No. 25-3310

In the United States Court of Appeals for the Third Circuit

Sophia O'Neill,
Petitioner,
v.

Trustees of the
University of Pennsylvania,
Respondent.

Appeal of the Decision of the United States District Court for the Eastern District of Pennsylvania, No. 2:25-CV-01129-MAK

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONER

Christine T. Elzer Pa. ID. No. 208157 NELA Board Member Elzer Law Firm, LLC 960 Penn Avenue Suite 1001 Pittsburgh, PA 15222 (412) 230-8436 celzer@elzerlaw.com	Elizabeth E. Theran National Women's Law Center 1350 I St. NW, Ste. 700 Washington, DC 20005 (202) 588-5180 etheran@nwlc.org	Michael L. Foreman Pa. ID. No. 30231 Penn State Dickinson Law Civil Rights Appellate Clinic 22 University Drive, Ste 105D University Park, PA 16802 (814) 865-3832 mlf25@psu.edu

TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

This Court Should Adopt the Negligence Standard that Governs in Coworker Harassment Cases as the Appropriate Standard for Third-Party Harassment. 4

I. The Supreme Court Has Enunciated the Negligence Standard for Coworker Harassment. 4

II. Nine Circuits Have Correctly Adopted the Negligence Standard for Third-Party Workplace Harassment, and this Court Has Suggested This Standard Applies. 7

III. The Sixth Circuit Alone Has Erroneously Rejected the Negligence Standard for Third-Party Workplace Harassment 11

IV. The Negligence Standard Prevents Widespread Harm in the Workplace. ... 14

CONCLUSION 18

Certification of Bar Membership 20

Certificate of Compliance with Fed. R. App. P. 32(g) 20

Certificate of Virus Scan 21

Certificate of Identical Copies 21

TABLE OF AUTHORITIES

CASES

Bivens v. Zep, Inc., 147 F.4th 635 (6th Cir. 2025)..... 3, 5, 11, 12, 13

Burlington Industries Inc. v. Ellerth, 524 U.S. 742 (1998) 4, 5, 6, 7

Chapman v. Oakland Living Center, 48 F.4th 222 (4th Cir. 2022).....17

Crist v. Focus Homes, 122 F.3d 1107 (8th Cir. 1997)..... 8, 10, 11, 12

Curry v. District of Columbia, 195 F.3d 654 (D.C. Cir. 1999) 10

Dayton Power & Light Co. v. FERC, 126 F.4th 1107 (6th Cir. 2025).....13

Dunn v. Wash. Cnty. Hosp., 429. F.3d 689 (7th Cir. 2005).....11

Edelman v. Lynchburg Coll., 535 U.S. 106 (2002) 12

EEOC v. Costco Wholesale Corp., 903 F.3d 618 (7th Cir. 2018).....9, 13

EEOC v. Vill. at Hamilton Pointe LLC, 102 F.4th 387 (7th Cir. 2024) 8

Faragher v. City of Boca Raton, 524 U.S. 775 (1998)..... 4, 5, 7

Folkerson v. Circus Circus Enters., 107 F.3d 754 (9th Cir. 1997) 8

Freeman v. Dal-Tile Corp., 750 F.3d 413 (4th Cir. 2014) 18

Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006) 10

Gardner v. CLC of Pascagoula, LLC, 915 F.3d 320 (5th Cir. 2019)..... 8, 9, 10, 12

Kunin v. Sears Roebuck & Co., 175 F.3d 289 (3d Cir. 1999) 9

Lockard v. Pizza Hut, 162 F.3d 1062 (10th Cir. 1998). 7, 8, 10, 12

Loper Bright Enter. v. Raimondo, 603 U.S. 369 (2024)..... 11, 12, 13

Medina-Rivera v. MVM Inc., 713 F.3d 132 (1st Cir. 2013) 8

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) 6

O'Neill v. Trustees of Univ. of Penn., No. CV 25-1129, 2025 WL 3047884 (E.D. Pa. Oct. 31, 2025) 10

Pryor v. United Air Lines, Inc., 791 F.3d 488 (4th Cir. 2015) 8

Roy v. Correct Care Sols., LLC, 14 F.3d 52 (1st Cir. 2019) 8

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 13

Summa v. Hofstra Univ., 708 F.3d 115 (2d Cir. 2013) 8, 9, 12

Thomas v. Securiguard Inc., 412 F. Supp. 3d 62 (D.D.C. 2019) 10

Vance v. Ball State Univ., 570 U.S. 421 (2013) 4, 6, 7

Watson v. Blue Circle, Inc., 324 F.3d 1252 (11th Cir. 2003) 8

Weston v. Pennsylvania, 251 F.3d 420 (3d Cir. 2001) 9

STATUTES

Fed. R. App. P. 29(b) 1

OTHER AUTHORITIES

Amanda Rossie et al., *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women*, NAT'L WOMEN L. CTR. 1, 5 (2018).....16

C. Lampman et al., *Women Faculty Distressed: Descriptions and Consequences of Academic Contrapower Harassment*, J. WOMEN HIGH. EDUC. 1, 1-4 (2016) 16, 17

Deborah J. Vagins et al., *Limiting Our Livelihoods: The Cumulative Impact of Sexual Harassment on Women's Careers*, AAUW 1, 5 (2019).....15

Holly Kearl et al., *Measuring #Metoo: A National Study on Sexual Harassment and Assault*, UCSD CTR ON GENDER EQUITY & HEALTH 18, 43 (2019) 14

Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers*, CTR. FOR AM. PROGRESS (NOV. 20, 2017).....16

Mark Hudson, *The State of Workplace Harassment: Why Gen Z Deserves Special Attention*, TRALIANT (Feb. 10, 2025) 15

U.S. EQUAL EMP. OPP. COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 1, 8 (2016).....14

U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 1, 8 (2016).....14

Workplace Sexual Harassment "A Chronic Problem," Says APA President, AM. PSYCH. ASS'N (Nov. 16, 2017) 17

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Employment Lawyers Association ("NELA") and the National Women's Law Center ("NWLC") are nonprofit organizations dedicated to advancing workplace justice and ensuring that anti-discrimination laws are enforced consistent with their remedial purpose.

NELA is the largest professional membership organization in the United States dedicated to advancing employee rights. Its members represent workers in labor, employment, and civil rights cases nationwide and are committed to faithful enforcement of anti-discrimination laws. NELA members regularly represent workers who experience severe or pervasive harassment from non-employees—customers, patients, contractors, or students—with whom they must interact.

NWLC is a nonprofit legal organization that has fought for gender justice since 1972, including the right to be free from sex discrimination. It advances workplace justice and related civil rights, and administers the TIME'S UP Legal Defense Fund, which supports access to legal representation for individuals facing workplace sexual harassment.

[1] Pursuant to Fed. R. App. P. 29(b) Counsel for Amici certify that all parties to this action have consented to the filing of this brief. Further, no person or entity other than the members of Amici has paid in whole or in part for the preparation of this brief, nor has anyone else authored this brief in whole or in part, and no person other than the Amici, its members and its counsel have made monetary contributions to the preparation or submission of this brief.

NELA and NWLC have a strong interest in this case because it concerns employer liability for workplace harassment by third parties. Both NELA and NWLC routinely represent employees in workplace civil rights cases, including in the Third Circuit. For workers interacting with third parties, meaningful protection under Title VII depends on holding employers to a negligence standard when they know or should know of harassment and fail to take reasonable corrective action.

The decision below adopts a substantial-certainty standard that departs from the consensus of most federal circuits and risks leaving many workers without effective protection. Accordingly, NELA and NWLC respectfully submit this brief as amici curiae.

SUMMARY OF THE ARGUMENT[2]

Workplace harassment is no less harmful or actionable because it is committed by a third party. Here, the University of Pennsylvania required a junior academic employee to interact with a student who repeatedly intimidated her and subjected her to unwanted romantic communications. Although Ms. O'Neill reported the conduct promptly, her employer's insistence that she continue to interact directly with her harasser ultimately forced her from her position. Treating

[2] Amici focus on only one critically important issue: the employer liability standard for third-party harassment.

this harassment differently because the harasser was a third party elevates form over the requirements of Title VII which prohibit a hostile work environment.

Ignoring Supreme Court guidance, the standard adopted by nine circuits, and Third Circuit precedent, the district court adopted a substantial-certainty standard for third-party harassment liability based on the Sixth Circuit's decision in *Bivens v. Zep, Inc.*, 147 F.4th 635 (6th Cir. 2025) (cert. petition filed Feb. 3, 2026). However, *Bivens* stands as an outlier and was wrongly decided. Every other circuit to address this issue has applied a negligence standard in harassment cases involving students, customers, patients, contractors, and other non-employees.

Harassment inflicts the same harm regardless of the harasser's status, and employers are best positioned to address it once on notice. Employers have the ability to prevent and remedy third-party harassment because they have control over the work environment where harassment occurs. A negligence standard only requires employers to act reasonably. In contrast, a substantial-certainty standard undermines Title VII's purpose by incentivizing employer ignorance and inaction, leaving employees—especially junior employees, like Ms. O'Neill—without meaningful protection.

ARGUMENT

This Court Should Adopt the Negligence Standard that Governs in Coworker Harassment Cases as the Appropriate Standard for Third-Party Harassment.

I. The Supreme Court Has Enunciated the Negligence Standard for Coworker Harassment.

Although the Supreme Court has not explicitly addressed the issue of employer liability for third-party harassment, it has repeatedly signaled that the negligence standard is the correct standard. *See Burlington Industries Inc. v. Ellerth*, 524 U.S. 742, 759 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 789, 799 (1998); *Vance v. Ball State Univ.*, 570 U.S. 421, 439, 446 (2013). The Court has explained that holding employers to a negligence standard for workplace harassment aligns with Title VII's purpose because it encourages employers to adopt preventive policies.

The Supreme Court most fully developed the doctrine of employer liability under Title VII in a pair of cases involving supervisors that harassed their employees: *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In these cases, the Court addressed whether an employer can be vicariously liable for supervisor harassment, answering in the affirmative. *Ellerth*, 524 U.S. at 746-47, 764-65; *Faragher*, 524 U.S. at 780.

Significantly, the *Ellerth* and *Faragher* Courts further observed that an employer always faces direct[3] liability for negligence when the employer knew or should have known about harassing behavior and failed to take reasonable steps to stop it. *Ellerth*, 524 U.S. at 759*; Faragher*, 524 U.S. at 789. As the *Ellerth* Court explained, "negligence provides the minimum standard for employer liability under Title VII." *Ellerth*, 524 U.S. at 759. Likewise, the *Faragher* Court reiterated that employers face direct liability for negligence in coworker harassment claims, as supported by "unanimity" among circuit and district courts. *Faragher*, 524 U.S. at 789, 799. Even the dissenting Justices in *Ellerth* and *Faragher*, who disagreed with the majority's application of vicarious liability with an affirmative defense in the supervisor harassment context, maintained that employers who are negligent should be subject to direct liability for harassment under Title VII. *Ellerth*, 524 U.S. at 767 (Thomas, J., dissenting) (explaining that "[a]n employer should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur").

The Supreme Court further clarified the employer-liability doctrine in *Vance v. Ball State University*, when addressing which employees qualify as supervisors for purposes of vicarious liability under the *Faragher*/*Ellerth* rule. *Vance*, 570 U.S.

[3] As explained further below, the *Bivens* Court had it backwards, contending that an employer is subject to vicarious liability for coworker harassment. *See Bivens*, 147 F.4th at 643. This fundamental misunderstanding and departure from Supreme Court precedent resulted in the Sixth Circuit's erroneous holding.

at 423-24. The Court held that, for an alleged harasser to qualify as a supervisor whose actions could subject the employer to vicarious liability, the employer must have empowered the harasser to take tangible employment actions against the targeted employee. *Id.* Although the employer's direct liability for negligence was not at issue in *Vance*, the Court again observed that employers can also be liable for coworker harassment under a negligence theory based on the employer's failure to control working conditions. *Id.* at 424, 449. The Court explained: an "employer is directly liable for an employee's unlawful harassment if the employer was negligent with respect to the offensive behavior," *Id*. at 427, and that "*an employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment*." *Id.* at 446 (emphasis added). The Court further indicated the negligence standard applies in "many other situations." *Id.*

The Supreme Court's sexual-harassment jurisprudence emphasizes that the negligence standard encourages employers to use reasonable care to detect, prevent, and correct any harassing behavior, and to adopt anti-harassment policies and procedures to report and remedy harassment. *See Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 806-07; *Vance*, 570 U.S. at 424, 430, 448-49. The Court has acknowledged that "a substantial body of judicial decisions" supports that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

The Court has also recognized that the negligence standard accomplishes these goals without overextending liability. While careful to limit an employer's vicarious liability to harassment by supervisors, the Court has consistently approved imposing direct liability for an employer's own negligence. *See Vance*, 570 U.S. at 424, 427, 446, 449; *Ellerth*, 524 U.S. at 759; *Faragher*, 524 U.S. at 789, 799. In fact, the only stated concern about the scope of direct liability for negligence, as expressed by the dissenting Justices in *Vance*, was that the negligence standard is too minimal, and that employers could escape liability by showing the employer lacked actual or constructive notice of the harassing behavior. *Vance*, 570 U.S. at 466 (Ginsburg, J., dissenting). Importantly, the Supreme Court has *never* acknowledged a substantial-certainty standard as a standard for employer liability. *See generally Ellerth*, 524 U.S. 742; *Faragher*, 524 U.S. 775; *Vance*, 570 U.S. 421.

II. Nine Circuits Have Correctly Adopted the Negligence Standard for Third-Party Workplace Harassment, and this Court Has Suggested This Standard Applies.

Given the Supreme Court's analysis of the negligence standard and its functions in employment law, it is unsurprising that the negligence standard has governed not only coworker harassment claims, but also third-party harassment claims in most federal circuits. *See*, *e.g., Vance*, 570 U.S. at 427; *Lockard v. Pizza Hut*, 162 F.3d 1062, 1073-74 (10th Cir. 1998). Nine circuits that have addressed employer liability for third-party harassment claims have adopted the negligence standard. These circuits have explained that the Supreme Court's negligence test is

the minimum standard for employer liability and the most practical standard for addressing workplace realities. *See*, *e.g.*, *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 321-22 (5th Cir. 2019).

Over the last three decades, the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits ("the Circuits") have expressly adopted the negligence standard for harassment claims involving third parties, holding an employer liable when it "knew or should have known" about harassing conduct but failed to address it. *See Roy v. Correct Care Sols., LLC*, 14 F.3d 52, 68 (1st Cir. 2019); *Pryor v. United Air Lines, Inc.*, 791 F.3d 488, 498 (4th Cir. 2015); *Gardner*, 915 F.3d at 321-22 (5th Cir. 2019); *EEOC v. Vill. at Hamilton Pointe LLC*, 102 F.4th 387, 403 (7th Cir. 2024); *Crist v. Focus Homes*, 122 F.3d 1107, 1110 (8th Cir. 1997); *Folkerson v. Circus Circus Enters.*, 107 F.3d 754, 756 (9th Cir. 1997). The Second and Tenth Circuits' negligence tests ask specifically whether the employer should have known of harassing conduct in the exercise of reasonable care. *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013); *Lockard*, 162 F.3d at 1074. The Eleventh Circuit similarly frames the negligence standard as whether the employer had actual or constructive notice of third-party harassment. *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003). The Circuits have applied the negligence standard to a wide range of workplace harassment claims, including but not limited to sexual harassment, in situations involving contractors, students, patients, and customers. *See*, *e.g., Medina-Rivera v. MVM Inc.*, 713 F.3d 132, 136 (1st Cir. 2013);

Summa, 708 F.3d at 124; *Gardner*, 915 F.3d at 327; *EEOC v. Costco Wholesale Corp.*, 903 F.3d 618, 624 (7th Cir. 2018).

While this Court has not directly addressed the applicable rule in third-party harassment claims in a precedential opinion, it has strongly suggested that the negligence standard applies to third-party harassment claims. In *Weston v. Pennsylvania*, 251 F.3d 420 (3d Cir. 2001), this Court reversed the dismissal of a sexual harassment claim against a prison involving harassment of an employee by both coworkers and inmates. With respect to harassment by inmates, this Court held, "[p]rison liability for inmate conduct may indeed apply when, for example, the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior." *Id.* at 427. The Court further remanded the case to the district court to allow the employee an opportunity to add allegations as to "prison officials' instigation and/or knowledge of these events[,]" for example, whether "prison officials knew of the harassing conduct but failed to remedy it." *Id.* at 427-28. As such, this Court acknowledged that negligence is the proper standard in a third-party harassment case.

Moreover, this Court has long applied the negligence standard in coworker harassment claims, focusing on the employer's response to harassment. *See Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 294 (3d Cir. 1999).[4] Similarly, although the

[4] Plaintiff-Appellant's Brief provides a full discussion of Third Circuit precedent on the negligence standard at pages 25-27.

D.C. Circuit has not established precedent regarding third-party harassment liability, it has utilized the negligence standard for coworker harassment, which its district court has extended to third-party harassment. *See Curry v. District of Columbia*, 195 F.3d 654, 660 (D.C. Cir. 1999); *Thomas v. Securiguard Inc.*, 412 F. Supp. 3d 62, 95 (D.D.C. 2019).

The negligence standard is proper, in part, because employers are best positioned to control the work environment where harassment occurs. *See*, *e.g., Crist*, 122 F.3d at 1110-11; *Freitag v. Ayers*, 468 F.3d 528, 538 (9th Cir. 2006). The district court in this case expressed concerns that employers would face liability for third-party conduct of which they had no control, but that concern is unfounded. *See O'Neill v. Trustees of Univ. of Penn.*, No. CV 25-1129, 2025 WL 3047884, at *10 (E.D. Pa. Oct. 31, 2025). The Circuits have considered multiple aspects of an employer's control over the work conditions before determining if the employer should face liability—including employer control over the physical environment, the ability to alter those conditions, and the opportunity to provide more staff members and training. *See Crist*, 122 F.3d at 1110-12. An employer with notice of the harassment, therefore, is liable because of its "negligence and ratification" of the harassment through its failure to reasonably respond. *Freitag*, 468 F.3d at 538.

Additionally, the Circuits have emphasized that the negligence standard is appropriate because third parties are effectively equivalent to coworkers in the workplace. *See*, *e.g., Lockard*, 162 F.3d at 1073-74; *Gardner*, 915 F.3d at 321-22.

The negligence framework assigns liability based on the employer's failure to address and rectify workplace harassment rather than the employer's relationship to the harasser. *See*, *e.g., Dunn v. Wash. Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005). As the Circuits have explained, direct liability for negligence turns on the employer's failure to use its "arsenal of incentives and sanctions" in response to the harasser's conduct. *Dunn*, 429 F.3d at 691. Thus, whether the harasser is a coworker or a third party is irrelevant because employers are only liable for their own conduct: their negligence in failing to respond to the harassment.

III. The Sixth Circuit Alone Has Erroneously Rejected the Negligence Standard for Third-Party Workplace Harassment.

In *Bivens*, the Sixth Circuit adopted the substantial-certainty standard, relying in part on *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), to dismiss the Circuits' reasoning. *Bivens*, 147 F.4th at 646-47. According to the *Bivens* court, the Circuits reached their conclusion on the negligence standard by blindly deferring to the EEOC's third-party harassment guidelines, which *Loper Bright* prohibits. *Id.* at 646. The court's reasoning was erroneous for several reasons.

First, the Sixth Circuit was simply wrong in characterizing the Circuits as blindly deferring to the EEOC's guidelines. As explained above, the Circuits reached their conclusions through independent reasoning, which varied from court to court. Although some of the Circuits referenced the EEOC guidelines, none of them relied solely on the guidelines or "deferred" to the EEOC. *See Crist*, 122 F.3d at 1110-11;

Summa, 708 F.3d at 124. To the contrary, the Circuits relied on Supreme Court precedent, which they interpreted as requiring the negligence standard in third-party claims. *See*, *e.g., Gardner*, 915 F.3d at 321-22. They also reasoned independently that the negligence standard best protects employees by observing the realities of the workplace and employer control. *See Lockard*, 162 F.3d at 1073-74; *Crist*, 122 F.3d at 1110-12. The Circuits repeatedly explained that since employers are best suited to control the working environment where harassment occurs, they should face liability for failing to reasonably respond to third-party harassment, just as they do for coworker harassment. *See Lockard*, 162 F.3d at 1073-74; *Crist*, 122 F.3d at 1110-12; *see also Dunn*, 429 F.3d at 691-92.

Second, the Sixth Circuit wrongly concluded that *Loper Bright* rendered the Circuits' decisions invalid. *Bivens*, 147 F.4th at 646. In *Loper Bright*, the Supreme Court ended forty years of precedent in overturning *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which established judicial deference to an agency's statutory interpretation when the statute was ambiguous. *See Loper Bright*, 603 U.S. at 412-13. But *Loper Bright* is irrelevant here—*Chevron* deference never even applied to the EEOC's harassment guidelines because the EEOC has no substantive rulemaking authority under Title VII. *See*, *e.g., Edelman v. Lynchburg Coll.*, 535 U.S. 106, 113 (2002) (observing that while the EEOC has authority under Title VII "to adopt 'suitable procedural regulations,' . . . [it] has no rulemaking power [over substantive issues]").

Although *Loper Bright* overturned *Chevron* deference, it did not abrogate all administrative law. *See Loper Bright*, 603 U.S. at 412-13. The Sixth Circuit's misreading of *Loper Bright* ignores that agency guidelines can still act as persuasive authority for a court's consideration. *Bivens*, 147 F.4th at 646 ("In either case, our respect for the agency's interpretation extends at most only so far as we find that reading 'persua[sive].'") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). While the *Bivens* court did not find the EEOC guidelines persuasive, citing EEOC guidelines is not fatal to a court's opinion. Agency guidelines, while not binding, provide persuasive wisdom which can support a court's own interpretation of a statute. *See Dayton Power & Light Co. v. FERC*, 126 F.4th 1107, 1135 (6th Cir. 2025) (Nalbandian, J., concurring) ("Properly understood, *Skidmore* recognizes that agencies have the 'power to persuade,' not the power to bind.") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). In fact, even the defendant-employer in *Bivens* admitted that *Loper Bright* did not affect the Circuits' rulings because the negligence case law does not rely on EEOC guidelines. Suppl. Br. for Appellee at 4, *Bivens v. Zep, Inc.*, 147 F.4th 635 (6th Cir. 2025).[5]

[5] The Sixth Circuit in *Bivens* rejected the negligence standard despite the defendant-employer's admission that "an employer may be responsible only for its own negligence in this scenario [of third-party harassment]." Suppl. Br. for Appellee at 4, *Bivens v Zep., Inc.*, 147 F.4th 635 (citing *Costco Wholesale Corp.*, 903 F.3d at 627).

IV. The Negligence Standard Prevents Widespread Harm in the Workplace.

Workplace harassment is pervasive, underreported, and associated with serious psychological and professional harm. Critically, that harm does not depend on whether the harasser is a coworker or a third party. Like coworker harassment, third-party harassment alters the conditions of employment for the countless employees required to interact with customers, patients, and students every day. A negligence standard for third-party harassment is therefore essential in preventing large-scale workplace harm and fulfilling the remedial purpose of anti-discrimination law.

National data highlights the staggering scope of the problem. The EEOC estimates between 25% and 85% of women experience sexual harassment at work. *See* U.S. EQUAL EMP. OPP. COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 1, 8 (2016). Other studies report that 81% of women as well as 43% of men have experienced workplace harassment or assault. *See* Holly Kearl et al., *Measuring #Metoo: A National Study on Sexual Harassment and Assault*, UCSD CTR. ON GENDER EQUITY & HEALTH 18, 43 (2019).

These figures likely understate the true prevalence of workplace harassment. Common responses to sex-based harassment include avoiding the harasser (33%-75%), minimizing or downplaying the conduct (54%-73%), or attempting to ignore or endure it (44%-70%). *Id.* at v. The least common response is to take formal action—by either reporting internally or filing a legal complaint. *Id.*

Studies show that only about 30% of individuals who experience harassment report it to a supervisor, manager, or union representative, meaning roughly 70% of those who experience harassment never report the conduct even at an internal level. *Id.* Along the same lines, American Association of University Women survey data shows that 59% of women who experienced sexual harassment did not report it to their employer, the EEOC, law enforcement, or the media, often citing fear of retaliation, career harm, or the belief that reporting would not result in meaningful accountability. Deborah J. Vagins et al., *Limiting Our Livelihoods: The Cumulative Impact of Sexual Harassment on Women's Careers*, AAUW 1, 5 (2019), https://www.aauw.org/app/uploads/2020/03/Limiting-our-Livelihoods-Full-Report.pdf. Moving to a substantial-certainty standard would mean even fewer workers would feel safe reporting third-party harassment because they might feel they need to offer "smoking gun" evidence of such harassment in order for their employer to take remedial action.

The stark reality is that non-employee third parties often commit workplace harassment. A national survey found that 21% of Generation Z respondents identified a client, visitor, or patient as their harasser. *See* Mark Hudson, *The State of Workplace Harassment: Why Gen Z Deserves Special Attention*, TRALIANT (Feb. 10, 2025), https://www.traliant.com/blog/the-state-of-workplace-harassment-why-gen-z-deserves-special-attention/. Regarding academic workplaces, research shows that 72% of faculty experience student-initiated harassment, with sexual harassment

comprising nearly one-third of incidents. *See* C. Lampman et al., *Women Faculty Distressed: Descriptions and Consequences of Academic Contrapower Harassment*, J. WOMEN HIGH. EDUC. 1, 1-4 (2016). Even in an environment where many who experience harassment do not report it, service industry workers, whose jobs require frequent interaction with third parties, file large numbers of sexual harassment charges with the EEOC. *See* Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers*, CTR. FOR AM. PROGRESS (NOV. 20, 2017), https://www.americanprogress.org/article/not-just-rich-famous/.

Data analyzing EEOC charges filed between 2012 and 2016 shows that the industries in which women filed the highest number of sexual harassment charges were: accommodation and food services; retail trade; health care and social assistance; manufacturing; and administration and support services. *See* Amanda Rossie et al., *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women*, NAT'L WOMEN L. CTR. 1, 5 (2018), https://nwlc.org/wp-content/uploads/2018/08/SexualHarassmentReport.pdf. Three of the four industries with the largest volume of sexual harassment filings—accommodation and food services, retail trade, and health care—are service industries requiring routine interactions with third-party customers and patients. *Id.* at 16-18. Moreover, these overrepresented sectors frequently employ women in low-wage, customer-facing roles, where power imbalances and economic insecurity increase vulnerability. The

negligence standard strengthens protections for millions of workers across service industries where sexual harassment is common and charges are concentrated.[6]

Workplace harassment can cause long-lasting psychological, physical, and professional harm, including depression, anxiety, sleep disturbance, impaired concentration, stress-related illness, substance use, suicidal ideation, and shame, as well as decreased job satisfaction, lower organizational commitment, and higher absenteeism and turnover. *See* C. Lampman et al., *supra*, at 1-4. Women are more likely to be harassed at the workplace and suffer worse adverse effects than men. *See Workplace Sexual Harassment "A Chronic Problem," Says APA President*, AM. PSYCH. ASS'N (Nov. 16, 2017), https://www.apa.org/news/press/releases/2017/11/workplace-sexual-harassment. Early-career and lower status faculty often face heightened barriers to reporting and greater risk of reputational harm, making employer intervention critical. *See* C. Lampman et al., *supra*, at 1-4.

Holding negligent employers liable for third-party harassment aligns with Title VII's purpose by incentivizing employers to implement policies that combat and prevent sexual harassment. On the other hand, the substantial-certainty standard adopted in *Bivens,* which requires an employer to be "substantially certain" that

[6] While this case involves a claim of sexual harassment, third-party harassment can be directed at employees based upon any of the protected traits. *See Chapman v. Oakland Living Center*, 48 F.4th 222 (4th Cir. 2022) (applying the negligence standard to a third-party racial harassment claim in which an assisted living facility's owner's six-year-old son called the plaintiff, an African American, racial slurs).

harassment would occur, would create perverse incentives for employers to ignore harassment in order to escape liability. *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 423 (4th Cir. 2014) (applying the negligence standard so that "an employer cannot avoid Title VII liability for [third-party] harassment by adopting a 'see no evil, hear no evil' strategy").

As a junior female instructor whose job required interaction with students, Sophia O'Neill exemplifies the type of employee the negligence standard is designed to protect. Treating her differently because her harasser was a student ignores the reality of the harm and leaves vulnerable workers unprotected.

CONCLUSION

Harassment inflicts the same harm in the workplace whether committed by a coworker or a third party, and employers remain best positioned to prevent and remedy harassment once on notice. Negligence is a fair and workable standard that aligns with Title VII's remedial purpose: it protects vulnerable employees, incentivizes proactive employer action, and avoids perverse incentives for employers to remain ignorant. This Court should reject the substantial-certainty standard and join the clear consensus of circuits that apply a negligence framework to third-party harassment claims.

Respectfully submitted this 19th day of February, 2026.

Christine T. Elzer Elzer Law Firm, LLC 960 Penn Avenue Suite 1001 Pittsburgh, PA 15222 (412) 230-8436 celzer@elzerlaw.com	Elizabeth E. Theran National Women's Law Center 1350 I St. NW, Ste. 700 Washington, DC 20005 (202) 588-5180 etheran@nwlc.org	/s/Michael L. Foreman Michael L. Foreman Penn State Dickinson Law Civil Rights Appellate Clinic 22 University Drive, Ste 105D University Park, PA 16802 (814) 865-3832 mlf25@psu.edu

Certification of Bar Membership

I certify that that I am a member of the Bar of the U.S. Court of Appeals for the Third Circuit.

/*s*/ Michael L. Foreman

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This Brief complies with the type-limitation of Fed. R. App. P. 32(g) because it contains 4,153 excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that on this 19th day of February 2026, a true and correct copy of the foregoing *Brief of Amici Curiae National Employment Lawyers Association and National Women's Law Center in Support of Petitioner* was electronically filed with the Court through the appellate CM/ECF system. I further certify that all parties required to be served have been served.

/s/ Michael L. Foreman