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HARASSMENT ON THE HILL: A CRITICAL LOOK AT THE COLORADO LEGISLATURE'S SEXUAL HARASSMENT POLICY AND ITS EFFECTS

In October 2017, the *New York Times* published an exposé describing, in painstaking detail, allegations of sexual assault and harassment against top Hollywood producer Harvey Weinstein.¹ The scope of Weinstein's abuse is sensational, and one may begin to question how anyone could get away with such behavior over multiple decades without repercussions. Sadly, over the next few months, near-daily accusations surfaced alleging abuse and harassment by many other similarly situated men.² What thread did those accused have in common? Power. Those who have it are able to exploit, abuse, threaten, and intimidate those who do not. One with power likely also has money, fame, cultural influence, political capital, and the ability to make problems go away through any combination thereof.

One of the many reasons victims do not come forward is because of the stigma associated with sexual assault.³ Social media has helped tremendously in an effort to destigmatize sexual assault and to connect those who have suffered as a result. The “Me Too” movement is an example of how social media has connected survivors and helped the world at large conceptualize the ubiquity of sexual assault and harassment.⁴

The Me Too movement was created ten years ago by activist Tarana Burke,⁵ who called it “a catchphrase to be used from survivor to survivor to let folks know that they were not alone and that a movement for radical healing was happening and possible.”⁶ It was used as a Twitter hashtag by actress Alyssa Milano in the wake of the Weinstein scandal with the goal of giving people an understanding of “the magnitude of the

1. Jodi Kantor and Megan Twohey, *Harvey Weinstein Paid off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

2. Sarah Almukhtar, Michael Gold & Larry Buchanan, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall From Power*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html>.

3. Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOL. TODAY (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner>.

4. Rebecca Newman, *#MeToo: The Social Media Impact Statement*, GQ (Feb. 15, 2018), <http://www.gq-magazine.co.uk/article/metoo-backlash-social-media>.

5. Zahara Hill, *A Black Woman Created the “Me Too” Campaign Against Sexual Assault 10 Years Ago*, EBONY, (Oct. 18, 2017), <http://www.ebony.com/news-views/black-woman-me-too-movement-tarana-burke-alyssa-milano#axzz55htTJbmj>.

6. *Id.*

problem.”⁷ In twenty-four hours, the hashtag was tweeted almost a half-million times.⁸ The movement was not confined to Twitter; social media sites such as Facebook and Instagram were also inundated with posts by survivors sharing their stories.⁹ The hashtag helped show those who had experienced such trauma that they were sadly far less alone than they might have thought. It also helped those who may not have believed or understood the ubiquity of such behavior to understand its impact on those who have experienced it.

Obviously, those in power are not the only people who perpetuate workplace abuse and harassment. One of the valid criticisms of the Me Too movement is that its repercussions are only reaching those of high notoriety.¹⁰ To think that victims of such behavior do not exist in the average American workplace is to be completely out of touch with reality. There is important work that must be done to address the inadequacies -or a complete lack- of workplace sexual misconduct processes.

This Article, however, will focus on elected officials, a specific subset of powerful persons who have been shielded by secretive processes that do little to support their victims. Further, the policies currently in place permit settlements to be paid not out of their own pockets but through the use of public funds. I argue that public funds should not be able to be used to settle harassment claims, and that the processes by which such claims are handled must be more transparent.

As of January 11, 2018, at least fourteen legislators from ten states have resigned following accusations of sexual harassment or other misconduct.¹¹ There have been other repercussions for at least sixteen legislators from more than a dozen states, including their “voluntary or forced removal from legislative leadership positions.”¹² The fallout does not seem to be stopping: during the writing of this Article multiple state legislators were either accused of sexual misconduct or had sanctions levied against them. On February 6, 2018, Oregon state Senator Jeff Kruse announced his retirement in the wake of allegations of sexual harassment.¹³

7. Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/>.

8. Natalie Jarvey, *#MeToo Movement Tops 1.7 Million Tweets*, HOLLYWOOD REP. (Oct. 24, 2017), <https://www.hollywoodreporter.com/news/metoo-movement-tops-17-million-tweets-1051517>.

9. Maya Kosoff, *Can #MeToo Turn Instagram Into a "Grenade"?*, VANITY FAIR (Mar. 9, 2018), <https://www.vanityfair.com/news/2018/03/metoo-dietmadisonave-instagram-advertising-industry>

10. Gillian B. White, *The Glaring Blind Spot of the 'Me Too' Movement*, ATLANTIC (Nov. 22, 2017), <https://www.theatlantic.com/entertainment/archive/2017/11/the-glaring-blind-spot-of-the-metoo-movement/546458/>.

11. David A. Lieb, *States Tackling Shortcomings in Sexual Misconduct Policies*, U.S. NEWS & WORLD REP. (Jan. 11, 2018, 3:53 PM), <https://www.usnews.com/news/best-states/alaska/articles/2018-01-11/sexual-misconduct-policies-face-updates-in-state-capitols>.

12. *Id.*

13. Tracy Loew & Jonathan Bach, *Oregon State Senator Jeff Kruse Resigns Over Sexual Harassment Claims*, USA TODAY (Feb. 8, 2018, 9:20 PM),

On February 8, 2018, Arizona state Representative Don Shooter was expelled by his colleagues in a fifty-six to three vote over his repeated sexual harassment of female colleagues and subordinates.¹⁴ His expulsion appears to be the first such event since the beginning of the Me Too movement.¹⁵ On February 9, 2018, a complaint filed in November against Colorado Senator Larry Crowder was made public.¹⁶ The depth and breadth of the problem is clearly evident and requires immediate attention from every statehouse in the country, as well as the federal government.

Colorado legislators have made up an alarmingly large percentage of those accused. As of March 24, 2018, two Democratic representatives, a Democratic senator, and three Republican senators from the Centennial State have been accused of sexual harassment or misconduct by their colleagues and subordinates.¹⁷ On March 2, 2018, Representative Steve Lebsock was expelled from the Colorado legislature in a fifty-two to nine vote after multiple claims of sexual harassment against him were found to be credible.¹⁸ He was the first member of the house to be expelled since 1915.¹⁹ Claims against Senators Larry Crowder, Randy Baumgardner, and Jack Tate have been investigated by independent third parties, who have returned reports declaring their accusers' claims to be "more credible" than the Senators' denials.²⁰ However, despite the investigations' findings, there has been no disciplinary action taken against the Senators.²¹ Senator Baumgardner has voluntarily stepped down from the transportation committee, but denies any wrongdoing.²² Investigations of two other claims of sexual harassment against him are ongoing.²³ A

<https://www.usatoday.com/story/news/politics/2018/02/08/oregon-state-sen-jeff-kruse-resigns-over-sexual-harassment-claims/322222002/>.

14. Dustin Gardiner & Yvonne Wingett Sanchez, *Arizona House Expels Representative Don Shooter, Citing 'Dishonorable' Pattern of Workplace Harassment*, USA TODAY (Feb. 1, 2018, 11:41 AM), <https://www.usatoday.com/story/news/politics/legislature/2018/02/01/arizona-house-votes-whether-remove-rep-don-shooter-office-sex-harassment/1086577001/>.

15. *Id.*

16. John Frank, Jesse Paul & Brian Eason, *Another Colorado Lawmaker's Credible Sexual Harassment Complaint Emerges, as Democrats Mount Pressure for Top Republican to Act*, DENV. POST (Feb. 9, 2018, 12:42 PM), <https://www.denverpost.com/2018/02/09/larry-crowder-sexual-harassment-complaint-kevin-grantham/>.

17. *Id.* Complaints have been filed against Senator Randy Baumgardner, R-Hot Sulphur Springs; Senator Jack Tate, R-Centennial; Senator Larry Crowder, R-Alamosa; Representative Steve Lebsock, D-Thornton; and Representative Paul Rosenthal, D-Denver. *Id.*

18. *Lebsock Expelled From Colorado House Following Marathon Harassment Debate*, COLO. PUB. RADIO (Mar. 2, 2018, 2:16 PM), <https://www.cpr.org/news/story/steve-lebsock-legislature-expulsion>.

19. *Id.*

20. Frank, Paul & Eason, *supra* note 16.

21. Bente Birkeland, *Colorado Lawmaker Alleges Wrongful Restroom Use at Capitol*, KUNC (Mar. 19, 2018), <http://www.kunc.org/post/colorado-lawmaker-alleges-wrongful-restroom-use-capitol>.

22. James Anderson, *Colorado Senate Minority Leader Steps Down, Cites Misconduct*, ASSOCIATED PRESS (Mar. 22, 2018), <https://www.apnews.com/210c4486a13749aa8aac02576b282050>.

23. Birkeland, *supra* note 21.

claim against Democratic Senator Daniel Kagan is currently being investigated.²⁴ A claim against Representative Paul Rosenthal was dismissed, as it was found to have occurred prior to his election, and thus is outside of the general assembly's jurisdiction.²⁵ It is clear that the problems in the statehouse run deep. During an employee sexual harassment training only weeks after Representative Lebsock's expulsion, a legislative aide to Senator Jim Smallwood used Snapchat to send a grossly inappropriate message mocking the event.²⁶ He was fired immediately.²⁷

While the high number of government employees implicated in sexual misconduct cases in Colorado is itself alarming, the dramatic events surrounding the charges and their aftermath are equally troubling. In a surprising move, Lebsock changed his party affiliation from Democrat to Republican minutes before the vote to expel him took place.²⁸ It appears to be a retaliatory move which will allow Republicans to fill his seat.²⁹ A more shocking reveal was the decision by two Democrats to wear bulletproof vests to work out of fear of retaliation by Lebsock for their public support of his accusers.³⁰

The legislature does not appear to be getting any less acrimonious. Democrats are outraged by the complaint against Senator Daniel Kagan, which was filed by Senator Beth Martinez-Humenik, a Republican, who claims Senator Kagan used the women's restroom multiple times in the past year.³¹ Senator Kagan says it was an honest mistake because the restrooms are unmarked and that it only occurred once.³² Democrats believe the complaint is a retaliatory response to their resolution to expel Republican Senator Randy Baumgardner.³³ Senate President Kevin Grantham has declined to bring the resolution forth for a vote, despite the results of an independent investigation finding the claims credible.³⁴

24. *Id.*

25. Joey Bunch, *Colorado State Representative Susan Lontine Accuses Senator Larry Crowder of Sexual Harassment*, COLO. POL. (Feb. 8, 2018), <https://coloradopolitics.com/susan-lontine-crowder-harassment/>.

26. Joe St. George, *Colorado Capitol Aide Fired Over Sexual Harassment Social Media Posts*, FOX31 DENV. (Mar. 22, 2018, 5:32 PM), <http://kdvr.com/2018/03/22/colorado-capitol-aide-fired-over-sexual-harassment-social-media-posts/>.

27. *Id.*

28. John Bowden, *Colorado GOP makes claim on seat vacated by Democratic State Representative Expelled Over Misconduct Claims*, HILL (Mar. 2, 2018, 10:38 PM), <http://thehill.com/homenews/state-watch/376553-colorado-gop-makes-claim-on-seat-vacated-by-dem-state-rep-expelled-over>.

29. *Id.*

30. *Id.*

31. Sam Brasch, *Kagan Bathroom Complaint The Latest in Increasing Senate Acrimony Over Harassment*, COLO. PUB. RADIO (Mar. 21, 2018), <https://www.cpr.org/news/story/kagan-bathroom-complaint-the-latest-in-increasing-senate-acrimony-over-harassment>.

32. *Id.*

33. *Id.*

34. *Id.*

Causing more strife, Senator Grantham has requested that the Denver District Attorney's Office investigate all current and future allegations; if criminal liability were found, the offender would be prosecuted and expelled.³⁵ However, he made clear that expulsion would be predicated upon a finding of criminal liability.³⁶ This is problematic, as sexual harassment is not a criminal offense.³⁷ Criminal liability could be determined under the state's sexual assault or unlawful sexual contact statutes, but both are more specifically targeted to forceful sexual conduct rather than workplace harassment, which is often less overt.³⁸ Democrats believe that criminal prosecution and the legislature's decision to take action are questions that merit separate investigations, arguing that there is an independent legislative obligation to have "a work environment free from all forms of harassment."³⁹ A criminal investigation would take time and resources away from district attorneys that could be spent elsewhere. Having a comprehensive sexual harassment policy would allow the legislature to hold its members accountable by laying out a scheme of clearly defined impermissible conduct and the resulting punishment for engaging in it. Regardless, it is clear that changes must be made.

The current workplace harassment policy for the general assembly is problematic for a number of reasons. Foremost is the lack of clarity regarding the chain of command: a complaint may be issued to as many as a dozen different people.⁴⁰ This has caused confusion regarding who is in charge of the disciplinary process. While there is great benefit in the ability of a victim to choose to come forward to a person she feels comfortable with, the fact that the complaint will ultimately be investigated by the senior member of each chamber diminishes its benefit. Representative Susan Lontine, who lodged a complaint against Senator Larry Crowder, felt that complaining about a Republican male senator to the Republican male senate president could result in an unfair situation, politically and otherwise.⁴¹ Her fears were not unfounded: despite an independent third party finding her complaint "more credible"⁴² than Senator Crowder's denial, no disciplinary action against him has been taken. The report was released in December 2017.⁴³

35. Blair Miller, *Colorado Senate President Calls For Denver DA to Review Sexual Harassment Claims at Capitol*, ABC7 DENV. (Mar. 1, 2018, 11:42 AM), <https://www.thedenverchannel.com/news/politics/colorado-senate-president-calls-for-denver-da-to-review-sexual-harassment-claims-at-capitol>.

36. *Id.*

37. *Id.*

38. COLO. REV. STAT. § 18-3-402 (2013); COLO. REV. STAT. § 18-3-404 (2013).

39. Miller, *supra* note 35.

40. Brian Eason & Jesse Paul, *Culture Change, Not Policy, is Key to Addressing Sexual Harassment in the Colorado Legislature, Experts Say*, DENV. POST (Dec. 14, 2017, 9:32 AM), <https://www.denverpost.com/2017/12/14/colorado-legislature-sexual-harassment-policy/>.

41. *Id.*

42. Frank, Paul & Eason, *supra* note 16.

43. *Id.*

The second major problem is twofold: the sexual harassment policy does not lay out any steps for disciplinary action against those accused, which leads to the secondary issue that the leader of each house is charged with choosing and enforcing any action. This has led to different treatment of those accused simply dependent upon their party membership. Democratic Representatives Lebsack and Rosenthal were immediately stripped of their leadership positions by House Speaker Crisanta Duran, while the three Republican Senators have faced no disciplinary action. This is so despite the report of an independent third party, which found the claims against Senators Baumgardner and Crowder credible.⁴⁴ The lack of action by the Republican leaders spurred Democratic minority leader Lucia Guzman to step down.⁴⁵ She plans to use her remaining time in the term to combat workplace harassment.⁴⁶

More problematic is the sexual harassment policy's lack of clarity, which has led to infighting between the Democrats and Republicans, who each believe the other should be in charge of discipline. Senate President Kevin Grantham has said that he does not want to "react off the cuff" by stripping those accused of committee positions.⁴⁷ Due to the current policy's shortcomings, Senator Grantham is not required to act at all.

Finally, the entire process is extremely secretive, which protects the accused more than the victim and unfairly denies Colorado voters of necessary information. Complaints and investigative materials are not subject to public inspection unless the accused chooses to release them for purposes of maintaining their innocence.⁴⁸ This is harmful not only to the complainant, who may face backlash for bringing the complaint, but also to Colorado citizens, who are left in the dark about the misconduct of elected officials. Currently, even the amount of complaints levied against legislators are not available to the public so voters have no idea how rampant the problem is. Representative Lontine felt forced to go public regarding her complaint against Senator Larry Crowder, despite the backlash she will likely face, because "the public needs to know" about their elected officials' behavior.⁴⁹

Outside of the problems with the Colorado policy's lack of guidance is a larger issue of how sexual harassment claims may be settled and where the money, if any, comes from when they are. Since last year, when it was disclosed that sitting federal legislators had used public funds to pay settlement claims to victims, there has been a public outcry

44. Eason & Paul, *supra* note 40.

45. Anderson, *supra* note 22.

46. *Id.*

47. Frank, Paul & Eason, *supra* note 42.

48. COLO. REV. STAT. § 24-72-204(3)(a)(X)(A) (2017).

49. Bunch, *supra* note 25.

to end the practice.⁵⁰ Indeed, a mere three weeks after its introduction, a bill which would require legislators to pay back the Department of Treasury for any money used to settle a harassment claim was passed by the House of Representatives.⁵¹ Whether it passes in the Senate remains to be seen but is a hopeful sign, at least for claims against federal employees.

None of the six Colorado legislators have used public funds to settle their harassment claims, but there is no law in place which outlaws the practice, leaving the possibility open if any lawsuits are filed. While no public funds have been used in the legislative branch, the same cannot be said of the judicial branch. A *Denver Post* investigation found that \$55,000 of public funds were used to settle two sexual harassment cases against two Colorado judicial employees.⁵² In one case the accused employee was fired, and in the other the employee resigned.⁵³ It is not known whether either accused employee was a judge. In the judicial branch as well as the legislative branch, strict privacy regulations prevent citizens from understanding the full picture as to how public funds are being used, and the extent to which elected and appointed officials' conduct is shielded from public scrutiny.

Public funds should never be used to settle claims of sexual harassment or misconduct by elected officials. Those who are found guilty of such behavior should be forced to pay any restitution out of their own pockets and not allow taxpayers to cover the cost of their illegal behavior. To shield an elected wrongdoer from the consequences of their actions and to deny voters the knowledge of the events' existence is to take advantage of the trust the public puts in its elected officials. To remedy this problem, Colorado must put any complaints of sexual harassment or misconduct under the oversight of an independent third party. The records and findings of such an investigation should be made public (with the victim's name redacted if she or he so chooses) so voters have necessary knowledge regarding the character of their elected officials. Finally, any settlement should be paid for by the harasser, not the taxpayer.

Colorado is taking steps to rewrite its harassment policy, as well as to hire a third party to investigate any harassment claims. It is clear that the state is attempting to move in the right direction, but as seen by Representative Lontine's public declaration regarding the ineptitude of the

50. Jane Coaston, *There's a Little-Known Fund That Goes to Victims of Sexual Harassment on the Hill. You Pay For It*, VOX (Nov. 21, 2017, 1:10 PM), <https://www.vox.com/policy-and-politics/2017/11/21/16679292/secret-fund-pays-victims-sexual-harassment-the-hill>.

51. Jane Coaston, *Congress Needs a Reckoning. Will This Bill Do It?*, VOX (Feb. 6, 2018, 4:39 PM), <https://www.vox.com/policy-and-politics/2018/1/30/16933376/congress-sexual-harassment-fix-bill>.

52. David Migoya, *Colorado Judicial Departments Paid \$55,000 to Pair of Sexual Harassment Victims in Past Five Years*, DENV. POST (Dec. 27, 2017), <https://www.denverpost.com/2017/12/27/colorado-employee-sexual-harassment-settlements/>.

53. *Id.*

process, a solution must be presented sooner rather than later. With the microscope trained on the mightiest of our country and the voices of their victims amplified by the Me Too movement, the country is at a crossroads. Based on current legislation by the federal government and promises from the state of Colorado, one can only hope that those in power are held accountable for their actions. One may wish for a time where such behavior is not only intolerable but unimaginable. However, it is clear that both Colorado and the nation as a whole have a long way to go.

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