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Sixth Circuit Raises Standard for Employer Liability in Customer Harassment Cases

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When is an employer liable for the harassment of an employee by a non-employee? The Sixth Circuit answered this question on Friday in Bivens v. Zep, Inc., holding that Title VII imposes liability for customer (or other non-employee) harassment only when the employer intended for the harassment to occur or was substantially certain that it would. This signifies a clear departure from the EEOC's negligence-based approach and diverges from the prevailing view in other federal appellate courts.

Case Background

Dorothy Bivens was employed as a sales representative for Zep, Inc. A few months into her employment, she visited one of Zep's motel clients. Upon entering the motel manager's office, the manager locked the door and asked Bivens if they could date. Bivens declined and requested to leave. The manager unlocked the door, and she exited. The next day, Bivens reported the incident to her supervisor, who reassigned the account to another sales team to ensure Bivens would not need to interact with the client again.

A short time later, Zep cut her position in a COVID-era reduction-in-force. She then sued for a hostile work environment, retaliation, and race discrimination. The District Court granted summary judgment in favor of Zep on all claims. On appeal, the Sixth Circuit affirmed.

The Court's Analysis

The key legal issue on appeal was whether Zep could be held liable under Title VII for harassment committed by a non-employee. In resolving this issue, the Sixth Circuit adopted the framework articulated in *Dunn v. Washington County Hospital*, 429 F.3d 689 (7th Cir. 2005), concluding that an employer may only be held liable for third-party harassment where the employer either intended for the harassment to occur or was substantially certain it would take place.

Applying this heightened intent-based standard, the court found no basis for employer liability. Zep took prompt action after the incident by reassigning the motel account to another sales team, and there was no evidence that Zep was aware of or encouraged the customer's behavior beforehand. Because Bivens could not demonstrate that Zep either desired or was nearly certain the harassment would occur, her hostile work environment claim failed as a matter of law.

The Court expressly acknowledged that its holding departs from both the EEOC's interpretation of Title VII and the majority approach among its sister circuits. Under 29 C.F.R. § 1604.11(e), the EEOC takes the position that employers may be held liable for non-employee harassment where they "know or should have known of the conduct and fail to take immediate and appropriate corrective

action." This negligence-based standard has been adopted by the First, Second, Eighth, Ninth, Tenth, and Eleventh Circuits.

The Sixth Circuit, however, expressly rejected this standard. It emphasized that the EEOC's authority under Title VII is limited to issuing procedural regulations setting forth the steps for pursuing a claim under Title VII-not substantive interpretations of the statute itself, and that the EEOC's interpretive guidelines-like § 1604.11(e)-carry no binding or "controlling" effect on courts.

The Court further grounded its reasoning in the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which overruled *Chevron* and reaffirmed the judiciary's responsibility in interpreting federal statutes. The Sixth Circuit observed that even if the EEOC had been granted authority to interpret Title VII's substantive provisions, *Loper Bright* would still require courts to conduct their own analysis of the statute. In this instance, the Court found the EEOC's view unpersuasive and inconsistent with the statutory text. It also criticized other federal circuits for adopting the EEOC's view without conducting their own analysis of Title VII's text.

Key Takeaways for Employers

The *Bivens* decision substantially narrows employer liability under Title VII for harassment by customers and other third parties within the Sixth Circuit (covering Kentucky, Michigan, Ohio, and Tennessee). Employers in this jurisdiction will now only be liable where the employer intended the harassment or was nearly certain it would occur.

While this decision provides some insulation for employers in the Sixth Circuit, it should not discourage proactive efforts to prevent and remediate harassment, regardless of the source. Further, employers operating in multiple jurisdictions should tread carefully, and apply a national best-practices approach as courts outside the Sixth Circuit continue to apply the negligence-based standard.

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