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Appeals Court Rules That Thirteen Incidents of Alleged Sexual Harassment Over Two to Three Years Did Not Violate California Law

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California law prohibits two forms of sexual harassment. An employer commits "quid pro quo harassment" if it requires an employee to submit to unwelcome sexual advances as a term of employment. An employer is liable for "hostile work environment harassment" if the employee is subject to harassment that is "sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment." A recent California Court of Appeal decision, *Haberman v. Cengage Learning, Inc.*, demonstrates that even prolonged exposure to numerous episodes of offensive conduct may not be "pervasive" enough to subject an employer to liability for hostile work environment sexual harassment.

The plaintiff in *Haberman* was a sales representative for a textbook publishing company. She claimed that the company's national sales manager repeatedly made unwelcome sexual comments to her during the course of her employment. Among other things, the manager commented on the plaintiff's physical appearance. He told her he was looking for casual sex and he asked her if she knew anyone who might be interested. Once, he asked her how she knew whether someone was good in bed. On another occasion, while following her in a parking lot, the manager called the plaintiff on her cell phone and told her that he was "coming right up behind her and that it felt pretty good." Altogether, the plaintiff identified thirteen instances in a two to three-year period in which the manager made inappropriate remarks which, she alleged, made her feel uncomfortable. The trial court ruled that these acts were insufficient, as a matter of law, to give rise to a claim for a hostile work environment.

The Court of Appeal agreed. It emphasized, "the hostile work environment form of sexual harassment is actionable only when the harassing behavior is *pervasive* or *severe*." The court cited past decisions in which seemingly egregious actions – such as vulgar sexual propositions, unwanted touching of an employee's breast, and repeated efforts to kiss an employee – were held insufficient to constitute sexual harassment. Turning to the case at hand, the court parsed each of the thirteen episodes of alleged misconduct. The court found that while such actions were "inappropriate for the workplace," they were too "isolated, sporadic, and often trivial" to expose the employer to liability.

The *Haberman* decision illustrates that not all allegations of inappropriate conduct will support an employee's claim of sexual harassment. As the Court of Appeal emphasized, laws protecting against sexual harassment are not a "civility code" and they were not "designed to rid the workplace of vulgarity." Especially when the plaintiff's allegations relate to verbal comments, rather than unwanted physical contact, an employee bears a heavy burden in establishing that the conduct was so "pervasive" as to expose an employer to liability.

Conclusion. While the *Haberman* decision provides a helpful tool for lawyers to defend claims of hostile workplace sexual harassment, employers should not take too much comfort from the outcome in this case. Even unfounded sexual harassment lawsuits can be expensive to defend, and there can be no assurance that a court – or a jury – will find the plaintiff's allegations insufficient. Employers should make clear that they will not tolerate any sexual comments at the workplace or in connection with the company's business.