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## EMPLOYMENT LAW

# Management's Failure to Investigate Harassment Entitles Employee to Trial

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*Special to the Legal*

How many discriminatory comments does it take to create a hostile work environment? How should a manager handle vague reports of harassing conduct? These questions and more were recently addressed in *Mitchell v. Kensington Community Corp. for Individual Dignity*, No. 18-2869, 2019 U.S. Dist. LEXIS 205679 (E.D. Pa. Nov. 26, 2019), where the court denied summary judgment to an employer based on management's failure to meaningfully investigate repeated, albeit somewhat vague, reports of harassment.

### LONG-TERM EMPLOYEE RESIGNS IN FRUSTRATION

For more than 25 years, plaintiff Charles Mitchell, an African American, worked in maintenance for defendant Kensington Community Corp. for Individual Dignity (KenCCID), an in-home services provider for persons with disabilities, doing everything from simple repairs to supervising contractors. He served as the company's sole maintenance coordinator until 2014, when KenCCID added a second coordinator: Lionel Labitan, according to the opinion.

Friction between Mitchell and Labitan surfaced almost immediately. According to Mitchell, Labitan made



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offensive comments about African Americans on an almost-daily basis. Taking things a step further, Labitan personalized the abuse by allegedly making disparaging remarks about Mitchell to a co-worker in French (Mitchell could tell that they were insulting him due to their laughter and "body language"), the opinion said. Mitchell reported to management that Labitan often called him "no good," "lazy" and the like, at one point even telling a third party that Mitchell "ain't nobody but the Uber driver."

While it was undisputed that Mitchell made myriad complaints to management about Labitan's behavior, the court found the evidence "ambiguous" as to whether Mitchell specifically complained of the harassing remarks,

as he could not "specifically remember" doing so. KenCCID's fiscal director remembered discussing racially derogatory name calling with employees in the Mitchell's department, but could not recall Mitchell ever reporting such comments—although Mitchell did complain that he "generally felt harassed" by his co-workers.

Mitchell eventually became "fed up" with Labitan's harassment and decided to resign from KenCCID, allegedly due to fear that he might lose control of his anger and attack Labitan if he stayed. By contrast, KenCCID's CEO believed that Mitchell resigned because he had recently passed his CDL exam and decided to pursue a career as a truck driver. Mitchell brought suit against KenCCID, claiming national origin harassment and constructive discharge.

### NATIONAL ORIGIN DISCRIMINATION CLAIM FAILS

In considering Mitchell's claim of discrimination based on his national origin, the court asked whether Mitchell had set forth a prima facie case under Title VII, which requires proof that the plaintiff belongs to a protected class, he was qualified for the position, he was subject to an adverse employment action, and under circumstances that raise an inference of discriminatory action, the employer continued to seek out individuals with qualifications similar to the plaintiff's to fill the position.

Since Mitchell failed to demonstrate that he had suffered a constructive discharge, the court found that he could not establish the adverse-employment-action element. As the court noted, successful claims of constructive discharge typically involve significant employer action, such as threatening the employee with termination or discipline or transferring the employee to a less-desirable position, but KenCCID had taken no such action. In the U.S. Court of Appeals for the Third Circuit, an employee claiming constructive discharge must also show that he thoroughly explored alternative avenues before concluding that resignation is the only option. Although Mitchell presented evidence that he had regularly complained to management about his disagreements with Labitan, the court found no evidence that Mitchell worked with management to find alternatives to resignation. Reiterating the Third Circuit's instruction that discrimination laws are not "a palliative for every workplace grievance, real or imagined," as in *Connors v. Chrysler Financial*, 160 F.3d 971, 976 (3d Cir. 1998), the court concluded that while Mitchell certainly had stressful and frustrating experiences at KenCCID, he failed to show that a reasonable person in his position would have felt compelled to resign, and thus failed to set forth a prima facie claim of discrimination.

## HOSTILE WORK ENVIRONMENT CLAIM SURVIVES

Next, the court turned to Mitchell's hostile work environment claim, which required a showing that Mitchell suffered intentional discrimination due to his national origin, the discrimination was severe or pervasive, the discrimination detrimentally affected him, the discrimination would have detrimentally affected a reasonable person in Mitchell's position, and that respondent superior liability (employer liability) exists. According to Mitchell,

Labitan's derogatory comments included that African Americans are all "on welfare" because they are "lazy," that they "sit on street corners" carousing and dealing drugs, and that their women are "only good for play things." After reviewing Mitchell's testimony that these remarks continued regularly for the three years that the two men worked together, and that the comments deeply offended him, the court found that Mitchell had established the first four elements.

As for the fifth element—employer liability—the court observed that KenCCID could only be held liable for Labitan's comments if it was negligent in controlling working conditions in his department, and could raise an affirmative defense that it took reasonable care

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to prevent harassing behavior, but that Mitchell unreasonably failed to take advantage of the corrective opportunities that it provided. Mitchell testified that he had complained to management many times about Labitan's harassment, though he may not have relayed the specific words used, and KenCCID's CEO and fiscal director confirmed that they had received Mitchell's complaints, and that his allegations against Labitan were "serious accusations." Despite this evidence that Mitchell's complaints were made and received, the court found no indication that management documented, investigated, or indeed took "any meaningful action" to follow up on Mitchell's allegations. For example, managers did

not counsel Labitan on his inappropriate behavior and did not question other employees in the department to confirm Mitchell's version of events. In light of KenCCID's lackluster response to Mitchell's myriad complaints, the court concluded that he had established a genuine dispute as to KenCCID's negligence in controlling his working conditions, and thus that his hostile work environment claim would survive summary judgment.

## BEST PRACTICES TO HANDLE HARASSMENT COMPLAINTS

This case again highlights the importance of maintaining a robust anti-harassment policy. But policies are not enough: all employees should receive regular refreshers and managers must be trained to identify and respond to complaints. Employers must investigate disputes proactively—even vague complaints like Mitchell's assertion that he "generally felt harassed." Had KenCCID conducted a thorough investigation in this case, it would have revealed the underlying issues and perhaps built a record sufficient to support summary judgment on all of Mitchell's claims. •