

Background Information Relating to Rewrite Subcommittee Ideas: Emotional Distress, Administrative Exhaustion and Caps on Damages

The information contained in this document is provided strictly to provide background information and context relating to the ideas shared by the Rewrite Subcommittee of the Task Force Relating to the Rights of Coloradans with Disabilities. The subcommittee members believe it is important to read the ideas they have presented with an understanding of the current rights provided by law. Nothing contained in this document should be construed as legal advice.

Questions: Under current law, for what types of claims could a plaintiff pursue emotional distress damages for discrimination against a person with disabilities? How are the rights of other protected classes different vs. a person with disabilities under current CO law regarding the right to seek damages for discrimination?

Under Colorado law, a person who suffers disability discrimination in employment or housing can recover emotional distress damages. A person who is denied access to a place of public accommodation because of disability can only recover a statutory fine of \$3,500. A “public entity” or “place of public accommodation” is defined as a private or government-owned business, organization, or facility that offers goods, services, or accommodations to the public. Places of public accommodation are open to the public and engage in commerce, which can include buying or selling things or services.

Under current Colorado law, a person with disabilities has the same right to seek damages for employment discrimination and/or housing discrimination as any other person who is subjected to discrimination based on any other protected status or class. However, the statutory penalties or fines that can be recovered for discrimination in public accommodation differ based on protected status. While individuals with disabilities may recover a fine of \$3,500, individuals subjected to public accommodation discrimination based on any

protected status other than disability are limited to a fine of not less than \$50 and not more than \$500.

Question: Have any recent changes to law or court rulings changed the rights of an individual with a disability from seeking and recovering emotional distress damages?

In 2013, the Colorado State Legislature passed the “Job Protection and Civil Rights Enforcement Act of 2013,” which took effect in 2015. That amendment to CADA provided the right to jury trials in employment discrimination cases (except for cases of age discrimination) and authorized the recovery of emotional distress damages. In 2022, the Legislature passed another amendment to CADA that brought age discrimination in line with other forms of employment discrimination and authorized jury trials and the recovery of emotional distress damages.

Although emotional distress damages are not available under CADA for public accommodation discrimination, a federal law, the Rehabilitation Act of 1973, had been interpreted as allowing the recovery of emotional distress damages for disability discrimination by entities that receive federal financial assistance. However, in 2022, in the case *Cummings v. Premier Rehab Keller, P.L.L.C.*, the U.S. Supreme Court took away the right to recover emotional distress damages under the Rehabilitation Act. Prior to *Cummings*, Section 504 and Title II were held to permit damages for intentional discrimination, (which means pursuing a course of action that the defendant knew was likely to violate the law but did the act anyway rather than any degree of animus).

Question: For which types of discrimination claims are the caps on the amount that can be recovered limited by the federal statutes currently incorporated by reference into Colorado Revised Statutes?

Presently, CADA puts caps on the dollar amount of emotional distress damages and punitive damages that can be recovered for employment discrimination claims. These caps are based on, and track, damages caps that the U.S. Congress passed as part of federal anti-discrimination law amendments in 1991.

Claims involving race or gender discrimination against public entities can also be brought under two federal statutes, 42 U.S.C. § 1981 (race discrimination) and 42 U.S.C. § 1983 (race or gender discrimination through enforcement of the 14th Amendment Equal Protection Clause), which do not contain any caps on damages.

Question: Which types of claims could be affected by the committee's ideas on: a) Emotional Distress damages (including punitive) and b) Removal of requirement to exhaust administrative remedies?

Claims for public accommodation discrimination would be affected by the Committee's idea to allow for the recovery of emotional distress and punitive damages for any type of discrimination. Claims for employment discrimination would be affected by the Committee's idea that caps on emotional distress and punitive damages be eliminated. The Committee's idea to allow punitive damages upon a finding of intentional discrimination would essentially mirror employment and housing, but would permit such damages against public entities and accommodations for the first time.

The Committee is discussing an idea that CADA be amended to eliminate or make optional the requirement of exhaustion of administrative remedies, i.e., filing a charge of discrimination with the Colorado Civil Rights Division (CCRD). Presently, under CADA, a person subjected to disability discrimination must file a charge under the following timelines:

- For employment discrimination claims—within 300 days of the date of the discriminatory or unfair employment practice. A lawsuit must then be filed within 90 days of the CCRD's issuance of a determination/right to sue letter.
- For housing discrimination claims—within one year after the date of the unfair housing practice (but a lawsuit can be filed even if no charge was filed, but not if the CCRD has obtained a conciliation agreement). A lawsuit can be filed within two years of the date of the discriminatory practice, but if a charge was filed, that two year period does not include the time that passed while the charge was pending.