Sixth Circuit Stands Alone (For Now?) on Third-Party Harassment Liability

December 11, 2025

Pittsburgh, PA

The Legal Intelligencer

(by **Janet Meub**)

When can an employee hold its employer liable for harassment by a third-party? For instance, can a concierge hold a hotel liable for the inappropriate conduct of a paying guest? The consensus in many circuit courts, heavily influenced by the Equal Employment Opportunity Commission's (EEOCs) guidance and procedural regulations, is that negligence is enough to answer that question in the affirmative. If an employer *knew* or *should have known* of the third-party harassment and failed to take immediate action, the employer can be held liable. However, the Sixth Circuit recently strayed from the path of the negligence theory of liability, and in *Bivens v. Zep, Inc*., 147 F. 4th 635 (Aug 8, 2025), held that Title VII "imposes liability for non-employee harassment only where the employer intends for the harassment to occur."

To establish a sex-based hostile work environment claim under Title VII, a plaintiff must establish that (1) she is a member of a protected class (2) who faced unwelcome harassment, which (3) was based on her sex and (4) created a work environment that reasonably interfered with her work performance, for which (5) her employer is responsible. Employers can be held directly liable for the actions of their agents, whether those of a supervisor who can bind the company or those of a lower-level employee whose intentional acts are within the scope of employment can result in vicarious liability for the employer. Because sexual harassment does not serve any business purpose, most circuit courts have interpreted Title VII to require a showing that the harasser was either "aided in accomplishing the tort by the existence of the agency relationship" or that the employer was negligent in letting the employee commit the tort. When a third-party harasses an employee, most courts invoke the same negligence theory to hold the employer liable. That is, until the Sixth Circuit tackled the issue in August.

Facts of *Bivens*

In *Bivens*, the plaintiff worked as a territory sale representative for a manufacturer and distributor of cleaning products. As part of her job, Bivens made sales calls to retail and commercial clients to sell products and maintain client relationships. Not long after she was hired, Bivens called on a motel client. During their meeting, the motel's manager asked to speak to Bivens in his office. While Bivens was in the motel manager's office, the manager locked the office door behind her and twice asked Bivens out on a date. Bivens declined the awkward invitation and explained that she was married. She then asked the manager to unlock the office door and ended the meeting.

Bivens reported the incident to her supervisor, who reassigned the motel client to a different sales team, so that Bivens would not have to interact with the client again. Around this same time, in response to fluctuating business due to the COVID-19 pandemic, Bivens' position with the company was eliminated as part of a reduction in force.

Bivens filed suit, alleging hostile work environment harassment, retaliation, and discrimination by claiming that she had been subjected to a hostile work environment and that she had been fired either because she complained about the client's improper advances or because of her race. The District Court granted Zep's motion for summary judgment on each of Bivens' claims, prompting Bivens to appeal.

Sixth Circuit Says Liability for Third-Party Harassment Requires Employer Intent

In addressing the issue as to whether her employer could be liable for the motel manager's actions, the Sixth Circuit examined the history and purpose of Title VII and the interpretations of Title VII by both its sister circuits and the EEOC. The Court noted that when Congress passed Title VII, it created a federal species of intentional tort, distinguishing Title VII from torts based on mere negligent action. "Consistent with that congressional design, the key

‘factual question’ in a Title VII disparate treatment claim is whether ‘the defendant intentionally discriminated against the plaintiff’.” The Court noted that Title VII’s definition of the term employer includes agents of the company. Because agency law presumes the company controls its agent, an agent’s wrongful intent may be imputed to an employer on whose behalf the agent acts. Thus, a company can be held liable for discriminatory conduct of its employee acting in the scope of their employment.

However, if the harasser is not an employee, there is no agency, no furthering of the employer’s business interests, and no imputed intent up the chain of command. As a result, the Court held that Zep was not liable for the motel manager’s actions because Zep did not intend for Bivens to be harassed. It reasoned that, to hold an employer liable for the acts of third parties, the employer must desire an unlawful consequence from its actions or is “’substantially certain’ that it will result.” It must be the “intentional decision of the employer to expose women to [discriminatory] working conditions.”

In its opinion, the Court also held that, while the EEOC is authorized to issue procedural regulations for pursuing Title VII, its substantive interpretive guidelines have no controlling effect. Thus, the EEOC’s negligence standard – i.e., that an employer knew or should have known of the third-party harassment – is not enough to impose liability because the EEOC’s interpretive guidelines have no controlling effect on the Sixth Circuit’s analysis of Title VII. Though many sister circuits similarly use the negligence standard to impose liability on the employer for non-employee harassment, the Sixth Circuit admitted that it does not “lose any sleep standing nearly alone” in its interpretation of Title VII, which is true to Congress’ design. In doing so, the Court acknowledged that other circuits applying the negligence standard would likely reach the same decision it reached in *Bivens*.

The Sixth Circuit may not go it alone for long in its adoption of the desired intent standard. In late October, the U.S. District Court for the Eastern District of Pennsylvania found the *Bivens* decision to be persuasive and commended its “careful review of agency law” in *O’Neill v. Trustees of the University of Pennsylvania*, 2025 WL 3047884 (Oct 31, 2025).

Facts of *O’Neill*

In *O’Neill*, the University of Pennsylvania (University) awarded Sophia O’Neill a master’s degree in Robotics and Autonomous Systems in 2022. Shortly thereafter, O’Neill began working for the University in two roles – as a full-time Lab Manager in the School of Design, and as a Teaching Assistant in the Robotics and Autonomous Systems program. In these roles, O’Neill was required to work in person in the lab and to help students with their assignments.

In the fall of 2022, eight students in the program made complaints about the aggressive conduct of a six foot four-inch, male student (“Student HR”) in the lab. On one occasion during the second semester, O’Neill experienced Student HR’s behavior when he blocked her from her desk in the lab and hovered over her desk, demanding answers to an assignment. On another occasion, Student HR waited outside the lab for O’Neill to arrive at work and then, later that day, he blocked her path when she was exiting a room, refusing to move until she asked him to do so.

Upon returning to her desk and opening her emails, O’Neill discovered that Student HR had sent her several messages, including a middle of the night call on the messaging platform Discord. The messages stated that Student HR was in the middle of a “depressive psychotic episode,” asked O’Neill to come stay with him, and told her “Love you so much babe” with heart and kissing face emojis. O’Neill immediately reported Student HR’s behavior to the University.

In response, the University developed a safety plan for O’Neill after speaking with her and with Student HR. As a result of this plan, Student HR would only be permitted to attend the lab when the male lab manager worked, and he was prohibited from contacting O’Neill outside of an academic setting. Student HR agreed to the plan, acknowledging that he would face disciplinary proceedings if he violated it. O’Neill, however, sought a guarantee that she would never interact with Student HR, including prohibiting Student HR from accessing the Robotics lab even when she was not present.

O’Neill did not return to work, though the University continued to pay her and provide her with benefits. The University gave O’Neill a deadline to either return to work or formally request a leave of absence. O’Neill confirmed that she would not return to work and filed a complaint against the University with the Philadelphia Commission on Human Relations for forcing her to interact with her accused harasser. O’Neill then sued the University in the Eastern District of Pennsylvania for “creating and fostering a sex-based hostile work environment, for constructive discharge, and for retaliation under both Title VII and the Philadelphia Fair Practices Act.

The District Court determined that O'Neill had not adduced evidence to show that the University or its employees knew Student HR had physically intimidated or confessed unreciprocated romantic feelings for her until she reported his behavior. In its opinion, the Court called the negligence standard and the *Bivens* standard "almost-identical" and indicated that both approaches would have reached the same conclusion. The Court predicted that the Third Circuit will align with the Sixth Circuit's approach in *Bivens*.

Employers should be aware of the *O'Neill* case to determine which standard the Third Circuit applies in the event of an appeal. Will the Third Circuit adopt *Bivens'* desired intent standard for imposing liability in the context of harassment by non-employees and prove the District Court in O'Neill prophetic? Stay tuned.

Janet Meub is senior counsel in the Litigation and Employment and Labor groups of Babst Calland. She routinely counsels corporate clients on employment matters including discrimination, accommodations, wage and hour, discipline and termination, severance agreements, non-compete/non-solicitation agreements, unemployment compensation, and employee handbook and corporate policy updates. Janet also conducts workplace investigations and performs corporate trainings on employment "hot topics." She may be contacted at jmeub@babstcalland.com or 412-394-6506.

To view the full article, **click here**.

Reprinted with permission from the December 11, 2025 edition of *The Legal Intelligencer*© 2025 ALM Media Properties, LLC. All rights reserved.