himself against her back, RR7:28, 38, and touched her breasts while she was putting plates away. RR7:42. He put a finger in her face during a meeting.

⁶ On cross examination, Williams testified that she never told managers that she had been assaulted or expressly made a complaint about assault. See RR7:140 (Q. You never called about the hotline about any assault, did you? A. ***I called about the harassment.*** Q. But you never called and said I've been assaulted by a fellow co-worker, have you? A. No.)

RR7:29. Importantly, Williams made clear these events were all prior to Waffle House moving Davis and assigning Bobbie Griffith and Williams to work together:

Q. What else did he say to you?

A. It was more actions after that.

Q. Was he combining his comments with actions?

A. Yes.

* * *

Q. Okay. But by this time you're working with Bobbie Griffith, correct?

A. *There was one other thing before Bobbie.*

RR7:49. She then went on to relate the incident in which Davis blocked her exit to walk-in cooler room. RR7:49-50. The significance of Williams' testimony that "one more thing" happened "before Bobbie [Griffith]" is that it shows her attempt to provide a timeline. It shows that the bodily contact or other allegedly threatening events mentioned above in her narrative happened *before* Ajene moved Davis to the second shift and assigned Griffith and Williams to work together "sometime in July." RR7:28-29, 31.

This timeline is further confirmed by the testimony that followed. Williams noted "the next incident," RR7:51 (*i.e.* the next after the "one more thing" that happened prior to Davis's move) was the incident where Davis allegedly showed her a condom when he was sitting by a time clock and Williams was attempting to clock in. RR7:51. She testified that at the time of this incident Davis was working on the second shift, indicating that it occurred after he had already been moved. RR7:53. Further, on cross examination

and redirect, she also acknowledged that she was cornered when Davis was on the third shift, not the second. RR7:117, 288, 308. The cooler incident also occurred when Davis was on the third shift. RR7:117. The condom incident—clearly not an assault—occurred later, when Davis was on the second shift. RR288, 308-09.

The record does not show specific instances of bodily contact or other assault-like conduct that could have permitted the jury to conclude that an assault occurred *after* Davis was moved.⁷ Williams testified that there were no other examples of Davis rubbing up against her other than what she testified about. RR7:58. Williams testified that after the move Davis “stared” at her while he was in the restaurant off-duty, RR7:55, “winked” at her, RR7:57, “flirted” with her, RR7:57. These are not assaults, and Waffle House cannot be liable for negligent supervision or retention for failing to police this kind of conduct.

This analysis also answers JUSTICE O’NEILL’s question as to whether the underlying tort is sufficient to sustain the negligence cause of action. App. 2. Waffle House was not on trial for globally preventing an assault, but for negligent supervision and retention of Davis. It was Williams’ burden to establish a timeline that showed

⁷ Williams testified generally that Davis pushed her out of the way “several times,” RR7:58, or assaulted her “many times,” RR7:296, but did not specify whether assaults (rather than “harassment”) happened after Davis was moved. She testified that she had been “cornered” other times during the overlap of shifts, but did not state whether touching or threatening behavior occurred that could constitute an assault. These conclusory statements are not evidence that the Court can credit. *Coastal Transp. v. Crown Cent. Petrol.*, 136 S.W.3d 227, 232 (Tex. 2004) (conclusory testimony insufficient to support judgment); *Brandt v. Surber*, 194 S.W.3d 108, 132 (Tex. App.—Corpus Christi 2006, pet. denied) (conclusory evidence lacks probative value due to insufficient factual substantiation). Additionally, without any specification of when these events occurred or what they involved, there is an equal inference that the conduct occurred before or after Davis was moved. When circumstances are equally consistent with two facts, there is no evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 813 (Tex. 2005).

Waffle House failed to take reasonable care to prevent assault. Williams’ testimony—even taken at face value—could not permit a reasonable jury to conclude that Davis committed a single assault after Waffle House took the reasonable, prompt, effective remedial action of moving Davis to another shift. Williams’ vague subsequent complaints that Davis continued to wink at or flirt with her are exactly what the sexual harassment statute is designed to address, and do not support a finding that Waffle House was negligent in supervising or retaining Davis.

III. Bobbie Griffith’s Testimony Was Relevant To Liability And Damages.

JUSTICE MEDINA asked about role the exclusion of Griffith’s testimony played in the case. App. 6. Griffith was Williams’ confidante. RR7:292-93, CR194-96.⁸ The exclusion of her testimony, especially in a 10-2 verdict—caused harm and is grounds for remand for two reasons.

First, Griffith’s testimony was relevant to *liability*. For example, at argument CHIEF JUSTICE JEFFERSON asked whether there was evidence in the record that Williams found Davis’ conduct “unwelcome.” App. 2. Due to the exclusion of Griffith’s testimony,⁹ the jury never heard about Griffith’s testimony about Williams’ propensity to inject sexual discussions and acts into the workplace. This information was relevant to the sexual harassment case, because “unwelcomeness” is one of the elements a plaintiff is required to prove in a hostile work environment case. It was also relevant as to whether

⁸ Griffith *did* testify that she never saw Davis do anything inappropriate towards Williams. RR9:80.

⁹ A new trial based on after-acquired evidence from Lisa Stone would have further developed the evidence on this issue.

Davis's conduct caused "physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative" TEX. PEN. CODE § 22.01(a)(3). Due to the exclusion of Griffith's testimony, the jury did not hear all of the evidence—relevant and admissible—that it needed to determine whether sexual harassment *or* an assault occurred.

At the very least, Griffith's testimony would have been relevant to the jury's assessment of *damages*. The jury did not hear evidence that Williams regularly discussed three-way sex and her "open marriage" and that she propositioned customers in the workplace. CR194-96. Griffith would have testified that Williams told another cook, named Bubba, about a "ménage a trois" that she had, and invited him to come see her. CR196. This evidence surely would have affected the jury's perception of harm done to Williams, and punitive damages to be awarded against Waffle House. It is unimaginable that the jury would have awarded compensatory damages and \$3,460,000 in punitive damages if the jury had heard all of the relevant testimony.

CONCLUSION AND PRAYER FOR RELIEF

Waffle House asks the Court to reverse and render a take-nothing judgment in its favor. Alternatively, Waffle House asks the Court to reverse and remand to the trial court or court of appeals for proceedings consistent with the Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 9, 2009, one copy of the above brief was sent by U.S. Mail Overnight, to the following:

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