

Sixth Circuit Provides Employers Protection in Customer Harassment Cases

Labor & Employment Law Update

By Marissa Borschke and Christopher Green on September 11, 2025

Earlier this month, the Sixth Circuit issued a decision in *Bivens v. Zep* that significantly narrows when an employer can be held liable under Title VII for harassment committed by a third party, such as a customer or client.

The court held that an employer may only be liable in this scenario if the employer **intended** for the harassment to occur. This ruling departs from the EEOC's longstanding interpretation of Title VII as well as from the majority of other federal appeals courts that have considered the issue.

Traditional Rules of Employer Liability

Traditionally, Title VII liability comes in two forms:

1. **Direct liability.** When owners, officers, or other high-level officials engage in unlawful conduct, the employer is automatically liable because those officials are treated as stand-ins for the company itself.
2. **Vicarious liability.** For misconduct by lower-level employees, liability depends on agency or negligence principles—for example, if the employer knew or should have known about harassment and failed to take corrective action.

The challenge in *Bivens v. Zep* was different: What happens when the harasser is not an employee at all, but a customer?

Background of *Bivens v. Zep*

Bivens, an outside sales representative for Zep, Inc., claimed she was sexually harassed by a motel manager who was one of Zep's customers. She alleged that after she entered his office, he locked the door behind her, stared at her, and asked (twice) if they could date. The encounter ended when she declined the client's invitation. After she reported the incident to her supervisor, Zep reassigned the account to another sales representative, meaning she should not have had to interact with the client again.

Around the same time the company initiated a cost-cutting plan that included a reduction in force. Ultimately 23 roles were cut, including Bivens's. She sued, alleging hostile work environment, retaliation, and discrimination under Title VII and Michigan law.

The Sixth Circuit's Answer

The Sixth Circuit panel found that because customers are not “agents” of the employer, the usual vicarious liability rules did not apply. That is because unlike coworkers or supervisors—who act as agents of the employer—customers fall outside the employer's chain of control.

That left only a theory of direct liability. The Sixth Circuit explained that to prevail, Bevens had to show Zep itself intended the harassment—either by wanting it to occur or by acting with substantial certainty it would result. Because the record contained no evidence that Zep harbored such intent, the hostile work environment claim could not stand.

In practical terms, an employer is unlikely to face Title VII liability for customer misconduct unless it deliberately places an employee in a situation where harassment is almost certain to occur.

Why Employers Should Care

For employers in the Sixth Circuit, *Bivens v. Zep* offers an important protection by narrowing liability for customer or client misconduct. Employers cannot be held responsible under Title VII for third-party harassment unless they intentionally allowed or facilitated it. This will be a high bar for plaintiffs to meet.

This decision sets the Sixth Circuit (covering Ohio, Michigan, Kentucky, and Tennessee) apart from most other circuits, including the First, Second, Eighth, Ninth, Tenth, and Eleventh. Those courts (and the EEOC itself) apply a negligence standard, holding that employers can be liable if they “knew or should have known” about customer's conduct and failed to act. The Sixth Circuit, however, expressly rejected that approach in requiring proof of employer intent.

That said, employers should still be aware:

- **Policies matter.** Maintain and enforce anti-harassment policies that apply to interactions with customers, vendors, and visitors;
- **Act quickly.** Promptly investigate and address complaints, even if liability under Title VII is limited;
- **Look beyond Title VII.** State and local laws may impose broader standards of responsibility.

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Overall, the Sixth Circuit's ruling in *Bivens v. Zep* marks a major departure from the majority view and raises the threshold for employer liability in cases of customer harassment. While this is a favorable development for employers in the Sixth Circuit, businesses should continue to take complaints seriously and ensure strong preventive measures are in place.

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