IN THE SUPREME COURT OF TEXAS

NO. 07-0205

WAFFLE HOUSE INC., PETITIONER,

v.

CATHIE WILLIAMS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued March 12, 2009

JUSTICE O'NEILL, joined by JUSTICE MEDINA , dissenting.

Sexual harassment is not a tort recognized under the common law, therefore I agree with the Court that such behavior cannot support a claim for negligent supervision. But assaultive behavior surely can, whether or not it has sexual overtones. The Court's denial of common law protection for a subset of assault that is sexually motivated adds insult to injury. In my view the Texas Commission on Human Rights Act (TCHRA) preempts negligent-supervision claims based on harassment, but it does not preempt assault-based claims merely because the perpetrator sexually harassed the victim too. That assault-based negligence claims remain viable, however, does not mean they may be used to siphon claims otherwise actionable under the TCHRA. Negligence damages cannot arise from conduct constituting sexual harassment, and evidentiary support for assault-based awards must be measured accordingly. In the case before us the trial court should have

given the jury a limiting instruction to this effect, although error on this point was not preserved. Nevertheless, the evidence is legally insufficient to support all of the negligence damages the jury awarded, therefore, I would remand to the court of appeals for a proper review that excludes evidence of TCHRA-prohibited conduct. Because the scope of the Court's remand is more limited, I respectfully dissent.

I.

This case calls for us to decide whether an employee may maintain against her employer both a statutory cause of action for sexual harassment under the TCHRA and a common law claim for negligent supervision stemming from a co-worker's assault. The Court concludes that the TCHRA is the exclusive remedy for sexual harassment in the workplace, and that Cathie Williams's negligent-supervision claim is preempted because it is merely a repackaged version of her harassment claim. I agree with the former proposition, but not the latter.

Texas common law does not recognize a claim for sexual harassment. *See Gonzales v. Willis*, 995 S.W.2d 729, 739 (Tex App.—San Antonio 1999, no pet.) ("'Sexual harassment has never been a common law tort; as a cause of action, it is a statutory creation.'") (quoting *Hays v. Patton-Tully Transp. Co.*, 844 F. Supp. 1221, 1223 (W.D. Tenn. 1993)). Accordingly, a tort claim will not lie for an employer's negligent supervision of a sexual harasser. *Id.* at 739–40. It is against this backdrop that the Legislature enacted the TCHRA, with the purpose of "execut[ing] the policies of Title VII of the Civil Rights Act of 1964." TEX. LAB. CODE § 21.001(1). The TCHRA prohibits employer discrimination directed at the "terms, conditions, or privileges of employment" because of race, color, disability, religion, sex, national origin or age. TEX. LAB. CODE § 21.051(1). Sexual

harassment is a form of sex discrimination prohibited by Title VII and the TCHRA. *See Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

The TCHRA is a carefully crafted scheme designed to protect against the type of behavior Williams principally complains about, and to hold employers accountable. *See Zeltwanger*, 144 S.W.3d at 446. Allowing evidence of sexual harassment to support a negligent-supervision claim would threaten to swallow the statutory scheme. Thus, I agree with the Court that the TCHRA is preemptive as to behavior that constitutes sexual harassment. I likewise agree that a plaintiff may not avoid the TCHRA's preemptive effect by siphoning sexual-harassment evidence into an assault-based claim for negligent supervision. But it does not follow that a victim of assault should be denied common law redress for injury the assault caused when the perpetrator sexually harasses her as well. While an employer is not an insurer of its employees' safety at work, the common law clearly imposes a duty on employers to provide a safe work place. *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996). Accordingly, a claim for negligent supervision should lie if an employee's assaultive behavior is endangering another, whether or not that behavior has sexual overtones. An assault is an assault, whether it is sexually motivated or not.

Consider the effect of the Court's construct: 1. An employer fails to take reasonable action after Employee A repeatedly slams Employee B into the wall. Employee B may sue for assault-based negligent supervision. 2. An employer fails to take reasonable action after Employee A gropes Employee B before repeatedly slamming her into the wall. The TCHRA is Employee B's exclusive remedy. The Court's decision exposes an employer who tolerates a bully's assaultive

conduct to greater liability under the common law than an employer who tolerates the same behavior accompanied by the indignity of sexual abuse. Surely in its statutory attempt to afford greater workplace protection from sexual harassment the Legislature did not intend to curtail relief for victims of assault.

II.

We have long held that statutes must not be construed to abolish common law claims unless the statutory language clearly says so. *See Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000); *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969). The text of the TCHRA contains no indication that the remedies it provides are exclusive or preempt the common law. *See* TEX. LAB. CODE § 21.001. Nor does the statute imply that the TCHRA's administrative review system precludes common law causes of action. Moreover, there is no text-based support for the exclusivity effect the Court reads into the TCHRA's election-of-remedies provision. *See* TEX. LAB. CODE § 21.211. That the provision precludes simultaneous claims in different forums based upon employment practices the TCHRA declares unlawful would seem to permit, not preclude, common law claims like assault that the TCHRA does not cover.

Neither does our decision in *City of Waco v. Lopez* support the Court's holding today. 259 S.W.3d 147 (Tex. 2008). *Lopez* presented the issue whether one statute preempted another, and was resolved by application of the code-construction rule that a specific statute controls over a more general one that is irreconcilable. *Id*. at 153–54. This case, on the other hand, concerns implied statutory preemption of a common law claim, something our jurisprudence disfavors absent "clear repugnance" between the two. *Cash Am.*, 35 S.W.3d at 16 (quoting *Holmans v. Transource*

Polymers, Inc., 914 S.W.2d 189, 192 (Tex. App.—Fort Worth 1995, writ denied)). There is no repugnance between the TCHRA and an assault-based claim of negligent supervision.

Our decision in *Hoffmann-La Roche, Inc. v. Zeltwanger* is similarly inapplicable, as it was based not on the preemptive effect of a statutory scheme over the common law but on the "gap-filler" nature of the intentional-infliction-of-emotional-distress ("IIED") tort. *Zeltwanger,* 144 S.W.3d at 447 (noting that the tort of IIED exists only to "'supplement existing forms of recovery by providing a cause of action for egregious conduct' that might otherwise go unremedied") (quoting *Standard Fruit and Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998)). Because in *Zeltwanger* the TCHRA covered the same emotional damages caused by essentially the same conduct, we held that there was no remedial gap to fill. *Id.* Here, by contrast, Williams's negligence claim is based on assault, a well-established common law tort.

The TCHRA and a claim for common law assault are simply aimed at different wrongs. The purpose of the TCHRA's ban on sexual harassment is to eliminate employment discrimination and establish equal employment conditions and opportunities for both sexes in the workplace. *See* TEX. LAB. CODE § 21.001. The common law tort of assault, on the other hand, exists to redress personal injury caused by offensive physical contact or the threat of imminent bodily injury. *See Hall v. Sonic Drive-In of Angleton, Inc.*, 177 S.W.3d 636, 650 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). There is no indication that the Legislature intended the TCHRA to redress harm that results from assault, and it is difficult to square the protective goals of the legislation with the preemption of assault-based claims depending upon whether an assault is sexually motivated.

III.

Williams agrees that her negligent-supervision claim against Waffle House must necessarily stem from Davis's tortious conduct in assaulting her. In holding Williams's negligent-supervision claim preempted, the Court focuses solely on a single element of the assault definition in the jury charge — whether the person committing the alleged assault causes physical contact with another "when [the person] knows or should reasonably believe that the other will regard the contact as offensive or provocative." But the charge also defined assault to include "intentionally or knowingly threaten[ing] another with imminent bodily injury." The evidence must be measured against the complete definition the jury was given.

The record in this case contains evidence that Davis engaged in conduct designed to intimidate Williams and cause her to fear for her safety. Williams testified that Davis physically abused her on numerous occasions, pushing her into the counters, the grill, and into the dish table on multiple occasions. On another occasion, he cornered her alone in an unlit storeroom by blocking her exit. Williams testified that she did not confront Davis directly because she "was scared of him," and a Waffle House district manager acknowledged that Davis may have presented an actual danger to Williams. Based on the charge and the evidence presented, the jury could have found that Davis's conduct went beyond "boorish," as the Court terms it, and constituted assault entirely apart from his ongoing sexual harassment. Because Williams's assault-based negligence claim was supported by independent facts unrelated to sexual harassment, I would hold that the TCHRA does not preempt it.

IV.

Even though the TCHRA does not preempt Williams's assault-based negligence claim, however, she may not recover damages in negligence for conduct that the TCHRA deems unlawful. In other words, Williams may not recover negligence damages for TCHRA-prohibited activity. Accordingly, the jury should have been instructed that damages in negligence cannot arise from conduct that amounts to statutory sexual harassment, and the trial court erred in failing to give the jury a proper limiting instruction. *See Gonzales*, 995 S.W.2d at 738–39. However, I agree with the court of appeals that Waffle House failed to preserve error on this point. ___ S.W.3d ___.

Nevertheless, because damages for sexual harassment fall within the TCHRA's exclusive purview, the court of appeals erred in considering TCHRA-prohibited conduct in its evidentiary review of the assault-based negligence award. ___ S.W.3d ___. Although there is some evidence to support Williams's claim that she was damaged by Davis's assaultive conduct, the evidence is legally insufficient to support all of the damages the jury awarded. *See Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007). Accordingly, I would remand the case to the court of appeals to conduct a proper sufficiency review of the negligence award and, if appropriate, consider remittitur of damages that arose from TCHRA-prohibited activity. *Id.* If a proper remittitur cannot be determined, then the case should be remanded for a new trial should Williams not elect her TCHRA remedy. *Id.* Because the scope of the Court's remand is limited to review of Williams's TCHRA claims, I respectfully dissent.

_____

Harriet O'Neill
Justice

OPINION DELIVERED: June 11, 2010