

# BLURRED LINES: TEXAS SUPREME COURT APPLIES HAZY DISTINCTION BETWEEN WORKPLACE HARASSMENT AND ASSAULT

Insights  
Mar 2, 2017

The Texas Supreme Court recently blurred the distinctions between harassment and assault claims as they apply to employer liability under the state's antidiscrimination statute. In considering whether a plaintiff is required to expressly plead a state law sexual harassment cause of action when bringing such a claim, the court said that plaintiffs need only bring a sexual assault tort claim – carrying with it no limitations on damages and no administrative exhaustion requirements – when the *gravamen* of the complaint is assault as opposed to harassment.

The Court's February 24, 2017 decision will likely embolden plaintiffs' attorneys to ratchet up the number of claims that are characterized as "assault" as opposed to "harassment," leading to additional difficulties for employers who must defend against them (*B.C. v. Steak 'n Shake Operations, Inc.*).

## EMPLOYEE ALLEGES VIOLENT SEXUAL ASSAULT BY SUPERVISOR

A plaintiff (whose initials are "B.C.") was an associate at a Steak 'n Shake restaurant in Frisco, Texas. She alleged her supervisor had sexually assaulted her with inordinate violence in the restaurant's bathroom one night. Prior to the assault, she claims her supervisor had not acted in any sexual manner toward her.

B.C. sued Steak 'n Shake and the supervisor individually, claiming assault, sexual assault, battery, negligence, gross negligence, and intentional infliction of emotional distress.

## Related People



**Michael V. Abcarian**

Senior Counsel

214.220.8300



**Richard R. Meneghello**

Chief Content Officer

503.205.8044

Steak 'n Shake asked the trial court to dismiss the case, arguing that the state statute governing sexual harassment, known as the Texas Commission on Human Rights Act (TCHRA), preempted B.C.'s assault claim. The trial court agreed with the employer and dismissed the case. An appellate court upheld the trial court's ruling, citing the 2010 Texas Supreme Court decision in *Waffle House, Inc. v. Williams*, which held that the TCHRA's statutory remedy is the exclusive avenue for those pursuing claims of workplace sexual harassment. B.C. then asked the Texas Supreme Court to review the matter.

## **SUPREME COURT RESURRECTS PLAINTIFF'S CLAIM**

To the surprise of many, the Texas Supreme Court reversed the appeals court and breathed new life into B.C.'s claim. It ruled that claims of assault do not always have to be brought under the TCHRA even if they *could* be. It pointed out that the TCHRA has a strict damages cap, and also requires plaintiffs to jump through certain administrative hoops before they may bring their claims, which should not apply in sexual assault cases. It specifically noted that the Texas legislature had not intended to burden assault victims with capped damages or protect employers by requiring the predictability that results from administrative exhaustion requirements, simply because an assault happened to occur in the workplace.

The high court distinguished the facts of this case from those in *Waffle House* by finding them unique. For example, B.C.'s alleged assault occurred in a single violent instance whereas the conduct in *Waffle House* involved multiple instances of nonconsensual touching that occurred over a six-month period.

The Texas Supreme Court not only distinguished the two cases based on the severity and frequency of the assailant's conduct, but in essence – or gravamen – on account of the fundamental differences arising out of potential employer liability raised in each lawsuit. In *Waffle House*, the plaintiff based her claim on the employer's retention and continued supervision of the plaintiff's co-worker (and harasser), which subjected the employer to the TCHRA's mandatory administrative scheme. Very differently, B.C.'s claim was predicated on a theory of vicarious liability given that the alleged wrongdoer was a company supervisor.



**Stephen J. Roppolo**

Partner

713.292.5601

---

## **Service Focus**

Employment Discrimination  
and Harassment

---

## **Related Offices**

Dallas

Houston

The Texas Supreme Court explained that there is a fundamental and consequential difference between sexual assault and sexual harassment, and that it is the gravamen of the complaint that makes the difference insofar as which theory applies. In *Waffle House*, the gravamen of plaintiff's complaint was deemed to be hostile work environment, while the assaultive nature of her claims ostensibly gave rise to the additional common law claim for negligence. Because the gravamen of the *Waffle House* complaint was the sexual harassment and *not* the assault, the claims were covered and preempted by the TCHRA.

By contrast, the court in *Steak 'n Shake* noted that B.C. did not allege that her employer was liable for fostering a hostile work environment, something the TCHRA is intended to remedy. Instead, B.C. alleged her supervisor, on a single occasion and without warning or prior incident, sexually assaulted her in the restaurant in a violent fashion. The Texas Supreme Court noted that the typical hallmarks of a sexual harassment claim were absent from B.C.'s complaint; namely, she did not allege that her supervisor offered a promotion or tied sexual favors to job performance; her supervisor's actions (outside of the single alleged assault) did not have the purpose of unreasonably interfering with her work performance or creating a hostile environment; there were no discussions or actions of a sexual nature prior to the assault; and she did not claim her supervisor's conduct to be part of a pattern of prior similar behavior. When considering the factual assertions set forth in the pleadings in the light most favorable to B.C., the court concluded the gravamen of her complaint was *assault* and not *harassment*.

What's the take away in this case? When the gravamen of a plaintiff's claim is assault, the TCHRA will not preempt an assault claim, even if grounded in the facts that could also constitute a sexual harassment claim under the TCHRA. However, as we all know, life isn't always that simple.

## **THE CRITICAL DISTINCTION BETWEEN HARASSMENT AND ASSAULT**

Under Texas statutory law, harassment is unlawful where: (1) enduring the offensive conduct becomes a condition of continued employment, or (2) the conduct is so severe or pervasive that it creates a work environment that a reasonable person would consider intimidating, hostile, or abusive. Hostile work environment claims are actionable

through the TCHRA when based upon allegations of discrimination.

Under Texas common law, a person commits an assault if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another; (2) intentionally or knowingly threatens another with imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe the other will regard that contact as offensive or provocative.

Employers need to understand the role they play when it comes to harassment claims under the TCHRA. The Texas Supreme Court has focused on whether employers know, tolerate, or foster alleged harassment, which are important inquiries when sexual harassment liability is determined. This is vastly different than determining whether an assault has taken place, where employers can be found liable on a *respondent superior* theory of liability – in other words, vicarious liability.

## PREDICTIONS

The *Steak 'n Shake* decision will undoubtedly embolden plaintiff's lawyers to plead common law tort claims. It may also confuse courts and make it much more difficult for employers to get such claims dismissed on the basis of regulatory preemption. If a court classifies a claim as sexual harassment, the claim will be subject to the TCHRA, including administrative prerequisites to suit and damage caps. But if a court classifies a claim as sexual assault, it will be governed by common law where there are no administrative prerequisites to suit and damage caps do not apply. From now on in Texas, if a plaintiff's harassment claim includes an allegation of objectionable physical contact, the plaintiffs' attorney may well assert an assault claim, not harassment, in order to avoid the damages limits and charge-filing requirements of the TCHRA.

Applying the gravamen test, Texas courts will now consider the gravity of the alleged assault and whether the assault was part of a pattern of conduct or occurred as a one-time incident. The alleged physical assault in *Waffle House*, while offensive, was not deemed to be as egregious as the violent bathroom assault in *Steak 'n Shake*. Likewise, the conduct in *Waffle House* was part of a pattern of conduct that extended

over a six-month period, leading to the finding of a hostile work environment.

Clearly, courts will be faced with harder cases that have more convoluted facts. For example, where will Texas courts draw the line when an assailant allegedly assaults the plaintiff more violently than the alleged behavior in *Waffle House*, but not as abhorrently as the alleged conduct in *Steak 'n Shake*? Even on remand of the *Steak 'n Shake* case, the plaintiff will still need to prove that the assault took place as alleged and that the employer should be vicariously liable for it. The Texas Supreme Court did not address the merits of the claim or under what circumstances an employer can be held responsible for a supervisor sexually assaulting an employee, only that the employee would not be required to use TCHRA as an exclusive remedy. These kinds of fact patterns and legal issues will no doubt blur the lines even more.

If you have any questions about this decision or how it may affect your organization, please contact your Fisher Phillips attorney, or one of the attorneys in any of our Texas offices:

Dallas: 214.220.9100

Houston: 713.292.0150

San Antonio: 210.227.5434

---

*This Legal Alert provides information about a specific new court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*