The Practitioner's Guide to

COLORADO EMPLOYMENT LAW

SECOND EDITION

VOLUMES 1 & 2

SEAN R. GALLAGHER
KATHRYN E. MILLER
JESSICA BROWN
Managing Editors

The Colorado Anti-Discrimination Act

Gillian McKean Bidgood, Esq.
Qusair Mohamedbhai, Esq.

A chapter in *The Practitioner's Guide to Colorado Employment Law*.

Information regarding this book can be found at http://cle.cobar.org/Books/ProductInfo/productcd/ZPGCEL08B.aspx

CONTINUING LEGAL EDUCATION IN COLORADO, INC.
COLORADO BAR ASSOCIATION • DENVER BAR ASSOCIATION

Chapter 4

THE COLORADO ANTI-DISCRIMINATION ACT

Gillian McKean Bidgood, Esq.*
Qusair Mohamedbhai, Esq.

SYNOPSIS

§ 4.1 • GENERAL PROVISIONS

§ 4.1.1—Overview

Colorado's Anti-Discrimination Act (CADA) prohibits discrimination based on protected status in the workplace, housing, and public accommodations. Categories protected include disability, race, creed, color, sex, sexual orientation, religion, age, national origin or ancestry, victims of domestic abuse, marital status, and "lawful off-duty activities." C.R.S. § 24-34-402(1)(a). Under CADA, it is a discriminatory or unfair employment practice for an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation against any person otherwise qualified because of that individual's protected status. Employment agencies, labor unions, and a variety of other labor organizations are also prohibited from discrimination on these bases. CADA applies to employees, job applicants, and members of labor organizations. Broader than federal law, CADA applies to state and local governments, employment agencies, labor unions, and virtually all employers.

CADA established a state agency, the Colorado Civil Rights Division (CCRD), which is charged with its enforcement and with eliminating discriminatory practices in the workplace. The CCRD is supervised by the Colorado Civil Rights Commission (Commission), whose members are appointed by the governor. Aggrieved individuals must file a charge of discrimination with the CCRD within six months of notice of the claimed discriminatory treatment and exhaust administrative procedures before earning the right to file a private state court action. Relevant statutory provisions may be found at C.R.S. §§ 24-34-301, *et seq.*, and the CCRD's Rules are codified in 3 C.C.R. 708-1.

CADA was amended in 2007 to add a proscription against sexual orientation discrimination and a safe harbor for religious organizations, and to eliminate the possibility of an employer attorney fee award in cases alleging violation of the lawful off-the-job activity statute. CADA was modestly expanded by legislative efforts in 2008 and 2009.

CADA was also amended in 2013 by HB 13-1136, the Job Protection and Civil Rights Enforcement Act of 2013. These amendments *go into effect January 1, 2015, and apply only to causes of action accruing on or after January 1, 2015*. The principal aim of the bill is to substantially strengthen the remedies available to employees who prove violations of CADA. The Job Protection and Civil Rights Enforcement Act of 2013 does not add any new rights to CADA. Feb. 14, 2013 Session, 4:28. Rather, the law repeals, reenacts, and amends portions of C.R.S. Title 24, Article 34, Parts 3 and 4 ("Colorado Civil Rights Division" and "Employment Practices," respectively).

Practice Pointer

CADA applies to virtually all employers and protects more categories of individuals than federal law. Upcoming changes in the remedies provisions of CADA will make it even more important for smaller employers to understand employment law. While it is unclear what the actual impacts will be, enhanced remedies and the availability of attorney fees will likely allow employees increased access to counsel, and the potential for increased litigation for employers.

§ 4.1.2—Remedies Under CADA

Under CADA, the Commission or a court may award or require reinstatement or hiring of employees, back pay (for up to two years prior to the filing of the charge of discrimination, reduced by any amount that was or could have been earned with reasonable diligence), front pay, or "any other equitable relief the commission or court deems appropriate." C.R.S. § 24-34-405(2)(a). In addition, once the amendments to CADA take effect, the Commission or a court may award compensatory and punitive damages against a defendant found to have engaged in intentional discriminatory or unfair employment practices. However, neither the Commission, nor a commissioner, nor an administrative law judge (ALJ) has the authority to award compensatory or punitive damages for CADA violations. The State Personnel Board is also unable to award damages to state employees for intentional discrimination or unfair employment practices. Aggrieved parties seeking those damages must file suit in a court of competent jurisdiction to recover those damages. Punitive damages are not recoverable against the state or any subdivision thereof. C.R.S. § 24-34-405(8)(b). Under the amendments to CADA, where plaintiffs in civil actions filed under Part 4 (employment) are seeking compensatory or punitive damages, either party may demand a trial by jury.

Although the primary aim of the Job Protection and Civil Rights Enforcement Act of 2013 is to add compensatory and punitive damages remedies for violations of CADA, compensatory and punitive damages are not available where only disparate impact is shown. C.R.S. § 24-34-405(3)(a). In order for a plaintiff to recover punitive damages, he or she must show by "clear and convincing evidence that the defendant engaged in a discriminatory or unfair employment practice with malice or reckless indifference to the rights of the plaintiff. However, if the defendant demonstrates good-faith efforts to comply" with this part and "prevent discriminatory and unfair employment practices in the workplace, no punitive damages shall be awarded." C.R.S. § 24-34-405(3)(b)(I). Punitive damages are also not available in civil actions for failure to make reasonable accommodations for a person with a disability if the defendant made a good-faith effort to identify and make such an accommodation and it would cause an undue hardship on the operation of the defendant's business. C.R.S. § 24-34-405(3)(b)(II).

Additionally, under the amendments to CADA, a court may award reasonable attorney fees and costs to the prevailing plaintiff for any civil action under Part 4 (no longer just for off-duty conduct cases). If a court finds that an action brought "was frivolous, groundless, or vexatious," the court may award costs and attorney fees to the defendant. C.R.S. § 24-34-405(5).

For discrimination based on age, a plaintiff in a civil action is entitled only to the relief authorized in subsection (2) and in 29 U.S.C. § 626(b)[1] and 29 U.S.C. § 216(b).[2] That is, for age discrimination there are no punitive damages. However, a plaintiff is not precluded from bringing additional discrimination claims alongside an age discrimination claim. C.R.S. § 24-34-405(3)(g).

In determining the appropriate level of damages to award a plaintiff who is a victim of intentional discriminatory or unfair employment practices, "the court shall consider the size and assets of the defendant and the egregiousness of the intentional discriminatory or unfair employment practice." C.R.S. § 24-34-405(3)(d)(III). Those compensatory and punitive damages are "in addition to, and do not include, front pay, back pay, interest on back pay, or any other type of relief awarded pursuant to subsection (2) of this section." C.R.S. § 24-34-405(3)(e).

If the Commission or the State Personnel Board makes a finding of intentional discrimination, an aggrieved party may file a civil action in a district court seeking compensatory and punitive damages. C.R.S. § 24-34-405(8)(c)(I). For complaints filed with the Commission, plaintiffs must file the action for damages within "thirty days after the date the commission mails notice of the order issued pursuant to 24-34-306(9) and subsection (2) of this section." C.R.S. § 24-34-405(8)(c)(II). Failure to file within that 30 days bars the action for damages, and the Commission's order becomes final and subject to judicial review. C.R.S. § 24-34-405(8)(c)(II). For complaints filed with the State Personnel Board, if an ALJ issues the initial written decision on behalf of the board, plaintiffs "may not file a civil action until after the expiration of the thirty-day period specified in section 24-50-125.4(4) for filing an appeal." If a party does not file an appeal of the ALJ's initial decision with the State Personnel Board, the aggrieved party must file the civil action for compensatory damages within 30 days after the expiration of the appeal period specified in C.R.S. § 24-50-125.4(4). If the aggrieved party does file an appeal with the State Personnel Board, he or she must file the civil action for compensatory damages within 30 days after the board transmits notice of its decision on the appeal. C.R.S. § 24-34-405(8)(c)(III)(A). Failure to file an action for compensatory damages within the 30 days after the appeal period expires or the date the board's decision is transmitted, whichever is applicable, bars any action for compensatory damages. C.R.S. § 24-34-405(8)(c)(III)(B).

If the aggrieved party initially files a complaint with the Commission, that party and the district court shall serve a copy of the civil action complaint on the Commission, which, upon receipt by the Commission, automatically stays the Commission's order pending the outcome of the civil action. C.R.S. § 24-34-405(8)(d)(I). If the aggrieved party is an applicant or employee in the state personnel system, that party and the district court shall serve a copy on the State Personnel Board, which, upon receipt by the board, automatically stays the board's decision pending the outcome of the civil action. C.R.S. § 24-34-405(8)(d)(II). Where either the Commission or the State Personnel Board makes a finding of intentional discrimination or unfair employment practice, the district court shall consider whether the aggrieved party is entitled to damages and determine the amount of any damages to be awarded.

Damages Caps

The Job Protection and Civil Rights Enforcement Act of 2013 is intended to hold all employers to the same anti-discrimination standard, regardless of how many people the employer employs. Thus, for violations of CADA, all employers are exposed to monetary liability, subject to statutory caps on compensatory and punitive damages. The total amount of compensatory and punitive damages awarded shall not exceed the following the amounts specified by 42 U.S.C. § 1981a(b)(3),[3] subject to the following exceptions for employers who employ fewer than 15 employees. C.R.S. §§ 24-34-405(3)(d)(I) and (II).

- One or more employees, but fewer than five employees in each of 20 or more weeks in the current or preceding calendar year, $10,000. C.R.S. § 24-34-405(3)(d)(II)(A).
- Five or more employees, but 14 or fewer employees in each of 20 or more weeks in the current of preceding calendar year, $25,000. C.R.S. § 24-34-405(3)(d)(II)(B).

CADA requires the Commission to investigate charges of discrimination. If the Commission finds that there is "probable cause" to believe a violation occurred, it first attempts to eliminate the practice by "conference, conciliation, and persuasion," followed by a cease and desist order if those methods are unsuccessful. C.R.S. §§ 24-34-306(2) and (9). Other remedies, which may be ordered alone or in combination, include "[r]einstatement or hiring of employees, with or without back pay . . . [f]ront pay; or [a]ny other equitable relief the commission or court deems appropriate." C.R.S. § 24-34-405. CADA permits but does not require an award of back pay. *Colo. Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1372-73 (Colo. 1988).

§ 4.1.3—Relationship To Federal Law And State Common Law

Federal and state anti-discrimination laws are cumulative, not pre-emptive, in nature. *Colo. Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963). Frequently, this means that employees may choose among the laws' protections and enforce their rights under the more favorable statutes. However, federal aviation laws do have a preemptive effect on Colorado's anti-discrimination laws to the extent that these laws "relate to" the services of an airline carrier. 49 U.S.C. app. § 1305; *Belgard v. United Airlines*, 857 P.2d 467, 469-70 (Colo. App. 1992). Thus, an airline pilot with a perceived visual disability is not entitled to the protections of CADA in seeking employment as an airline pilot. CADA was drafted to mirror federal anti-discrimination laws in many important respects, and federal case law is frequently used to interpret CADA and decide new questions. CADA does not preempt Colorado common law nor limit an employee's right to bring common law harassment claims or claims for employment-related torts. *Brooke v. Rest. Servs., Inc.*, 906 P.2d 66, 70 (Colo. 1995); *High v. JIK, Inc.*, 2013 U.S. Dist. LEXIS 125329 (D. Colo. Sept. 3, 2013). However, one U.S. District Court for the District of Colorado decision suggested without deciding that "CADA effectively pre-empts claims for wrongful discharge in violation of public policy where the policy in question is embodied by CADA's requirement of non-discrimination." *Gatuma v. Encore Elec. Inc.*, 2012 U.S. Dist. LEXIS 155394, at *15 (D. Colo. Oct. 30, 2012).

§ 4.1.4—Who Is Subject To CADA

CADA generally covers "any person employed by an employer, except a person in the domestic service of any person." C.R.S. § 24-34-401(2). An "employer" is any person employing other persons within the state and includes the State of Colorado and its political subdivisions and departments, school districts, and the Board of Regents of the University of Colorado, among others. C.R.S. § 24-34-401(3); *Colo. Civil Rights Comm'n v. Univ. of Colo.*, 759 P.2d 726 (Colo. 1988). Certified state employees must first use the state personnel procedures before filing a complaint with the CCRD. "Employer" does not include religious organizations or associations, except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing, and CADA does not apply to any religious organization with respect to its employment of individuals of a particular religion to perform work connected with its religious activities. C.R.S. §§ 24-34-402(6) and (7).

CADA covers employment agencies, which means "any person undertaking to procure employees or opportunities to work for any other person or holding itself out to be equipped to do so." C.R.S. § 24-34-401(4). Labor organizations and joint apprenticeship committees are also subject to CADA. C.R.S. §§ 24-34-401(5) and (6).

§ 4.2 • DISCRIMINATORY OR UNFAIR PRACTICES IN EMPLOYMENT

§ 4.2.1—Discriminatory Practices For Anyone

It is unlawful for anyone to participate in discrimination by aiding, abetting, inciting, compelling, or coercing the doing of any discriminatory or unfair employment practice; to obstruct or prevent any person from complying with CADA; or to attempt, either directly or indirectly, to commit any act defined as discriminatory under CADA. Intent to violate the Act is not required to establish a violation of this provision. *Colo. Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358 (Colo. 1988) (finding Travelers violated the Act by writing an employer's group insurance policy that discriminated against pregnant women). Further, it is a discriminatory or unfair practice to discriminate against any person because that person has opposed any discriminatory or unfair employment practice; because that person has filed a charge of discrimination with the Commission; or because that person has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to CADA. C.R.S. § 24-34-402(1)(e)(IV).

§ 4.2.2—Employer Discriminatory Practices

An employer may not refuse to hire, discharge, promote or demote, harass, or otherwise discriminate in matters of compensation or otherwise against any person otherwise qualified for employment because of disability, race, creed, color, sex, sexual orientation, religion, age, national origin, ancestry, or because the person is a victim of domestic abuse. C.R.S. § 24-34-402(1)(a); C.R.S. § 24-34-402.7(3). CADA was amended in 2009 to expand proscribed employer discrimination to include discrimination in *any* of the "terms, conditions or privileges of employment." C.R.S. § 24-34-402. The earlier version limited CCRD jurisdiction to the specific practices of discharge, refusal to hire, failure to promote or demote, harassment, and "other discrimination." A consistently applied, reasonable dress code is not a violation of the Act. C.R.S. § 24-34-402(5). An employer is only covered by the prohibition of discrimination on the basis of marital status if it employs 25 or more employees, and CADA only proscribes refusing to hire or discharging on this basis. Regarding discrimination based on lawful, off-duty activities, termination is the only adverse employment action covered by CADA.

Practice Pointer

Unlike federal law, CADA includes a specific provision that "harassment is not an illegal act unless a complaint is filed with the appropriate authority at the complainant's workplace and such authority fails to initiate a reasonable investigation of the complaint and take prompt, appropriate remedial action if appropriate." C.R.S. § 24-34-402(1)(a). This provision seems to require a plaintiff to prove all three conditions were met. Thus, CADA may be difficult to reconcile with existing federal law on harassment, which only limits an employer's liability where an employee failed to follow the employer's reporting procedure. However, there is no clear guidance on this issue. The Colorado Court of Appeals has suggested that a complaint to the employer may not be necessary where it would be futile. *Am. Legion v. Colo. Civ. Rights Comm'n*, 2011 Colo. App. LEXIS 319, *18-19 (Colo. App. Jan. 13, 2011).

It is a discriminatory practice for an employer to aid, abet, or protect others' discriminatory employment practices; to obstruct or prevent compliance; to discriminate against any person opposing a practice believed to be unlawful; or to discriminate in retraining or vocational programs. C.R.S. §§ 24-34-402(1)(e) and (f).

The 2008 amendments added protection for employees who inquire about or compare their wages:

> Unless otherwise permitted by federal law, [it is an unfair labor practice] for an employer to discharge, discipline, discriminate against, coerce, intimidate, threaten, or interfere with any employee or other person because the employee inquired about, disclosed, compared, or otherwise discussed the employee's wages; to require as a condition of employment nondisclosure by an employee of his or her wages; or to require an employee to sign a waiver or other document that purports to deny an employee the right to disclose his or her wage information. This paragraph (i) shall not apply to employers who are exempt from the provisions of the "National Labor Relations Act", 29 U.S.C. sec. 151 et seq.

C.R.S. § 24-34-402(1)(i).

Perhaps not wishing for employers to bear an undue burden in eradicating discrimination, CADA permits an employer (or labor organization, joint apprenticeship committee, or vocational school) to file a charge of discrimination *against* an employee or member, asking the Commission for assistance in obtaining compliance with the Act's provisions. C.R.S. § 24-34-404.

§ 4.2.3—Employers And Employment Agencies: Advertising And Publications

It is a discriminatory or unfair employment practice to discriminate in any type of publication, including advertising for employment. C.R.S. § 24-34-402(1)(d). The publisher, the employer, and any involved employment agency may each be held liable for a discriminatory advertisement or publication. Employers and employment agencies must carefully screen planned interview inquiries to avoid discriminatory questions in the hiring process. It is permissible to ask questions that pertain to necessary job requirements, even if those questions reveal information about an individual's protected status.

It is unlawful for an employment agency to refuse to list, properly classify, or refer for employment an individual otherwise qualified for a known available job because of the individual's protected status. An employment agency is expected to refuse to comply with an employer's request to screen or de-select applicants based on protected status. Failure to so refuse may result in agency liability for discrimination on either a direct basis or for aiding and abetting a discriminatory practice.

Employment agencies are prohibited from making pre-employment inquiries respecting familial status, plans to marry or have children, or the nature or severity of a physical handicap, and from asking any other questions pertaining to an individual's protected status. There are exceptions for situations where the bona fide occupational qualifications require inquiry into protected status (*e.g.*, questions about the ability to perform job-related functions are permissible). By way of example, it is unlawful to publish a help-wanted advertisement for a person who is "age 25-35," "young," "college student," "recent college graduate," "age 40-50," a "cleaning lady," "handyman," "Mexican landscaper," etc. Commission Rule 40.3. However, a help-wanted advertisement may properly state the specific physical requirements of a position (*e.g.*, the ability to lift in excess of 50 pounds, work outdoors in varying weather, etc.). C.R.S. § 24-34-402(1)(b); Commission Rule 60.2(E).

§ 4.2.4—Labor Organization Prohibited Practices

Labor organizations may not deny full membership or any membership benefits, or expel any individual, on account of the individual's protected status. Equal representation is expected in collective bargaining and labor dispute situations. The prohibitions regarding pre-employment inquiries and advertising also apply to labor organizations. C.R.S. §§ 24-34-402(1)(c) and (d). There are exceptions made for bona fide seniority systems and employee benefit plans that use years of service for purposes of calculating benefits. Commission Rule 40.4.

§ 4.3 • ENFORCEMENT BY THE COLORADO CIVIL RIGHTS DIVISION

§ 4.3.1—CCRD Authority And Structure

The Colorado Civil Rights Division (CCRD) is charged with enforcement of CADA. The CCRD is, in turn, supervised by the Commission, which includes approximately equal representation in the business and state government community.[4] It investigates charges, issues cease and desist orders, and holds hearings, as appropriate. The duties of the Commission "are geared toward eliminating discriminatory practices on a broad scale rather than addressing the harm such practices cause on a case-by-case basis." *Brooke*, 906 P.2d at 69. The statutes and regulations illuminate this objective by detailed description of the CCRD's duty to investigate and determine the "extent of unfair or discriminatory practices" and to "formulate plans for the elimination thereof by educational or other means"; to "issue publications and reports, promote goodwill among the various racial, religious, age, and ethnic groups of the state and which will tend to minimize or eliminate discriminatory or unfair practices"; to recommend policies and legislation to the governor and the legislature; and to "cooperate . . . with other agencies and organizations . . . in the planning and conducting of educational programs designed to eliminate racial, religious, cultural, age and intergroup tensions." C.R.S. § 24-34-305(1).

In 2009, CADA was amended to expand the duration and powers of the CCRD and to empower the division to hire more investigators and new support staff, and to initiate charges on its own behalf. Now, the Commission, a commissioner, or the attorney general on its own motion may make, sign, and file a charge alleging a discriminatory or unfair practice in cases where the Commission, a commissioner, or the attorney general determines that the alleged discriminatory or unfair practice imposes a significant societal or community impact. C.R.S. § 24-34-306(1)(b). When the Commission, a commissioner, or the attorney general files a charge, the remedy available for the discriminatory or unfair practice is limited to equitable relief to eliminate the discriminatory or unfair practice.

Practice Pointer

The CCRD and the federal Equal Employment Opportunity Commission (EEOC) are parties to a work-sharing agreement between the agencies. Thus, filings are considered duly filed for purposes of determining whether the filing was timely. The EEOC can only investigate and prosecute cases over which it would have independent jurisdiction under federal anti-discrimination laws. Thus, the EEOC will generally refer cases involving LGBT issues, marital status, and domestic abuse to the CCRD for action.

§ 4.3.2—Filing A Charge Of Discrimination

If an individual believes that he or she has suffered discriminatory treatment, a written, signed, and verified charge of discrimination must be filed with the CCRD within six months' notice of the claimed discriminatory treatment. C.R.S. §§ 24-34-306 and -403. In some circumstances, such as a charge of discrimination in advertisement, a charge may properly be filed against more than one person or entity. Filing the charge and exhausting agency administrative procedures are prerequisites to obtaining the right to sue in Colorado district court. The six-month period begins to run upon *notice* of a possible claim, which may be deemed to have been given in advance of the adverse employment action. For example, if an employee is given advance notice of a demotion or impending layoff, the six-month period will begin to run at the time of the notice and in advance of the actual action. Complainants under the Lawful Off-Duty Activities Statute, C.R.S. § 24-34-402.5, are not required to file a charge before filing a suit in district court.

Practice Pointer

Courts have become more and more stringent when it comes to whether an employee has appropriately exhausted his or her administrative remedies. Practitioners who represent claimants should treat a charge of discrimination like a court filing and, in most circumstances, add as much detail as possible. Conversely, practitioners who represent respondents should scrutinize charges of discrimination to determine whether the charge of discrimination provides sufficient notice of the conduct that the claimant alleges is unlawful.

Practice Pointer

The Colorado Court of Appeals has applied the doctrine of tolling to permit the filing of charges of discrimination outside the 180-day time period (discussed in § 4.3.3) in situations where the employer failed to post the required employee notice and the employee was able to prove that he or she did not have actual knowledge of the employer's CADA violation until after the employee consulted with an attorney. *Quicker v. Colo. Civil Rights Comm'n*, 747 P.2d 682 (Colo. App. 1987). CADA's notice-posting requirements are contained in Commission Rule 20.1.

§ 4.3.3—Investigation, Dismissal, And Obtaining The Right To Sue

After a charge of discrimination is filed, the CCRD serves it on the respondent/employer by mail, along with a request for information. The charging party and respondent are asked at this time if they wish to participate in a voluntary mediation, which is conducted by CCRD staff. See Chapter 24, "Settlement and Mediation," for more information on the mediation process. If the parties agree to participate in mediation, the respondent's deadline for responding is stayed pending the outcome of the mediation. If either party declines to participate or no settlement is reached at the mediation, the respondent will respond and the charge of discrimination will then be investigated to determine if probable cause exists for crediting the allegations of the charge.

An investigation is a systematic inquiry into the allegation of a charge of discrimination, and CCRD activities may include, but are not limited to, collecting and analyzing evidence, interviewing witnesses, issuing subpoenas, and holding informal fact-finding meetings with the parties. Commission Rule 10.2(J). If the agency requests a fact-finding meeting, attendance at the meeting

may yield valuable insight into the charge's merit, chances of settlement, and the Commission's viewpoint regarding the case. Strategies may be prepared based on the meeting's outcome.

At the conclusion of the investigation, the Commission will either dismiss the charges or issue a finding of probable cause. Dismissal of the charge constitutes exhaustion of administrative remedies, and the complainant is not required to participate further in administrative proceedings. *Montoya v. City of Colo. Springs*, 770 P.2d 1358 (Colo. App. 1989). If a charge is dismissed, the Commission must notify the charging party that it has 10 days in which to file an appeal. Filing of an appeal is optional, but if filed, the appeal will toll the deadline for filing a civil action until the conclusion of the appeal proceedings. On appeal, the Commission may: (1) reverse the director's decision and take further appropriate action; (2) remand the charge to the director for further investigation; or (3) uphold the director's decision. Commission Rule 10.6.

At any time during the investigation, a complainant may write a letter requesting that the administrative procedures be terminated and a right to sue letter be issued. Such a request must be granted if it is made 180 days or more after the charge is filed, and may be granted if made before the expiration of 180 days, if the Commission determines that the investigation cannot be completed within 180 days.

Practice Pointer

The charging party obtains the right to sue automatically upon dismissal at any phase of the administrative proceedings, and may also obtain the right to sue upon request. Within 90 days of the date of CCRD's mailing of the notice of the right to sue, the charging party must file a lawsuit in Colorado district court. Thereafter, the right to sue is lost. However, if charges were dual-filed with the EEOC, the notice of right to sue from CCRD does not trigger the 90-day limitation period for filing federal claims. Only the EEOC's notice of right to sue can trigger that period for federal claims. *Rodriguez v. Wet Ink, LLC*, 603 F.3d 810 (10th Cir. 2010).

§ 4.3.4—Proceedings After A Probable Cause Finding

If probable cause is found, the director provides the respondent with notice of the charges and orders the parties to participate in compulsory mediation, called a conciliation conference. The objective of the mediation is to eliminate the discriminatory or unfair practice. *See* C.R.S. § 24-34-306(2)(b)(II). If mediation fails, the Commission may hold a full administrative hearing that includes discovery and the right to subpoena and cross-examine witnesses, conducted using the Colorado Rules of Civil Procedure. At the conclusion of the hearing, an administrative law judge for the division will issue findings of fact and conclusions of law, and will either dismiss the charge or, if merit is found, issue a cease and desist order and invoke other authorized equitable remedies, as it deems appropriate. The charging party has the right to file a subsequent action in a Colorado district court within 90 days of conclusion of the agency action. C.R.S. § 24-34-306(2)(b)(I)(B).

§ 4.4 • LITIGATION OF A CADA CASE

§ 4.4.1—Burdens Of Proof And Production In CADA Discrimination Cases

CADA follows the federal civil rights statutes' model regarding burden of proof. Discrimination may be proved by direct evidence of discrimination (such as a verbal admission) or inferentially. An employee can establish a *prima facie* case by demonstrating that he or she is a member of a protected class, was otherwise qualified for his or her position, and that the employer fired the employee, failed to hire the employee, or took other adverse employment action against the employee in violation of CADA. Once an employee has made a *prima facie* showing of employment discrimination, the burden then shifts to the *employer* to articulate a legitimate business reason for the employment action. The employee retains the burden of proof, and must then show that the employer's articulated reason is not credible and is a pretext for discrimination. *Colo. Civil Rights Comm'n v. Big O Tires*, 940 P.2d 397, 399 (Colo. 1997).

A plaintiff may establish pretext by showing by substantial evidence that the employer's proffered reason for acting adversely towards him or her is unworthy of belief and that the termination was motivated, at least in part, by illegal discrimination. *See Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995). Some examples of cases worthy of jury evaluation on the issue of pretext include *Texas Southland Corp. v. Hogue*, 497 P.2d 1275 (Colo. App. 1972), where there was evidence that the employer did not actually learn of the facts supporting its claimed reason for termination until after the employee's termination, and *St. Luke's Hospital v. Colorado Civil Rights Commission*, 702 P.2d 758 (Colo. App. 1985), where the claimant, who was black, offered evidence that employees of other races committed offenses similar to those that the employer claimed led to the claimant's termination, yet those employees were not terminated.

A claimant may also survive summary judgment by introducing affirmative evidence of a discriminatory motive. *Danville v. Reg'l Lab Corp.*, 292 F.3d 1246, 1249-50 (10th Cir. 2002). The plaintiff does not have the burden of proving that a defendant's proffered reasons were false, or that a discriminatory factor was the "sole" motivating factor in the employment decision. *James v. Sears, Roebuck & Co., Inc.*, 21 F.3d 989, 992 (10th Cir. 1994). Instead, the employee must show by competent evidence that unlawful intent was a determining factor and that the decision violates the statute. *Big O Tires, Inc.*, 940 P.2d at 399.

In disability discrimination cases, the burden of proof actually shifts to the employer after the employee's showing of a *prima facie* case, and the employer must show by a preponderance of the evidence that the disqualifying factors were justified under the business necessity defense or that there is no reasonable accommodation that the employer can make with regard to the handicap, that the handicap actually disqualifies the applicant from the job, and that the handicap has significant impact on the job. *Colo. Civil Rights Comm'n v. N. Wash. Fire Prot. Dist.*, 772 P.2d 70, 80 (Colo. 1989).

§ 4.4.2—Case And Statutory Analysis — Prohibited Practices

Age Discrimination

Under the current version of CADA, age discrimination is permissible under the following circumstances:

1) The employee is under 40 or age 70 or older;
2) Where age is a bona fide occupational qualification reasonably necessary to an employer's normal business operation, or where the differentiation is based on reasonable factors other than age;
3) Where age discrimination is necessary to observe the terms of a plan or program that rewards employees based on years of service, age, or both, unless the plan "is a subterfuge to evade the purposes of [the Anti-Discrimination Act]"; or
4) "To compel the retirement of any employee who is sixty-five years of age or older and under seventy years of age and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer and if such plan equals, in the aggregate, at least [$44,000]."

C.R.S. §§ 24-34-301 and -402(4)(a) through (c).

Claims of age discrimination are also affected by the Job Protection and Civil Rights Enforcement Act of 2013, which amends CADA's definition of "age." Beginning in January 2015, "age" means a chronological age of at least 40 years and there will no longer be a prohibition on claims filed by people 70 years old or older. Thus, once the amendments become effective, anyone over 40 may pursue an age claim under CADA.

Federal age discrimination cases are used to interpret the CADA age discrimination provisions. Age discrimination must be established by inferential or direct evidence, and more than a mere belief that age discrimination occurred is necessary to establish pretext. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195 (Colo. 1997).

Disability Discrimination

CADA prohibits discrimination against any person otherwise qualified because of a disability. The statute makes exceptions for situations in which there is no reasonable accommodation, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job. C.R.S. § 24-34-402(1)(a). An employer may make an agreement with an employee for a part-time schedule (up to 20 hours per week) as part of a therapeutic training program lasting no more than 18 months. C.R.S. § 24-34-402(3). CADA's disability discrimination provisions are "substantially equivalent" to the federal Americans with Disabilities Act, and these statutes should be interpreted consistently whenever possible. Commission Rule 60.1(C).

Under CADA, "'[d]isability' has the same meaning as set forth in the federal 'Americans with Disabilities Act of 1990.'" C.R.S. § 24-34-301(2.5). Thus, a person is disabled if that person: (1) has a

physical or mental impairment that substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(1). Major life activities are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, touching, learning, and working. Commission Rule 60.1(D)(1)(c).

A disability substantially limits performance of a major life activity only if it prevents or severely restricts an individual from performing that activity. "Substantial" suggests that the impairment must be of "ample and considerable amounts," and of a permanent or long-term nature. *Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 254 (Colo. App. 2006) (finding Attention Deficit Disorder was not a substantially limiting condition where the claimant was still able to progress in his high school education).

An employer must make a reasonable accommodation for a disabled person who is "otherwise qualified" for the position he or she holds or desires. C.R.S. § 24-34-402. "Otherwise qualified" means that an individual can perform the essential functions of the position he or she holds or desires with reasonable accommodation. Reasonable accommodation is established by a dialogue that is commenced by the employee, who must alert the employer regarding the employee's disability and request an accommodation to enable the employee to perform the essential functions of the position he or she holds or desires. *Cmty. Hosp. v. Fail*, 969 P.2d 667, 673 (Colo. 1998). An employee may only claim disability discrimination if he or she can establish that the employer knew or reasonably should have known of the disability and of the need for accommodation. *Phelps v. Field Real Estate Co.*, 991 F.2d 645, 650 (10th Cir. 1993) (interpreting federal law).

A possible accommodation may be suggested by either party. The employer bears the burden of proof on the issue of whether an accommodation is reasonable or an undue hardship, which is decided on a case-by-case basis. For example, an employer may satisfy its burden to reasonably accommodate by offering an employee a transfer to a vacant position at a lower rate of pay if there are no other vacant positions and the new rate of pay is consistent with the new position's responsibilities. It is usually not necessary to create a position customized for a disabled individual if reasonable alternatives exist. *Cmty. Hosp.*, 969 P.2d at 673 (interpreting federal law).

Some restructuring of a position may be necessary to meet the burden of reasonable accommodation. In *AT&T v. Royston*, the employer's refusal to reassign or restructure a position for an employee whose job included heavy lifting and sedentary functions was a violation of CADA where, subsequent to injury, he had lifting restrictions but was able to perform the position's sedentary functions. 772 P.2d 1182 (Colo. App. 1989).

Finally, an employer must consider a requested accommodation in order to be considered reasonable. In *Healion v. Great West Life Insurance Co.*, an employer violated CADA when it refused to purchase a voice-activated dictating machine requested by an employee and did not investigate the cost of this purchase or consider alternatives. 830 F. Supp. 1372, 1376 (D. Colo. 1993).

Colorado Medical Marijuana and Disability Discrimination

Colorado voters have adopted two constitutional amendments involving marijuana. In 2000, Amendment 20 created a regulated industry in Colorado to provide medical marijuana for individuals with "debilitating conditions," such as cancer; glaucoma; positive status for HIV or AIDS; cachexia; severe pain; severe nausea; seizures, including epilepsy; and persistent muscle spasms, including multiple sclerosis. Colo. Const. art. XVIII, § 14(1)(a). Then, in 2012, Amendment 64 allowed people 21 years and older to possess and use small amounts of marijuana immediately after the passage of the amendment. It also created an industry regulated by the State of Colorado to provide for the sale of marijuana for adult personal use beginning in 2014. Colo. Const. art. XVIII, § 16. Colorado law and its interpretation of these amendments is still developing. There are few definitive answers, but questions are arising with increasing frequency.

In particular, employers and employees face questions about the intersection between medical marijuana and CADA's prohibitions on discriminating against people with disabilities in matters of compensation, conditions, or privileges of employment. C.R.S. § 24-34-402. Under CADA, an employer may be required to make a "reasonable accommodation" (a change in the way that work is performed that will enable the employee to perform his or her essential job functions and does not create an undue hardship for the employer) for a "qualified individual with a disability." However, an employer cannot be liable under the reasonable accommodation provision of CADA if the employer can demonstrate that there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job. CADA mirrors federal law — the Americans with Disabilities Act — and Colorado regulations expressly permit use of federal authority to establish a disability discrimination claim under CADA. Commission Rule 60.1(C).

CADA does not specifically mention medical marijuana, drug testing, or drug use. However, because medical marijuana registry identification cards are only available to people with medical conditions such as cancer and AIDS, drug testing and zero-tolerance policies implicate the disability provisions of CADA. Employees may argue that an employer must accommodate their use under CADA.

There are no reported decisions to date addressing whether a disabled employee with a registry identification card is entitled to an accommodation for off-duty use of medical marijuana. However, there are four issues with this argument, depending on which side of the bar the practitioner may be on in a particular case.

First, attorneys representing employers may argue that the language of the constitutional amendments does not support requests for an accommodation. Amendment 20 specifically provides that "[n]othing in this section shall require any employer to accommodate the medical use of marijuana in any work place." Colo. Const. art. XVIII § 14(10)(b). Thus, some employers' counsel may take the position that the amendment specifically states that employers are not required to accommodate medical marijuana use. In addition, Amendment 20 specifically prohibits use in plain view of, or in a place open to, the general public. Colo. Const. art. XVIII § 14(5)(a)(II). Thus, counsel for employers may argue that the amendment prohibits use of medical marijuana in the workplace.

However, counsel for medical marijuana users likely will argue that since Amendment 20 only states that employers are not required to provide accommodations "in any work place," this means that they must continue to provide accommodations for individuals with qualifying disabilities who treat their conditions with medical marijuana outside of any work place. Such accommodations may include modifying "zero tolerance" drug policies to exempt medical marijuana users under certain circumstances and other accommodations that generally would be available to individuals with qualifying disabilities, including leave for medical treatments.

Amendment 64 similarly provides that it does not require employers to accommodate the use of marijuana in the workplace or prevent employers from having policies restricting use of marijuana by employees. Colo. Const. art. XVIII, § 16(6)(a). Employers may rely on this language in Amendment 64 and Amendment 20 to counter a wrongful termination in violation of public policy claim brought by an employee fired for failing a drug test. Employees may rely on this language to support a wrongful termination claim, and argue Amendment 64 as a source of public policy prohibiting termination for use occurring outside of the workplace.

Second, employers may be hesitant to accommodate medical marijuana use because they mistakenly believe that the federal Drug Free Workplace Act (DFWA) requires employers to fire employees who test positive for marijuana. 41 U.S.C. § 8102. However, the DFWA applies only to certain federal contractors/grant recipients, and there is no requirement in the DFWA that covered employers test or terminate employees for drug use. The DFWA generally requires that employers establish a program informing employees that they may not use illegal drugs in the covered workplace, and that the employees must advise the covered employers of any convictions for drug-related offenses occurring in the covered workplace.[5]

Third, employers also may be hesitant to accommodate off-duty medical marijuana use because of concerns that the use may threaten workplace safety or the employee's job performance. Current drug-testing technology tests only for the presence of marijuana metabolites in a person's system. Metabolites are drug residues that remain in the body for some time after the effects of a drug have worn off. Under current technology, no drug tests can determine when marijuana use occurred or whether an employee is or was impaired.[6] Colorado is developing regulations on driving while under the influence of marijuana. However, those regulations are new and untested.

Fourth, employers may be concerned that inconsistent enforcement of drug-testing policies may leave the employer vulnerable to discrimination claims from other employees. For example, if an employer accommodates use of medical marijuana but not use of marijuana or other drugs for religious reasons, the employer may worry about claims of religious discrimination.

This area of the law and the technology used in drug testing surely will continue to develop. For now, counsel should familiarize themselves with the Colorado Court of Appeals decision in *Coats v. Dish Network, L.L.C.*, which is discussed in § 4.5.2.

Gender

Gender discrimination includes discrimination on account of gender and due to pregnancy. Employer-sponsored insurance policies that discriminate in their coverage of men and women (by exclusion of coverage for pregnancy, among other methods) violate CADA, and both the employer

and the insurance company will be held responsible for the violation. *Colo. Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358 (Colo. 1988).

It is a discriminatory practice to require that particular jobs be performed by only men or women, with some exceptions. For example, an employer may not refuse to hire an individual based on stereotyped characterizations, such as that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship; or that turnover is higher among women. Commission Rule 80.2. However, in limited circumstances, gender may be a bona fide occupational qualification of the position, in which case the discrimination is permissible. Some examples include the positions of restroom attendant or prison guard. Selecting candidates of a particular gender based on the preferences of co-workers is also illegal. Employers are required to make the same contributions for the fringe benefits of men and women, without regard to whether the employee is the head of the household or principal wage earner. Pay scales may not vary based on gender. Seniority systems that favor men or women for advancement are also deemed discriminatory by the CCRD. Gender-based discrimination in pension plans (in retirement ages or benefit levels, presumably based on stereotypical assumptions) is prohibited. Commission Rules 80.2-80.7.

Several CADA cases have been decided in the area of gender discrimination. In *Lawley v. Department of Higher Education*, the Colorado Supreme Court upheld the CCRD's finding of discrimination in a case where the evidence showed that the plaintiff's male supervisor protected two other male employees by forcing the layoff of the plaintiff — a highly paid female employee — and creating a new position specifically tailored for one of the retained males. 36 P.3d 1239, 1251 (Colo. 2001). The transfer of the first male employee protected another male employee from being bumped through the company's seniority system, and the supervisor took these actions in disregard of the usual channels of authority and of alternative proposals made by superiors.

Marital Status/Family Relations

It is a discriminatory practice to discharge an employee or refuse to hire a person solely because that employee or person is married to or plans to marry another employee of the employer. C.R.S. § 24-34-402(1)(h). Exceptions to this law are made for employers with 25 or fewer employees, and in circumstances where (1) one spouse would directly or indirectly exercise supervisory, appointment, or dismissal authority or disciplinary authority over the other spouse; (2) one spouse would audit, verify, receive, or be entrusted with monies received or handled by the other spouse; or (3) one spouse has access to the employer's confidential information, including payroll and personnel records. *Id.* Regulations reflect that this section was enacted primarily in an attempt to protect married women from discrimination. Commission Rule 80.4.

Victims of Domestic Abuse

CADA also protects victims of domestic abuse. It states that "[e]mployers shall permit an employee to request or take up to three working days of leave from work in any twelve-month period, with or without pay, if the employee is the victim of domestic abuse, . . . stalking, . . . sexual assault, or the victim of any other crime, the underlying factual basis of which has been found by a court on the record to include an act of domestic violence. . . ." C.R.S. § 24-34-402.7(1)(a). This section applies where the employee is using the leave to protect himself or herself by: seeking a civil protection order to prevent domestic abuse, C.R.S. § 24-34-402.7(1)(a)(I); obtaining medical care or mental

health counseling for himself or herself or his or her children related to injuries from any of the acts described in subsection (1)(a), C.R.S. § 24-34-402.7(1)(a)(II); making his or her home secure from or seeking new housing to escape the perpetrator of any of the acts described in subsection (1)(a), C.R.S. § 24-34-402.7(1)(a)(III); seeking legal assistance and attending and preparing for court-related proceedings to address issues arising from any of the acts described in subsection (1)(a), C.R.S. § 24-34-402.7(1)(a)(IV).

Employees are required to provide appropriate advance notice of leave pursuant to this section as required by the employer's policy, and employers may require documentation that the employee qualifies. C.R.S. § 24-34-402.7(2)(a). Employees may also be required to exhaust any and all annual leave available. C.R.S. § 24-34-402.7(2)(b). All information related to the employee's leave shall be kept confidential by the employer. C.R.S. § 24-34-402.7(2)(c).

It is unlawful for an employer to "interfere with, restrain, or deny the exercise of or any attempt to exercise any rights provided by this section." C.R.S. § 24-34-402.7(3)(a). Perhaps most importantly, "[i]t shall be unlawful for any employer to discharge *or in any other manner discriminate against any individual* for exercising his or her rights under this section." C.R.S. § 24-34-402.7(3)(b) (emphasis added).

The Job Protection and Civil Rights Enforcement Act of 2013 amends C.R.S. § 24-34-405(3)(a) to state that "in a civil action brought by a plaintiff under this part 4 against a defendant who is found to have engaged in an intentional discriminatory or unfair employment practice, the plaintiff may recover compensatory and punitive damages as specified in this subsection (3)." Because the domestic abuse victim protections are found in Part 4 (employment practices), plaintiffs who are suing under this section may recover compensatory and punitive damages. In effect, this makes victims of domestic abuse a protected class.

However, C.R.S. § 24-34-402.7(1)(b) states that the provisions in subsection (1)(a) apply only to employers who employ 50 or more employees and employees who have been employed with the employer for 12 months or more. Because the amendments to CADA apply to all employment practices and outline the damages caps for employers with particular numbers of employees, it appears that C.R.S. § 24-34-402.7(1)(b) and HB 13-1136(3) may conflict with respect to the size of employer to which the domestic abuse victim protections apply. Judicial interpretation of the provisions is likely needed to resolve the apparent conflict.

Race, Ethnicity, National Origin, and Ancestry

Colorado cases reflect a unified effort by the Commission and the courts to eradicate discrimination. Race discrimination is "often insidious" and rarely involves direct evidence. *Adolph Coors Co. v. Colo. Civil Rights Comm'n*, 502 P.2d 1113, 1116 (Colo. App. 1972). For example, in situations where there are two candidates for a position and the employer chooses the non-minority candidate, the Commission and courts will scrutinize that decision and make an independent examination of the candidates' qualifications. In *Bodaghi v. Department of Natural Resources*, the Colorado Supreme Court upheld the Commission's finding that the selection of an American-born candidate over one of Iranian origin and ancestry was discrimination, based on a very careful comparison of the job description and the candidates' various qualifications. 995 P.2d 288 (Colo. 2000):

> An employer "has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." . . . However, when an employer rejects an employee who is a member of a protected class for a position for which he is amply qualified, the critical determination is whether the two employees are equally qualified . . . . Furthermore, evidence that an employer has misjudged the qualifications of candidates may be "probative of whether the employer's reasons are pretexts for discrimination." The use of subjective factors supports an inference of pretext when an employer justifies rejection of a minority candidate on the basis of such subjective factors even though the minority candidate is objectively better qualified than the non-minority chosen. The use of such subjective criteria as "thoughtfulness" and "creative" also may offer a convenient pretext for giving force and effect to discrimination . . . . We must infer that a candidate who meets the specific requirements in the job announcement is better qualified than one whose selection depends upon alternative criteria.

Id. at 300. Cases in which the court of appeals reached similar conclusions include *Texas Southland Corp. v. Hogue*, 497 P.2d 1275 (Colo. App. 1972), and *St. Luke's Hospital v. Colorado Civil Rights Commission*, 702 P.2d 758 (Colo. App. 1985).

For cases where the Commission's finding of discrimination was reversed by the court, see *Adolph Coors Co. v. Colorado Civil Rights Commission*, 502 P.2d 1113, 1116 (Colo. App. 1972), and *Colorado Civil Rights Commission v. Refrigerated Foods, Inc*., 515 P.2d 1137 (Colo. App. 1973). In the *Coors* case, the appeals court upheld the reversal of the Commission's finding of discrimination where the claimed evidence of discrimination occurred years prior to the termination and the charging party could establish no connection between the events. The court in *Refrigerated Foods* similarly found that there was no connection between the employer's discharge of the claimant and alleged racial slurs made by a supervisor.

Regarding national origin discrimination, regulations state that "[t]he commission is aware of the widespread practices of discrimination on the basis of national origin, and intends to apply the full force of law to eliminate such discrimination." Commission Rule 70.1. In particular, the Commission will strictly examine the use of English language tests where the person tested came from circumstances where English was not that person's first language or mother tongue, and where speaking English is not a requirement of the work to be performed. Other suspect practices include denial of opportunity for persons associated with those of a specific national origin, discrimination on the basis of surname, and discrimination against persons who fall outside national norms for height and weight in situations where physical size is not an issue in job performance. Commission Rule 70.2.

Sexual Orientation

CADA was amended in 2007 to add a proscription against sexual orientation discrimination. "Sexual orientation" means a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status, or an employer's perception thereof. C.R.S. § 24-34-301(7). Sexual orientation discrimination is also prohibited by ordinance in the cities of Denver, Boulder, and Aspen. There are no reported decisions interpreting this provision of CADA.

§ 4.5 • DISCRIMINATION ON ACCOUNT OF LEGAL OFF-DUTY ACTIVITIES

§ 4.5.1—Overview

In 1990, Colorado enacted the Lawful Off-Duty Activities Statute, which generally protects employees from being terminated for lawful behavior that occurs away from the employer's premises and outside of working hours. C.R.S. § 24-34-402.5(1). A termination based upon an employee's lawful off-duty activities is an unlawful employment practice even if the employer has not adopted a policy restricting employees' off-duty activities. *Gwin v. Chesrown Chevrolet*, 931 P.2d 466, 470 (Colo. App. 1996). As discussed in § 4.5.3, defenses are available to employers under the statute.

Unlike other sections of CADA, an employee may not file a charge with the Commission based on violation of this section. The sole recourse for violation is a civil action for damages in Colorado district court. A two-year statute of limitations applies to lawsuits brought under this section. *Galvan v. Spanish Peaks Reg'l Health Center*, 98 P.3d 949, 951 (Colo. App. 2004).

Damages under this section of CADA are more generous than under the others — at least until the CADA amendments take effect in 2015. Employees may collect all wages and benefits that would have been due up to and including the date of judgment, and, where the employer has more than 15 employees, there is a mandatory attorney fee award for prevailing plaintiffs. C.R.S. § 24-34-402.5(2)(a).

§ 4.5.2—Prohibited Practices

The Lawful Off-Duty Activities Statute was originally enacted with the goal of protecting cigarette smokers. However, the broad language of the statute permits application to a wide variety of conduct, including: sexual orientation, *Robert C. Ozer, P.C. v. Borquez*, 923 P.2d 166 (Colo. App. 1996), *rev'd*, 940 P.2d 371 (Colo. 1997) (suggesting lawful activities statute could provide cause of action for sexual orientation discrimination, but deciding on different grounds); unpopular political beliefs, *Slater v. King Soopers, Inc.*, 809 F. Supp. 809 (D. Colo. 1992) (involving terminated employee affiliated with the KKK); and seeking a refund for a motivational seminar endorsed by and partially paid for by the employer, *Gwin v. Chesrown Chevrolet*, 931 P.2d 466 (Colo. App. 1996).

Employees have also sought protection from the Lawful Off-Duty Activities Statute with respect to marijuana use. In addition, employees may argue that there are open questions of law because the federal Controlled Substances Act (CSA), which generally criminalizes the use of marijuana, does not expressly address "medical marijuana" under state-authorized regulatory programs adopted after the passage of the CSA. Thus, the Colorado Constitution allows employees to argue that offsite marijuana use outside of working hours is protected lawful activity, while allowing employers to argue that offsite marijuana use outside of working hours is illegal and unprotected.

The Colorado Court of Appeals was called upon to address this conflict in the case of *Coats v. Dish Network, L.L.C.*, 303 P.3d 147 (Colo. App. 2013), *cert. granted* (2014). In that case, Dish Network terminated the employment of a quadriplegic employee who worked in one of its call centers when he tested positive for marijuana after a "random" drug test. However, the employee held a state-issued registry identification card to treat his medical condition. The employee asserted that his positive test result was the result of medical marijuana use offsite and that he never was under the influ-

ence of marijuana at work. Thus, he sued under the Lawful Off-Duty Conduct Statute, claiming he was fired based on his lawful off-duty conduct. The employer argued that the claim should be dismissed because the employee's marijuana use was prohibited by the federal CSA.

The trial court dismissed the employee's claim, reasoning that the employee did not have a cognizable claim because Amendment 20 did not legalize medical marijuana use. Rather, the trial court determined that the amendment created an affirmative defense to a criminal charge based on medical marijuana use. For this proposition, the court cited *Beinor v. Industrial Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011), which, in a split-decision with Judge Gabriel dissenting, reached the same conclusion in a case where an employee was denied unemployment benefits because his medical marijuana use violated the employer's zero-tolerance drug policy.

On appeal, among other arguments, the employee in the *Dish Network* case argued that the term "lawful activity" in the Lawful Off-Duty Activities Statute referred only to state law and not to federal law and that medical marijuana use was legal under Colorado law, among other arguments. The employer argued that in order to be protected, the activity could not violate either state or federal law. Unlike the trial court, the Colorado Court of Appeals addressed head-on the question about whether the statute referred to state or federal law.

The appellate court concluded that the term "lawful activities" is ambiguous and considered the ordinary meaning of the word. While the court acknowledged that the policy of the statute was to keep employers from interfering in an employee's personal life, the court concluded that the plain language of the statute only protected activities that did not violate either state or federal law. Further, the court noted that the legislature could have specified that the activity did not have to be lawful under federal law if it so desired.

One judge on the appellate panel dissented from the decision, arguing that the spirit of the law called for the statute to be interpreted in a way that would protect the most conduct possible and that requiring that an activity be lawful under both state and federal law was too narrow. Further, the dissent argued that off-duty conduct was a state concern. Therefore, the dissent argued that lawfulness should be measured solely by state law. Finally, the dissent argued that Amendment 20 made medical marijuana use lawful because that word was used in the amendment and related materials.

At the time of this publication, *Dish Network* is on appeal to the Colorado Supreme Court; oral argument occurred in September 2014. Until such time as the Colorado Supreme Court has weighed in, employers can be expected to argue that the current state of Colorado law is that an employer may terminate an employee for medical marijuana use without violating the Lawful Off-Duty Activities statute. However, counsel for medical marijuana users likely will continue to argue the current Colorado law with respect to medical marijuana and the Lawful Off-Duty Activity Statute due to numerous changes in the law and regulations.

In addition, counsel for employers likely will argue that because the *Dish Network* case addressed the meaning of the term "lawful activities," it has implications for adult personal use of marijuana under Amendment 64, such that it also would preclude viable claims under the Lawful Off-Duty Activities Statute for terminations based on adult personal use of marijuana off duty and off premises. Counsel for employees can be expected to challenge these terminations as against public policy, arguing that Amendment 64 creates a right to the use and possession of marijuana.

§ 4.5.3—Defenses

Employers may avoid liability under the Lawful Off-Duty Activities Statute by proving one of three affirmative defenses — namely, that the off-duty activities (1) relate to a bona fide occupational qualification; (2) are reasonably and rationally related to the on-the-job activities of the particular employee or group of employees (as opposed to all of the company's employees); or (3) create an actual or apparent conflict of interest with the employee's responsibilities to the employer. C.R.S. § 24-34-402.5(1). Two published decisions provide insights into these affirmative defenses.

In *Marsh v. Delta Air Lines, Inc.*, an airline baggage handler was suspended and then fired because a newspaper published a letter he wrote to the editor criticizing the airline for replacing long-term employees with contract employees. 952 F. Supp. 1458 (D. Colo. 1997). The U.S. District Court for the District of Colorado rejected the baggage handler's argument that he could not be fired because the airline had not adopted a written policy prohibiting letters to the editor. Further, the court determined that the baggage handler was not exposing safety concerns but rather was venting his anger at his employer. In reaching this conclusion, the court was influenced by the fact that the baggage handler did not take advantage of the airline's internal grievance policy or report his supposed concerns to management. The court concluded that the baggage handler's letter-writing activity was not protected by the statute because it was a violation of an implied duty of loyalty, which the court decided was a bona fide occupational requirement under the statute.

It is worth noting that the court rejected the airline's argument that one of the baggage handler's job duties was promoting a positive image for the airline and that the letter to the editor created a conflict of interest for the baggage handler. *But see Ruiz v. Hope for Children, Inc.*, 2013 COA 91 (Colo. App. 2013). In *Ruiz*, the plaintiff was fired after revealing she was dating a client of her employer. The court of appeals held that the conflict of interest defense to the Lawful Off-Duty Activities Statute does not require an employer to prove the activity actually interfered with the employee's job performance; an appearance of conflict is sufficient.

On the other hand, in *Watson v. Public Service Co.*, protection was extended to a temporary utility worker who was not given a permanent position because he reported potentially unsafe working conditions to the Occupational Safety and Health Administration. 207 P.3d 860 (Colo. App. 2008). The appellate court rejected the employer's argument that the statute did not apply because the employee's off-duty activity related to the utility worker's employment. Although the employer did not raise a duty of loyalty argument, the court of appeals noted that no Colorado appellate opinion had ever approved the implied duty of loyalty theory set out in *Marsh*.

These cases demonstrate that courts take a narrow view of the exceptions of the Lawful Off-Duty Activities Statute. However, these cases also demonstrate that there are limits to an employee's protections.

---

*Original author Patricia S. Bellac, Esq. The authors would like to give special thanks to Kimberly Ryan, Esq. for her contributions to the marijuana law sections and Aaron Belzer for his research assistance with this 2014 update.

NOTES

1. The relief available under 29 U.S.C. § 626(b) is limited to "prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion . . . ."

2. The relief available under 29 U.S.C. § 216(b) is limited to "[d]amages; right of action; attorney's fees and costs; termination of right of action . . . ."

3. 42 U.S.C. § 1981a(b)(3) states that damages shall not exceed: for employers with more than 14 employees, but less than 101 employees in each of 20 or more calendar weeks in the current or preceding year, $50,000; for employers with more than 100 and fewer than 201 employees in each of 20 weeks in the current or preceding calendar year, $100,000; more than 200 and fewer than 501 employees, $200,000; more than 500 employees, $300,000.

4. The Commission is a seven-member bipartisan panel appointed by the governor with the consent of the state senate. There are two members from the business community (one representing small business), two members from state and local government, and three members from the community at large. At least four commissioners must be "members of groups of people" who may suffer discrimination due to their protected status. C.R.S. § 24-34-303. There are monthly Commission meetings, which are open to the public.

5. For more detailed information regarding the DFWA, see the U.S. Department of Labor's Drug-Free Workplace Act of 1988 E-Laws Advisor at www.dol.gov/elaws/asp/drugfree/screen4.htm.

6. *See* U.S. Department of Labor, ELaws Drug-Free Workplace Advisor: "Currently, drug testing does not test for *impairment* or whether a person's behavior is, or was, impacted by drugs," www.dol.gov/elaws/asp/drugfree/drugs/dt.asp.