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Recommended Citation

Joanna L. Grossman, *The Reasons Why Herman Cain Has Not Been Able to Talk His Way Out of His Exploding Sexual Harassment Scandal* Verdict (2011)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/929

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Verdict

November 7, 2011

Joanna L. Grossman

The Reasons Why Herman Cain Has Not Been Able to Talk His Way Out of His Exploding Sexual Harassment Scandal



The story of the sexual harassment allegations against GOP Presidential candidate Herman Cain, first broken by Politico, just keeps getting bigger. In addition to the two women who filed formal complaints of harassment against Cain while he was head of the National Restaurant Association (NRA) in the late 1990s, a third woman has now come forward to complain that she was also harassed by him, although she did not file a complaint at the time.

The details of the allegations and the settlements received by the two women who did file formal complaints against Cain have been leaking out in fits and spurts. Meanwhile, Cain has denied any wrongdoing, but refused to offer any explanatory details.

As my co-columnist John Dean explains in his [recent column \(http://verdict.justia.com/2011/11/04/thoughts-on-the-politics-of-the-sexual-harassment-charges-against-herman-cain\)](http://verdict.justia.com/2011/11/04/thoughts-on-the-politics-of-the-sexual-harassment-charges-against-herman-cain), the political fallout, especially because of Cain's handling of the allegations, may be "lasting and ruinous." But we still do not have the whole story, due in large part to confidentiality clauses in the two settlement agreements that prevent the two women who did file suit from talking about their complaints. These two women risk being sued by the NRA for breach of contract if they step up and tell their side of the story without first securing a waiver of the confidentiality provision.

For this reason, we may never know exactly what happened at the NRA over a decade ago, and whether it constituted actionable sexual harassment. Certainly, we would be premature in drawing any definitive conclusions about Herman Cain's culpability as a sexual harasser. Yet, the allegations against Cain raise important questions about the law and practice of sexual harassment in the workplace that deserve to be answered whether or not the whole story ever comes to light.

Ultimately, Cain's own take on the situation raises some of the most important questions of all. In this column, I'll consider what Cain has said, over the years, about discrimination and sexual harassment in particular.

"This bill opens the door for opportunists who will use the legislation to make some money."

So warned Herman Cain in 1991, when he was president of Godfather's Pizza and when Congress was in the process of strengthening federal anti-discrimination law. Through the Civil Rights Act of 1991, Congress created the right of victims of intentional discrimination to seek money damages in court, rather than just equitable relief (that is, a court order or the like). The Act also restored various aspects of anti-discrimination law that had been weakened by a series of Supreme Court rulings.

Cain would have been more accurate had he said that the 1991 bill opened the door to women, rather than to opportunists, and allowed them some compensation for wrongdoing, rather than a way "to make some money." Until very recently, women had to suffer in silence as they were routinely subjected to unwelcome sexual advances and other sexual conduct in the workplace, often at the hands of their bosses. In 1979, a novel survey in *Redbook* magazine found that 88 percent of 9000 women said they had experienced behaviors that we would now call sexual harassment in the workplace. And in 1981, a large study of federal workers conducted by the U.S. Merit Systems Protection Board reported that 65 percent of women surveyed said they had experienced sexual harassment. There was no clear legal definition of sexual harassment at the time, but the behavior the women reported included touching, fondling, groping, coercing sexual favors through opportunities for promotion or threats of firing, verbal harassment, and being exposed to sexually explicit graphics.

Then, in 1991, sexual harassment was thrust into the public consciousness during Clarence Thomas's Supreme Court confirmation hearings. Law professor Anita Hill accused Thomas of sexually harassing her when she worked for him at the Equal Employment Opportunity Commission (EEOC). Ironically, he was then the head of this agency, which is charged with enforcing federal anti-discrimination laws. The hearings were televised and the allegations widely publicized and discussed. Sexual harassment became a household term.

The Hill-Thomas hearings may have transformed sexual harassment into a mainstream issue, but the law of sexual harassment was already quite well-established by 1991. Title VII of the Civil Rights Act of 1964 had made sex discrimination illegal. And, the first cases alleging sexual harassment as a form of sex discrimination had been litigated in the mid-1970s, before judges who seemed quite mystified by the concept.

For example, one federal court, in *Corne v. Bausch & Lomb* (1975), dismissed a lawsuit brought by two women who alleged that their supervisor had subjected them to repeated verbal and physical advances at work, forcing them eventually to quit. The court described the supervisor's action as "nothing more than a personal proclivity, peculiarity or mannerism"; and held that by making advances, he was merely "satisfying a personal urge." The court went on to observe that it would be "ludicrous" to find this conduct to violate Title VII, because the "only sure way an employer could avoid such charges would be to have employees who were asexual."

Even more disturbingly, a case decided the following year dismissed a Title VII lawsuit alleging rape by a supervisor on the theory that just because a rape occurred at work, rather than in a back alley, did not transform it into a form of workplace discrimination.

But the federal courts got religion soon thereafter. In 1979, Catharine MacKinnon published a highly influential book, *The Sexual Harassment of Working Women*, in which she articulated both a theory and a practical framework for understanding sexual harassment in the workplace as a form of sex discrimination. Then, in 1980, the EEOC, under the direction of Eleanor Holmes Norton, adopted guidelines that addressed the problem of sexual harassment. Those guidelines, readily adopted by judges who were basically at sea when faced with the first wave of harassment cases, still form the backbone of sexual harassment law.

Then in 1986, the U.S. Supreme Court weighed in to affirm that sexual harassment is a form of intentional sex discrimination and, for that reason, unlawful. In that case, *Meritor Savings Bank v. Vinson* (<http://supreme.justia.com/us/477/57/case.html>), the Court endorsed the EEOC's approach to defining actionable sexual harassment. It also articulated some general principles by which to assess employer liability – a separate question about when employers should be held responsible for harassment that has been committed by their employees.

By the late 1990s, when the alleged harassment by Cain is claimed to have occurred, sexual harassment had made its way into the public eye, into federal and state anti-discrimination law, and into employment policies across the

country.

“If speaking to somebody is sexual harassment, give me a break.”

So sputtered a frustrated Herman Cain, when being interviewed by conservative radio personality Sean Hannity about the allegations against him. What does constitute unlawful sexual harassment? Can “speaking to somebody” be against the law? Obviously, it depends on what you say and to whom.

Under current Title VII law (which governs employers with at least 15 employees), unlawful sexual harassment can take one of two forms. One is so-called “quid pro quo”, or hostile environment harassment. (Sexual harassment is also prohibited by states’ fair employment laws, but these laws often mirror Title VII in scope.)

Quid pro quo harassment occurs when a person with supervisory authority takes a tangible employment action (such as demotion or firing) against a subordinate employee who refuses to submit to sexual advances. “Sleep with me or you’re fired,” is the classic example, as well as a good example of how “speaking to somebody” can amount to sexual harassment.

Hostile work environment harassment occurs when an employee is subjected to unwelcome conduct of a sexual nature that is so severe or so pervasive as to create an objectively and subjectively hostile, abusive, or offensive working environment. This is sex discrimination because it alters the victim’s working conditions on the basis of his or her sex. (Men, of course, are covered by sexual harassment law as well, though quite rarely the victims.) Hostile environments can be created by any number of behaviors – verbal or written comments, verbal or physical sexual advances, sexual assault, and the display of sexual images, to name just the most common examples.

Sometimes what is even more important in litigation than the question whether the conduct was actionable is the question whether the employer can be held liable for the conduct at issue. Two important Supreme Court decisions in 1998, *Faragher v. City of Boca Raton* (<http://supreme.justia.com/us/524/775/case.html>) and *Burlington Industries, Inc. v. Ellerth* (<http://supreme.justia.com/us/524/742/case.html>), established a framework for assigning employer liability for harassment. Based on agency principles—the legal standards that govern the relationship between a principal (such as a corporation) and the agent that acts on his or her behalf, such as an employee—the Court held that employers are automatically liable for harassment that results in a tangible employment action against the victim of supervisory harassment. Classic quid pro quo “Sleep with me or you’re fired” cases would fall under this rule.

For hostile environment harassment by a supervisor – defined as someone with the authority to hire and fire or otherwise tangibly affect the working conditions of the harassed employee—employers are presumptively liable. However, once that presumption is triggered, employers have the opportunity to avoid liability or damages through proof of a two-prong affirmative defense. They can assert that defense if they prove that they took reasonable care to prevent and correct harassment, and that the victim unreasonably failed to take advantage of corrective opportunities that were made available to her (for instance, by failing to file an internal complaint).

However, if hostile environment harassment occurs at the hands of the owner, president, or alter ego of a company that is an employer, then strict liability—that is, liability with no affirmative defense that can be proven and thus can allow the employer to escape liability—attaches, regardless of the nature of the harassment. Thus, harassment by someone in Herman Cain’s position at the NRA exposes the organization to a very high level of risk.

Individuals cannot be sued directly under Title VII, however, regardless of their position in a business entity.

Thus, Cain himself, as an individual, would not have faced a Title VII suit. This explains why he does not seem to have been a party to the two settlement agreements.

(Finally—although this rule does not seem to be at issue in the Cain scandal—for harassment by co-workers or third parties, employers are held only to a negligence standard, which means they are liable only if they knew or should have known about the harassment and failed to respond. Part of the rationale for this rule is that co-

workers generally do not have the same authority to act on the employer's behalf as a supervisor does.)

“I did a pretty good job of knowing where to draw the line.”

In this quote, Cain is pointing to the lack of sexual harassment complaints against him at the jobs he held prior to being CEO at the NRA, and putting them forth as a sort of testament to his line-drawing talent.

At the time he said this, Cain was being interviewed by Greta Van Susteren of Fox News, who had asked him whether he was just one of those “over-complimenters”—her term for a man who just doesn't know what sexual harassment is and thinks they're “you know, complimenting a woman.” Cain credits his apt line-drawing to knowing “the lady, the individual” and having a “good sense for where you cross the line relative to sexual harassment.” He also told Van Susteren, in response to her question whether he had a “roaming eye,” “I enjoy flowers, like everybody else.”

In fact, even the little we know so far suggests that Cain is not the line-drawing master he believes himself to be, when it comes to sexual harassment. Three different women have said he harassed them while he was the highest-ranking employee in the NRA; two of these filed formal complaints and received significant financial settlements; and one of the two, through a statement read by her lawyer (with permission of the NRA), claims that the harassing behaviors involved a “series of inappropriate behaviors and unwanted advances from the CEO” that took place over a two-month period.

At the margins, sexual harassment can involve line-drawing that can be exacerbated by gender-based differences in perceptions of social-sexual behavior in the workplace. Some studies have shown a slight difference in the way men and women perceive ambiguous behavior: what men view as flirtatious or invited may feel unwelcome and harassing to women. But gender differences make only a marginal difference in line-drawing, and, interestingly, they make no difference at all when the harassment is severe or overt.

In truth, most sexual harassment is pretty unambiguous. Harassers foist their sexual conduct or advances on unwelcoming subordinates or co-workers who feel powerless to stop it. And the law does not look at harassment from the perspective of the harasser, so relying on one's own ability to “draw the line” is dangerous business. Hostile environment harassment can occur even when the harasser has nothing but benign motives. The question is simply whether the victim experienced the conduct as hostile, offensive, or abusive, and whether a reasonable person in her shoes would also have experienced it that way.

Sexual harassment in the workplace cannot be reduced to a problem of over-complimenting; attempting to minimize the issue that way demeans the experience of modern women, forty percent of whom are still, in the modern era, likely to experience some form of sexual harassment in any two-year period. Cain's attempt to claim his alleged ogling of women was akin to enjoying the sight of flowers reflects a similar lack of understanding about the nature, severity, and prevalence of sexual harassment in the modern workplace, as well as its severe consequences for women.

And no matter how unwelcome sexual harassment is, study after study has shown that victims rarely file formal complaints after being harassed. Empirically, doing so is in fact the least likely response of a woman to an incident of sexual harassment at work. So the idea that women are filing sexual harassment lawsuits at the drop of a hat, as a way to make money, is simply false on the facts. The overwhelming majority of women just want the harassment to stop.

Moreover, victims tend to complain only about severe harassment, and only when they've exhausted all other avenues. They rightly fear retaliation from the harasser and/or their workplace, and they often worry about being socially ostracized at work and even about damaging the harasser's career.

Thus, a man who, like Cain, provoked two formal harassment complaints within just a year or two or each other ought to have his line-drawing license revoked. Such complaints are not lightly made.

“This is absolutely fabrication, man.”

So complained Cain to Sean Hannity. He added, “How many more ways can I say this stuff is totally fabricated?”

This is perhaps the worst of all of Cain’s responses to the harassment scandal. There is simply no evidence that sexual harassment complaints are frequently fabricated. All the evidence suggests to the contrary, as noted just above: Many employees who are victimized by harassment suffer in silence. Filing and pursuing an internal grievance or a lawsuit is grueling, personally intrusive, and very likely to trigger retaliation and job loss. And, ultimately, such grievances are hard to win. It is the rare person who would endure the required process on a trumped-up claim.

A survey of employers revealed that, in more than 90 percent of internal grievances involving harassment, the victim’s allegations are found to be true. Sometimes what she alleges is not a violation of the company’s harassment policy or of applicable law, but employers are almost never faced with an outright fabrication.

Certainly, then, it would be surprising if the NRA settled two cases close in time, for a significant amount of money, despite its belief that they were both fabricated. It is an insult to all employees that Cain would resort to such feeble attempts to defend himself, as I’ve discussed here, without offering any details of the incident that led to the claim—details that might well support the claimant.



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