

FP SNAPSHOT FOR HOSPITALITY EMPLOYERS: APPEALS COURTS SPLIT ON LIABILITY STANDARD FOR WORKPLACE HARASSMENT BY NON-EMPLOYEES

Insights
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Welcome to this edition of FP Snapshot for Hospitality Employers, where we take a quick snapshot look at a recent significant workplace law development with an emphasis on how it impacts employers in the hospitality industry. This edition is devoted to a recent federal appeals court ruling that sets a new standard for determining employer liability for workplace harassment committed by a non-employee, marking a clear break from most other courts as well as the Equal Employment Opportunity Commission (EEOC).

Snapshot Look at *Bivens v. Zep, Inc.*

In an [August 8 decision](#), the 6th US Circuit Court of Appeals ruled that Zep, Inc., a manufacturer and distributor of cleaning products for retail and commercial businesses, was not liable for workplace harassment committed by a non-employee.

- **How It Started.** Dorothy Bivens worked for Zep as a sales representative for a brief period in 2021. A few months into the role, she told her supervisor that Zep's client, a motel manager, had sexually harassed her when she met him inside his office, and her supervisor reassigned that client to a different sales team. Around the same time, Zep's president eliminated 23 sales roles, including Bivens', as part of a workforce reduction.
- **The Lawsuit.** Bivens sued Zep in a Michigan federal court under Title VII of the Civil Rights Act of 1964 (as well as Michigan's state law equivalent), claiming that the company created a hostile work environment based on

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the harassment incident at the motel manager’s office and terminated her in retaliation for reporting it. The district court ruled in favor of Zep on all claims, and the 6th Circuit affirmed.

- **6th Circuit’s New Standard.** The ruling focused on whether an intent-based or negligence standard of liability applies in cases involving non-employee harassment of an employee. The appeals court held that employer liability attaches in such cases only when the employer intended for the harassment to occur. And it rejected the negligence theory of liability that is applied by most other circuit courts and in EEOC regulations.

Title VII Liability Tests for Workplace Harassment Committed by a Non-Employee		
	How It Works <i>An employer can be held liable if...</i>	Where It’s Used
Negligence Standard	...the employer knew or should have known of the third-party conduct and failed to take immediate and appropriate corrective action.	<ul style="list-style-type: none"> • EEOC regulations • The 1st, 2nd, 8th, 9th, 10th, and 11th Circuits
Intent Standard	...the employer desired to cause the harassment committed by the non-employee or was substantially certain that it would occur.	<ul style="list-style-type: none"> • The 6th Circuit

Further FP Reading: For our in-depth coverage on *Bivens v. 2* click [here](#).

Hospitality Industry at Increased Risk of Non-Employee Harassment

Hospitality employers – including hotels, restaurants, casinos, and more – are uniquely exposed to third-party harassment risks due to how frequently employees interact with guests, vendors, patrons, and other non-employees. On top of that, the hospitality industry relies on customer

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service and guest satisfaction, and it often involves isolated situations (such as housekeepers or room service attendants working in hotel rooms) and situations that involve alcohol consumption. Each of these factors increases the risk of workplace harassment, according to a [2016 study by an EEOC Select Task Force](#).

For example, the study notes that “a tipped worker may feel compelled to tolerate inappropriate and harassing behavior rather than suffer the financial loss of a good tip,” and that “in order to ensure customer happiness, management may, consciously or subconsciously, tolerate harassing behavior rather than intervene on the workers’ behalf.”

How *Bivens v. Zep, Inc.* Impacts Hospitality Employers

- **Good News for Employers in Kentucky, Michigan, Ohio, and Tennessee.** The *Bivens* decision, which is only binding on courts within the 6th Circuit, makes it harder for plaintiffs to succeed on Title VII claims based on non-employee conduct. This is a major win for employers in Kentucky, Michigan, Ohio, and Tennessee.
- **Important Reminder for All Hospitality Employers.** According to the EEOC and most federal courts outside of the 6th Circuit, an employer may be held liable under Title VII for a non-employee’s conduct so long as it knew or *should have known* of the conduct and failed to take immediate and appropriate corrective action. And even though the 6th Circuit just significantly limited Title VII liability based on third-party conduct, it did not eliminate it altogether.
- **The Bottom Line.** Hospitality employers across the country should continue to take third-party harassment seriously. The intent standard of liability is not the norm nationwide and is at odds with EEOC rules, so even employers in the 6th Circuit should be cautious – especially because many hospitality employers operate in multiple states where different liability standards may apply. You must also be aware of any additional worker protections that may apply at the state or local level.

Will Other Circuits Adopt the Intent Standard? Stay tuned to other circuit courts address this issue going forward. Federal courts now have much more power to toss out agencies’ positions due to the Supreme Court’s [landmark decision last year](#) in *Lo Bright* – which is what the *Bivens* court relied on in setting as

EEOC's negligence standard and creating a new one based on interpretation of Title VII.

3 Practical Steps for Hospitality Employers

Consider taking these three steps to manage your risk of liability for a non-employee's conduct:

- **Make sure your policies address third-party harassment.** Consider updating your workplace policies to clearly outline the types of conduct that will not be tolerated from guests, clients, vendors, and other non-employees, and what steps your company will take if such conduct occurs.
- **Train your employees.** Managers and supervisors should understand how to recognize third-party harassment and how to promptly address it. Inform your employees that harassment by guests, customers, or other third parties will not be tolerated. Employees should know how to report incidents of inappropriate and/or harassing conduct from non-employees.
- **Take complaints seriously and document everything.** Consider designating an experienced person or team to conduct investigations. Make sure to document each step of the process, including any corrective action taken by the company.

Conclusion

If you have any questions about your Title VII liability exposure related to third-party conduct, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [Hospitality Industry Team](#). Make sure to sign up for [Fisher Phillips Insights](#) to stay up to speed on the latest developments.