



The Our American States podcast—produced by the National Conference of State Legislatures—is where you hear compelling conversations that tell the story of America’s state legislatures, the people in them, the politics that compel them, and the important work of democracy.

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Tackling Sexual Harassment in the Legislature | OAS Episode 26 | Jan. 25, 2018

Welcome to Our American States, a podcast of meaningful conversations that tell the story of America’s state legislatures, the people in them, the politics that compel them, and the important work of democracy. For the National Conference of State Legislatures, I’m your host Gene Rose.

The #MeToo movement was started more than ten years ago to ensure survivors of sexual harassment knew that they were not alone in their journey. Focus on the movement has increased significantly in recent months and resulted in several industries, including government, to reexamine its sexual harassment policies.

In this episode of Our American States, we wanted to take a closer look at how state legislatures are responding, and we have as our guest a program principal at the National Conference of State Legislatures, Jonathan Griffin. Jonathan, welcome to the program.

Jon: Thanks for having me.

Gene: So Jonathan, there are two tracks I’d kind of like to get you to speak on today: one is legislation in states that might be changing because of the #MeToo movement; and the second, what legislatures are doing internally about their own sexual harassment policies and training.

But before we go into those lines of questioning, help us understand the legal aspect of sexual harassment here. Who defines sexual harassment? What laws come into play here?

Jon: Well, so sexual harassment was recognized as a form of sex discrimination under Title 7, or that violates Title 7 of the Civil Rights Act of 1964. Title 7 doesn’t specifically define sexual harassment. Federal regulations and guidelines set forth by the Equal Employment Opportunity Commission, EEOC, have started to define two specific types of behavior that would qualify as harassment. Those are quid pro quo harassment and hostile environment harassment.

Quid pro quo is a Latin phrase that roughly translates to: this for that. It’s kind of what people think of as their standard sexual harassment type of behavior, offering or demanding some sort of act or an omission of some act in order to gain some sort of promotion or not receive some sort of reprimand.

Hostile environment is a more pervasive type of harassment. That is when the person's work environment is so out of whack that just going into work and being around work can create a claim of sexual harassment. That's usually, you know, off-color jokes or just poor behavior by other employees.

A sexual harassment claim can include both quid pro quo and hostile environment if both are happening at the same time within a work environment.

Gene: And how does the Equal Employment Opportunity Commission come into play here? Can they come in and tell state legislatures if their policies need to be changed?

Jon: They can't do that. I guess if they were asked to come in and testify or provide guidance... they do promote guidelines for not just public employers, but for small business owners and various other employers of what type of behavior would not be allowed, or what a policy should look like, or what type of training should be offered. They also provide general guidelines for everyone about what type of behaviors can constitute sexual harassment. And they provide a reporting option.

So within your state, if they felt like they were suffering from harassment and didn't know who to go to, there's always the option of going directly to the EEOC with a complaint.

Gene: Just in general terms, most state legislatures are in session now. Are we seeing some movement to change laws just regarding sexual harassment in general?

Jon: Definitely. So far there has been a surprisingly large number of bills that have been introduced across the states regarding this topic, much more than in any previous year I'm aware of. Bills have come across in a few ways. Some have been resolutions to amend chamber rules to make sure that sexual harassment guidelines are clearer within the legislative body and what they apply to.

For instance, the Massachusetts House and Senate both initiated resolutions that would call for a complete review of the internal sexual harassment policies. Oklahoma and Virginia have similar legislation. Delaware's House and the Iowa House have both updated their code of ethics to have a larger component of sexual harassment language added to it.

In addition, we're seeing some more creative bills that we haven't really ever seen before. Illinois introduced legislation this year that would provide for a hotline for both public and private employees to anonymously be able to report to the Attorney General's office an option of sexual harassment, or an offense of sexual harassment.

New York has introduced legislation that would create a crime of official misconduct for sexual harassment for legislatures. And three states, California, Illinois and New York, have initiated legislation that would prohibit or require legislators to reimburse the use of state funds for settlements for sexual harassment.

Gene: And that's certainly something Congress has been criticized for recently.

Jon: Correct. And many of those bills echo the federal bills that are out there right now on the same subject.

Gene: Okay, and so what about internally in the policies legislatures operate under, are we seeing a lot of activity there as well?

Jon: Yes, a ton. I would guess virtually all, if not all states will at some point or are currently examining their sexual harassment policies. The increased attention to this has made this a priority issue I would imagine in virtually every state.

We've seen or we've been made aware of changes within the Maryland legislature's policies, the New Mexico legislature, and just today Florida's Senate released a new policy on sexual harassment.

Gene: What kind of changes are you seeing Jonathan? Are these policies becoming stronger, or how would you characterize them?

Jon: They are becoming stronger. Usually in what I've seen it's just through increased clarification or an increase in options for reporting, or just anything to make employees aware of their options going forward. Some have also included training requirements, but really you're seeing a strengthening coming in the way of making it a clear policy so that a layman or anyone who feels like they've suffered some sort of harassment can easily understand their options moving forward.

Gene: And what kind of training is out there for state legislators in terms of sexual harassment?

Jon: We know a handful of states that have made public statements about training. We're certainly seeing states offering internal policies or doing training more than ever before, but we don't have really a 50-state grasp or any grasp on what kind of universal things have been true throughout the training.

Gene: A lot of what I have read is attempts to try to make it easier for people who have suffered harassment to report it, that perhaps the culture does not permit that now. I'd like to get your reaction to that.

Jon: Yes, certainly, like I was saying before, I mean, that is really where we're seeing the policies change is to make sure that the policies provide a clear path for someone who is looking to make a complaint, a number of different options to who to make the claim to based on their level of comfort with whoever they're reporting to, or if it's against an administrator, that there's another option to report to somebody else. And just clear guidelines about what the investigation process includes, what options they have if they feel like they can't get a good internal investigation that they could also reach out externally, and then examples and an explanation for what type of remedial action would occur once the investigation was concluded.

Gene: What other research on this topic are you doing, Jonathan, that state legislatures across the country would be interested in?

Jon: This topic has typically been done very internally, not a lot of press releases or media coverage; states updating and changing. And right now we're seeing a lot more of a public facing movement to make sure that employees and legislators understand what the rules are within their chambers.

So what we're really working on right now is just getting together legislation, which as I said before, we're seeing more than we've ever seen before, and just working to continue compiling and updating policies and finding out where states are changing their policies for 2018.

Gene: So Jonathan, when NCSL is out doing training to legislatures or are there certain recommendations that you all make for legislatures to consider?

Jon: We have done some review of state policies and state training right now and after reviewing some of those, we do have some general recommendations. But we think it's very important that training should be mandatory, that it should be done in a classroom setting, and that there should be a live trainer in the legislature to assist with that training and to provide immediate response to questions.

We also think that the training should have not just a component that provides a summary of the national laws on sexual harassment, but there should also be someone who is an in-state or in-the-legislature expert to provide specific assistance regarding the laws or the rules specific to their chamber or their legislature.

We also believe that an HR director or someone tasked with receiving sexual harassment complaints should be present to answer any questions about the reporting process, and we feel like there should be a separate training for legislative staff and for membership just because of the unique portions of their jobs.

Gene: Jonathan, thank you so much for this information. We appreciate you being a guest on Our American States.

Jon: Thank you for having me.

Music and Gene:

Now we will hear from two sexual harassment experts who advise corporations and government about their policies and procedures. First we'll hear from Jenny Yang who most recently was one of five commissioners at the U.S. Equal Employment Opportunity Commission. She is very familiar with state legislatures and provides a unique perspective.

Yang: I am a Commissioner at the U.S. Equal Employment Opportunity Commission. I have been there for now over four and a half years, and I am winding up my term shortly. I was our former Chair for about two and a half years.

I think now is an incredibly important time for us to make broad organizational change, to use this opportunity of awareness to get the real buy-in from all levels in organizations and particularly in the leadership.

It's been over 30 years since the Supreme Court recognized that sexual harassment is sex discrimination that violates Title 7 of the Civil Rights Act of 1964. That's one of the civil rights statutes that the EEOC enforces. And we saw across our offices harassment cases on all bases. We get about 90,000 charges a year and harassment makes up over 30% of those charges. About 46% of all of our charges involve sexual harassment.

So we see harassment on a number of different bases and all of my colleagues on the commission have had the same experience where we are just shocked when we see the magnitude of the kinds of harassment issues that we're litigating across the country.

And so what we wanted to do with this taskforce is understand: What can employers be doing to prevent this? What can we be doing to raise awareness? And what are some of those solutions? Because people know that there's a problem, yet we still see this occurring, and it's been happening for decades.

Gene: Yang provides her analysis of harassment and how it is tied to discrimination, and discusses the types of policies that should be in place to address sexual harassment.

Yang: As a start place, it is against the law to allow harassment because it is a form of discrimination; so sex-based harassment is discrimination. And our job at the EEOC and really everyone's job is to support equal opportunity for everyone in the workplace. So we don't want to create an environment where people have all these barriers to just doing their job. And from a broader, moral level, particularly at a state legislature, right, where you have that public trust, there is that obligation to allow everyone to serve. The government can serve its people better when it is inclusive, diverse and representative, and you're not going to be able to create that kind of environment if certain people don't feel welcome in that environment. So ultimately the government can better serve all its constituency where they have that kind of inclusive environment.

Encouraging people to come forward when they see a problem is part of the culture change. Particularly supervisors really should be obligated to report any conduct that they're aware of or have reason to believe may be a problem. So I think that's an important component of the training and the policy, so supervisors understand their role.

But anyone can really have a powerful role in stepping forward to even, maybe not right when the situation happened if that's too uncomfortable, but pulling people aside afterwards, either the person who may be subject to the harassment or the harasser, to try to understand if there is something that they can do to intervene or to report it when they have a problem.

One of the things that we did as an outgrowth of the taskforce is develop a new respectful workplace training. We wanted to innovate and think about how we can provide support for that cultural change. So that's something that the EEOC offers.

Gene: Yang says it's important to have procedures that allow for resolution of a reported incident of sexual harassment.

Yang: You also need to have well-trained investigators. Sometimes we've seen investigators who are not really trained on how to do an investigation. We've seen people have their administrative assistant go up and try to investigate some very senior person in the company, and that great imbalance of power is also a problem. So often it helps to have even external third parties doing investigations, particularly where you have senior individuals involved.

So there are multiple steps. There isn't just one thing. But the most important thing is leadership and accountability. You need all these other things as well, but they won't work unless people authentically believe there is a real commitment to doing something about it if there's a problem.

What I often have seen is that these issues are just really difficult for people to talk about. It's embarrassing, the topics, both for the person coming forward as well as the people who are in leadership who need to talk to people and understand what happened. So there is a real temptation to just hope it will go away, or give someone one warning and say: don't do it again. But that kind of slap on the wrist both sends a message to people: look, it's not worth coming forward, and it doesn't provide real accountability. I think it's really important for the organization to understand what message they're sending to everyone in the organization by their response when there is a problem.

Gene: Legislatures need to be aware of the various forms of sexual harassment that can take place.

Yang: Unacceptable behavior in the legislature can take a variety of forms. It can involve people who are employees on the staff that may be asked for sexual favors in exchange for a promotion or the opportunity to work on an important matter. It could involve harassment of a lobbyist who may not be an employee of the organization, but has business before the legislature, and that is also problematic.

It can involve people who are even independent contractors who work in the facility. You may have janitorial staff that work for another company, but are being subject to harassment in your building; cafeteria workers, security folks, others. So I think it's important for the legislator to think about the broad group of people who are impacted.

Interns can be another group of people who are particularly vulnerable to harassment since they are younger, many in their first jobs, and may not know how to respond. So they can be prey for people who have done this before and know that they can more likely get away with it. So it's important that even some of the temporary workers who may come as an intern understand the policy.

One of the mistakes some employers make is they only provide their policy on anti-harassment reporting to permanent employees. But if you're coming in as an intern or some temporary employee or independent contractor, they don't provide you with that information. So we've had people come in at our commission meeting and in cases and they were temporary workers – never got the policy – had a supervisor harassing them, and really didn't know what to do to report that harassment.

Another risk factor is alcohol: tolerated, consumed at social events and others can reduce people's inhibitions, as can being in a very powerful position. Some of the research shows that

can also reduce people's inhibitions and encourage them to behave in a way that's not appropriate.

Another risk factor is having a young workforce. You also have a lot of young people working in the legislature, some as interns, others in their first jobs, and that can also be a significant problem.

So where you have a very male-dominated workforce, particularly where you have leadership that is not particularly diverse, that can exacerbate the problems.

Gene: Changing behaviors and the culture is critical to have an honest and transparent system.

Yang: Well what we've seen is one of the most effective ways to change behavior is to create systems. It's very important that you have a complaint mechanism as well as an investigatory body that has credibility and authority within your organization, because if you don't give that function sufficient independence and resources, it won't have the ability to really root out and address the problems.

So in order for the leadership to demonstrate that they are holding themselves accountable, they really do need to create those policies and practices that are not just on paper good, but in practice working. And so there's a real need to check: Are these practices working? That can be in the form of focus groups conducted by a third party, so that you can get frank answers. It can be climate surveys that are done anonymously, so people can give you that feedback as to whether it's working. But we can't be afraid to look under the hood and to get that information.

Gene: Now we hear from Jonathan Segal, another sexual harassment training expert.

Segal: I've been a lawyer for more than 25 years and I am an employment lawyer that works on the management side. My focus is entirely prevention. Back in 1991, I began to focus on harassment, saw this as a big problem in society, saw it and still see it as a symptom of even a bigger issue of the role that women are assigned. This to me is not simply an isolated issue.

And so what I do in my work is try to help companies not just avoid legal risk, but to prevent harm to individuals. I am hopeful. I wrote an article referring to this as a great awakening. I always believed it was a serious problem. It's more serious than I believed.

Awareness is fine. I think the denial has been shattered by the courageous silence breakers. Now that the denial has been shattered, what do we do? And it can't be: training one and done. We need to look at systemically: What is in legislatures that might make it more likely for this to happen? What is there in legislatures that might make good people act not in good ways, be complicit and be silent? I think the awareness is all good.

Gene: Segal says sexual harassment awareness sometimes brings unintended consequences.

Segal: The major concern that I would have would be that some man might say: "Oh my goodness, everything I say or do could get me in trouble. So I'm going to avoid those who could misconstrue me." And therefore, they will avoid women, and when more men have more power in legislatures than women, then more women would be denied opportunities. There are safe

ways to mentor, safe ways to socialize. Avoidance, a form of discrimination if material enough, is not a strategy to combat harassment.

So an issue for legislatures to talk about would be: How do we make sure that we include women or men in opportunities, but in a way we're not exposing them to hostile behavior, harassing behavior, even if it wouldn't rise to the level of illegality? It doesn't have to be unlawful. And I think that's a real important point to think about.

The other thing I do worry a bit about is, and the EEOC taskforce talked about this, the zero tolerance messaging. Well, if we send the message zero tolerance, what that can do is say: we're going to ignore the fact that not all misconduct warrants corrective action, prompt and proportionate. But not all misconduct is the same. By no means condoning it, a "sexist," and I put it in quotes, joke must be responded to, but it's not the same as a sexual assault. And if we say zero tolerance, I have two fears. One is there are many women and some men who will say: I just want it to stop. I don't want the person fired. And then they may suffer in silence because they don't want someone else to suffer more. They need to know it will be proportionate, so they will feel more empowered to come forward.

I don't want them to think: my only choice in every case is terminate or do nothing, 'cause then they may do nothing. So I think we can say zero tolerance for unacceptable conduct; proportionate action depending on what it is. I think messaging is real important here.

Gene: Legislators and legislative leaders, Segal says, need to be held accountable.

Segal: If we train and educate, but there's no accountability, I'm not sure that training or education is worth a lot. People need to be held accountable and that is particularly important at the top. The more power you have, the more the voters, the more those who work for you expect from you. And, you know, it's interesting 'cause it may not simply be the voters you need to think about. You may need to think about the person on your staff that won't come to you when there is a problem brewing because they don't respect you.

So I think leaders need to be very thoughtful in modeling respectful behavior. I learned from the taskforce that disrespectful or uncivil behavior can be a gateway drug to harassment, that when we're disrespectful it sort of takes the lid off of what otherwise might not happen. And I've seen that in other workplaces too – harassing behavior then follows.

But it's not just what we don't do. It's what we expect of leaders to do. And that is if they see it or they hear it, they need to respond to it. If you are a leader, there is no such thing as being a passive bystander. By your silence you send a very strong message. That's really important and I think in the state legislatures, it's probably three to one men to women. That's particularly important. You know, we can't put the burden on women alone. Women don't need paternalistic rescuing. Women just need an equal shot, and that means that men can't sit back and just watch. Men need to be partners, allies in making sure that what's unacceptable doesn't occur. And by the way, you don't need a daughter to stand up when you see sexually harassing conduct. You just need to have a spine and a conscience.

Gene: Segal says people need to trust the system.

Segal: If no one is raising concerns, then they don't trust the system. And then you have to ask yourself: Why? Is your anti-retaliation policy strong enough? Is your anti-retaliation messaging strong enough? And I think you can change culture in part if you give people reasons why. I believe most people are good people and most people don't want to see fellow human beings harmed. So to me number one is preventing harm.

And we're not just talking about a legal issue. We're talking potentially about robbing someone of their dignity and respect, depriving someone the opportunity to achieve.

Gene: Segal says there are correct ways to respond if legislators overhear or witness inappropriate behavior.

Segal: There are two things we want to avoid, and one of them is re-victimization. Re-victimization would be someone makes a slur against women of color and then the person with power looked to the woman of color and says: "Are you okay with that?" Or "He didn't mean to offend you." Now the burden is on her! Or paternalism: "I don't want to hear that language. That may offend the ladies." And I use that expression consciously. I don't want to hear that 'cause that offends me!

Do you ever have that moment where you wake up at 3:00 in the morning? I know I do... and I say to myself: boy, I wish I had said this. And I want to go back and say: Can we replay this conversation? Sometimes I say: By the way, if you think you should have said something yesterday, ya can still say it today! "I was thinking last night about the comment that you made. Not okay. Let me tell you why." You can still do the right thing.

But sometimes people that seem like they're so good on the spot, it's 'cause they have the top-of-mind answers ready. "I'm sorry I offended you" is a non-apology! What that may be heard is: "I'm sorry that you're so sensitive."

Try this one: "Thank you for telling me. I won't do that again." If someone has the courage to tell you, whether it be a colleague or a subordinate, that you did something wrong, there's some respect they're showing you. They believe that you're teachable, that you're respectful.

Music and Gene VO:

And that concludes this edition of Our American States. We invite you to subscribe to this podcast on iTunes and Google Play. Until our next episode, this is Gene Rose for the National Conference of State Legislatures. Thanks for listening.