

## LABOR AND EMPLOYMENT LAW

### Digging in to *Waffle House*

by AUDREY MROSS and MICHAEL McCABE

The 2010 Texas Supreme Court case that has employment lawyers abuzz curtailed judges' common-law creations in favor of legislators' statutory remedies when the issue is workplace sexual harassment.

The following is the background on the case, according to the Texas Supreme Court's opinion: A waitress' unresolved complaints regarding alleged sexually crude touching and comments at the hands of a co-worker cook, Eddie Davis, spawned *Waffle House Inc. v. Williams*. The alleged offending physical conduct included winking, making comments with his hands in his pants, pushing Cathie Williams into counters and the grill, and grabbing her from behind while pressing his body to hers and saying, "Isn't she great, isn't she wonderful?"

Except for moving Davis to a different shift, there was no management response to her complaints. Williams quit and filed complaints with the Equal Employment Opportunity Commission and its state counterpart, the Texas Commission on Human Rights.

Upon exhausting her administrative remedies, Williams sued Waffle House and Davis in state court, alleging sexual harassment under the Texas Commission on Human Rights Act (TCHRA), common-law battery by Davis, and common-law negligent supervision and retention by Waffle House. Davis was nonsuited before trial. The jury found for Williams on her common-law and statutory claims against Waffle House, to the tune of \$400,000 in compensatory damages, \$25,000 in future compensatory damages and \$3.46 million in punitive damages. Williams elected to recover under her negligent supervision and retention claim, which allowed her to avoid the TCHRA's capped damages. The final judgment was \$425,000 for past and future compensatory damages and \$425,000 in punitive damages, plus interest and costs, which Fort Worth's 2nd Court of Appeals affirmed.

The Texas Supreme Court took up Waffle House's appeal and agreed that the negligent supervision and retention claim should fail as a matter of law because the TCHRA is the exclusive remedy for workplace sexual harassment. It noted that legislators' creation of statutory remedies does not always displace common-law remedies, unless there is "a clear repugnance" between the two causes of action.

Williams had to prove an independent underlying tort as an element of her negligent supervision and retention claim, but the alleged assault cited for that purpose also was part of the alleged misconduct in her statutory claim of sexual harassment.

The court opined that allowing the same conduct to support both claims would allow plaintiffs to circumvent the TCHRA's remedial scheme with an allegation of even the slightest physical contact. The court justified its opinion by extolling the TCHRA's process of using conference, conciliation and persuasion to resolve workplace disputes and balance employees' and employers' interests. Furthermore, the court preferred the statute's limitations periods, substantive elements and affirmative injunctive relief, such as reinstatement, over those offered by common law. The court found implied exclusivity in the TCHRA's election-of-remedies provision. And the court held that the issue underlying the negligent supervision and retention claim — the efficacy of the employer's remedial response — is addressed under the TCHRA within the employer's affirmative defense.

The *Waffle House* decision potentially will discourage plaintiffs from bringing employment claims, because it significantly limits plaintiffs' potential remedies. However, the decision also means that plaintiffs lawyers will be more likely to focus exclusively on their clients' TCHRA claims early in litigation, resulting in more cases surviving summary judgment and going to trial.

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