B.C. v. STEAK N SHAKE OPERATIONS, INC.:
SHAKING UP TEXAS'S INTERPRETATION OF THE TCHRA

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I. INTRODUCTION

The Texas Commission on Human Rights Act (TCHRA) was enacted to provide remedies for employees that have suffered from discrimination in the workplace, including sexual harassment.[1] Since codification, a new issue has emerged in many forms in courtrooms across Texas: whether the TCHRA preempts common law claims arising from the same set of facts. This issue has been particularly problematic in sexual assault cases.

B.C. v. Steak N Shake Operations, Inc. is a case the Supreme Court of Texas will decide this term, involving a woman who was sexually assaulted by her supervisor while at work.[2] She sued under several common law theories of liability, with no assertion of a TCHRA violation.[3] On appeal, citing nearly identical federal cases, B.C. stresses that her claim is not preempted by the TCHRA because of the act's legislative intent, as well as the distinction between sexual assault and sexual harassment, which Texas courts thus far have failed to recognize.

This Note will address why the Supreme Court of Texas should hold in favor of B.C. on this issue. Part II will discuss the purpose of the TCHRA in light of Title VII of the Civil Rights Act of 1964, along with case law

1. *See* TEX. LAB. CODE ANN. § 21.001(1) (West 2015).
2. *See* B.C. v. Steak N Shake Operations, Inc., 461 S.W.3d 928, 928–29 (Tex. App.—Dallas 2015, pet. granted). The Supreme Court of Texas decided *B.C. v. Steak N Shake Operations, Inc.* on February 24, 2017, after this Note was written. *See* B.C. v. Steak N Shake Operations, Inc., No. 15-0404, 2017 WL 730433 (Tex. Feb. 24, 2017). For purposes of this Note, all citations to the appellate court's opinion of *Steak N Shake* and any briefs filed with the Supreme Court in connection with the case reflect the status of the case and such briefs *before* the Supreme Court rendered its decision.
3. *Steak N Shake*, 461 S.W.3d at 928–29.

interpreting both acts. Part III analyzes *Steak N Shake*, while Part IV will conclude by explaining why the Supreme Court of Texas should hold that B.C.'s claim is not preempted by the TCHRA.

II. BACKGROUND

A. The Texas Commission on Human Rights Act

The TCHRA states that an employer commits an unlawful employment practice if it "discriminates in any . . . manner against [an employee] in connection with compensation or the terms, conditions, or privileges of employment" because of an employee's gender.[4] It was enacted to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964," which was passed by Congress to target employment discrimination.[5] The recognized purpose of the TCHRA is to provide Texans with a remedy for acts of discrimination that are not recognized at common law, and to allow a harmonious interpretation of Title VII and the TCHRA.[6] Because the TCHRA is modeled after the federal law, it is well established that federal case law may be cited as authority in cases relating to the Texas law.[7]

The TCHRA creates a "comprehensive administrative review system," granting specific remedies for civil actions alleging its violation.[8] This meticulous design is circumvented when a plaintiff brings a common law action for conduct that the TCHRA was intended to cover, thus avoiding the comprehensive process prescribed by the TCHRA.[9] For example, "[s]exual harassment is a recognized cause of action under both Title VII and the TCHRA."[10] To make out a statutory sexual harassment claim, an employee must prove offensive harassment occurred plus something more—typically discrimination affecting the "terms, conditions, or privileges of employment," such as a constructive discharge or hostile work environment.[11] Thus, a claim under the TCHRA relates more to the aftermath of the harassment in the plaintiff's workplace, easily distinguishable from a common law claim for sexual assault.

4. LAB. § 21.051.
5. *Id.* § 21.001(1). *See generally* 42 U.S.C. § 2000e (2012).
6. Perez v. Living Ctrs.-Devcon, Inc., 963 S.W.2d 870, 874–75 (Tex. App.—San Antonio 1998, pet. denied).
7. Hoffman-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 445–46 (Tex. 2004).
8. *Id.* at 446 (quoting Schroeder v. Tex. Iron Works, Inc., 813 S.W.2d 483, 485 (Tex. 1991)).
9. *See id.*
10. Waffle House, Inc. v. Williams, 313 S.W.3d 796, 804 (Tex. 2010).
11. TEX. LAB. CODE ANN. § 21.051 (West 2015).

B. Common Law Claims Under the TCHRA

The Supreme Court of Texas has addressed the preemption of common law actions under the TCHRA on multiple occasions. In *Waffle House, Inc. v. Williams*, the court was confronted with a case in which an employee, Williams, was sexually harassed by a co-worker who made sexual comments towards her, pushed her into counters, and would occasionally rub against her chest with his arm.[12] Williams sued her employer for both sexual harassment under the TCHRA and negligence under the common law.[13]

After a comprehensive analysis of the TCHRA, the Supreme Court of Texas held that an employer's liability for a pattern of unwanted sexual touching by a coworker is limited to the narrowly tailored TCHRA scheme covering sexual harassment.[14] Furthermore, the court held that Williams's common law tort claims were grounded on harassment within the scope of the TCHRA, because the corrective actions taken by Waffle House were "already baked into the TCHRA analysis and a key part of the controlling statutory framework."[15] Permitting the common law claim "would allow plaintiffs to pick and choose among irreconcilable and inconsistent regimes," and as a result, employees would have little incentive to follow the Legislature's comprehensive administrative process.[16] This hypothetical frustration of legislative intent motivated the court's holding.[17]

In *Hoffman-La Roche Inc. v. Zeltwanger*, the Supreme Court of Texas similarly held that a common law claim for intentional infliction of emotional distress (IIED) was unavailable to an employee complaining of sexual harassment by a supervisor.[18] The court stated that if "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 [IIED]."[19] These two cases demonstrate that Texas courts prioritize the implementation of the TCHRA and its comprehensive remedies for plaintiffs alleging workplace harassment. The Supreme Court of Texas is only willing to acknowledge common law claims that are completely unrelated to the statutory claim, declining relief in actions based on the same course of conduct as that statutory claim.[20]

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12. *Waffle House*, 313 S.W.3d at 798–99.
13. *Id.* at 798.
14. *Id.* at 803.
15. *Id.* at 811.
16. *Id.* at 808.
17. *Id.*
18. Hoffman-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 441 (Tex. 2004).
19. *Id.*
20. *Waffle House*, 313 S.W.3d at 808.

C. Common Law Claims Under Title VII

Typically, federal decisions only serve a persuasive purpose in a Texas courtroom, but the Supreme Court of Texas has made clear that federal case law is instructive in cases concerning Title VII and the TCHRA, especially federal case law interpreting the Title VII preemption issue.[21] In 1995, the Ninth Circuit decided *Brock v. United States*, which distinguished workplace sexual discrimination and sexual assault.[22] In *Brock*, the plaintiff was a Forest Service employee who was required to share sleeping accommodations on field outings with her supervisor.[23] He continually subjected her to unwanted physical contact, and during one of the outings, he raped her.[24] The defendant-employer argued that Title VII was her exclusive remedy for claims of sexual discrimination, but the Ninth Circuit disagreed.[25] The court wrote:

> Although [the supervisor's] rape and sexual assault of Brock is sufficient to establish a claim of sexual discrimination, that conduct also constitutes more than sexual discrimination . . . .
>
> Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee's sex. In both instances, however, the ability to characterize the ultimate harm suffered as including a lesser offense . . . does not change the nature or extent of the ultimate harm. When the harms suffered involve something more than discrimination, the victim can bring a separate claim.[26]

The *Brock* holding has since been adopted by federal courts beyond the Ninth Circuit, including the District of Columbia,[27] Ohio,[28] Pennsylvania,[29] and Massachusetts.[30]

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21. *See Hoffman-La Roche*, 144 S.W.3d at 445–46.
22. *See* Brock v. United States, 64 F.3d 1421, 1423 (9th Cir. 1995).
23. *Id.* at 1422.
24. *Id.*
25. *See id.*
26. *Id.* at 1423.
27. *See, e.g.*, Boyd v. O'Neill, 273 F. Supp. 2d 92, 96 (D.D.C. 2003) ("[Title VII] does not preclude a federal employee from bringing common law claims of [IIED] and assault against her supervisor based on conduct that also happens to be discriminatory.").
28. *See, e.g.*, Wallace v. Henderson, 138 F. Supp. 2d 980, 985 (S.D. Ohio 2000) (holding that an employee who has brought a Title VII claim is not precluded from suing for "a highly personal violation" beyond discrimination).
29. *See, e.g.*, Shaffer v. Peake, No. 07-298, 2008 WL 794470, at *18 (W.D. Pa. Mar. 24, 2008) (stating that Title VII does not preempt all claims relying "on the same nucleus of operative facts," but rather only preempts causes of action providing consistent relief theories (quoting Brunetti v. Rubin, 999 F. Supp. 1408, 1411 (D. Colo. 1998))).
30. *See, e.g.*, Kibbe v. Potter, 196 F. Supp. 2d 48, 70 (D. Mass. 2002) (noting that *Brock v. United States* provides the most persuasive instruction on this topic).

A Houston federal district court recently reached the same outcome in a similar case. In *Santiero v. Denny's Restaurant Store*, an employee's supervisor sexually assaulted her in a restroom, so she sued the employer for sexual harassment under both Title VII and Texas common law for an intentional tort.[31] The court concluded that both the statutory and common law claims could go forward, and that the former did not preempt the latter.[32] This holding stands in stark contrast to the way Texas courts seem to interpret the TCHRA.

III. *B.C. v. STEAK N SHAKE OPERATIONS, INC.*

The Texas Court of Appeals in Dallas recently addressed this issue of TCHRA preemption in *B.C. v. Steak N Shake Operations, Inc.* An employee, B.C., filed a lawsuit alleging that she was sexually assaulted, battered, and molested by her supervisor, Jose Ventura, in the restroom while at work.[33] She specifically alleged that he pushed her against a restroom sink, grabbed the back of her head, and pulled her face toward him and tried to kiss her.[34] He then began to pull and tug at her pants and attempted to put his hands up her shirt.[35] B.C. tried to leave the restroom, but Ventura stopped her, pushing her up against a wall, unbuckling his pants, and grabbing B.C.'s head to try and force her to perform oral sex on him.[36] B.C. managed to push him away, causing Ventura to lose his balance, creating an opportunity for B.C. to escape.[37] B.C. asserted multiple causes of action against Steak N Shake based on a theory of vicarious liability, including assault, negligence, and IIED.[38] Steak N Shake argued that the common law claims were preempted by the TCHRA's statutory cause of action for sex discrimination, and the trial court agreed, granting Steak N Shake's motion to dismiss.[39]

On appeal, B.C. only challenged the dismissal of her assault claim, arguing that although the TCHRA applies to sexual harassment claims, the same is not true of assault claims.[40] The Dallas Court of Appeals held that B.C.'s claim was premised on "unwanted offensive touching" and was mere

31. Santiero v. Denny's Rest. Store, 786 F. Supp. 2d 1228, 1230–31 (S.D. Tex. 2011).
32. *See id.* at 1236.
33. B.C. v. Steak N Shake Operations, Inc., 461 S.W.3d 928, 928–29 (Tex. App.—Dallas 2015, pet. granted).
34. Petitioner's Brief on the Merits at 1, B.C. v. Steak N Shake Operations, Inc., No. 15-0404 (Tex. filed May 29, 2015) [hereinafter Petitioner's Brief].
35. *Id.* at 1.
36. *Id.* at 1–2.
37. *Id.* at 2.
38. *See id.*
39. *Id.*
40. *Id.* at 3.

sexual harassment.[41] The court agreed that an assault may have occurred, but decided that it was also actionable as harassment under the TCHRA; therefore, the common law claim was preempted, even though B.C. never brought forward a harassment claim.[42] B.C. appealed again, and the Texas Supreme Court granted B.C.'s petition for review.[43]

IV. ANALYSIS OF THE *STEAK N SHAKE* DECISION

The Dallas Court of Appeals likened B.C.'s situation to that of the *Waffle House* plaintiff,[44] and Steak N Shake did the same in its brief to the Supreme Court of Texas.[45] However, a distinction can be made between the two. In *Waffle House*, Williams's claims against her employer arose out of the tolerance of repeated instances of inappropriate sexual comments and "unwelcome flirting" by a co-worker.[46] Her claims involved the employer's negligence, which fell directly into the statutory scheme of the TCHRA.[47] In contrast, B.C.'s case involves an intentional sexual assault in the workplace by a supervisor. B.C. claims that the assault occurred on a single occasion, and makes no allegations regarding a constructive discharge or hostile work environment—the situations in which the TCHRA comes into play.[48] Instead, she seeks relief for Ventura's offensive physical contact and the threat of imminent bodily injury that he inflicted on her.[49]

Steak N Shake provides the Supreme Court of Texas with an opportunity. A distinction must be made between workplace sexual harassment and sexual assault—a distinction that the Dallas Court of Appeals failed to make when it wrote that "the gravamen of B.C.'s complaint against Steak N Shake is sexual harassment/sexual assault committed by her supervisor."[50] The "gravamen" of B.C.'s claim is not an allegation of workplace sexual harassment. The error is clear in the court's syntax, which incorrectly treats sexual harassment and assault as one and the same.[51]

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41. B.C. v. Steak N Shake Operations, Inc., 461 S.W.3d 928, 929–30 (Tex. App.—Dallas 2015, pet. granted).
42. *Id.*
43. *Case Detail*, TEX. JUD. BRANCH, http://www.search.txcourts.gov/Case.aspx?cn=15-0404&coa=cossup (last visited Oct. 16, 2016).
44. *See Steak N Shake*, 461 S.W.3d at 929.
45. *See* Response to Brief on the Merits at 19, B.C. v. Steak N Shake Operations, Inc., No. 15-0404 (Tex. filed Nov. 30, 2015).
46. Waffle House, Inc. v. Williams, 313 S.W.3d 796, 799 (Tex. 2010).
47. *Id.*
48. *See* TEX. LAB. CODE ANN. § 21.051 (West 2015).
49. *See* Petitioner's Brief, *supra* note 34, at 1–2.
50. B.C. v. Steak N Shake Operations, Inc., 461 S.W.3d 928, 930 (Tex. App.—Dallas 2015, pet. granted).
51. *Amici Curiae* Brief In Support of Petition for Review at 5, B.C. v. Steak N Shake Operations, Inc., No. 15-0404 (Tex. filed June 22, 2015) [hereinafter Amicus Brief].

Sexual harassment involves a particular kind of discrimination.[52] The Equal Employment Opportunity Commission defines workplace sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.[53]

A physical assault need not be proven to prevail in a claim for harassment.[54] In contrast, sexual assault is a criminal offense involving physical contact, and it can occur between any persons in any location, whereas harassment is, fundamentally, a workplace concern.[55] The idea that Texas civil courts are willing to blur that distinction and refuse to acknowledge the harm that sexual assault causes is not a passive issue.

The distinction between sexual assault and harassment requires an altered interpretation of the TCHRA. The TCHRA and Title VII were designed to supplement existing laws and institutions, not to supplant those laws.[56] *Waffle House* made clear that "a plaintiff may not rely on the *same* set of facts to plead two contrasting claims against an employer."[57] However, "*Waffle House* does not preclude stand-alone claims for assault—an intentional tort—where no sexual harassment claim was pled or would seem to fit the facts alleged."[58] The Dallas court's conclusion allows discrimination against a female assault victim, "depriving her of a [] common-law remedy that existed independently of, and well before, 'sexual harassment' was legally cognizable."[59] In sum, the holding punishes a litigant due to her gender—a harm specifically targeted by the enactment of Title VII and the TCHRA.[60]

V. CONCLUSION

The best route for the Supreme Court of Texas in its impending decision of this case is adherence to the federal interpretation in cases similar to B.C.'s, which have correctly interpreted the construction of the

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52. *Id.*
53. *Facts About Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/publications/fs-sex.cfm (last visited Oct. 16, 2016).
54. *See generally, e.g.*, Pa. State Police v. Suders, 542 U.S. 129 (2004) (recognizing a sexual harassment claim based solely on offensive comments and other verbal harassment).
55. Amicus Brief, *supra* note 51, at 9–10.
56. CBOCS W., Inc. v. Humphries, 553 U.S. 442, 455 (2008).
57. Amicus Brief, *supra* note 51, at 11.
58. *Id.*
59. *Id.* at 12.
60. *Id.*

common law in light of Title VII. The TCHRA was enacted as a spinoff of Title VII, with a legislative intent that federal law should guide its use, and therefore it seems logical that the court should adhere to that federal law in its analysis. Accordingly, assuming the Texas Supreme Court acknowledges both the legislative intent and distinction between B.C.'s claim and that of *Waffle House*, B.C. should prevail.

Sydney Huber