

**Fahey Schultz
Burzych Rhodes**

EXPERT COUNSEL  REAL SOLUTIONS

Keeping Your Personnel Decisions Out of the Headlines – and Court

HELEN “LIZZIE” MILLS AND JACOB N. WITTE

FAHEY SCHULTZ BURZYCH RHODES PLC

The Michigan Times



University Drops Professor for Pro-Palestine Tweets!

What Happened?

- A University Professor sued University and individual Board members, alleging that he was retaliated against for exercising his First Amendment rights.
- He argued that his appointment was denied due to his tweets condemning Israel's actions during a skirmish with Palestine.



Key Facts



- The University sent the Professor an offer of employment while he was employed at another school. The Professor accepted the offer, resigned from his current position and began the process of moving his family to the University.
- During this time, the Professor began harshly criticizing recent actions by Israel on Twitter, often using profanity. These comments gained media attention, and soon the University was responding to publicity regarding the Professor.

Key Facts, Cont.

- The University initially showed support for the Professor, but began receiving letters and emails from students, alumni and donors expressing concern over the Professor.
- After meeting with two donors, the Chancellor of the University wrote the Professor a letter saying that the University could not appoint him.
- A month after classes started, the University Board of Trustees voted on new faculty appointments. The Board took one vote to appoint 120 new members, then voted separately on the Professor, unanimously denying his appointment. This was apparently the first time anything like this took place in the history of the University.



The Claim

To succeed on a First Amendment free speech claim, an employee must show that:

1. The speech was constitutionally protected
2. He or she suffered a deprivation likely to deter free speech
3. The speech was at least a motivating factor in the employer's action



Policy

Consistency

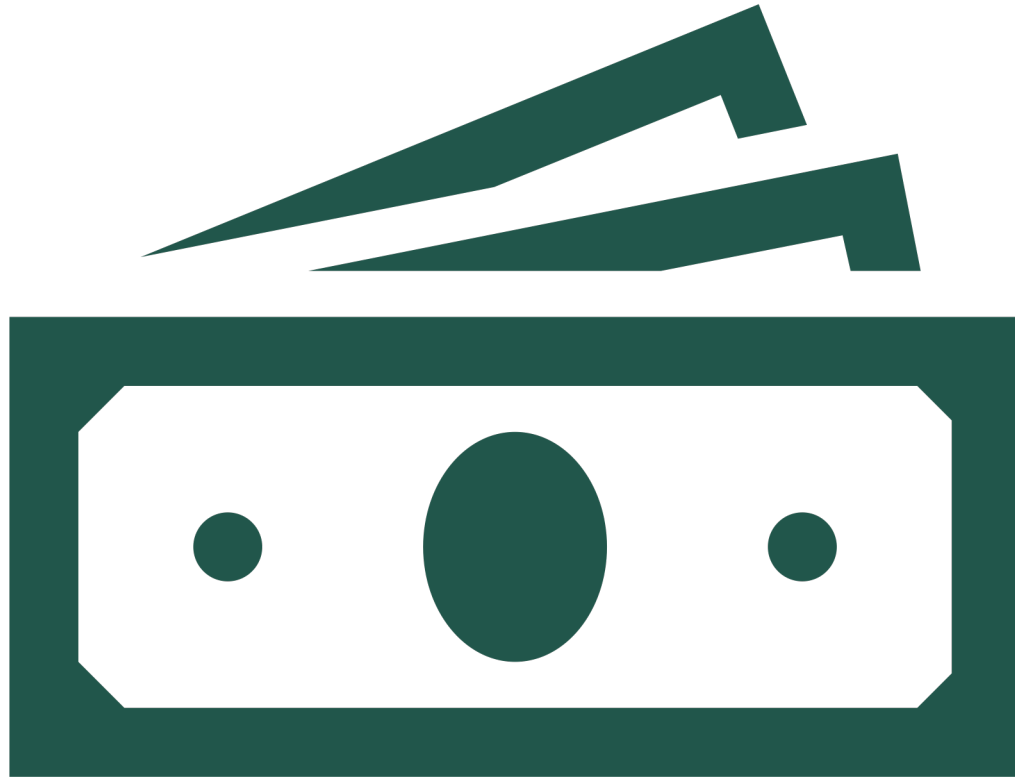
Know the Rules

Have a Reason

Stay Strong

How to Avoid this Headline

City Administrator Canned After Reporting Mayor's Misuse of Donations!



What Happened?

- A City Administrator filed a suit for wrongful termination.
- First Amendment violations and violation of Michigan's Whistleblower Protection Act upon being fired shortly after reporting her suspicions that the Mayor had illegally diverted donation funds.

Key Facts

- The Administrator reported the Mayor to the chief legal officer for the City two times and was terminated on the very same day she made her second report.
- The Administrator received no warning before being terminated.
- When she was invited to the Mayor's office, the chief legal officer was present.
- The termination letter gave no reason for her discharge.

Key Facts, Cont.

- The Mayor initially told the Administrator that she was being discharged because the state could not afford to pay her salary. When the Administrator told the Mayor that the City paid her salary, not the state, the Mayor changed his story, telling her she would be discharged for failing to provide information about a disease outbreak. The Mayor claimed this was the “final straw.”
- The Administrator had evidence that she had emailed the Mayor about the outbreak twice and alleged that they discussed it over dinner. The Mayor had no documentation to refute this.



The Claim

To establish a Whistleblower claim, an employee must demonstrate that:

1. he or she engaged in a protected activity;
2. he or she was discharged, threatened, or otherwise discriminated against; and
3. there was a causal connection between the protected activity and the employer's retaliation action.



What is Protected Activity



Have a Reason

Give Notice

Prove it

Investigate Objectively

How to Avoid this Headline



Pregnant Attorney Abandoned by Calloused Employer!

An in-house attorney who worked for a municipal utility requested to telecommute while she was on bedrest due to pregnancy complications.

The Utility denied the request and Attorney filed suit, alleging a failure to accommodate in violation of the Americans with Disabilities Act (“ADA”).

What Happened?

Key Facts

- The Utility had no formal, written policy for telecommuting, but often allowed employees to telecommute. In fact, on one occasion the Utility had allowed the Attorney to telecommute for two weeks while she recovered from a neck injury.
- The Attorney was placed on bed rest for 10 weeks after receiving surgery for pregnancy complications and requested that the Utility permit her to telecommute for 10 weeks. The Attorney included a letter from her doctor.



Key Facts, Cont.

- The Utility formed an “ADA Committee” to evaluate the Attorney’s request and to determine whether she could still perform the essential functions of her job while working remotely. The Utility determined that the Attorney’s physical presence was essential to her position and expressed concerns about confidentiality, ultimately denying the requested accommodation.
- For almost a month while her request to telecommute was pending, the Attorney worked remotely without objection.

Key Facts, Cont.



- The Attorney appealed the denial of her request two times. Both appeals were denied.
- A jury awarded the Attorney \$92,000 in damages for the Utility's failure to accommodate.
- The Utility argued that the Attorney's written job description inherently required the Attorney to be physically present at work, but the Attorney presented evidence that she could accomplish her work from home. The Attorney also presented evidence that the job description for her position was based on a 20-year old questionnaire. The jury accepted the Attorney's arguments.

The Claim

To establish a prima facie case of disability discrimination under the ADA for failure to accommodate, an employee must show that:

1. He or she is disabled within the meaning of the ADA
2. He or she is otherwise qualified for the position, with or without reasonable accommodation
3. The employer knew or had reason to know about the disability
4. He or she requested an accommodation
5. The employer failed to provide the necessary accommodation



1

**Talk to Your
Employees**



2

**Update Your Job
Descriptions**



3

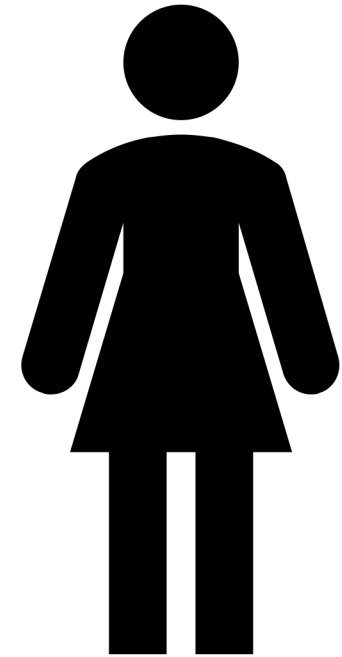
**Draft Political
Policies**

How to Avoid this Headline

Shipping Company Nailed for
Failing to Address Hostile Work
Environment! #MeToo

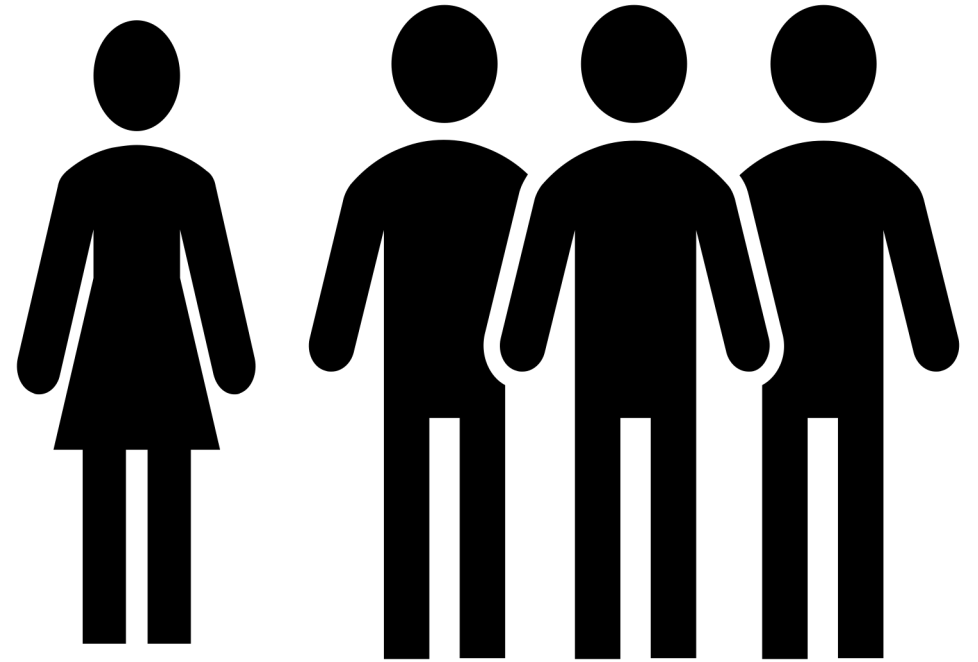
What Happened?

- A female employee who had resigned from her position as a transportation sales representative at a shipping company sued her former employer, alleging that she had been subjected to a hostile work environment.



Key Facts

- The Employee was the only woman working on the sales floor and was often surrounded by six male coworkers. The Employee and her male coworkers did most of their work over the phone.



Key Facts, Cont.

- Male coworkers, as well as the male branch manager, often used profane, gender-derogatory language to refer to or insult females with whom they spoke on the phone.
- Nearly every day, the male coworkers would listen to a morning talk show that regularly discussed women in a crude, sexual manner.
- On one occasion, a coworker displayed a pornographic image of a naked woman on his computer. On other occasions, the male coworkers would sing songs about gender-derogatory topics.

Key Facts, Cont.



- The Employee began objecting to the offensive language and conduct, first orally and later by email. The male employees' behavior continued unabated.
- When her complaints to her coworkers resulted in no change in behavior, the Employee began complaining to her branch manager. The branch manager failed to take any corrective action, and never reported any violations of the Shipping Company's sexual harassment policy to the corporate office.

Key Facts, Cont.

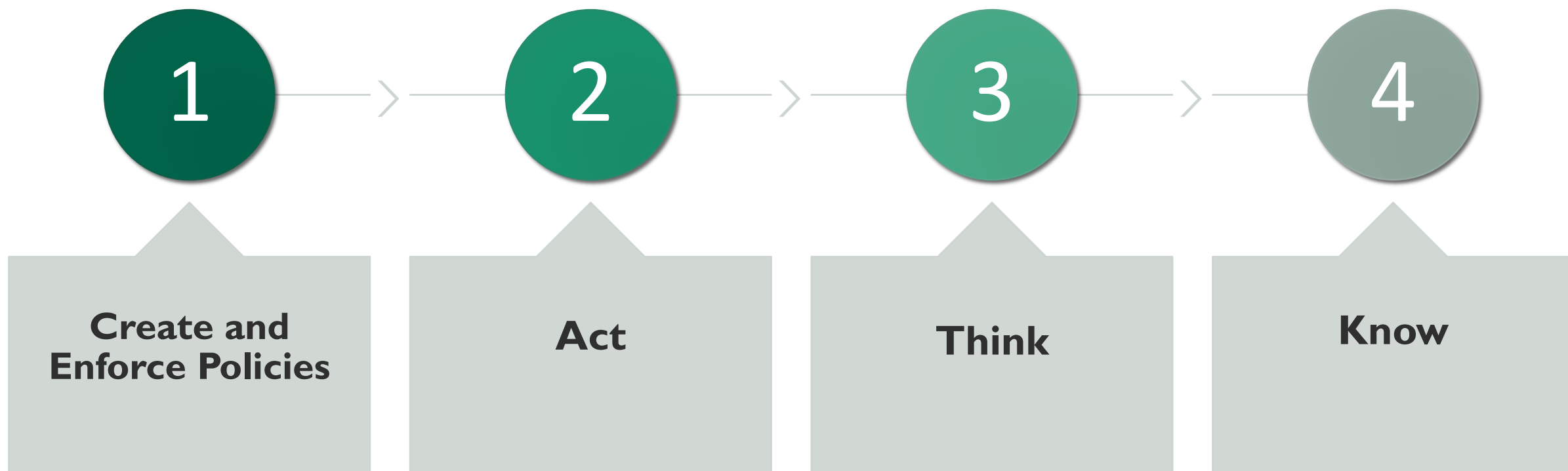
- The Employee contacted the corporate office, and an executive visited the branch location, but the Executive never brought up the offensive conduct or met with the employee.
- The Employee resigned and filed suit against the Shipping Company, alleging that she was subjected to a hostile work environment.

The Claim

To prevail in a Title VII suit against an employer for a sexual harassment that resulted in a hostile work environment, an employee must prove five elements:

1. the employee belongs to a protected group;
2. the employee was subject to unwelcome sexual harassment;
3. the harassment complained of was based upon sex;
4. the harassment complained of was sufficiently severe or pervasive to alter the terms and conditions of employment;
and
5. a basis for holding the employer liable.





How to Avoid this Headline



Questions

Helen “Lizzie” Mills

Jacob N. Witte

Fahey Schultz Burzych Rhodes PLC
4151 Okemos Rd., Okemos, MI 48864

Tel: 517-381-0100

hmills@fsbirlaw.com

jwitte@fsbirlaw.com

www.fsbirlaw.com

