

No. 26-2270

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

YURI SMITH,
Plaintiff-Appellant,

v.

CATERPILLAR INC.,
doing business as Caterpillar Logistics Services, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of Illinois

**BRIEF OF THE NATIONAL WOMEN'S LAW CENTER AND THE
NATIONAL EMPLOYMENT LAWYERS' ASSOCIATION AS AMICI
CURIAE IN SUPPORT OF PLAINTIFF AND IN FAVOR OF REVERSAL**

Emma Lerner Freeman
Elizabeth E. Theran
NATIONAL WOMEN'S LAW CENTER
1350 I Street NW, Suite 700
Washington, DC 20005
(202) 588-5180
etheran@nwlc.org

Counsel for Amici Curiae

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Appellate Court No: 26-2270Short Caption: Smith v. Caterpillar Inc.

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Attorney's Signature: /s Elizabeth Theran Date: 10/16/2026Attorney's Printed Name: Elizabeth TheranPlease indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).

Yes



No

Address: National Women's Law Center, 1350 I St. NW, 7th Floor, Washington DC 20005Phone Number: 202-588-5280Fax Number: 202-588-5185E-Mail Address: etheran@nwlc.org

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Attorney's Signature: /s Emma Lerner Freeman Date: October 16, 2026Attorney's Printed Name: Emma Lerner FreemanPlease indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☒Address: National Women's Law Center, 1350 I St. NW, 7th Floor, Washington DC 20005Phone Number: (413) 221-9033Fax Number: 202-588-5185E-Mail Address: elfreeman@nwlc.org

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STATEMENT OF INTEREST OF AMICI CURIAE¹

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

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 the NWLC Fund administers the TIME’S UP Legal Defense Fund, which supports access to legal representation for individuals facing workplace sexual harassment.

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.

¹ Pursuant to Fed. R. App. P. 29(b), counsel for amici curiae certify that they authored this brief, that no party’s counsel authored this brief in whole or in part, and that no party or person beyond amici contributed any money toward the brief. The parties consented to its filing.

NWLC and NELA have a strong interest in this case because it concerns employer liability for workplace harassment by third parties. Both NWLC and NELA routinely represent employees in workplace civil rights cases, including in the Seventh 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.

This Court has already adopted this standard. But the decision below failed to follow it. Instead, the district court misread and ignored binding Circuit precedent, departed from the consensus of all but one federal circuit court, and risked leaving many workers without effective protection from harassment. Accordingly, NWLC and NELA respectfully submit this brief as amici curiae in support of Plaintiff-Appellant and in favor of reversal.

SUMMARY OF THE ARGUMENT

Workplace harassment is no less harmful or actionable because it is committed by a third party. Here, Plaintiff-Appellant Yuri Smith was physically attacked in the parking lot of his workplace by a coworker and a former employee. Neither Defendant-Appellee Caterpillar's security guards nor Smith's own manager—all of whom witnessed the altercation—

intervened, and Smith was fired two days later. Treating this type of harassment differently than colleague-on-colleague misconduct simply because the harasser was not a current Caterpillar employee elevates form over Title VII's long-established requirements, which prohibit a hostile work environment no matter its source.

Ignoring this Court's binding precedent, Supreme Court guidance, and the standard adopted by eight other circuit courts, the district court held that "[a]n employer is liable under Title VII for the conduct of a third-party nonemployee only when it makes the intentional decision to expose the employee to the discriminatory working condition." Order, R.35, at 20. In support of this conclusion, the district court invoked this Court's decision in *Dunn v. Washington County Hospital*, 429 F.3d 689, 691 (7th Cir. 2005), and the Sixth Circuit's decision in *Bivens v. Zep, Inc.*, 147 F.4th 635 (6th Cir. 2025) (cert. denied Apr. 20, 2026). This reasoning was wrong twice over. First, the district court sorely misread *Dunn* and ignored subsequent decisions from this Court that establish—beyond dispute—a negligence framework for employer liability in third-party harassment cases. See *EEOC v. Costco Wholesale Corp.*, 903 F.3d 618, 624 (7th Cir. 2018); *EEOC v. Vill. at Hamilton Pointe LLC*, 102 F.4th 387, 403 (7th Cir. 2024). On top of that, *Bivens*—which has no precedential authority here—is an outlier among the circuit courts on

the standard for third-party harassment liability and was wrongly decided in all events.

The Supreme Court has strongly signaled that a negligence framework governs employer liability in these circumstances. And of the other circuits to have squarely addressed the issue, all but one has applied a negligence standard in harassment cases involving students, customers, patients, contractors, and other non-employees. That is because harassment inflicts the same harm regardless of the harasser's status, and employers are best positioned to prevent and remedy discriminatory or hostile workplace conditions because they have control over the work environment where harassment occurs.

A negligence standard is far from stringent or burdensome—it only requires employers to act reasonably. This standard appropriately balances Title VII's remedial purpose with understandable concerns that employers will be held liable for conduct outside their control. In contrast, the district court's "intentional decision" analysis strikes no such balance. By immunizing employers who fail to address even those discriminatory workplace conditions that they know or reasonably should have known were harming their employees, the "intentional decision" standard both

undermines Title VII's deliberately broad reach and leaves employees like Smith without meaningful protection from workplace harassment.

ARGUMENT

I. This Court Should Reaffirm the Negligence Standard for Third-Party Harassment Cases Set Forth in *Dunn*, *Costco*, and *Hamilton Pointe*.

Since 2005, this Circuit has held employers directly liable under Title VII when they negligently fail to discover or remedy third-party workplace harassment. Yet the district court dismissed Smith's hostile-work-environment claim after applying an "intentional decision" standard with no foundation in this Circuit's case law. This Court should stay its well-reasoned course and reaffirm the negligence employer-liability standard for third-party workplace harassment.

A. *Dunn*, *Costco*, and *Hamilton Pointe* establish direct negligence liability for employers who know—or should know—about discriminatory workplace conditions, yet fail to address them.

For over two decades, this Court has applied a negligence framework to employer liability for workplace harassment by third parties. *See Dunn*, 429 F.3d at 691; *Costco*, 903 F.3d at 624; *Hamilton Pointe*, 102 F.4th at 403.

This Court first applied a negligence standard to employer liability for third-party workplace harassment claims in *Dunn*. There, a nurse in Illinois brought a Title VII hostile-work-environment suit against her hospital

employer, alleging that a doctor at her facility “made life miserable for her and other women on the staff.” 429 F.3d at 690. The district court had granted summary judgment to the hospital because the doctor had staff privileges but was not an employee. *Id.* In reversing that conclusion, this Court wrote that “liability under Title VII is direct rather than derivative.” *Id.* at 691. Because of this, Judge Easterbrook explained, “it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer.” *Id.* (citing “the norm of direct liability in private law” where “negligent or reckless” conduct can give rise to liability).

This Court illustrated its point with an analogy. “Suppose a patient kept a macaw in his room, that the bird bit and scratched women but not men, and that the Hospital did nothing,” the Court wrote. *Id.* “It would be the Hospital’s responsibility to protect its female employees by excluding the offending bird from its premises” even though the bird “(a) was not an employee, and (b) could not be controlled by reasoning or sanctions.” *Id.* That is precisely the basis of direct negligence liability: Where an employer knows or should know that conduct occurring in its workplace is causing discriminatory harm, the employer is directly liable for harm flowing from that conduct even when the bad actor is not an employee. *See id.* at 691.

This Court cemented its reasoning in *Dunn* over a decade later in the *Costco* decision, which involved a Costco employee who was stalked by a Costco customer for over a year and then fired after she did not return from medical leave. 903 F.3d at 621. This Court affirmed the district court’s denial of Costco’s motion for judgment as a matter of law, making clear that the fact that the employee’s stalker was “a customer rather than [] a supervisor or co-worker” “does not get Costco off the hook.” *Id.* at 624. That’s “because an employer can be liable for a hostile work environment that results from the acts of non-employees, including customers.” *Id.* at 625 (citing *Dunn*, 429 F.3d at 691). This Court clearly distinguished between an employer’s *vicarious* liability for the acts of a supervisory employee and its *direct* liability “for its own negligence” in “failing to prevent[] negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises . . . under his control.” *Id.* at 627 (quoting *Dunn*, 429 F.3d at 691).

Just two years ago, in the *Hamilton Pointe* decision, this Court further delineated the contours of its negligence liability standard for third-party workplace harassment claims. *Hamilton Pointe* involved Title VII racial harassment claims brought by Black employees of a long-term care facility. As it did in *Dunn* and *Costco*, the Court in *Hamilton Pointe* made clear—as a threshold matter—that “there is no requirement that severe or pervasive

harassment stem from co-worker or supervisor conduct” to support employer liability under Title VII. 102 F.4th at 403 (“An employer may be liable for a hostile work environment originating from the harassing conduct of third parties”). But the *Hamilton Pointe* Court articulated the negligence standard still more explicitly than it had in *Costco*. After holding that “an employer is liable for non-supervisor harassment only if it has been negligent in discovering or remedying the harassment,” *id.* at 403, the Court held that “*this same negligence standard applies to hostile work environment claims based on third-party conduct,*” *id.* at 405 (emphasis added).

Read together, *Dunn*, *Costco*, and *Hamilton Pointe* unmistakably impose direct liability on employers who know or should know about discriminatory workplace conditions yet fail to address them. These cases confirm that Title VII makes hostile-work-environment liability contingent on an employer’s failure to address and rectify workplace harassment rather than the employer’s relationship to the harasser. As this Court explained in *Dunn*, 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 — no matter who that harasser is. *Dunn*, 429 F.3d at 691. It is therefore irrelevant whether a harasser is a coworker or third party because employers are only liable for *their own* conduct: negligently failing to respond to the harassment.

See *Costco*, 903 F.3d at 627–28 (“Costco’s liability . . . depends not only on what [the harasser] did, but also on how Costco responded.”).

B. The district court misread *Dunn* and ignored *Costco* and *Hamilton Pointe*.

Viewed against this background, the district court’s analysis strayed from this Circuit’s well-established treatment of third-party workplace harassment cases. First, puzzlingly, the district court invoked *Dunn* for the proposition that only an employer’s “intentional decision to expose [an] employee to the discriminatory working condition” can give rise to liability in third-party nonemployee Title VII cases. R.35 at 20 & n.7. But that is not what *Dunn* held. While the district court did not cite any particular language from *Dunn* for this point, it appears to have relied on the *Dunn* Court’s statement that “[t]he right question is whether the Hospital intentionally created or tolerated unequal working conditions.” 429 F.3d at 692. This statement, though, is only part of *Dunn*’s holding – not all of it. Intentionality certainly gives rise to liability, but so too may negligence. Read as a whole, *Dunn* makes this point abundantly clear through its embrace of direct liability under Title VII and this Court’s telling statement that “it makes no difference” whether harassment is committed by “an employee, an

independent contractor, or for that matter a customer.” *Dunn*, 429 F.3d at 691. Simply put, the district court got *Dunn* wrong.

But even assuming *arguendo* that *Dunn* was ambiguous on this point, *Costco* and *Hamilton Pointe* plainly were not. Had the district court accounted for those cases, which held explicitly that intentionality is *not* a prerequisite for employer liability in these circumstances, it could never have read *Dunn* to require intentionality rather than mere negligence. Instead, the district court did not even cite—much less grapple with—either *Costco* or *Hamilton Pointe*, even though both cases postdate *Dunn* by over a decade and even though *Hamilton Pointe* is this Circuit’s most recent decision about claims very much like Smith’s. That conspicuous gap in the district court’s reasoning cries out for correction by this Court.

That is particularly so because, earlier in its opinion, the district court *correctly* noted that employers are “liable for the discriminatory acts of [nonsupervisors]” —including nonemployees—“only if they are negligent either in discovering or remedying the harassment.” R.35 at 18 (quoting *Johnson v. Advoc. Health & Hosps. Corp.*, 892 F.3d 887, 904 (7th Cir. 2018)). Given its ultimate reliance on a heightened “intentionality” standard, the district court’s recitation of the correct negligence standard is perplexing. Without clarification and guidance from this Court, the district court’s

erroneous analysis may lead other trial courts astray and threaten to muddle the doctrinal clarity that *Dunn*, *Costco*, and *Hamilton Pointe* together established.

II. The Supreme Court Has Strongly Signaled that Its Negligence Standard for Title VII Liability for Coworker Harassment Would Also Apply to Third-Party Harassment.

The Supreme Court's coworker-harassment jurisprudence only confirms the correctness of *Dunn*, *Costco*, and *Hamilton Pointe*. Although the Supreme Court has not explicitly addressed the issue of employer liability for third-party harassment, it has repeatedly signaled that negligence is the correct framework. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 755, 789, 799 (1998); *Vance v. Ball State Univ.*, 570 U.S. 421, 439, 446 (2013).

Faragher and *Ellerth* are the two seminal Supreme Court decisions—both involving supervisors who harassed their subordinate employees—that fleshed out the doctrine of employer liability under Title VII. In both, the Court squarely held that an employer can be vicariously liable for supervisor harassment. *Ellerth*, 524 U.S. at 746–47, 764–65; *Faragher*, 524 U.S. at 780. But the Court's analysis went beyond vicarious liability, also

observing—tellingly—that an employer is *always* directly² liable for negligence when it 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 Court in *Faragher* reiterated that employers face direct liability for negligence in coworker-harassment claims. *Faragher*, 524 U.S. at 789, 799 (noting “unanimity” among circuit and district courts on this point). Even the dissenting Justices in *Ellerth* and *Faragher*, who disagreed with the majority’s application of vicarious liability in the supervisor harassment context, maintained that negligent employers should be subject to direct liability for harassment under Title VII. *Ellerth*, 524 U.S. at 767 (Thomas, J., dissenting) (maintaining 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”).

² 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.

The Supreme Court further clarified the employer-liability doctrine in *Vance v. Ball State University*, which addressed which employees qualify as supervisors for purposes of vicarious liability under *Faragher* and *Ellerth*. *Vance*, 570 U.S. at 423–24. For an alleged harasser to qualify as a supervisor, the Court held, the employer must have empowered the harasser to take tangible employment actions against the targeted employee. *Id.* Although *Vance* did not have occasion to address the employer’s direct liability for negligence, the Court again observed that employers can also be liable for coworker harassment under a negligence theory based on their failure to control working conditions. *Id.* at 424, 449. The Court explained that 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 observed that the negligence standard applies in “many other situations.” *Id.*

The Court has long acknowledged that, according to “a substantial body of judicial decisions,” “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). And as the Supreme

Court's subsequent sexual-harassment jurisprudence emphasizes, the negligence standard encourages employers to use reasonable care to prevent, detect, and correct any harassing behavior; to adopt meaningfully deterrent anti-harassment policies; and to craft effective, accessible procedures through which employees can report 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 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 blessed the imposition of direct liability for an employer's own negligent conduct. *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 concern any Justice has voiced about the scope of direct liability for negligence—articulated by the dissenting Justices in *Vance*—was that the negligence standard is not strict enough. As Justice Ginsburg cautioned, employers could escape negligence liability by showing that they lacked actual or constructive notice of the harassing behavior. *Vance*, 570 U.S. at 466 (Ginsburg, J., dissenting).

III. The Overwhelming Weight of Circuit Authority Favors the Negligence Framework for Third-Party Harassment Liability.

Of the nine other circuit courts to directly consider the question, all but one has held — like this Court — that employers are directly liable under Title VII for negligently failing to identify or remedy third-party workplace harassment. Only the Sixth Circuit has strayed from this well-reasoned path. In adopting the heart of the Sixth Circuit’s flawed reasoning, the district court thus contravened not only this Court’s precedent but nearly all apposite authority.

A. Eight Other Circuits Have Correctly Adopted the Negligence Standard for Third-Party Workplace Harassment.

Over the last three decades, the First, Second, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits (“the Circuits”) have held that an employer is liable when it “knew or should have known” about harassing conduct but failed to address it. *See Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 68 (1st Cir. 2019); *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013); *Pryor v. United Air Lines, Inc.*, 791 F.3d 488, 498 (4th Cir. 2015); *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 321–22 (5th Cir. 2019); *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); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1073–74 (10th Cir. 1998); *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003).

These Circuits have explained that the Supreme Court's negligence test is both the minimum standard for employer liability under Title VII and the most practical standard for addressing the human realities of workplace harassment. *See, e.g., Gardner*, 915 F.3d at 321–22.

The Circuits emphasize different aspects of the negligence framework, but all embrace the same fundamental premise: Employer liability flows from notice and the absence of a reasonable response, not the identity of the workplace harasser. 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*, 708 F.3d at 124; *Lockard*, 162 F.3d at 1074. The Eleventh Circuit similarly asks whether the employer had actual or constructive notice of third-party harassment. *Watson*, 324 F.3d at 1259. And the Circuits have applied the negligence standard to a wide range of workplace harassment claims, including sexual harassment committed by independent 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.

Authority supporting the negligence framework does not end with these eight Circuits. While the Third Circuit has not directly addressed the

applicable rule in third-party harassment claims in a precedential opinion,³ 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), the Third Circuit 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, that 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 Third Circuit further remanded the case to the district court to allow the employee 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. *Weston* thus strongly indicates that negligence is the proper standard in a third-party harassment case.

Similarly, while the D.C. Circuit has not expressly decided what standard should govern employer liability for third-party harassment claims

³ An appeal squarely presenting this question to the Third Circuit is *sub judice*. See *O’Neill v. Trs. of the Univ. of Pa.*, No. 25-3310 (appeal from grant of summary judgment to the University of Pennsylvania on employee lab manager’s hostile-work-environment claim based on mistreatment of employee by graduate student in lab).

under Title VII, it has utilized the negligence standard for *coworker* harassment, and its district court has applied that standard 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).

It makes good sense that all these Circuits have reached the same conclusion. At the outset, the negligence standard is warranted because third parties are more like coworkers than supervisors. *See, e.g., Lockard*, 162 F.3d at 1074; *Gardner*, 915 F.3d at 321–22. The negligence standard is also appropriate 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).

Nor is there any basis to fear that employers will be held liable for workplace conditions beyond their purview. The Circuits consider 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, its 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.

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

The only federal circuit to reject the negligence framework for third-party harassment is the Sixth. *See Bivens v. Zep, Inc.*, 147 F.4th 635 (6th Cir. 2025). In its place, that court adopted a “substantial-certainty standard,” which imposes hostile-work-environment liability only where an employer “either desired to cause [the] harassment or was substantially certain that it would result from its actions.” *Id.* at 645 (citation modified). While the district court in this case did not adopt the substantial-certainty standard word-for-word, its analysis flowed from the same mistaken notion that employers are liable only for their own “intentional actions.” *Id.*; *see* R.35 at 20. It is therefore instructive to outline the two primary reasons that *Bivens* was wrongly decided and should not infect this Court’s Title VII jurisprudence.

First, the Sixth Circuit claimed that the Circuits adopted a negligence standard only because they blindly deferred to the EEOC’s third-party harassment guidelines, which *Loper Bright* prohibits. *See Bivens*, 147 F.4th at 646–47 (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024)). This characterization was wrong. As explained above, the Circuits each arrived at the negligence framework through independent reasoning, which varied

from court to court and did not regurgitate the EEOC guidelines without analysis. Although some of the Circuits referenced those guidelines, none merely “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 for third-party claims. *See, e.g., Gardner*, 915 F.3d at 321–22. They also explained, as a matter of policy and Title VII’s remedial purpose, that the negligence standard best protects employees by accounting for the realities of the workplace and an employer’s control over it. *See Lockard*, 162 F.3d at 1073–74; *Crist*, 122 F.3d at 1110–12. The Circuits repeatedly reasoned that employers—who are best suited to control the working environment where harassment occurs—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 incorrectly concluded that *Loper Bright* categorically invalidated the Circuits’ decisions. *Bivens*, 147 F.4th at 646. In *Loper Bright*, the Supreme Court ended forty years of precedent by overturning *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which had required judicial deference to an agency’s statutory interpretation when a statute was ambiguous. *See Loper Bright*, 603

U.S. at 412–13. But *Loper Bright* is irrelevant here—*Chevron* 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].”).

Nor did *Loper Bright* abrogate all administrative law when it did away with *Chevron* deference. See *Loper Bright*, 603 U.S. at 412–13. The Sixth Circuit’s overreading of *Loper Bright* ignores that agency guidelines, while not binding, remain persuasive authority that 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)). Even the defendant-employer in *Bivens* admitted that *Loper Bright* did not affect the Circuits’ rulings because state negligence jurisprudence does not rely on EEOC guidelines. Suppl. Br. for Appellee at 4, *Bivens v. Zep, Inc.*, 147 F.4th 635 (6th Cir. 2025).⁴

⁴ The Sixth Circuit in *Bivens* rejected the negligence standard despite the defendant-employer’s admission that “an employer may be responsible only

Bivens stands alone for good reason: Its analysis is fatally flawed. To the extent the district court leaned on *Bivens* in adopting an intentionality standard, this Court should reject that reasoning.

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

The negligence framework is not just correct as a matter of prevailing Circuit precedent—it is the best and most practical approach as a matter of workplace policy. The harassment of employees across a wide swath of professional environments 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, contractors, and students every day. A negligence standard for third-party harassment is therefore essential to prevent large-scale workplace harm and fulfill the remedial purpose of anti-discrimination law.

National data highlights the staggering scope of the problem. The EEOC estimates that between 25% and 85% of women experience sexual harassment at work. *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, SELECT TASK

for its own negligence in this scenario [of third-party harassment].” *Bivens* Suppl. Br. for Appellee at 4 (citing *Costco*, 903 F.3d at 627).

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).

High as they are, these figures nevertheless 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%). U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra*, at v. The least common response is to take formal action—by either reporting internally or filing a legal complaint. *Id.* Indeed, 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 yield 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>.

In this way, workplace harassment remains pernicious precisely because employees who experience it are systematically disincentivized from seeking help. Abandoning *Dunn*, *Costco*, and *Hamilton Pointe* and leaving the district court's "intentional choice/deliberate indifference" analysis undisturbed would further entrench this problem, causing workers to feel even *less* safe reporting third-party harassment. If employees must provide "smoking gun" evidence of harassment to be taken seriously by their bosses, they are more likely to keep quiet and allow further misconduct to fester.

This outcome would eviscerate Title VII's remedial purpose. The stark reality is that non-employee third parties frequently 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*, TRALIAN (Feb. 10, 2025), <https://www.traliant.com/blog/the-state-of-workplace-harassment-why-gen-z-deserves-special-attention/>. And research shows that, in academic workplaces, 72% of faculty experience student-initiated

harassment—*one-third* of which was sexual in nature. See C. Lampman et al., *Women Faculty Distressed: Descriptions and Consequences of Academic Contrapower Harassment*, J. WOMEN HIGH. EDUC. 1, 1–4 (2016). The same is true of the service industry, an environment that requires workers to interact frequently with third parties. Even though service workers are notoriously—and understandably—reluctant to report workplace harassment, such workers nevertheless 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/>. It stands to reason that a large proportion of those incidents were committed not by fellow service workers but by customers, passers-by, or other third parties.

Data analyzing EEOC charges filed between 2012 and 2016 show 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'S 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. By incentivizing employers to adopt preventive policies that cut off harassment before it can even occur, the negligence standard strengthens protections for millions of workers across service industries where sexual harassment runs rampant and EEOC charges are routine.⁵

Workplace harassment can—and frequently does—cause long-lasting psychological, physical, and professional harm, including depression, anxiety, sleep disturbance, impaired concentration, stress-related illness, substance use, suicidal ideation, and shame, along with decreased job satisfaction, lower organizational commitment, and higher absenteeism and

⁵ While this case involves a claim of physical harassment, third-party harassment can be directed at employees based upon any protected characteristic. *See, e.g., 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).

turnover. *See* C. Lampman et al., *supra*, at 1–4. Women are more likely to be harassed in 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 all kinds of harassment. On the other hand, the intentionality standard adopted by the district court—which puts employers on the hook if they deliberately create discriminatory conditions or are recklessly indifferent to them—would perversely induce employers to ignore harassment in order to escape liability. *See 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.”).

Smith is exactly the type of employee the negligence standard was crafted to protect. Treating him differently under the law because his

attacker was a *former* employee rather than a current one leaves vulnerable workers unprotected by ignoring the reality of the harm that third parties can – and do – regularly inflict.

CONCLUSION

Workplace harassment inflicts precisely the same harm whether it is committed by a coworker or a third party. Either way, employers are best positioned to detect, remedy, and prevent harassment—no matter who perpetrates it. Negligence is a fair and workable standard that aligns with Title VII’s remedial purpose: It protects vulnerable employees, incentivizes employer proactivity, and avoids perverse incentives for employers to remain ignorant of misconduct occurring right beneath their noses. This Court should correct the district court’s use of an intentionality standard and reaffirm the negligence framework set forth in *Dunn*, *Costco*, *Hamilton Pointe*, and the decisions of eight other circuit courts.

Respectfully submitted this 16th day of October, 2026,

s/Elizabeth E. Theran
Elizabeth E. Theran
Emma Lerner Freeman
NATIONAL WOMEN’S LAW CENTER
1350 I Street NW, Suite 700
Washington, DC 20005
(202) 588-5180
etheran@nwlc.org

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and Circuit Rule 29 because it contains 5,838 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Book Antiqua 14 point.

s/Elizabeth E. Theran

Elizabeth E. Theran

NATIONAL WOMEN'S LAW CENTER

1350 I Street NW, Suite 700

Washington, DC 20005

(202) 588-5180

etheran@nwlc.org

CERTIFICATE OF SERVICE

I certify that on October 16, 2026, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

s/Elizabeth E. Theran

Elizabeth E. Theran

NATIONAL WOMEN'S LAW CENTER

1350 I Street NW, Suite 700

Washington, DC 20005

(202) 588-5180

etheran@nwlc.org