Third-Party Harassment Claims Require Intent in the Sixth Circuit

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For years, employers have faced liability for third-party, non-employee harassment of their employees based solely on a negligence standard. According to harassment guidance issued by the Equal Employment Opportunity Commission (EEOC), an employer was "negligent" if it either "unreasonably failed to prevent the harassment" or "failed to take reasonable corrective action in response to harassment about which it knew or should have known." On August 8, 2025, the Sixth Circuit Court of Appeals substantially narrowed employer liability in Ohio, Tennessee, Kentucky, and Michigan.

In *Bivens v. Zep, Inc.* Bivens, a sales representative, visited a client's site. The client's motel manager locked the office door and asked Bivens on a date. She said no, left, and later reported the incident to her supervisor. He immediately reassigned the client to another sales team. Bivens' job subsequently was eliminated in a reduction in force. She sued for hostile work environment harassment, race discrimination, and retaliation based on the incident at the client site. Both the district court and the Sixth Circuit found in favor of the defendant-employer.

Citing the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which directed courts to independently interpret statutes rather than relying on agency interpretations, the Sixth Circuit did not find the EEOC's negligence standard persuasive. Nor was it bothered that the First, Second, Eighth, Ninth, Tenth, and Eleventh Circuits have all applied a "negligence theory of liability" to third-party harassment. According to the Sixth Circuit, because those courts either deferred to the EEOC's interpretation pre-*Loper* or engaged in what "often seems like judicial policymaking," those decisions held little value.

Instead, reasoned the Sixth Circuit, "[h]aving interpreted Title VII ourselves, we conclude, unlike the EEOC, that it imposes liability for non-employee harassment only where the employer intends for the harassment to occur." For the court, the requisite intent can be

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found if the employer either wanted the harassment to occur or was substantially certain that it would — neither of which was present in *Bivens*.

The Sixth Circuit's decision is a significant departure from prior case law and EEOC guidance on employer liability for third-party (e.g., clients, customers, vendors, visitors) acts. That said, the *Bivens* decision does not completely absolve employers within the Sixth Circuit's jurisdiction from third-party misconduct. They still must diligently take steps to prevent and promptly (and effectively) address aberrant conduct by a third party in the workplace. Moreover, employers operating in multiple states must be keenly aware that the "lower bar" negligence-based liability standard currently will be applied in courts outside the Sixth Circuit.

For additional information about this decision or questions about minimizing third-party misconduct in the workplace, please contact the authors or any attorney in Frost Brown Todd's Labor and Employment practice group.

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