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Sixth Circuit’s Higher Standard for Employer Liability

In *Bivens v. Zep, Inc.*, the Sixth Circuit Court of Appeals (which hears appeals from federal courts in Kentucky, Michigan, Ohio, and Tennessee) established a new, higher standard for holding employers liable for harassment committed by third party, non-employees. The main question analyzed was: “When, if ever, is an employer liable—either directly or vicariously—for the harassment of an employee by a non-employee?”

The plaintiff, Dorothy Bivens, contended a business customer had locked her in his office and asked her on a date. Bivens refused the customer’s invitation and ended the conversation. Bivens reported the incident to her supervisor, who reassigned the customer to another sales team so she wouldn’t have to interact with him again. Shortly after, Bivens was terminated as part of a company-wide reduction in force. She sued Zep, alleging a hostile work environment, retaliation, and discrimination.

The Sixth Circuit ruled in favor of Zep, reasoning that Zep could be liable for the customer’s actions only if it intended for Bivens to experience a hostile work environment at the hands of the customer or was substantially certain that she would. This is a significant-seeming departure from the typical negligence analysis used by most courts and the EEOC. The negligence standard is where an employer is liable if they “knew or should have known” about the harassment and failed to take prompt corrective action.

Substantial Certainty v. Negligence

The ruling in *Bivens v. Zep, Inc.* establishes a higher bar for proving employer liability for third-party harassment compared to the negligence standard. “Substantial certainty” means the employer was positive (for all practical purposes) that the harassment would occur or reoccur. Since Bivens’ situation was a “one-off,” and Zep was unaware of any alleged harassment until after Bivens reported it, the court found Zep was not “substantially certain” the harassment would occur, especially consider Zep’s prompt action when Bivens did report it.

The Sixth Circuit’s “substantially certain” standard is more favorable to employers but is certainly not a get-out-of-jail-free card. The Sixth Circuit pointed out that in many cases, particularly where an employee has specifically reported harassment by a third party, but the employer responds inadequately, the substantially certain standard would likely be satisfied.

Impact on Employers

For employers in the Sixth Circuit, the ruling is a favorable development. It provides a stronger defense against employment claims arising from actions by non-employees, as it is much harder for a plaintiff to prove an employer acted with intent or was substantially certain that harassment

would occur, at least in situations where the third party's conduct had not previously been observed by or reported to the employer. This decision could encourage other circuits to reconsider the validity of the EEOC's guidance in future cases and potentially lead to additional rulings similar to *Bivens*, but, for now, the new standard is unique to that jurisdiction.

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