No. 25-3310

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Sophia O'Neill,
Plaintiff-Appellant,

v.

Trustees of the University of Pennsylvania,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Administrative Guidance

Other Authorities

STATEMENT OF INTEREST

This appeal raises important questions concerning the appropriate standard for determining when an employer is liable for third-party harassment—that is, harassment perpetrated by someone other than an employee or agent of the employer—under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The Equal Employment Opportunity Commission (EEOC) administers and enforces Title VII and thus has a substantial interest in the proper interpretation of the statute. *See* 42 U.S.C. § 2000e-5(a), (f)(1). The EEOC files this brief under Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUE[1]

Whether negligence is the appropriate standard for determining when an employer is liable for third-party harassment under Title VII.

[1] The EEOC takes no position on any other issue presented, including whether the plaintiff here could prevail under a negligence standard, or on the ultimate disposition of this appeal.

STATEMENT OF THE CASE

A. Statement of Facts.[2]

Sophia O'Neill worked as a robotics lab manager and teaching assistant at the University of Pennsylvania. Appx0006. There, O'Neill alleges, a male student harassed her because of her sex. Appx0006-0008. According to O'Neill, the student often physically intimidated her by hovering over her desk (which he did not do to her male co-manager), aggressively demanded her help on assignments, and once blocked her path to her desk after a work happy hour. Appx0007.

When O'Neill arrived to work one morning, the student was waiting for her outside the lab. Appx0007. Once they were both inside, the student again blocked O'Neill's path as she tried to leave a room. Appx0007. When O'Neill left the room and went to her desk, she opened a series of online messages the student had sent to her. Appx0007. In these messages, the student implored O'Neill to come to his home to stay with him, told her

[2] We draw these facts from the district court's opinion. Because this appeal involves a grant of summary judgment, the facts must be construed in the light most favorable to O'Neill. *See Qin v. Vertex, Inc.*, 100 F.4th 458, 469 (3d Cir. 2024).

that he loved her, and said he was "[g]oing to surprise [her]," sometimes adding heart or kissing face emojis. Appx0007-0008.

O'Neill immediately reported these messages to her supervisor and other University personnel. Appx0008. The University responded by removing the student from the lab and developing a safety plan for O'Neill. Appx0008-0009. The plan limited the student to using the lab only when O'Neill's co-manager was working and prohibited the student from speaking with O'Neill outside an academic setting. Appx0009. The University warned the student that he could face disciplinary action if he violated the plan. Appx0009. Believing that the University's plan did not do enough to keep her safe, O'Neill did not return to work. Appx0009.

B. District Court's Decision.

O'Neill filed this action, asserting a sex-based hostile-work-environment claim under Title VII (among other claims). Appx0010. The district court granted summary judgment to the University. Appx0024. The court determined that although a reasonable jury could find that O'Neill suffered severe or pervasive sex-based harassment, it could not find the University liable for that harassment. Appx0011-0021.

The court acknowledged that in assessing whether an employer is liable for third-party harassment, most circuits apply a negligence standard. Appx0015. Under that standard, an employer is liable if it knew or should have known about the harassment and failed to take prompt and appropriate remedial action. Appx0015. The court noted, however, that a Sixth Circuit panel had recently set out a different standard in *Bivens v. Zep, Inc.*, 147 F.4th 635 (6th Cir. 2025) ("*Zep*"), *petition for cert. filed* (U.S. Feb. 3, 2026) (25-932).[3] Appx0015-0016. The *Zep* panel had determined that an employer is liable only when the employer *intended* for the harassment to occur. 147 F.4th at 645. Under that standard, the plaintiff must show the employer "either 'desired to cause' her harassment or was 'substantially certain' that [the harassment] would 'result from' its actions." *Id.* (citation modified).

Claiming an absence of binding precedent on the issue, the district court stated that it was "persuaded" by *Zep* and "predict[ed]" that this Court "would align with [*Zep*]." Appx0016. The court then concluded that

[3] We use "*Zep*" to avoid confusion with the eponymous *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

O'Neill could not meet *Zep*'s standard because no reasonable jury could find that the University "desired" for her to be harassed or was "substantially certain" she would be harassed. Appx0017-0018. As an alternative basis for its ruling, the court found that O'Neill could not prevail under a negligence standard because the University took prompt and appropriate remedial action. Appx0018-21.

SUMMARY OF ARGUMENT

I. For three principal reasons, negligence is the appropriate standard for determining when an employer is liable for third-party harassment under Title VII.

A. First, the overwhelming weight of authority supports a negligence standard. This Court and nearly every other circuit applies a negligence standard in third-party harassment cases. *See, e.g.*, *Weston v. Pennsylvania*, 251 F.3d 420, 427-28 (3d Cir. 2001), *overruled in part on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). The EEOC has also long articulated the same view in its interpretive guidelines. *See* 29 C.F.R. § 1604.11(e).

B. Second, traditional agency principles support a negligence standard. The Restatement (Second) of Agency § 213(d) (1958) provides

that an employer may be liable for negligently allowing or failing to prevent a third party's tortious conduct on premises or with instrumentalities within the employer's control. That principle applies with equal force in the harassment context: The employer controls the work environment, which means it may be directly liable for negligently allowing or failing to prevent workplace harassment perpetrated by third parties.

C. Third, a negligence standard promotes Title VII's twin objectives of deterrence and compensation. It incentivizes employers to adopt appropriate measures to detect, prevent, and remedy third-party harassment, and ensures compensation for victims of harassment when employers fail to do so.

II. For mirror-image reasons, the intent standard set forth in *Bivens v. Zep, Inc.*, 147 F.4th 635 (6th Cir. 2025), *petition for cert. filed* (U.S. Feb. 3, 2026) (25-932), which the district court adopted, is incorrect.

A. First, both courts overlooked or misconstrued key precedents. The district court here overlooked *Weston* and other decisions from this Court that apply a negligence standard in the third-party harassment context. The *Zep* panel similarly overlooked Sixth Circuit precedent that

used a negligence standard; incorrectly believed another circuit, the Seventh, had endorsed an intent standard (when, in fact, it adopted a negligence standard); and misapprehended why and how many other circuits endorse a negligence standard. These shortcomings diminish considerably whatever persuasive value *Zep* might have.

B. Second, the *Zep* panel—and by extension, the district court here—misunderstood how traditional agency principles apply in the harassment context. Contrary to *Zep*'s understanding, an employer's direct liability for negligently allowing harassment flows from the employer's control over the work environment, and it does not require an agency relationship between the employer and the harasser. In reasoning otherwise, *Zep* overlooked the Restatement (Second) of Agency § 213(d), which addresses an employer's liability for torts committed by agents *or* third parties, and instead incorrectly relied on a different part of the Restatement that addresses only torts committed by agents.

C. Finally, *Zep*'s intent standard would undermine Title VII's objectives. It would minimize employers' incentive to create reporting mechanisms or investigate complaints of harassment, and it would

potentially cut off redress for victims of even blatant harassment at the hands of third parties.

For these reasons, the EEOC respectfully urges this Court to clarify that negligence is the appropriate standard for determining when an employer is liable for third-party harassment under Title VII.

ARGUMENT

I. Negligence is the appropriate standard for determining when an employer is liable for third-party harassment under Title VII.

Title VII makes it unlawful for an employer to discriminate against any individual with respect to her "terms, conditions, or privileges of employment" because of the individual's sex. 42 U.S.C. § 2000e-2(a)(1). This provision prohibits sex-based harassment that is "sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment." *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013) (alteration omitted) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). To prevail on a hostile-work-environment claim, a plaintiff must establish, among other things, a basis for employer liability. *Id.*

The Supreme Court has made clear that "[n]egligence sets a minimum standard for employer liability under Title VII." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998). Accordingly, "an employer will *always* be liable when its negligence leads to the creation or continuation of a hostile work environment," or when it "was negligent in permitting th[e] harassment to occur." *Vance v. Ball State Univ.*, 570 U.S. 421, 445-46 (2013) (emphasis added); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 799-800 (1998).[4] In turn, an employer is negligent if it "failed to provide a reasonable avenue for complaint" or "knew or should have known about the harassment and failed to take prompt and appropriate remedial action." *In re Trib. Media Co.*, 902 F.3d 384, 400 (3d Cir. 2018) (citation omitted).

[4] Although not applicable here, an employer may be liable under alternative standards if the harasser is either (i) the employer's proxy or alter ego or (ii) an employee with supervisory authority. *See O'Brien v. Middle E. Forum*, 57 F.4th 110, 117-20 (3d Cir. 2023); *Minarsky v. Susquehanna Cnty.*, 895 F.3d 303, 310-11 (3d Cir. 2018). These standards supplement, but do not displace, a negligence standard, which continues to provide a separate basis for employer liability. *See Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999).

For three principal reasons, negligence is the appropriate standard for determining when an employer is liable for third-party harassment.

A. This Court and nearly every other circuit applies a negligence standard.

The overwhelming weight of authority supports a negligence standard. Indeed, this Court and the majority of other circuits have consistently applied a negligence standard in cases involving third-party harassment.

Start with this Court's decisions. In *Weston v. Pennsylvania*, 251 F.3d 420, 427-28 (3d Cir. 2001), *overruled in part on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006),[5] this Court applied a negligence standard in assessing whether an employer (a state prison) could be liable for harassment by third parties (inmates). Specifically, it reasoned that the prison could be liable if "officials knew of the harassing conduct but failed to remedy it." *Id.*; *see id.* at 427 ("Prison liability for inmate conduct may indeed apply when … the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior.").

[5] *Burlington Northern* clarified the material adversity standard for Title VII retaliation claims. 548 U.S. at 59-70. It did not alter or otherwise affect employer-liability standards in the hostile-work-environment context.

Accordingly, this Court reversed the dismissal of a hostile-work-environment claim premised on inmate harassment to allow the plaintiff an opportunity to provide such allegations. *Id.* at 428; *see also Beckford v. Dep't of Corr.*, 605 F.3d 951, 958 (11th Cir. 2010) (listing *Weston* among decisions applying negligence standard for third-party harassment).

This Court later articulated the negligence standard more broadly in an unpublished decision, stating: "An employer may be liable under Title VII for the harassing conduct of third parties if the employer was aware of the conduct and failed to take reasonable remedial action in response." *Johnson v. Bally's Atl. City*, 147 F. App'x 284, 286 (3d Cir. 2005) (citing, e.g., *Weston*, 252 F.3d at 427-28). Since then, this Court has used a negligence standard to assess employer liability for harassment perpetrated by various third parties, including customers, patients, and, especially pertinent here, students. *See id.* at 285-86 (customers); *Davis v. Elwyn of Pa. & Del.*, No. 22-1646, 2023 WL 3918680, at *4-5 (3d Cir. June 9, 2023) (patients); *Smith v. Kelly Servs. Inc.*, 802 F. App'x 728, 728-29 (3d Cir. 2020) (students).

This Court is in good company. Until *Zep*, the courts of appeals that had addressed the issue "uniformly" reached the same conclusion, holding that negligence governs employer liability for third-party harassment. *Roy*

v. Correct Care Sols., LLC, 914 F.3d 52, 68 & n.10 (1st Cir. 2019) (collecting cases). In addition to this Court, at least[6] nine circuits—the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh—have endorsed that view. *See Medina-Rivera v. MVM, Inc.*, 713 F.3d 132, 136-37 (1st Cir. 2013); *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013); *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 422-23 (4th Cir. 2014); *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 321-22 (5th Cir. 2019); *Dunn v. Wash. Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1110-12 (8th Cir. 1997); *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 755-56 (9th Cir. 1997); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1072-74 (10th Cir. 1998); *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258-59 & n.2 (11th Cir. 2003).

In line with these decisions, district courts within this Circuit routinely apply a negligence standard in third-party harassment cases. *See, e.g.*, *Matu-Dadie v. Wernersville State Hosp.*, No. 5:17-cv-05451, 2018 WL 4501538, at *3-4 & n.5 (E.D. Pa. Sept. 20, 2018); *Wilson v. Columbia Gas of Pa.*,

[6] We say "at least" because, as we explain later, the Sixth Circuit also applied a negligence standard in a pre-*Zep* third-party harassment case.

676 F. Supp. 3d 424, 444 (W.D. Pa. 2023); *Hamarneh v. United Airlines*, No. 24-cv-05962, 2026 WL 183764, at *8 (D.N.J. Jan. 23, 2026). Some do so despite believing that this Court has not addressed the issue. *See, e.g.*, *Hewitt v. BS Transp. of Ill., LLC*, 355 F. Supp. 3d 227, 236 (E.D. Pa. 2019).

The EEOC has long articulated the same view in its interpretative guidelines. *See* 29 C.F.R. § 1604.11(e). Although these guidelines do not have the force of law, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65 (citations omitted).

In short, applying a negligence standard for third-party harassment aligns with this Court's caselaw, the law in nearly every other circuit, and the approach taken by district courts within this Circuit.

B. Traditional agency principles support a negligence standard.

The Supreme Court has long recognized that traditional principles of agency law are relevant in assessing employer liability under Title VII. *See Ellerth*, 524 U.S. at 754-55. The Court has likewise recognized that the Restatement (Second) of Agency (1958) (hereinafter, "Second Restatement") "is a useful beginning point for a discussion of general agency principles." *Id.* at 755. The Second Restatement remains relevant

because it was the version in existence when Congress enacted Title VII. *See Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 215 (3d Cir. 2017) (looking to Second Restatement for guidance).

One traditional principle of agency law is that an employer is directly liable for its own negligence. *See, e.g.*, *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1036 (3d Cir. 1987). And one application of that principle is that an employer may be directly liable for negligently allowing or failing to prevent a third party's tortious conduct on premises or with instrumentalities within the employer's control. Section 213(d) of the Second Restatement provides:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless … in permitting, or failing to prevent, negligent or other tortious conduct by persons, *whether or not his servants or agents*, upon premises or with instrumentalities under his control.

Id. (emphasis added). Section 213(d) thus establishes that negligence governs in determining when an employer is liable for third-party conduct. *See Buchanan v. Stanships, Inc.*, 744 F.2d 1070, 1076 n.5 (5th Cir. 1984); *see also* Restatement (First) of Torts § 348 (1934) (possessor of business premises liable for harm caused by "third persons" if it reasonably could have

"discovered" the third persons' acts and protected members of the public by, among other things, "controlling the conduct of the third persons").

These agency principles apply with equal force in the harassment context. Consistent with the traditional rule cited above, this Court has explained that an employer is "directly liable for its own negligence" in allowing or failing to prevent a hostile work environment. *Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 129 n.31 (3d Cir. 1999). And one application of that principle is that an employer should be directly liable for negligently allowing or failing to prevent workplace harassment even when the harassment is perpetrated by a third party. After all, the employer "control[s] the [work] environment at large," *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001), and thus "always has at least some degree of control over anyone on its premises," *Jarman v. City of Northlake*, 950 F. Supp. 1375, 1378 n.5 (N.D. Ill. 1997).

Circuits that have endorsed a negligence standard for third-party harassment largely follow the same logic. The Seventh Circuit's decision in *Dunn* is instructive. There, the court assessed whether an employer (a hospital) could be liable for allowing a non-employee (a doctor, who was an independent contractor) to harass one of its employees (a nurse). 429

F.3d at 690-91. The court began by articulating the general negligence standard: an employer may be liable for workplace harassment where the employer "knew of the problem" and "did not act reasonably" to address it. *Id.* at 691. Relying on the agency principles discussed above, the court explained that the same negligence standard applies when the harasser is a third-party, which is "the norm of direct liability in private law as well." *Id.* (citing Second Restatement § 213(d)). As the court stated: "Because liability is direct rather than derivative, 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.*

That is so, the court reasoned, because the employer has both a "responsibility … to provide its employees with nondiscriminatory working conditions" and some ability to prevent or stop harassment regardless of its source. *Id.* To illustrate the point, the court offered a hypothetical:

> 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 Hospital would be responsible for the decision to expose women to the working conditions affected by the macaw, even though the bird (a) was not an employee, and (b) could not be controlled by reasoning or sanctions. It would

> be the Hospital's responsibility to protect its female employees by excluding the offending bird from its premises.

Id. In short, under traditional agency principles, the employer's control over the work environment gives rise to negligence liability for third-party harassment. *See EEOC v. Costco Wholesale Corp.*, 903 F.3d 618, 627-28 (7th Cir. 2018) (Barrett, J.) (reciting *Dunn*'s quotation of Second Restatement § 213(d) and applying negligence standard to assess employer liability for customer harassment); *see also Wells v. Winnebago Cnty.*, 820 F.3d 864, 865 (7th Cir. 2016) ("[E]mployers must control the behavior of others in the workplace, so as to ensure nondiscriminatory working conditions.").

Other circuits have similarly looked to an employer's control over the work environment or working conditions as a principal basis for imposing a negligence standard. *See, e.g.*, *Lockard*, 162 F.3d at 1074 ("[T]he employer ultimately controls the conditions of the work environment."); *Crist*, 122 F.3d at 1112 (employer "clearly controlled the environment in which [the harasser] resided, and it had the ability to alter those conditions to a substantial degree"). The EEOC's interpretive guidelines likewise state that "the extent of the employer's control" over a third party's conduct is relevant. 29 C.F.R. § 1604.11(e). To be sure, an employer often cannot

dictate what a third party does in its workplace. But even then, the employer's control over the work environment enables it take at least some action to deter or remedy third-party harassment. *See Dunn*, 429 F.3d at 691; *Beckford*, 605 F.3d at 958; *see also Crist*, 122 F.3d at 1111-12 (employer's inability to immediately stop harasser's conduct "does not end the inquiry").[7] As relevant here, universities are especially well-equipped to prevent or remedy harassment perpetrated by students through codes of conduct, academic discipline, and other means. *See Summa*, 708 F.3d at 124 (considering university's "degree of control over the behavior of its student football players," who sexually harassed team manager employed by the university).

[7] We do not mean to suggest that an employer can never be liable for "off-premises" harassment. For example, if an employee's job requires her to meet customers off-site and the employee reports being harassed by those customers, the employer still must take some appropriate action to stop or remedy the harassment and will be liable if it does not. That outcome is consistent with the Second Restatement § 213(d), which speaks broadly of premises or instrumentalities within the employer's control, not merely premises on which the employer operates its business. In any event, this Court need not resolve that question here because the harassment at issue occurred on campus.

The key takeaway is that employer liability for third-party harassment flows entirely from the employer's ability to control the workplace or working conditions—and not from the existence of an agency relationship between the employer and the harasser. Applying a negligence standard for third-party harassment thus aligns with traditional agency principles and tort liability rules.

C. A negligence standard promotes Title VII's objectives.

A negligence standard promotes the twin objectives of deterrence and compensation that underlie tort law and Title VII jurisprudence. Just as tort law aims both to deter potentially harmful conduct and to compensate injured parties, *McGowan v. Univ. of Scranton*, 759 F.2d 287, 297 (3d Cir. 1985), Title VII aims both to deter discriminatory conduct and to compensate victims of discrimination. As the Supreme Court has explained: "Deterrence is one object of [Title VII]. Compensation for injuries caused by the prohibited discrimination is another." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995).

To that end, the Supreme Court has emphasized that Title VII requires employers to take affirmative steps to detect, prevent, and remedy discriminatory conduct, including harassment. *See Vance*, 570 U.S. at 430;

see also Faragher, 524 U.S. at 806 (discussing employers' "affirmative obligation to prevent violations"). A negligence standard advances these objectives by incentivizing employers to adopt appropriate measures to detect, prevent, and remedy third-party harassment, and by ensuring compensation for victims of harassment when employers fail to adopt such measures.

II. The intent standard adopted by the district court and *Zep* is incorrect.

For three mirror-image reasons, the intent standard set forth in *Bivens v. Zep, Inc.*, 147 F.4th 635 (6th Cir. 2025), *petition for cert. filed* (U.S. Feb. 3, 2026) (25-932), which the district court adopted, is incorrect.

A. The district court and *Zep* overlooked or misconstrued key precedents.

As an initial matter, the district court here overlooked this Court's published decision in *Weston*, 251 F.3d at 427-28. *See* Appx0004-0037. As discussed above, *Weston* applied a negligence standard in assessing employer liability for third-party harassment, which cannot be squared with *Zep*'s intent standard. That portion of *Weston* remains binding in this Circuit. *See supra* at 10 n.5; *see also United States v. Monaco*, 23 F.3d 793, 803

(3d Cir. 1994) ("[N]o panel of this court may overrule the holding of a previous panel.").

Even if *Weston* did not control the outcome here, the district court also overlooked this Court's unpublished decisions in *Johnson*, 147 F. App'x at 286, and *Davis*, 2023 WL 3918680, at *4-5, both of which applied a negligence standard. The court also faulted this Court's decision in *Smith*, 802 F. App'x at 729, for applying a negligence standard "without acknowledging [that this Court] had not yet spoken on the issue." Appx0032. But of course, this Court had spoken on the issue years earlier in *Johnson* (and before that, *Weston*). Taken together, these decisions undermine the district court's "predict[ion]" that this Court "would align with" *Zep*. Appx0016.

The *Zep* panel committed much the same error by overlooking its own precedent addressing third-party harassment. Like this Court, the Sixth Circuit had applied a negligence standard in assessing whether a prison could be liable for inmate harassment, explaining that the "general rule against prison liability for inmate conduct does not apply when the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior," including sexual harassment. *Slayton v. Ohio Dep't of*

Youth Servs., 206 F.3d 669, 677 (6th Cir. 2000). For that reason, other courts of appeals have listed the Sixth Circuit among those that apply a negligence standard for third-party harassment. *See Roy*, 914 F.3d at 68 & n.10 (citing *Slayton*, 206 F.3d at 677); *Beckford*, 605 F.3d at 958 (same).[8] This Court itself cited *Slayton* in articulating a negligence standard in *Weston*, 251 F.3d at 427.

The *Zep* panel did not acknowledge or attempt to distinguish *Slayton*. To the extent the two decisions conflict, *Slayton* controls in the Sixth Circuit as the earlier precedent. *See Habich v. City of Dearborn*, 331 F.3d 524, 530 n.2 (6th Cir. 2003) ("When an opinion of this court conflicts with an earlier precedent, we are bound by the earliest case.").

[8] Other courts and commentators have correctly recognized that *Slayton* endorsed a negligence standard for third-party harassment. *See, e.g.*, *Williams v. Liberty Park of Am.*, No. 16-cv-10940, 2017 WL 3034633, at *4 (E.D. Mich. July 18, 2017) (citing *Slayton* for the proposition that employer may be liable for "harassment by nonemployees" where it "fails to take steps to remedy" it), *aff'd*, No. 17-1955, 2018 WL 5985931 (6th Cir. May 15, 2018); *Davis v. Vt. Dep't of Corr.*, 868 F. Supp. 2d 313, 330 (D. Vt. 2012) (listing *Slayton* among decisions that apply negligence standard); Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. Rev. 1169, 1193-94 & n.142 (2017) (similar); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 Colum. L. Rev. 1357, 1372-73 & n.48 (2009) (similar).

The *Zep* panel also underestimated the weight of authority favoring a negligence standard. To start, the panel misconstrued the Seventh Circuit's decision in *Dunn*, incorrectly claiming that it too endorsed an intent standard. *See Zep*, 147 F.4th at 645-47. As explained above, *Dunn* articulated and applied a negligence standard. The Seventh Circuit itself has repeatedly confirmed as much. *See Costco Wholesale*, 903 F.3d at 627-28;[9] *Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600, 605 (7th Cir. 2006); *see also EEOC v. Vill. at Hamilton Pointe LLC*, 102 F.4th 387, 405 (7th Cir. 2024) (stating that a "negligence standard applies to hostile work environment claims based on third-party conduct," and citing *Dunn*); *Howard v. Cook Cnty. Sheriff's Off.*, 989 F.3d 587, 607 (7th Cir. 2021) (similar). Other circuits have likewise correctly recognized that *Dunn* endorsed a negligence standard. *See*

[9] The *Zep* panel appeared to believe that then-Judge Barrett's opinion in *Costco Wholesale* supported its reasoning, quoting the opinion's language that "an employer is not *vicariously* liable for the sexual harassment of its employee by a customer." *Zep*, 147 F.4th at 644-45. But Judge Barrett immediately explained that an employer may be liable "for its own negligence" in allowing or failing to prevent such harassment, relying on *Dunn* and the Second Restatement § 213(d). *Costco Wholesale*, 903 F.3d at 627-28.

Beckford, 605 F.3d at 958; *Freeman*, 750 F.3d at 422 & n.4; *Roy*, 914 F.3d at 68 & n.10.

The *Zep* panel's misreading of *Dunn* led it to wrongly believe it was taking sides in an existing circuit split rather than potentially creating one.[10] Compounding that error, the panel undercounted the number of circuits that have endorsed a negligence standard for third-party harassment. The panel stated that "by [its] count" only six circuits—the First, Second, Eighth, Ninth, Tenth, and Eleventh—have done so. *Zep*, 147 F.4th at 646 (collecting cases). But that count omits the Sixth Circuit's own decision in *Slayton*, puts the Seventh Circuit on the wrong side of the ledger (for the reasons just explained), and overlooks decisions from this Court and the Fourth and Fifth Circuits. *See Weston*, 251 F.3d at 427-28; *Freeman*, 750 F.3d at 422-23; *Gardner*, 915 F.3d at 321-22. In other words, what the *Zep* panel thought was a six-to-one circuit split was in fact an eleven-to-zero circuit consensus that the Sixth Circuit had already joined.

[10] Of course, *Zep* did not actually create a circuit split to the extent *Slayton* controls the question in the Sixth Circuit.

Along similar lines, the *Zep* panel misapprehended why other courts of appeals—and the Sixth Circuit itself—endorse a negligence standard. The panel suggested that most circuits merely deferred to the EEOC's interpretive guideline, set forth at 29 C.F.R. § 1604.11(e), "without undertaking an independent evaluation of the statute," *Zep*, 147 F.4th at 646, implying that the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), undermined their reasoning.

But that is not true. None of this Court's decisions applying a negligence standard cited or mentioned the guidelines. *See Weston*, 251 F.3d at 427-28; *Johnson*, 147 F. App'x at 286; *Davis*, 2023 WL 3918680, at *4-5; *Smith*, 802 F. App'x at 729. At least four other circuits—the Fourth, Sixth, Seventh, and Eleventh—similarly made no mention of the guidelines when adopting or applying a negligence standard. *See Freeman*, 750 F.3d at 422-23; *Slayton*, 206 F.3d at 677; *Dunn*, 429 F.3d at 691; *Watson*, 324 F.3d at 1258. Others merely cited or quoted the guidelines in passing. *E.g.*, *Medina-Rivera*, 713 F.3d at 137; *Gardner*, 915 F.3d at 322; *Crist*, 122 F.3d at 1111; *Folkerson*, 107 F.3d at 756. Only a few discussed the guidelines in much detail. *E.g.*, *Summa*, 708 F.3d at 124; *Lockard*, 162 F.3d at 1073. Even among the decisions that cited or discussed the guidelines, *none* said or suggested

they were extending any deference—let alone *Chevron* deference—to the EEOC's interpretation. Accordingly, *Loper Bright* did nothing to lighten the weight of authority favoring a negligence standard.

In short, the *Zep* panel did not appreciate that it was departing from existing Sixth Circuit precedent, that it was potentially creating rather than joining a circuit split, or that the circuit split it potentially created was more lopsided—or rather, one-sided—than it realized. These shortcomings diminish considerably whatever persuasive value *Zep* might have.

B. The district court and *Zep* misunderstood how traditional agency principles apply in the harassment context.

The *Zep* panel—and, by extension, the district court here—misunderstood how traditional agency principles apply in the harassment context. The *Zep* panel proceeded from the mistaken premise that a negligence standard applies in cases of co-worker harassment only because an employer may be held "vicariously" liable for negligently failing to prevent its agents' tortious conduct. 147 F.4th at 642-44. Relying on the Second Restatement § 219(2), the panel stated that "employer liability is imputed in this context *only* due to the agency relationship between the perpetrator (an employee) and the employer." *Id.* at 644 (emphasis added).

From there, the panel reasoned that a negligence standard must not apply in cases of third-party harassment because an employer cannot be held vicariously liable for the tortious conduct of individuals who are not the employer's agents. *Id.* at 644-65.

There are multiple flaws in that reasoning. To begin with, an employer's liability for negligently allowing co-worker harassment is direct, not vicarious. As this Court has explained, "an employer is directly, not vicariously, liable for its negligent response to knowledge of sexual harassment by co-workers." *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 104 n.3 (3d Cir. 2009); *see also Vance*, 570 U.S. at 427 ("[A]n employer is directly liable for an employee's unlawful harassment if the employer was negligent with respect to the offensive behavior."). The Sixth Circuit itself has recognized as much. *See Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 50 & n.1 (6th Cir. 1996). The *Zep* panel was simply wrong to assume that employers are responsible for co-worker harassment as a matter of vicarious liability.

Additionally, while focusing on § 219(2) of the Second Restatement, which addresses an employer's liability for torts committed by its agents, the panel neglected to acknowledge § 213(d), which addresses an

employer's liability for torts committed by agents *or* third parties. As explained above, the latter section makes clear that an employer may be directly liable for negligently allowing or failing to prevent "tortious conduct by persons, *whether or not his servants or agents*, upon premises or with instrumentalities under his control." Second Restatement § 213(d) (emphasis added). The commentary to § 219(2), on which *Zep* relied, *see* 147 F.4th at 644, reinforces that point, explaining that an employer may be "responsible for the conduct of others not his servants" when the employer is itself negligent. Second Restatement § 219(2) cmt. e. The *Zep* panel was thus wrong to conclude that a negligence standard applies only when there is an agency relationship between the employer and the harasser. As a matter of basic agency law, an employer may be directly liable for negligently allowing or failing to prevent a third party's harassment.

The *Zep* panel also reasoned that because Title VII prohibits *intentional* discrimination, an employer may be liable for a harasser's conduct only if the harasser's discriminatory intent can be imputed to the employer or, barring that, the employer itself intended for the harassment to occur. 147 F.4th at 643-45. But Title VII does not make such a demand. The statute prohibits discrimination "because of" sex and other protected

traits. 42 U.S.C. § 2000e-2(a)(1). In turn, "Title VII's 'because of' test incorporates the simple and traditional standard of but-for causation." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020) (citation modified).

Applying that traditional causation standard, the Supreme Court has long recognized that "an employer can be liable" for sex-based harassment "where its own negligence is a cause of the harassment." *Ellerth*, 524 U.S. at 759; *see also Vance*, 570 U.S. at 446 ("[A]n employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment."). Indeed, that is precisely how and why employers may be liable for co-worker harassment. *See Sellars v. CRST Expedited, Inc.*, 13 F.4th 681, 696 (8th Cir. 2021) (employer liable for co-worker harassment "only if the employer's own negligence caused the harassment or led to the continuation of the hostile work environment" (citations omitted)); *Wilson v. Moulison N. Corp.*, 639 F.3d 1, 7 (1st Cir. 2011) (similar). That reasoning applies equally to third-party harassment.[11]

[11] The Supreme Court and Congress sometimes characterize Title VII's proscription of discrimination "because of" protected traits as an "intentional discrimination" provision. But both simply use "intentional discrimination" as another way of referring to disparate-treatment discrimination as distinct from disparate-impact discrimination. *See, e.g.*, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 771 (2015) (using

C. *Zep*'s intent standard would undermine Title VII's objectives.

Zep's intent standard, which the district court endorsed, would undermine Title VII's objectives. By limiting liability to situations in which an employer intended for third-party harassment to occur, *Zep*'s standard minimizes employers' incentive to create reporting mechanisms or investigate complaints of harassment, thereby allowing employers to "avoid Title VII liability for third-party harassment by adopting a 'see no evil, hear no evil' strategy." *Freeman*, 750 F.3d at 423 (citation modified). By making it more difficult to establish employer liability, that intent standard also potentially cuts off redress for victims of even blatant harassment at the hands of third parties.

The *Zep* panel suggested that cases decided under a negligence standard might come out "the same way" under its intent standard. 147 F.4th at 647. There is considerable reason to doubt that prediction. The

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"disparate treatment" and "intentional discrimination" interchangeably); 42 U.S.C. § 1981a(a)(1) (distinguishing "intentional discrimination" from "an employment practice that is unlawful because of its disparate impact"). Hostile-work-environment claims are grounded in Title VII's disparate-treatment provision. *See Meritor*, 477 U.S. at 63-64; *see also Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 149 n.4 (3d Cir. 1999); *Raniola v. Bratton*, 243 F.3d 610, 617 (2d Cir. 2001).

standard *Zep* articulated is especially daunting because it requires a showing that the employer either "desired to cause" the victim's harassment or was "substantially certain" the harassment would occur. *Id.* at 645. It should come as little surprise, then, that commentators widely regard *Zep*'s intent standard as a more demanding threshold.[12] Indeed, that is presumably why the employer in this case advocated for the district court to depart from the negligence standard that courts of appeals had uniformly adopted.

The *Zep* panel also characterized third-party harassment as an "unusual situation." 147 F.4th at 647. But such harassment is hardly unusual. To the contrary, the caselaw evidences third-party harassment across numerous industries and by various individuals, including independent contractors, customers, hospital patients, nursing home residents, and, as alleged here, students. *See, e.g.*, *Dunn*, 429 F.3d at 691

[12] *See, e.g.*, Chase Clark, *Sixth Circuit Raises the Bar for Employer Liability for Client-Based Harassment*, Employment Law Worldview (Aug. 26, 2025), https://www.employmentlawworldview.com/sixth-circuit-raises-the-bar-for-employer-liability-for-client-based-harassment-us/; Alexander L. Reich & Kayla Kienzle, *Sixth Circuit Imposes Heightened Standard in Non-Employee Sexual Harassment Cases*, Saul Ewing (Aug. 25, 2025), https://www.saul.com/insights/blog/sixth-circuit-sexual-harassment.

(independent contractor); *Watson*, 324 F.3d at 1258 n.2 (customers); *Gardner*, 915 F.3d at 321-22 (patients); *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 914-15 (7th Cir. 2010) (residents); *Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1017 (9th Cir. 2018) (students).

As these cases reflect, the victims of these forms of harassment are all too often lower-level employees who wield less power to stop harassing conduct on their own. Imposing an employer-intent requirement for third-party harassment would therefore weaken Title VII's protections for those who need them most.

CONCLUSION

For the foregoing reasons, the EEOC urges this Court to clarify that negligence is the appropriate standard for determining when an employer is liable for third-party harassment under Title VII.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 3d Cir. L.A.R. 28.3(d) & 46.1(e), I certify that, as an attorney representing an agency of the United States, I am not required to be admitted to the bar of this Court. *See* 3d Cir. L.A.R. 28.3, comm. cmt. I also certify that all other attorneys whose names appear on this brief likewise represent an agency of the United States and are also not required to be admitted to the bar of this Court. *See id.*

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,387 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 in Book Antiqua 14 point.

Pursuant to 3d Cir. L.A.R. 31.1(c), I certify that the text of the electronically filed version of this brief is identical to the text of the hard copies of the brief that will be filed with the Court. I further certify pursuant to 3d Cir. L.A.R. 31.1(c) that, prior to electronic filing with this

Court, I performed a virus check on the electronic version of this brief using Microsoft Windows Defender, and that no virus was detected.

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CERTIFICATE OF SERVICE

I certify that on February 20, 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.

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