EMPLOYMENT LAW — SEXUAL HARASSMENT — SEVENTH CIRCUIT APPLIES RECKLESSNESS STANDARD TO CUSTOMER HARASSMENT. — *Anderson v. Mott Street*, 104 F.4th 646 (7th Cir. 2024).

There has been increased skepticism of sexual harassment claims, both in the public sphere[1] and in the courts.[2] Recently, in *Anderson v. Mott Street*,[3] the Seventh Circuit joined this trend by applying a heightened employer liability standard of recklessness to customer harassment and by holding that the plaintiff had not established sexual harassment premised on a hostile environment.[4] The *Mott* court departed from standard practice by applying a heightened liability standard to customer harassment through an inaccurate reading of case law. *Mott*'s novel analysis is therefore unjustified and leaves employees even more vulnerable to wrongful customer conduct.

Nikkolai Anderson was a host at Mott Street, a restaurant in Chicago.[5] Anderson claimed that while working at Mott Street, she was harassed by customers.[6] Anderson allegedly complained to two superiors after a customer touched her buttocks and chest.[7] After the incident, Anderson asked if she could dress in less revealing clothing or change positions in the restaurant because the customer interactions had made her uncomfortable,[8] but management declined both requests.[9] Anderson claimed that while working at Mott Street, she "complained about the patrons groping a lot."[10]

After telling a manager in writing that "[t]he work environment is extremely hostile,"[11] Anderson was terminated.[12] Mott Street claimed that it fired Anderson because of negative customer reviews and

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1 *See* Constance Grady, *The Mounting, Undeniable Me Too Backlash*, VOX (Feb. 3, 2023, 6:30 AM), https://www.vox.com/culture/23581859/me-too-backlash-susan-faludi-weinstein-roe-dobbs-depp-heard [https://perma.cc/6658-ELY6].

2 *See* Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1044–47 (2015) (identifying court "trends to narrow substantive protections against [sexual] harassment . . . and erect procedural obstacles that make those protections even more elusive," *id.* at 1047); Lea B. Vaughn, *The Customer Is Always Right . . . Not! Employer Liability for Third Party Sexual Harassment*, 9 MICH. J. GENDER & L. 1, 52–55, 54 n.265 (2002) (listing scholars that have identified or fear a contraction of sexual harassment law).

3 104 F.4th 646 (7th Cir. 2024).

4 *Id.* at 652 & n.2.

5 *Id.* at 650.

6 Brief & Required Short Appendix of Plaintiff-Appellant, Nikkolai Anderson at 3–5, *Mott*, 104 F.4th 646 (No. 23-2765); Complaint at 3–4, Anderson v. Mott St., No. 20 C 07721 (N.D. Ill. Aug. 14, 2023).

7 Brief & Required Short Appendix of Plaintiff-Appellant, *supra* note 6, at 3.

8 *Id.* at 4.

9 *Id.* After the incident, Anderson was promoted to "lead host," rather than moved to a server position as she had requested. *Id.* at 5.

10 *Id.* at 4.

11 *Id.*

12 *Id.* at 6.

performance issues.[13] Mott Street also claimed that the termination decisionmaker did not know about Anderson's written complaints at the time of termination.[14]

Anderson sued Mott Street in the United States District Court for the Northern District of Illinois, alleging sexual harassment based on a hostile work environment, sex discrimination, and retaliation[15] under Title VII,[16] as well as intentional infliction of emotional distress (IIED).[17]

The district court granted Mott Street's motion for summary judgment on all claims.[18] In his opinion, Judge Durkin determined that Anderson had violated a local evidence rule by failing to properly support some of her asserted facts.[19] However, because he found that the facts did not affect the case's outcome, he considered them anyway.[20] The court concluded that Anderson had not established sexual harassment based on a hostile work environment because the alleged incidents of harassment were "non-serious and isolated."[21] The district court did not consider Anderson's allegations of harassment from customers in its analysis.[22] In a footnote, Judge Durkin claimed that "Mott Street 'is not vicariously liable for the sexual harassment of its employee by a customer.'"[23] He ruled for Mott Street on Anderson's sex discrimination claim because she had failed to establish different treatment or pretext.[24] Judge Durkin also found for Mott Street on Anderson's retaliation claim because the termination decisionmaker was unaware of Anderson's protected conduct at the time of decisionmaking.[25] Anderson's IIED claim was deemed both time-barred and preempted.[26] Anderson subsequently appealed her Title VII claims.[27]

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[13] *Mott*, 104 F.4th at 650–51; Anderson v. Mott St., No. 20 C 07721, 2023 WL 5227391, at *4 (N.D. Ill. Aug. 14, 2023).

[14] *See Mott St.*, 2023 WL 5227391, at *9.

[15] *See id.* at *1.

[16] 42 U.S.C. § 2000e-2.

[17] *Mott St.*, 2023 WL 5227391, at *1.

[18] *Id.*

[19] *Id.* at *2 (citing De v. City of Chicago, 912 F. Supp. 2d 709, 715 (N.D. Ill. 2012); Mervyn v. Nelson Westerberg, Inc., 142 F. Supp. 3d 663, 664 (N.D. Ill. 2015); LaSalvia v. City of Evanston, 806 F. Supp. 2d 1043, 1046 (N.D. Ill. 2011)).

[20] *Id.*

[21] *Id.* at *5 (citing Mercer v. Cook County, 527 F. App'x 515, 521 (7th Cir. 2013); Patton v. Keystone RV Co., 455 F.3d 812, 816 (7th Cir. 2006)).

[22] *See id.*

[23] *Id.* at *5 n.5 (quoting Equal Emp. Opportunity Comm'n v. Costco Wholesale Corp., 903 F.3d 618, 627 (7th Cir. 2018)).

[24] *Id.* at *6–9.

[25] *Id.* at *9–10.

[26] *Id.* at *10.

[27] *Mott*, 104 F.4th at 651. Anderson also appealed the local evidence rule issue, but Judge St. Eve declined to consider it, since Anderson was not penalized. *Id.* at 651 n.1.

The Seventh Circuit affirmed.[28] Writing for the unanimous panel, Judge St. Eve found that "Anderson ha[d] not established a triable issue of material fact" for any of her Title VII claims.[29] Like the district court, Judge St. Eve determined that Anderson had not established sexual harassment based on a hostile work environment because the alleged incidents of harassment were insufficiently "severe or pervasive."[30] The opinion did not consider the alleged harassment from customers, writing that "without any indication that Mott Street *recklessly* permitted th[e] behavior, it is not liable for the actions of its customers."[31] Judge St. Eve also affirmed summary judgment for Mott Street on Anderson's sex discrimination claim, finding that Anderson's example of a male coworker who received different treatment was an insufficiently similar comparator.[32] The court found no evidence of pretext for the termination.[33] Finally, Judge St. Eve rejected Anderson's retaliation claim because she found that Anderson's protected conduct could not have caused the termination.[34]

The *Mott* court deviated from standard practice in picking out customer liability for an unjustifiably heightened standard through an erroneous reading of case law. Non-supervisory[35] harassment — including harassment from customers, coworkers, and independent contractors — has historically been analyzed under a single negligence liability framework, but the *Mott* court applied a heightened liability standard of recklessness distinctly to customer harassment. *Mott* misapplied *Equal Employment Opportunity Commission (EEOC) v. Costco Wholesale Corp.*[36] in support of this drastic move. This departure from — and misreading of — the law is particularly concerning since it raises, with inadequate justification, the already high bar to relief for victims of customer harassment.

Mott's application of a heightened liability standard of recklessness to customer harassment[37] was a departure from standard practice.

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[28] *Id.* at 650.

[29] *Id.* Judge St. Eve was joined by Judge Scudder and Judge Kirsch.

[30] *Id.* at 652.

[31] *Id.* at 652 & n.2 (emphasis added) (citing Equal Emp. Opportunity Comm'n v. Costco Wholesale Corp., 903 F.3d 618, 627 (7th Cir. 2018)).

[32] *Id.* at 652–54.

[33] *Id.* at 653–54.

[34] *Id.* at 655.

[35] This comment uses the term "non-supervisory" for clarity, though the Equal Employment Opportunity Commission's (EEOC) full title for this category of harassment is "Non-Supervisory Employees (E.g., Coworkers) and Non-Employees." U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2024–1, ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE § IV(C)(3) (2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace [https://perma.cc/3D2M-WEFL].

[36] 903 F.3d 618 (7th Cir. 2018).

[37] *Mott*, 104 F.4th at 652 n.2 (citing Equal Emp. Opportunity Comm'n v. Costco Wholesale Corp., 903 F.3d 618, 627 (7th Cir. 2018)).

Federal courts[38] and the EEOC[39] have historically analyzed all non-supervisory harassment under a single negligence standard. The *Mott* court even deviated from its own circuit. In *Dunn v. Washington County Hospital*,[40] the Seventh Circuit's Judge Easterbrook had used negligence language[41] to describe the liability standard for all non-supervisory harassment, saying that "it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer."[42] Judge Easterbrook explained that "[t]he employer's responsibility is to provide its employees with nondiscriminatory working conditions. The genesis of inequality matters not; what *does* matter is how the employer handles the problem."[43] *Mott* completely departed from standard practice by picking out customer harassment for a heightened recklessness standard.[44]

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[38] *See, e.g.*, EEOC v. Cromer Food Servs., Inc., 414 F. App'x 602, 603, 606–07 (4th Cir. 2011) (applying negligence standard when driver for food-stocking company was harassed by customers); Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073–74 (10th Cir. 1998); Folkerson v. Circus Circus Enters., Inc., 107 F.3d 754, 755–56 (9th Cir. 1997); Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1244 (10th Cir. 2001); Christian v. Umpqua Bank, 984 F.3d 801, 811 (9th Cir. 2020) (quoting *Folkerson*, 107 F.3d at 756); Sansone v. Jazz Casino Co., No. 20-30640, 2021 WL 3919249, at *3 (5th Cir. Sept. 1, 2021); Hales v. Casey's Mktg. Co., 886 F.3d 730, 735 (8th Cir. 2018) (citing Klein v. McGowan, 198 F.3d 705, 709 (8th Cir. 1999)); *see also* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1359, 1372–73 & nn.48–49 (2009) (listing cases).

[39] EEOC guidance has three frameworks for assessing employer liability for harassment, based on who committed the harassment. The third framework, referred to here as non-supervisory harassment, applies a negligence standard to harassment from customers, coworkers, independent contractors, and employer clients. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 35, § IV(C)(3); *see also* 29 C.F.R. § 1604.11(e) (2024). Although courts are not bound by EEOC guidance, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (citing Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976)), it has been historically afforded "great deference," Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) (citing United States v. City of Chicago, 400 U.S. 8 (1970); Udall v. Tallman, 380 U.S. 1 (1965); Power Reactor Dev. Co. v. Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO, 367 U.S. 396 (1961)). In addition, the EEOC has said that employers can be liable for harassment from non-employees since 1980, Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, 45 Fed. Reg. 74676 (Nov. 10, 1980) (codified at 29 C.F.R. pt. 1604), and agency guidance is due increased respect if that guidance has been consistent for a significant time, *see* United States v. Mead Corp., 533 U.S. 218, 228 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (citing Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993)).

[40] 429 F.3d 689 (7th Cir. 2005).

[41] *See id.* at 691 ("An employer is responsible for every . . . discriminatory term or condition of employment that the employer fails to take reasonable care to prevent or redress."). The absence of "reasonable care" is used to denote negligence. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (AM. L. INST. 2010) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances."). *Dunn* also stated that a party is liable if they are "negligent or reckless in permitting, or failing to prevent, negligent or other tortious conduct by persons . . . upon premises or with instrumentalities under [their] control." *Dunn*, 429 F.3d at 691 (quoting RESTATEMENT (SECOND) OF AGENCY § 213(d) (AM. L. INST. 1958)).

[42] *Dunn*, 429 F.3d at 691.

[43] *Id.* (citing *Lockard*, 162 F.3d at 1072–74).

[44] *See Mott*, 104 F.4th at 652 n.2 (citing EEOC v. Costco Wholesale Corp., 903 F.3d 618, 627 (7th Cir. 2018)).

Mott's novel approach is not supported by its citation to *Costco*. *Costco* applied a confusing — but singular — liability standard to all non-supervisory harassment.[45] Then-Judge Barrett wrote in *Costco* that "an employer is responsible for its own negligence if it is 'reckless in permitting, or failing to prevent, negligent or other tortious conduct by persons . . . under his control.'"[46] This formulation, which mentions both negligence and recklessness, is admittedly confusing — but other aspects of the *Costco* opinion are consistent with a negligence standard. A "reasonableness" requirement denotes a negligence standard,[47] and *Costco* adopted "reasonableness" language multiple times.[48] When *Costco* mentioned recklessness, it was quoting another case that based liability on whether an employer is "negligent *or* reckless."[49] *Costco*'s liability language is confusing, but, if anything, it supports a unified negligence standard, not *Mott*'s unique recklessness approach for customer harassment.

Aside from established practice, there are substantive reasons to think negligence, and not recklessness, is the more appropriate employer liability standard for customer harassment. First, a recklessness standard constructs a huge barrier to relief for victims of sexual harassment. Second, imposing such an obstacle runs counter to the Supreme Court's previous statements on Title VII employer liability. Third, while some advocate for a recklessness customer harassment liability standard on the grounds that it is fairer to employers,[50] negligence is a completely fair standard. Negligence does not subject employers to undue liability, and the exposure it does create is justified given employers' role in contributing to — and their ability to mitigate — customer harassment.

Mott's application of a recklessness standard rather than negligence for employer liability in customer harassment cases significantly hinders sexual harassment victims from obtaining judicial relief. "There is a wide difference between negligence and . . . reckless[ness]," so wide "as

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[45] *See Costco*, 903 F.3d at 627 (quoting *Dunn*, 429 F.3d at 691 (independent contractor harassment)) (citing Lapka v. Chertoff, 517 F.3d 974, 985 (7th Cir. 2008) (coworker harassment); Frazier v. Delco Elecs. Corp., 263 F.3d 663, 666 (7th Cir. 2001) (same)).

[46] *Id.* (alteration in original) (quoting *Dunn*, 429 F.3d at 691).

[47] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (AM. L. INST. 2010).

[48] *See, e.g.*, *Costco*, 903 F.3d at 627 ("Title VII requires only that the employer take steps reasonably likely to stop the harassment." (quoting *Lapka*, 517 F.3d at 985)).

[49] *Id.* (emphasis added) (quoting *Dunn*, 429 F.3d at 691 (finding liability when an employer is "negligent or reckless" (quoting RESTATEMENT (SECOND) OF AGENCY § 213(d) (AM. L. INST. 1958)))).

[50] Some argue that holding employers liable for customer harassment is unfair because employers do not control the harasser. *See* Vaughn, *supra* note 2, at 85 (noting that the "tougher issue" in defending employer liability for third-party harassment is employer control); Robert W. Cowan, Note, *Pizza Hut Pays the Dough as the Tenth Circuit Hands Employers a Bigger Slice of the Sexual Harassment Liability Pie in* Lockard v. Pizza Hut, Inc., *162 F.3d 1062 (10th Cir. 1998)*, 41 S. TEX. L. REV. 1157, 1171 (2000) ("[E]mployer exerted a much lower degree of control [over customers].").

to amount to a difference in kind."[51] Under a negligence standard, an employee would only need to show objective deviation from the standard of reasonable care,[52] but to show that their employer was reckless, an employee would need to show that the employer's conduct "involve[d] a substantially greater risk" with "consciousness that [the] conduct will likely cause injury."[53] Plaintiffs will have a much harder time recovering in customer harassment cases against their employers if they have to show that their employers were reckless, rather than just negligent.

Placing this recklessness obstacle in front of sexual harassment victims does not make sense given what the Supreme Court has said on Title VII employer liability standards. While the Supreme Court has not addressed customer harassment directly, it has stated that "[n]egligence sets a minimum standard for employer liability under Title VII."[54] Additionally, Justice O'Connor has defined sex discrimination as a "statutory employment 'tort,'"[55] and negligence is the dominant standard in tort law.[56] The *Mott* court's heightened recklessness standard for customer harassment is unjustifiably in tension with the Supreme Court's previous statements on employer liability.

Raising the liability standard from negligence to recklessness cannot be justified on fairness grounds because negligence does not overexpose employers to liability. It is actually quite difficult for employees to prevail under a negligence liability regime unless they reported the harassment to the employer.[57] This bars many employees from remedies, since sexual harassment victims are often hesitant to report,[58] perhaps

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[51] 57A AM. JUR. 2d *Negligence* § 265 (2024).

[52] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (AM. L. INST. 2010).

[53] 57A AM. JUR. 2d *Negligence* § 265 (2024).

[54] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998).

[55] Price Waterhouse v. Hopkins, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring in the judgment). *See generally* W. Jonathan Cardi, *The Role of Negligence Duty Analysis in Employment Discrimination Cases*, 75 OHIO ST. L.J. 1129 (2014) (discussing "[t]he tortification of employment discrimination law," *id.* at 1129).

[56] *See* KEVIN M. LEWIS & ANDREAS KUERSTEN, CONG. RSCH. SERV., IF11291, INTRODUCTION TO TORT LAW 1 (2023) ("A common example of a tort entails negligence."); John C.P. Goldberg & Benjamin C. Zipursky, *Recklessness in Tort: Interstitial Law as Doctrinal Fine-Tuning*, *in* INTERSTITIAL PRIVATE LAW 135, 138 (Samuel L. Bray et al. eds., 2024) (describing recklessness as an "outlier" in tort law that is limited to "notable cameos"). Other Title VII claims also use a negligence liability standard. *See* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993).

[57] *See* Joseph M. Sellers & Aniko R. Schwarcz, *Ensuring the Laws Barring Sexual Harassment Protect the Reticent Victim*, 30 AM. U. J. GENDER SOC. POL'Y & L. 215, 220 (2022); *see also, e.g.*, Magnuson v. Peak Tech. Servs., Inc., 808 F. Supp. 500, 513–14 (E.D. Va. 1992) (premising employer liability for harassment by non-employee on whether the employer knew of the harmful conduct); Hylton v. Norrell Health Care of N.Y., 53 F. Supp. 2d 613, 618–19 (S.D.N.Y. 1999) (finding employer not negligently liable for customer harassment when employee delayed in reporting).

[58] Sellers & Schwarcz, *supra* note 57, at 218–20.

especially in cases of customer harassment.[59] Scholars and judges have criticized the negligence standard for sexual harassment as being too difficult for employees to meet.[60] Concern that a negligence standard places excessive burdens on employers seems misplaced when negligence has been the liability standard for over forty years[61] and customer harassment remains pervasive.[62] If anything, it seems that the negligence standard is too permissive of customer harassment, not that it is too burdensome on employers.

Fairness concerns are especially misplaced given how employers contribute to, and have the power to prevent, customer harassment. Employers may increase the risk of customer harassment by forcing employees to wear sexualizing uniforms[63] or instituting harassment-prone policies, like tipping.[64] Employers want to facilitate an environment that pleases the customer[65] and may "prioritiz[e] customer satisfaction" over the employee's right to work free from discrimination.[66] It is fair to hold employers to a negligence liability standard because they are in the best position to take reasonable steps to alter common employment practices and prevent customer harassment.

It is also fair to hold employers to a negligence standard because employers control the workplace environment and can stop customer harassment. Though an employer may not be able to direct a customer in the exact way they direct employees, the employer in both scenarios "ultimately controls the conditions of the work environment."[67] Just as an employer can fire an employee, it can ask a customer to leave.[68] "The focus of the inquiry in a hostile work environment claim . . . is on

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[59] *See* Dalit Yassour-Borochowitz, *"It's a Total Embarrassment": Service Work and Customer Sexual Harassment*, WOMEN'S STUD. INT'L F., Jan.–Feb. 2020, at 1, 3.

[60] *See, e.g.*, Vance v. Ball State Univ., 570 U.S. 421, 466 (2013) (Ginsburg, J., dissenting) (calling negligence liability standard "employer-friendly," and saying it "leave[s] many harassment victims without an effective remedy"); Lu-in Wang, *When the Customer Is King: Employment Discrimination as Customer Service*, 23 VA. J. SOC. POL'Y & L. 249, 260–61 (2016); *cf.* Keith Cunningham-Parmeter, *The Sexual Harassment Loophole*, 78 WASH. & LEE L. REV. 155, 189, 196 (2021).

[61] *See* Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, 45 Fed. Reg. 74676 (Nov. 10, 1980) (codified at 29 C.F.R. pt. 1604).

[62] *See* Timothy G. Kundro et al., *A Perfect Storm: Customer Sexual Harassment as a Joint Function of Financial Dependence and Emotional Labor*, 107 J. APPLIED PSYCH. 1385, 1385 (2022).

[63] *See* Vaughn, *supra* note 2, at 30–33 (discussing cases where employer was held liable for harassment for forcing employees to dress sexually).

[64] Jakob Feltham, Comment, *The Limits of the Law: Tipping, Employment Discrimination, and Legal Theories for Plaintiffs Under Title VII*, 32 WIS. J.L. GENDER & SOC'Y 65, 73, 84 (2017).

[65] *See* Einat Albin, *Customer Domination at Work: A New Paradigm for the Sexual Harassment of Employees by Customers*, 24 MICH. J. GENDER & L. 167, 208–09 (2017).

[66] Yassour-Borochowitz, *supra* note 59, at 3; *see, e.g.*, Ann C. McGinley, *Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229, 1236–37 (finding employees believe harassment was tolerated by management to please customers).

[67] Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998).

[68] *E.g.*, Vaughn, *supra* note 2, at 86–87 (listing ways an employer could control the workplace to minimize customer harassment, including asking customers to leave, requiring misbehaving customers to apologize, and posting publicly that they will not tolerate customer harassment).

whether 'the workplace is permeated with "discriminatory intimidation, ridicule, and insult."'"[69] In cases of customer harassment, the employer has control over the workplace in ways that would allow it to attempt to remedy a hostile environment: "Employers are not the helpless entities that courts seem to make them out to be."[70]

Mott's application of a heightened liability standard to customer harassment deviated from standard practice, misread relevant case law, and cannot be justified on policy grounds — but that does not mean that the outcome of *Mott* was wrong. Anderson may have lost her case even if *Mott* conducted the proper analysis.[71] The concern here is not with the outcome of *Mott* but with the basis on which it was decided: *Mott*'s unique approach to customer harassment makes customer harassment claims much harder to win, leaving employers inadequately incentivized to address this problem and employees exposed to harm.

The *Mott* court's treatment of customer harassment is concerning because it undermines employees' already limited power in the face of misconduct. "[S]tudies show that customer sexual harassment is widespread and common . . . ."[72] Customer harassment is especially concerning for women, in particular low-income women and women of color, as they are more likely to work in customer-facing industries.[73] The *Mott* court's troubling decision inappropriately removed the incentives that employers in the Seventh Circuit had to prevent and address customer sexual harassment.

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[69] *Lockard*, 162 F.3d at 1073 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

[70] Vaughn, *supra* note 2, at 85.

[71] A strength of Anderson's case is that her employer forced her to dress sexually, despite her expressing that the dress code contributed to harassment. *See* Brief & Required Short Appendix of Plaintiff-Appellant, *supra* note 6, at 4. Courts have been especially likely to find employers liable for customer harassment when employers forced employees to dress sexually. *See* Vaughn, *supra* note 2, at 30–33. But a weakness for Anderson is that some of her alleged facts were pled in violation of a local evidence rule, meaning the court could have excluded them. Anderson v. Mott St., No. 20 C 07721, 2023 WL 5227391, at *2 (N.D. Ill. Aug. 14, 2023) (citing De v. City of Chicago, 912 F. Supp. 2d 709, 715 (N.D. Ill. 2012)).

[72] Yassour-Borochowitz, *supra* note 59, at 2; *see also* Kundro et al., *supra* note 62, at 1385.

[73] *See, e.g.*, Brooke Stephenson, *The Women on the Other End of the Phone*, PROPUBLICA (July 29, 2021, 5:00 AM), https://www.propublica.org/article/the-women-on-the-other-end-of-the-phone [https://perma.cc/8Q86-M9AD] (noting that "most customer service representatives are women," including large percentages of women of color); *cf. Most Common Occupations for Women in the Labor Force*, WOMEN'S BUREAU, U.S. DEP'T LAB. (Apr. 2024), https://www.dol.gov/agencies/wb/data/occupations/most-common-occupations-women-labor-force [https://perma.cc/D89Y-UYZS] (listing nursing and retail sales among most common jobs for women).