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Supreme Court of Texas.
Waffle House, Inc., Petitioner,
v.
Cathie Williams, Respondent.
No. 07-0205.

March 12, 2009.

Appearances:
Mark Emery, San Antonio, TX, for petitioner.
Susan Hutchison and Kern Lewis, Lewis & Hutchison, P.C., for respondents.

Before:

Wallace B. Jefferson, Chief Justice, Scott A. Brister, Harriet O'Neill, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Paul W. Green, Don R. Willett, David M. Medina, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 07-0205 Waffle House, Inc. v. Cathie Williams.

MARSHALL: May it please the Court, Mr. Emery will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF MARK EMERY ON BEHALF OF THE PETITIONER

ATTORNEY MARK EMERY: May it please the Court. If the decision below stands, the Court will put its stamp of approval on nothing less than a common law tort for sexual harassment in the State of Texas. This tort will sharply, but unpredictably [inaudible].

JUSTICE SCOTT A. BRISTER: There is a tort as to your employer for not providing a safe work place, always has been.

ATTORNEY MARK EMERY: Yes, Your Honor.

JUSTICE SCOTT A. BRISTER: If the sexual harassment, sexual discrimination laws had never been passed, so wipe out 30 or 40 years of law, they never passed those, wouldn't the safe work place probably have developed so to cover sexual harassment?

ATTORNEY MARK EMERY: That's very hard to predict, Your Honor, but to the extent it would have developed to protect something like what we recognize as sexual harassment, it would have done so consistent with traditional common law standards and that is the burden, as this Court has long held, in construction employers' duties, it's always a policy-making issue of balancing burdens, a balancing foreseeability and risk of injury against the magnitude of the burden and the consequences of

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placing that burden on an employer and, in this case, it would be a matter of what would be reasonable for an employer to do when learning of an allegation of something like sexual harassment.

JUSTICE DAVID M. MEDINA: Well it's certainly reasonable to take the alleged perpetrator of this incident out of the work situation and from what I read, they did a shift change so that they won't have contact with each other and yet this harassment allegedly still occurred. It certainly appears to be pretty graphic and pretty hostile toward this employee. So and yet it appears that Waffle House and its employees and its managers did nothing more than scoff at these alleged allegations.

ATTORNEY MARK EMERY: Your Honor, one thing that's very important about this case is the posture on which it comes to this court. The negligence, excuse me, the judgment from which Waffle House appeals is a judgment that is based solely on negligent supervision and retention. That means that in reviewing for the sufficiency of the evidence, both the Court of Appeals and this Court should be focused narrowly on the issue of (1) was there an underlying tort, in this case the allegation was assault, and (2) whether Waffle House's response to the assault was reasonable.

JUSTICE HARRIET O'NEILL: Why isn't the underlying assault tort enough to sustain the cause of action?

ATTORNEY MARK EMERY: First of all, it's not clear that there was an assault.

JUSTICE HARRIET O'NEILL: Well, no wait a minute, I mean there was physical touching. There was, the jury found assault and I don't think the evidence has been challenged on the assault finding.

ATTORNEY MARK EMERY: Well, Your Honor, there are a number of different, we'll call them different kinds of evidence that are in the record, everything from bumping to brushing to winking to talking. Only some of these things could be assault.

JUSTICE HARRIET O'NEILL: So there are some assaults.

ATTORNEY MARK EMERY: I mean we think.

CHIEF JUSTICE WALLACE B. JEFFERSON: Were any of these welcomed or were they unwelcomed according to the testimony?

ATTORNEY MARK EMERY: According to Cathie Williams' testimony, they were unwelcomed.

CHIEF JUSTICE WALLACE B. JEFFERSON: Then what's the definition of an assault.

ATTORNEY MARK EMERY: An assault is intentional knowing or reckless bodily contact.

CHIEF JUSTICE WALLACE B. JEFFERSON: So there's some evidence that wasn't challenged of an assault. So to get back to Justice O'Neill's question, does the Texas Commission on Human Rights, is it the exclusive remedy for assault as well as sexual harassment [inaudible].

ATTORNEY MARK EMERY: It doesn't have to, if the assault arises from sexual misconduct, which is entirely what the allegations are in this case, every allegation of misconduct by Mr. Davis had a sexual nature to it. This brings it within the scope of the Human Rights Act. So even if, even if there is evidence of an assault, the question is whether Waffle House's response to it was reasonable. In this case, Waffle House did act reasonably upon the earliest allegations of any assault, which were, at the time, and subsequently entirely uncorroborated and unwitnessed.

JUSTICE HARRIET O'NEILL: I'm a little bit confused as to whether you're now arguing a sufficiency point or whether the cause of action is sustainable.

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ATTORNEY MARK EMERY: It's foremost a sufficiency point. There is not, if the Court of Appeals had construed the duties to adequately supervise and retain in light with past Texas case law, there's legally and factually insufficient evidence to support the verdict. So.

JUSTICE DALE WAINWRIGHT: Mr. Emery, you may not know the answer to this, but why was the assault question put to the jury? Is that necessary for negligent retention claim and supervision claim?

ATTORNEY MARK EMERY: Yes, in Texas is it necessary. Negligent supervision and retention are dependent torts. There must be an underlying tort and sexual harassment is not such a tort.

JUSTICE DALE WAINWRIGHT: Well then the jury found that there was no clear and convincing evidence that Waffle House ratified the assault so what's the link then between the assault that was found and Waffle House versus its individual employees?

ATTORNEY MARK EMERY: The link between the assault and.

JUSTICE DALE WAINWRIGHT: Waffle House, what makes Waffle House liable for the assault. You say assault was necessary here. What makes Waffle House liable for the assault if the jury found that Waffle House did not ratify the assault.

ATTORNEY MARK EMERY: Nothing make Waffle House liable for an assault if it occurred and jury question 6 only asked whether Eddie Davis assaulted Cathie Williams. So the secondary question is that is what was submitted under jury question number 8, the negligent supervision retention question and that asked whether Waffle House fulfilled its duties in supervising and retaining.

JUSTICE SCOTT A. BRISTER: Can you help me with the timeline. How many of the touchings, forget about the talk and stuff like that, how many of the physical touchings occurred after she had reported misconduct to her supervisors?

ATTORNEY MARK EMERY: Your Honor, this is a very important issue in this case actually and, believe me, I have tried to go back into the record and construct a timeline. One aspect, important aspect of this case is that Cathie Williams' allegations are so diffuse that on the record it makes it very difficult to pinpoint. However, I would direct the Court's attention to the record at Volume 7 from pages 48 to 58 and this is the core of the evidence where Cathie Williams is talking about the different things that happen. I think the record firmly supports that anything that involved physical touching of the things that could possibly come within the scope of an assault happened before Eddie Davis was moved to another shift. There's testimony, for example, that this incident with Eddie Davis holding out a condom at some point, that's, I think that's the only thing that could possibly have happened on the basis of the record after he was moved to another shift and I can't see how this could possibly be resolved.

JUSTICE DAVID M. MEDINA: How does this work? An employee gets to sexually assault or have any type of physical contact or unwelcome contact with an employee. The employer gets one free pass to take care of that or what are you saying?

ATTORNEY MARK EMERY: Well under negligence analysis, I mean, certainly Waffle House doesn't want anybody sexual harassing or assaulting anybody at any time, but the negligence analysis is based on foreseeability of risk and in this case, Eddie Davis had no past history of any kind of assault.

JUSTICE HARRIET O'NEILL: Well how would you know because no investigation was done, from what I understand. The testimony was that despite these complaints, Waffle House undertook no investigation so how would you know that until the lawsuit developed?

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ATTORNEY MARK EMERY: I mean there was the ordinary hiring process that Waffle House went through.

JUSTICE HARRIET O'NEILL: Background check was done?

ATTORNEY MARK EMERY: I can't say positively that a background check was done.

JUSTICE HARRIET O'NEILL: Just not in the record is it?

ATTORNEY MARK EMERY: It's not in the record, that's right. So, I mean, there was, nobody was aware, none of the managers were aware that there had been any kind of past misconduct by Eddie Davis. Furthermore, even though all the employees are all working in a very small work space at all time, no one ever witnessed a single incidence of Eddie Davis.

JUSTICE HARRIET O'NEILL: That's typically the case in a sexual harassment context isn't it? Generally that doesn't occur in front of a lot of people.

ATTORNEY MARK EMERY: Okay, but then that's another important reason why we have sexual harassment and the way that the hostile work environment action is developed under the statute and how it works under negligence. When we're talking about negligence again, it's always a matter of balancing the risks in almost traditionally in an economic fashion. How much burden can we place on an employer to try to prevent certain actions?

JUSTICE DON R. WILLETT: I'm a little confused. Are you arguing for a Per Se Rule that employee claims that are sort of grounded in harassment-type facts have to be brought solely under the Commission on Human Rights Act or can there be a separate independent tort action combined with the statutory action?

ATTORNEY MARK EMERY: Well, I think we have to follow this Court's ruling in Zeltwanger on that issue and I think the Court of Appeals' opinion stands directly contrary to what this Court said in Zeltwanger. There the issue is you have side-by-side statutory claims and tort claims. In that case, it was intentional infliction of emotional distress.

JUSTICE HARRIET O'NEILL: Well, but an IIED claim we said was a gap filler only. It never was intended to be a gap filler where there was no other cause of action. Here there is a well-established common law cause of action for a safe workplace and negligent supervision so I don't see how those are comparable.

ATTORNEY MARK EMERY: I don't want to over analogize and say that negligent supervision or retention are a gap filler. So this Court hasn't said that in the past, but many of the same problems arise. Torts like negligent supervision and retention have been used more and more and they are, they do change over time and they are being used, as this case exemplifies, as a way to provide, to seek an alternate remedy to circumvent the Human Rights Act and its limitations of $300,000 say for an employer like Waffle House.

JUSTICE DON R. WILLETT: So what should be the effect of Zeltwanger and maybe the City of Waco case more recently on the Court's reasoning in this case?

ATTORNEY MARK EMERY: Zeltwanger should be applied to this case that you have a statutory sexual harassment claim. Under Zeltwanger, it's necessary to have independent evidence to support a separate tort and that evidence is just not in this record. There was a charge on assault, but that's a separate finding. There had to be wholly, independent evidence of that that had to be proven up. I mean this case was indisputably tried as a sexual harassment case.

JUSTICE DAVID M. MEDINA: What do you mean by independent evidence?

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You mean someone has to corroborate what the allegations are? Someone other than the two parties involved?

ATTORNEY MARK EMERY: Certainly that would make it a different case. Say, for example, the Court of Appeals relied heavily on a sexual harassment case, Wal-Mart v. Itz from the Austin Court of Appeals. That case highly distinguishable because there was another witness to the inappropriate conduct and further the jury found that was a ratification finding in that case, that the employer had actually ratified it. There's, neither thing happened in this case. So, again, we go back to the foreseeability issue again and what is it that was known at the time. Had there been open witnesses that were coming forth and were saying yes, Eddie Davis is doing this all the time. Waffle House may have had to act in a different manner in order to act reasonably. Based on what its managers knew at the time though, it took prompt, reasonable and effective action by moving Eddie Davis immediately to another shift. And I don't want to leave it that moving to the shift was the only thing that happened. Waffle House did undertake some investigation.

JUSTICE DON R. WILLETT: But there were no allegations of touchings or physical contact after he was moved?

ATTORNEY MARK EMERY: I don't think the record shows any.

JUSTICE DAVID M. MEDINA: An issue real quick, there's an issue about exclusion of some evidence and some allegations involving Ms. Williams and some conduct that she may have had in this regard. Can you address that and how that may have played on the decision in this case?

ATTORNEY MARK EMERY: Absolutely. I think this was absolute grounds, even though I'll say primarily I think this Court, the appropriate remedy is to reverse and render take-nothing judgment in Waffle House's favor, the exclusion of the evidence of Bobby Griffith and after-acquired evidence of failure to grant a new trial based on after-acquired evidence of Lisa Stone, very strong grounds for remand in this case. There was evidence from Bobby Griffith who Cathie Williams expressly asked to work with and who Waffle House made a point of having work with because she felt comfortable with her, testified in her deposition that Cathie Williams made a number of open comments about three-way sex and propositioning customers and things, details about her sex life. Throughout an entire trial on sexual harassment.

JUSTICE HARRIET O'NEILL: There's no evidence of any of those comments though were made to Davis.

ATTORNEY MARK EMERY: No there's not.

JUSTICE HARRIET O'NEILL: Let me ask you a quick question. The Texas Commission on Human Rights Act Preemption claim, was that raised before the Trial Court?

ATTORNEY MARK EMERY: Yes, it was, in both a motion for new trial and the motion [inaudible]. We expressly focused on Zeltwanger as a basis for that.

JUSTICE HARRIET O'NEILL: But only after the trial was over?

ATTORNEY MARK EMERY: There was some discussion of it in the trial briefing as well.

JUSTICE DON R. WILLETT: The Court of Appeals didn't seem to address that issue.

ATTORNEY MARK EMERY: Which is that?

JUSTICE DALE WAINWRIGHT: Preemption.

ATTORNEY MARK EMERY: No they didn't and this Court has not yet said straightly that there's, that the Human Rights Act preempts negligence cause of action. I think this.

JUSTICE DALE WAINWRIGHT: I'm asking it more in line with the

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preservation question. You said it was raised in the motion for new trial at the Trial Court. It was raised in the briefing at the Court of Appeals. That's a pretty important issue, but it was not address by the CA?

ATTORNEY MARK EMERY: It was certainly prominent in our briefing that the distinction between the negligence actions and the sexual harassment actions. At the Court of Appeals, we, at the Court of Appeals, we argued that the sexual harassment claim had never actually been reduced to the judgment and we still hold that position. We think that's why the grounds for rendition of take-nothing judgment in this case. The sexual harassment verdict was never put in the judgment and so negligent supervision.

JUSTICE HARRIET O'NEILL: I think that's not really our question. The question is whether it was raised to be exclusive. I mean I understand that you made the argument that it was a sexual harassment claim, but was the argument ever made that the Commission on Human Rights Act preempted other common law claims?

ATTORNEY MARK EMERY: No. We would still need to wait, I think, for authority from this Court to be able to make that argument.

JUSTICE HARRIET O'NEILL: But the argument was never made until here, is that correct?

ATTORNEY MARK EMERY: Not in the same terms, no.

JUSTICE DON R. WILLETT: I thought you said Zeltwanger gave you that argument?

ATTORNEY MARK EMERY: Zeltwanger, I think is a, there's a, I think a distinction between what Zeltwanger requires and this straightforward question of preemption. This Court could hold that the Human Rights Act entirely preempts a negligence cause of action. It hasn't said that, but it has demanded high standards that if you're going to bring a negligent supervision of retention action, there has to be entirely independent evidence. The plaintiff has to be able to prove up his or her case based on that. Your Honor, I see my time is up.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counselor. The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Ms. Hutchison and Mr. Lewis will present argument for the Respondents. Ms. Hutchison reserved the first 10 minutes.

ORAL ARGUMENT OF SUSAN HUTCHISON ON BEHALF OF THE RESPONDENT

ATTORNEY SUSAN HUTCHISON: Thank you. Good morning. May it please the Court, there are 13 other people in addition to Cathie Williams that are directly affected by this appeal and those would be the 12 jurors that listened to the evidence in this case for two weeks and the trial judge that listened to this evidence for two weeks.

JUSTICE PAUL W. GREEN: Well they don't decide the scope of the duty of negligent supervision or negligent hiring.

ATTORNEY SUSAN HUTCHISON: They.

JUSTICE SCOTT A. BRISTER: That's for us and that's not for them. So, why would if again in my hypothetical there had never been any sexual harassment, sexual discrimination laws, the law of negligent hiring and supervision would have just accommodated to modern times, nothing in negligent supervision and negligent hiring anybody had ever been able to sue for that in Texas for a stressful workplace or feel uncomfortable. It always has to be physical injury right?

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ATTORNEY SUSAN HUTCHISON: Well there has to be an underlying tort. According to the Gonzales case.

JUSTICE SCOTT A. BRISTER: No, no, I mean, you could say well the underlying tort is intentional infliction of emotional distress, but nobody's, no Texas Court, we never approved that. You can't sue your employer, never have been able to sue your employer if your only injury is emotional harm, emotional stress.

ATTORNEY SUSAN HUTCHISON: Well, there's a twofold answer.

JUSTICE SCOTT A. BRISTER: You mean have been able to or you haven't?

ATTORNEY SUSAN HUTCHISON: Well if there was not a sexual harassment law, then there would an intentional infliction of emotional stress tort that would be available. So if you're talking about if there were no sexual harassment law then.

JUSTICE SCOTT A. BRISTER: Then that would the gap filler, but I'm trying to see if negligent supervision hiring. You need to provide me a safe workplace. All of those cases in all of Texas history have been physical injuries.

ATTORNEY SUSAN HUTCHISON: I believe they have been physical injuries. The history of them have been.

JUSTICE SCOTT A. BRISTER: And your client here suffered no physical injuries.

ATTORNEY SUSAN HUTCHISON: Well she suffered an assault, which is a physical situation. I do believe that it meets the requirements.

JUSTICE SCOTT A. BRISTER: Did she sue for physical injuries?

ATTORNEY SUSAN HUTCHISON: She sued for an assault. If you're talking about the damages aspect of it, she does not have a.

JUSTICE SCOTT A. BRISTER: No part of her body was injured.

ATTORNEY SUSAN HUTCHISON: There was no physical damage, but the tort, the underlying tort itself is encompassed within the history of laws which would be addressed by providing a safe place to work.

JUSTICE SCOTT A. BRISTER: And I'm just trying to think and again it's hard to understand and analyze because the law did something different, Congress and the State legislature and everybody has agreed and all of this has been treated forever as sexual harassment rather than negligent hiring or supervision, but I'm just trying to see how I would sue my employer for negligent hiring and supervision when all my harm is purely, is not physical harm.

ATTORNEY SUSAN HUTCHISON: Well maybe I can go about it in a different fashion and say that the sexual harassment law encompasses some conduct that's different. For instance, there are some cases that say you could sue for a tort in a situation involving sexual harassment in the workplace or you couldn't sue for a tort that you could sue for under sexual harassment. In other words, if you are harassed, there is one case where a woman was harassed by verbal comments and propositions and conduct that would constitute sexual harassment under the sexual harassment law, but did not constitute a tort because there was no assault.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well what about outside the employer-employee relationship context. Is there a cause of action for assault, does a cause of action for assault always require bodily injury or can you bring one if a bounce shoves you that you don't have bruises, but can you sue the bouncer and his or her employer for civil action for assault, is that permissible?

ATTORNEY SUSAN HUTCHISON: Yes, the, an assault is if someone threatens another with imminent bodily injury or there is physical contact that someone knows the other would regard as offensive. There

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is no requirement of an actual physical damage only a threat of imminent injury or physical contact.

JUSTICE DON R. WILLETT: Is that civil definition or the criminal definition you just read?

ATTORNEY SUSAN HUTCHISON: I believe it's both.

JUSTICE SCOTT A. BRISTER: And opposing counsel says there's no proof that the physical touching, the assault, any of those occurred after she started reporting this to the supervisors.

ATTORNEY SUSAN HUTCHISON: And that's incorrect. The record reflects that it was ongoing and there's an important distinction. She reported to a number of different managers. The first one was Mr. [inaudible] and Mr. [inaudible] initially ignored her and laughed at her and totally disregarded her complaint.

JUSTICE SCOTT A. BRISTER: My question is very simple. After, where does the record show that after reporting this to her supervisors assaults occurred?

ATTORNEY SUSAN HUTCHISON: If you will look at Volume 7, pages 27, 30 and 55, there are references where she indicates and the distinction I'm trying to make is Mr. [inaudible] didn't immediately move Mr. Davis. He didn't do it until after she reported it to him several times and it was ongoing during that entire time. So after her initial report, the conduct continued.

JUSTICE DAVID M. MEDINA: What about verbal comments? So if the record is not sufficient to support the allegation continued assault, what about verbal comments that were made to her. Does that play into the result of this case?

ATTORNEY SUSAN HUTCHISON: It can to the extent that it's a threat of imminent bodily injury or if it's strictly verbal, it's going to the threat of imminent bodily injury and what constituted a threat in that regard, but if you will, the record reflects that the conduct by Mr. Davis, including the cornering, the rubbing, the brushing, the contacts, continued even after she reported it.

JUSTICE DALE WAINWRIGHT: Did they occur after they were moved to separate shifts?

ATTORNEY SUSAN HUTCHISON: Yes, during the times that there was shift overlap, she testified that some of the physical touching did continue to incur.

JUSTICE DAVID M. MEDINA: Is one of, excuse me, is one of those events, is that sufficient enough to support the verdict or does there have to be a series of these assaults before it reaches that threshold where the Court says well that's enough. The jury's right here. Or is it just one unwelcome assault?

ATTORNEY SUSAN HUTCHISON: My understanding is there's no requirement that somebody be assaulted more than once in order for a jury to find an assault claim and in order for that to sustain a negligent supervision claim. I don't know how many times somebody would have to be assaulted in order for after the employer is already on notice in order for there to be negligence.

JUSTICE DON R. WILLETT: If the allegations take out the lewd comments and all the banter and stuff, if it were purely physical contact, groping, whatever, would that be sufficient to sustain a harassment claim under the TCHRA and the separate assault claim or is one or the other?

ATTORNEY SUSAN HUTCHISON: There's absolutely nothing that says it has to be one or the other. That's.

JUSTICE DON R. WILLETT: So if the allegations were simply groping or touching, physical touching, you could bring a separate tort claim

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for assault and then a separate statutory claim for sexual harassment?

ATTORNEY SUSAN HUTCHISON: Yes.

JUSTICE DON R. WILLETT: And they were separately under both theories.

ATTORNEY SUSAN HUTCHISON: You can't recover under both. You can bring both and then you have to elect a remedy.

JUSTICE DON R. WILLETT: Choose.

ATTORNEY SUSAN HUTCHISON: And I believe that's what the cases say.

JUSTICE SCOTT A. BRISTER: But why in the world would you ever bring it under the TCHRA? Why wouldn't you always bring the tort? You get a much longer statute of limitations. You get punitive damages. You get all this stuff. In fact, if there's a separate tort you could do for all this, the statute would wither away.

ATTORNEY SUSAN HUTCHISON: I don't believe so for a number of reasons. First of all, you need to bring them concurrently, which was done in this case. Second of all, there is.

JUSTICE SCOTT A. BRISTER: Do you have to do that?

ATTORNEY SUSAN HUTCHISON: Because I believe there is mentioned and some of the cases say that the reason you need to bring them concurrently is because one of the things that the statute provides is that it encourages conciliation. It encourages discussions early on. It encourages administrative review and if you bring them concurrently, then all of those things will occur for the torts as well as for the statutory cause of action and, therefore, it meets the policy requirement behind the statute.

JUSTICE DAVID M. MEDINA: Ms. Hutchinson, how does this after-acquired evidence play into this case or should it?

ATTORNEY SUSAN HUTCHISON: It has absolutely no role in this case whatsoever. If you're talking about the Bobby Griffith or the Lisa Stone, I'm not sure which one, the.

JUSTICE DAVID M. MEDINA: Co-worker that allegedly read the verdict or heard about the verdict and got on the phone and said, wait a minute. This person is a bad actor.

ATTORNEY SUSAN HUTCHISON: First of all, she's a manager. She was known to Waffle House. She was on the records that they produced as a manager and so they had absolute availability of her testimony at any time they wanted to go and talk to her. They cannot wait until after a verdict and then say, oh by the way, we have a manager who has information that's relevant to this lawsuit. They would have had to have brought that into the case long before they got the verdict. They don't meet the requirements for going out and getting that information at a later time.

JUSTICE PHIL JOHNSON: Can I go back to the assault question with you? Assuming there's an assault, did the jury find that Waffle House did not ratify those actions?

ATTORNEY SUSAN HUTCHISON: They did and there's no requirement for a ratification because we are not, the claim as it stands now is not one for Waffle House's ratification of what happened. It's a claim for Waffle House's own conduct in their failure to supervise and their retention of Mr. Davis after his conduct was reported.

CHIEF JUSTICE WALLACE B. JEFFERSON: Your 10 minutes are up and you're taking co-counsel's time, but you can answer any further questions or defer to your co-Counsel.

JUSTICE SCOTT A. BRISTER: One brief one, they would have had to have known or should have known that it was going on.

ATTORNEY SUSAN HUTCHISON: And they did.

JUSTICE SCOTT A. BRISTER: She told because she told them. So your

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case is based on knew rather than should have known. Knew because she told them and then it continued after you say.

ATTORNEY SUSAN HUTCHISON: Yes, sir. Thank you.

ATTORNEY KERN LEWIS: May it please the Court, Justice Wainwright, I would like to go back, if I may, to a question you posed about what makes Waffle House liable in this case since there was no ratification and the answer to that question is 45.001 C2 makes them liable because the legislature in that Section of the Civil Practice and Remedies Code said that in an action arising out of a criminal act committed by an employee, the employer may be liable for punitive damages, but only if number 2 is the agent was unfit and the principal acted with malice in employing or retaining him. Number 4 and these are disjunctive, it's an "or", number 4 is the employer or manager ratified the act. So it's an "or" standard. The legislature has specifically said it's an "or" standard.

JUSTICE DALE WAINWRIGHT: That's why you submitted both?

ATTORNEY KERN LEWIS: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: The ratification question as well as the negligence question.

ATTORNEY KERN LEWIS: And also because had the jury found ratification, then that would have put it, Waffle House, in a position where they were vicariously liable for Mr. Davis' act. This verdict is based upon the fact that Waffle House, by acting with malice, in allowing this stuff to continue and not doing anything about it is liable for their own actions or inactions.

JUSTICE DAVID M. MEDINA: Let's talk about the malice. How does this reach the level of malice?

ATTORNEY KERN LEWIS: Because, Your Honor.

JUSTICE DAVID M. MEDINA: It seems like it was conduct for 18 days or.

ATTORNEY KERN LEWIS: No 18 hours.

JUSTICE DAVID M. MEDINA: 18 hours.

ATTORNEY KERN LEWIS: But it went on for eight months. It went over eight months that she made repeated complaints and what was very interesting at the trial was all this testimony about Waffle House's efforts to prevent sexual harassment. And they talk about; their complaint is that the Court of Appeals didn't give credence to all of their efforts to prevent sexual harassment. But the completely gloss over, this is very important. Question number 12 to the jury was, did Waffle House made a good-faith effort to prevent sexual harassment in its workplace and the jury answered no. They didn't challenge that on appeal. That didn't challenge the legal or the factual sufficiency of the evidence supporting that answer and so they're bound by it.

JUSTICE NATHAN L. HECHT: Let me ask, but that's a nonfinding, right?

ATTORNEY KERN LEWIS: But it's a founding, it's a finding. They have an affirmative defense created by the Kolstad case, the United States Supreme Court in Kolstad gives them an affirmative defense if they have in good faith tried to comply with Title VII and prevent these type of injuries in the workplace. That's their burden to prove.

JUSTICE NATHAN L. HECHT: Right, but I just want to be clear. The answer of no is not a finding to the contrary. It's just they didn't prove their defense by preponderance to the evidence.

ATTORNEY KERN LEWIS: Well, I would disagree with that, Your Honor. The way I read it and the way it was argued was their burden, we were acting in good faith and the jury said no.

JUSTICE NATHAN L. HECHT: But it doesn't mean they were acting in

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bad faith. It just means that the jury didn't find, make the finding.

ATTORNEY KERN LEWIS: Well, if there's not good faith, I don't know what the neutral zone is between good faith and bad faith, so I would submit it does.

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Lewis, if we were to hold that the TCHRA, the Human Rights Act, preempts these claims, is it your contention that because that argument wasn't expressly presented below it's waived or it would be one that we can reach because it's jurisdictional.

ATTORNEY KERN LEWIS: Well number one, I would say both. Number one, it was waived. It was not raised. Number two.

JUSTICE SCOTT A. BRISTER: They say they raised it in a motion for new trial.

ATTORNEY KERN LEWIS: It's not correct. They never raised it in the charge when the issues were submitted.

JUSTICE SCOTT A. BRISTER: But why would you raise that in the charge if you say their cause of action doesn't exist.

ATTORNEY KERN LEWIS: Well you would have to either by special exception or the charge.

JUSTICE SCOTT A. BRISTER: You could move for directed verdict, but there's never been a rule you have to move for directed verdict. You can always complain after the verdict comes back that the cause of action they recovered on doesn't exist.

ATTORNEY KERN LEWIS: But you also have to object during the charge that the issue being submitted that there's no basis for it and the reason for that would be the preemption issue, which they didn't raise. And most importantly on preemption, Justice Hecht, you wrote in your concurring opinion in Zeltwanger that the sexual harassment statute is not preempted by and it's specifically in the statute that it's not. I say it's not specifically in the statute. There's no mention of preemption in the statute. So if there's going to be preemption, that's a job for the legislature to do, not this Court.

JUSTICE SCOTT A. BRISTER: It's not what we said in City of Waco. We looked to see whether this specific statute controls generals. Here we have a very specific statute that specifically covers hostile work environment, specifically requires all these administrative tort, this, that and the other and caps and stuff and then we've got a negligence cause of action, which nobody's ever brought before. A negligence action for hostile work environment. And so why doesn't the specific under City of Waco, specific controls the general?

ATTORNEY KERN LEWIS: Because the legislature didn't say it was intended to control the general.

JUSTICE SCOTT A. BRISTER: Legislature didn't say it in City of Waco either.

ATTORNEY KERN LEWIS: Well, Your Honor, in this case, you said, for example, nobody has brought these cases. There are a lot of cases where people have brought both the negligent retention or the negligent supervision in the sexual harassment cases. This is not a case of first impression on that issue. It's just in the prior case, they, because the damage award was so small, there wasn't an election issue and so they didn't have to elect one or the other so it never came up with that.

JUSTICE SCOTT A. BRISTER: This lot of cases is all listed in your brief?

ATTORNEY KERN LEWIS: Yes, I know of one case, which I can, I don't know, I think it's the Itz case.

JUSTICE SCOTT A. BRISTER: There's a difference between one and a

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lot.

ATTORNEY KERN LEWIS: Well Wal-Mart v. Itz traces a history of where this has happened and it talks about negligent retention.

JUSTICE SCOTT A. BRISTER: And why would anybody, if you've got just a general negligent cause of action with two-year statute and all the punitive damages, etc., why would anybody comply with the statute?

ATTORNEY KERN LEWIS: Because we believe it's almost jurisdictional that you have to. Otherwise, they're going to argue they didn't, as she indicated, the policy arguments that you need to file your complaint and allow the Texas Commission on Human Rights to investigate and attempt to mediate and attempt to resolution.

JUSTICE SCOTT A. BRISTER: You all did all that?

ATTORNEY KERN LEWIS: Yes, Your Honor.

JUSTICE SCOTT A. BRISTER: Then didn't file a CHRA action?

ATTORNEY KERN LEWIS: We filed the lawsuit, but we just included both theories of recovery.

JUSTICE DAVID M. MEDINA: Mr. Lewis, Mr. Emery commented that if Ms. Williams prevails here that the common law of tort will be expanded and just create all kinds of litigation here. Can you respond to that, please?

ATTORNEY KERN LEWIS: No, Your Honor, that's not true. It's not an expansion of anything. It is a, it already exists, negligent supervision and retention and, in fact, you can, since the legislature said punitive damages can be awarded for negligent retention, then the legislature has also acknowledged this case of action for negligent retention. So this would not be an expansion of that.

JUSTICE DALE WAINWRIGHT: Sorry, were you finished?

ATTORNEY KERN LEWIS: Yes, sir.

JUSTICE DALE WAINWRIGHT: It sounded like you said that for sexual harassment, to pursue that the plaintiff must file with the CHRA, but you can file, I think your co-counsel said, concurrently, the common law action.

ATTORNEY KERN LEWIS: After the administrative remedies are exhausted before the [inaudible].

JUSTICE DALE WAINWRIGHT: So you agree for sexual harassment in Texas you have to follow the CHRA and file there?

ATTORNEY KERN LEWIS: Yes, sir.

JUSTICE DALE WAINWRIGHT: And pursue the administrative process. If you don't, then you cannot pursue a common law for the same conduct, do you agree?

ATTORNEY KERN LEWIS: Yes, Your Honor, I would agree.

JUSTICE DALE WAINWRIGHT: But you think the way you addressed those two potentially disparate approaches is you filed them concurrently?

ATTORNEY KERN LEWIS: Yes. To give you an analogy, in Texas.

JUSTICE DALE WAINWRIGHT: So the CHRA must be complied with, but you can also add the common law claim?

ATTORNEY KERN LEWIS: Yes, Your Honor, and I'll give you an example, perfect example. If you buy a car with an odometer that's been rolled back, you can sue for fraud, common law fraud, or you can sue under the Texas Deceptive Trade Practices Act, but if you're going to have both of them, you have to give the 60-day notice required by the Deceptive Trade Practices Act.

JUSTICE DON R. WILLETT: And you're saying you could have filed solely an assault claim?

ATTORNEY KERN LEWIS: Yes, they could have filed solely for assault.

JUSTICE DON R. WILLETT: And you could have filed solely another

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supervision and retention claim and left alone the statutory TCHRA stuff.

ATTORNEY KERN LEWIS: I'm not aware of any authority that says you cannot do that.

JUSTICE DON R. WILLETT: I thought I heard you say also though that if you elect to bring both ultimately in Court, you can't initially file a lawsuit on the common law stuff. You've got to first let the statutory stuff work its way through the administrative process and then you can combine both of them in your lawsuit.

ATTORNEY KERN LEWIS: I believe what Ms. Hutchison was saying to the Court was there is a public policy incentive for you to file them concurrently and go through the Commission on Human Rights process before bringing both actions in the State Court.

JUSTICE PAUL W. GREEN: What that means is that every statutory claim is going to have a common law claim component because why wouldn't a plaintiff want to bring both. All you would have to say is that well, maybe you have a sexual harassment, a workplace environment that's hostile. Well it doesn't include, well you just add well you now felt threatened when that person was doing it and then you've got your separate tort. Then you've got your common law claim. It just wipes out the statutory structure.

ATTORNEY KERN LEWIS: I don't believe so, Your Honor, because just as the DTPA for fraud the existence of a common law cause of action for fraud hasn't wiped out the DTPA. So they exist concurrently and that happens in numerous instances.

JUSTICE DON R. WILLETT: Quick question. When you look at liability under the TCHRA for harassment, you look at prompt remedial action and stuff like that, but isn't that inquiry sort of caught up in the same facts as negligent supervision and retention. It's sort of all kind of intertwined and you can't really fully tackle the prompt remedial action part did the employer really step in right away and fix it. That seems to be the same inquiry as negligent retention and supervision. How are they different?

ATTORNEY KERN LEWIS: I believe they are interrelated, but I believe that's proper for them to be interrelated because for them to get their affirmative defense under the sexual harassment claim of we responded reasonably, that's going to be the same facts as what they will try to prove in saying we were not negligent in retaining this person. So it's going to be the same facts and, again, there's no requirement that the facts be completely independent. Under the DTPA and fraud, it's the same facts that support both causes of action.

JUSTICE DALE WAINWRIGHT: I'm sorry, chief, one final question. If and following your concurrent theory, you filed the two approaches concurrently, if the CHRA says you have no claim, does that bar your common law claim under your theory?

ATTORNEY KERN LEWIS: Only if the reason that the Commission on Human Rights, are you talking about the Commission says there's no finding, what the Commission does is give you the right to sue letter in that instance. They don't make a final determinative outcome.

JUSTICE DALE WAINWRIGHT: What if they say it didn't happen? We did our investigation. We looked through, it didn't happen.

ATTORNEY KERN LEWIS: Then that is admissible by a defendant to say, look, the Commission found it didn't happen, but it is not jurisdictional. It does not cut off.

JUSTICE DALE WAINWRIGHT: So under your concurrent theory, the CHRA approach is superfluous because you can always pursue claim in a court of law.

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ATTORNEY KERN LEWIS: I guess I don't follow.

JUSTICE DALE WAINWRIGHT: Isn't that what you just said? You file them concurrently. You have to go first through the CHRA, that you said is required, right? I'm just following your approach. If the CHRA says you lose. It didn't happen on the evidence. What happened does not implicate the statute for any number of reasons, CHRA said you lose, I think you just said you can still pursue a common law claim in a court of law.

ATTORNEY KERN LEWIS: You can still, well not even a common law claim. You can still pursue a statutory claim.

JUSTICE DALE WAINWRIGHT: Well we're just talking about your common law claim for negligence.

ATTORNEY KERN LEWIS: Yes, Your Honor. So if the CHRA says you lose, you believe you can still pursue your common law claim in a court of law for negligence?

ATTORNEY KERN LEWIS: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: So the CHRA proceeding is superfluous. It's out there, but it has no bite, no teeth right?

ATTORNEY KERN LEWIS: In relation to the common law claim it's superfluous?

JUSTICE DALE WAINWRIGHT: Yes. In relation to your being able to pursue a claim for sexual harassment or negligent retention.

ATTORNEY KERN LEWIS: I think factually it is superfluous, but policy wise, it's not superfluous. There's a policy that the State has adopted that people pursue the administration remedy.

JUSTICE DALE WAINWRIGHT: But that's what the legislature intended, a statutory scheme with an agency of process that in the final analysis does not stop or change your court proceeding for sexual harassment.

ATTORNEY KERN LEWIS: Well if the legislature had intended otherwise, they would have made the finding by the Commission on the Human Rights, the binding and the jurisdictional finding of that's a done deal. You can't go after that.

JUSTICE DALE WAINWRIGHT: Believe me, there are a lot of things we wish the legislature had made clearer. We wrestle with those every day. Thank you, Counsel.

ATTORNEY KERN LEWIS: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Emery, please come forward. The, your opponent says that there was evidence of cornering, brushing, you know, other evidence of assault that we'll find in the record after Ms. Williams filed the complaint and you just say that's categorically not so.

REBUTTAL ARGUMENT OF MARK EMERY ON BEHALF OF PETITIONER

ATTORNEY MARK EMERY: Your Honor, I've looked at the record very carefully on this and, again, when Cathie Williams would subsequently to go managers and say, for example, it's still happening, it's very unclear from the record what this meant and ultimately this is plaintiff's burden of proof when these different incidences occurred. From the record, I've only concluded that there are things such as winking or making a comment. These would not be instances of assault and, therefore, they can't supply the predicate for a negligent supervision and retention. Justices Willett's and Wainwright, I think, have hit on exactly the right issue. There is nothing that stops a plaintiff from going this afternoon and filing a lawsuit based entirely on sexual harassment allegations and using the Court of Appeals'

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opinion as its sole basis. You could tract the language and one thing I don't, I want to make sure doesn't get lost is not just that the Court of Appeals' opinion affirmed a verdict for sexual harassment based on negligent supervision and retention, but that it so sharply expanded employers' duties in this case.

JUSTICE HARRIET O'NEILL: I understand that that's a claim made if you review the negligent retention case in isolation, but the legislature crafts remedies often and rarely makes them exclusive and many times you bring as I say the [inaudible] claim or other type claims that are merely meant to supplement. If you want to use that tool, you have certain hoops you have to jump through. We either found that exclusive if the statute says it's exclusive or if it's so pervasive that it's obviously exclusive. We don't favor exclusivity. We did in the IIED case because IIED was a gap filler. It strikes me that your argument is if the statute provides for a remedy, it's always going to just be the sole remedy.

ATTORNEY KERN LEWIS: No, Your Honor, and I do want to make clear that although because as our briefing has illustrated, there are a number of very good reasons for this Court to find preemption. It's not necessary for the Court to find that the Human Rights Act preempts the negligence supervision cause of action in these kinds of cases. The Court would still be making the right step just by reversing the Court of Appeals' opinion because it's construction of duty is so overbroad. If duty had been construed consistent with past cases, there's not legally sufficient evidence to support his verdict.

JUSTICE PHIL JOHNSON: What is your answer to their position that the malice finding under the statute gets to the judgment?

ATTORNEY KERN LEWIS: The jury's answer to question number 7 is absolutely crucial in this case. It there says that, it defined ratification as Waffle House managers knew of Davis' acts, recognized that Davis' acts would continue, that they, and they made a decision to retain him. Certainly, if this language as it was put in the charge would have got a finding in their favor, it would have done a lot to sew up their case, but the jury didn't find that. The jury found no clear and convincing evidence of ratification in this case and I think that that language.

JUSTICE PHIL JOHNSON: But the question was asked to malice.

ATTORNEY KERN LEWIS: I think that that ratification finding because of the language that the jury was charged with, entirely negates any malice finding. There can't be the subjective awareness element that's necessary for gross negligence given the jury's no answer to the ratification.

JUSTICE DON R. WILLETT: [inaudible] for the intertwined nature of looking at, on the one hand, the company's liability for negligent supervision and retention and on the other hand whether they really pursue prompt remedial action to combat and reduce their risk of harassment. What do you make of that? It seems to be the inquiry is sort of largely the same under the statutory claim because you can't really impose liability unless you find kind of the absence of reasonable, prompt action to tackle the discrimination, but separately there's this common law claim for negligence and supervision and retention, which seems to be a little bit intertwined.

ATTORNEY KERN LEWIS: Well one important issue is again the difference between this proceeds under the statute and when this proceeds in common law. Under statute, there are clearly defined defenses. There are defenses, both the liability and there's the Kolstad defense to punitive damages. These defenses aren't outlined in

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the negligence tort. It all revolves around the central concept of reasonableness, in this case Waffle House acted reasonably.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Counsel, your time's expired and the cause is submitted and the Court will now take a brief recess.

MARSHALL: All rise.

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