Simplified critical path diagram of the elements of negligence in tort law

1. Did D owe a duty of care to P?
   - NO (D not liable)

2. Did D breach that duty by failing to take reasonable precautions?
   - YES — 2.1. Was D’s failure to take reasonable precautions the legal cause of harm to P?
     - NO (D not liable)
   - YES — 2.2. Did D breach that duty by failing to take reasonable precautions?
     - YES (D liable)

3. Was D’s failure to take reasonable precautions the legal cause of harm to P?
   - YES (D liable)
   - NO (D not liable)

Note: On the diagram, “D not liable” means “D not liable to P for the tort of negligence.” D might be liable to P on some other theory.

In Title VII hostile work environment cases, negligence analysis may or may not apply; and if it does apply, the burden may fall either on plaintiff or defendant, as follows:

1. If the source of the harassment is plaintiff’s co-worker (someone who does not have supervisory authority over the plaintiff), then the burden is on the plaintiff to prove that the employer was negligent in controlling work conditions. Bottom of p. 596.

2. If the source of the harassment is plaintiff’s supervisor, and the harassment results in a tangible employment action (like demotion or termination), then the employer is strictly liable for the wrongful action of the supervisor. Bottom of p. 596. (This means that the plaintiff does not have to show that the employer was negligent. The plaintiff does not have to show that the employer knew or should have known that he or she was being demoted or fired for improper reasons.) “The sins of the supervisor are visited upon the employer.” (This might seem puzzling; in most cases the employer didn’t want the supervisor to engage in the harassment, and in most cases the employer doesn’t benefit from the harassment, so why hold the employer accountable for the supervisor’s wrongdoing? The solution to the puzzle is: the tangible employment action – demotion, termination, etc. – is the act of the employer.)

3. If the source of the harassment is plaintiff’s supervisor, and the harassment does not result in a tangible employment action (like demotion or termination), then the burden is on the employer to establish, by affirmative defense, that (1) employer exercised reasonable care to prevent and correct any harassing behavior (e.g., employer had an active harassment prevention program and complaint procedure), and (2) plaintiff unreasonably failed to take advantage of corrective opportunities that the employer provided. (This is the Ellerth-Faragher affirmative defense, p. 596.)

When negligence analysis does apply in a Title VII hostile work environment case, the key issue is step 2 (failure to take reasonable precautions).