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Herman Cain and the Sexual Harassment Perception Gap

November 9, 2011 • 5:30 am PST 52 responses



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Thanks to the [public testimony of Sharon Bialek](#), we have a sharper idea of the [sexual harassment allegations](#) lodged against Republican presidential candidate Herman Cain by a string of female acquaintances and employees over the past several decades. But in the nine days since the allegations first surfaced, our wider cultural understanding of sexual harassment has only clouded.

What is sexual harassment? Who decides? Commentators have been busy drawing up their own definitions. *Forbes'* Richard Minter [called sexual harassment](#) "a broad range of things" encompassing everything from "If you want that promotion you must sleep with me" to "Nice earrings." It was not sexual harassment when *Fox News* analyst Bob Beckel "threw a candy corn down my dress yesterday, and I didn't sue," fellow commentator Andrea Tantaros has decided. Sean Hannity told Ann Coulter that sexual harassment constitutes "the conversations and the things we joke about on a regular basis." Kentucky Congressman Rand Paul said that [he now avoids](#) telling "a joke to a woman in the workplace, any kind of joke, because it could be interpreted incorrectly." To conservative political commentator Laura Ingraham, sexual harassment is a woman willing to say she was "so offended" in exchange for a paycheck. David Brooks is not entirely sure whether [consensual sex constitutes sexual harassment](#). *The National Review's* John Derbyshire believes that sexual harassment [does not exist](#). "I do have a sense of humor," Cain [said in his own defense](#), "and some people have a problem with that."

This is no longer just about Cain and what he did or did not do—it's about what men like John Derbyshire, Bob Beckel, and Rand Paul are allowed to get away with in the office. The conversation surrounding the Cain allegations has centered on the idea that sexual harassment is a matter of a woman's perception—and if harassment is determined exclusively in each woman's mind, it would take just one humorless brat, hypersensitive underling, or lying gold-digger to ruin a good man's career.

In fact, a woman's perception is hardly central to a legal sexual harassment claim. The Equal Employment Opportunity Commission recognizes [two forms of workplace sexual harassment](#) that can inspire a discrimination claim. The first is "quid pro quo" harassment, in which unwelcome sexual conduct is "used as the basis for employment decisions" affecting the employee. (For example, if an employee is "coerced into submitting to unwelcome sexual advances in return for a job benefit"). The second is "hostile environment," where the unwelcome

sexual conduct does not directly affect hiring and firing decisions, but nevertheless "unreasonably interfer[es] with an individual's job performance" or creates an "intimidating, hostile, or offensive working environment."

Quid pro quo cases often come down to a determination of fact—they are decided based on whether the jury "believes what's being alleged actually happened," says [D.C. attorney and sexual harassment law expert Lynne Bernabei](#). A hostile work environment case, on the other hand, does hinge on perception—just not the victim's. "A sexually hostile work environment is much harder to prove, because you have to establish that the harassment is severe or pervasive," says Bernabei. In most courts, "you have to have a lot of incidents, sexually charged remarks, and negative comments about women to prove severe or pervasive sexual harassment." Adds Bernabei, "it's rarely a single event that creates a hostile work environment claim, except in the case of an attempted rape or a rape."

The hostile work environment calculation—Do the incidents constitute "harassment"? Are they bad enough to be considered "severe"? Did they happen long enough to be "pervasive"?—is the work of judges and juries, not victims. Courts typically make that determination based on the perception of a "reasonable person." Due to the history of gender-based violence and lopsided power structures in the American workplace, some courts have gone further to establish a "reasonable woman" standard to guide juries. "When you look at the reasonable person in the plaintiff's position, sometimes you have to look at the 'reasonable woman' because women will experience actions differently than men," Bernabei says.

But the "reasonable woman" is not your office's especially humorless, sensitive, or money-hungry woman. In many cases, the judges and juries imagining how a "reasonable woman" would perceive sexual harassment are, in fact, men.

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