

**Second Regular Session
Sixty-seventh General Assembly
STATE OF COLORADO**

PREAMENDED

*This Unofficial Version Includes Committee
Amendments Not Yet Adopted on Second Reading*

LLS NO. 10-0529.01 Christy Chase

HOUSE BILL 10-1269

HOUSE SPONSORSHIP

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House Committees

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Senate Committees

A BILL FOR AN ACT

101 **CONCERNING THE CREATION OF REMEDIES AVAILABLE IN**
102 **EMPLOYMENT DISCRIMINATION CASES.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)

Current law does not allow an award of compensatory or punitive damages or attorney fees and costs to a plaintiff who prevails in a lawsuit alleging a discriminatory or unfair employment practice under state law. While federal employment antidiscrimination laws allow such damages and reasonable attorney fees and costs, only employers who employ 15 or

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

more employees are subject to federal law. Moreover, victims of employment discrimination on the basis of sexual orientation are not afforded protections under federal law. Thus, employees who work for employers with fewer than 15 employees or who claim employment discrimination on the basis of sexual orientation are not allowed compensatory or punitive damages or to recover reasonable attorney fees and costs when they prove a case of employment discrimination.

The bill establishes the "Workplace Fairness and Civil Rights and Remedies Act of 2010", which would allow the additional remedies of compensatory and punitive damages in employment discrimination cases brought under state law. These damages would be in addition to the remedies allowed under current law, namely, front pay, back pay, interest on back pay, reinstatement or hiring, and other equitable relief that may be awarded. Compensatory damages are to compensate a plaintiff for other pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. If the plaintiff shows by a preponderance of the evidence that the defendant engaged in a discriminatory or unfair employment practice with malice or reckless indifference to the rights of the plaintiff, the plaintiff may recover punitive damages.

The bill caps the overall damages, including both compensatory and punitive, if applicable, that may be awarded to a plaintiff, based on the size of the employer defendant, as follows:

- ! For employers with 14 or fewer employees, not more than \$25,000;
- ! For employers with between 15 and 100 employees, not more than \$50,000;
- ! For employers with between 101 and 200 employees, not more than \$100,000;
- ! For employers with between 201 and 500 employees, not more than \$200,000; and
- ! For employers with more than 500 employees, not more than \$300,000.

When a plaintiff claims compensatory or punitive damages in a civil lawsuit, either party to the action is entitled to demand a jury trial. If the case is tried by a jury, the court is not to inform the jury of the damage caps. Additionally, the court may award the prevailing party reasonable attorney fees and costs.

In the first year after the bill takes effect, compensatory and punitive damages and reasonable attorney fees and costs would only be available against an employer with 15 or more employees. For actions accruing on or after August 11, 2011, these remedies would be available against any employer, regardless of the number of employees it employs.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** 24-34-405, Colorado Revised Statutes, is
3 REPEALED AND REENACTED, WITH AMENDMENTS, to read:

4 **24-34-405. Relief authorized - short title.** (1) THIS SECTION
5 SHALL BE KNOWN AND MAY BE CITED AS THE "WORKPLACE FAIRNESS AND
6 CIVIL RIGHTS AND REMEDIES ACT OF 2010".

7 (2) (a) IN ADDITION TO THE RELIEF AUTHORIZED BY SECTION
8 24-34-306 (9), THE COMMISSION OR THE COURT MAY ORDER AFFIRMATIVE
9 RELIEF THAT THE COMMISSION OR COURT DETERMINES TO BE
10 APPROPRIATE, INCLUDING, WITHOUT LIMITATION, THE FOLLOWING:

11 (I) REINSTATEMENT OR HIRING OF EMPLOYEES, WITH OR WITHOUT
12 BACK PAY, WHICH, IF AWARDED, SHALL BE PAID BY THE EMPLOYER,
13 EMPLOYMENT AGENCY, OR LABOR ORGANIZATION RESPONSIBLE FOR THE
14 DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE;

15 (II) FRONT PAY; OR

16 (III) ANY OTHER EQUITABLE RELIEF DEEMED APPROPRIATE BY THE
17 COMMISSION OR COURT.

18 (b) IF THE COMMISSION OR COURT ORDERS BACK PAY, THE
19 LIABILITY FOR BACK PAY SHALL ACCRUE FROM A DATE NOT MORE THAN
20 TWO YEARS PRIOR TO THE FILING OF A CHARGE WITH THE DIVISION. THE
21 COMMISSION OR COURT SHALL REDUCE AN AWARD OF BACK PAY BY ANY
22 AMOUNT OF ACTUAL EARNINGS OF, OR AMOUNTS THAT COULD HAVE BEEN
23 EARNED WITH REASONABLE DILIGENCE BY, THE PERSON WHO WAS THE
24 VICTIM OF THE DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE.

25 (3) (a) IN ADDITION TO THE RELIEF AVAILABLE PURSUANT TO
26 SUBSECTION (2) OF THIS SECTION, IN A PROCEEDING OR CIVIL ACTION
27 BROUGHT BY A COMPLAINING PARTY OR PLAINTIFF UNDER THIS PART 4

1 AGAINST A RESPONDENT OR DEFENDANT WHO IS FOUND TO HAVE ENGAGED
2 IN AN INTENTIONAL DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE,
3 THE COMPLAINING PARTY OR PLAINTIFF MAY RECOVER COMPENSATORY
4 AND PUNITIVE DAMAGES AS SPECIFIED IN THIS SUBSECTION (3) AND IN
5 ACCORDANCE WITH SUBSECTION (9) OF THIS SECTION. A COMPLAINING
6 PARTY OR PLAINTIFF SHALL NOT BE AWARDED COMPENSATORY OR
7 PUNITIVE DAMAGES WHEN THE RESPONDENT OR DEFENDANT IS FOUND TO
8 HAVE ENGAGED IN AN EMPLOYMENT PRACTICE THAT IS UNLAWFUL SOLELY
9 BECAUSE OF ITS DISPARATE IMPACT.

10 (b) A COMPLAINING PARTY OR PLAINTIFF MAY RECOVER PUNITIVE
11 DAMAGES AGAINST A RESPONDENT OR DEFENDANT, OTHER THAN A
12 GOVERNMENT, GOVERNMENT AGENCY, OR POLITICAL SUBDIVISION OF THE
13 STATE, IF THE COMPLAINING PARTY OR PLAINTIFF DEMONSTRATES BY A
14 PREPONDERANCE OF THE EVIDENCE THAT THE RESPONDENT OR
15 DEFENDANT ENGAGED IN A DISCRIMINATORY OR UNFAIR EMPLOYMENT
16 PRACTICE WITH MALICE OR RECKLESS INDIFFERENCE TO THE RIGHTS OF
17 THE COMPLAINING PARTY OR PLAINTIFF.

18 (c) A COMPLAINING PARTY OR PLAINTIFF MAY RECOVER
19 COMPENSATORY DAMAGES AGAINST A RESPONDENT OR DEFENDANT,
20 OTHER THAN THE STATE AND ANY COMMISSION, DEPARTMENT, OR
21 INSTITUTION OF THE STATE, FOR OTHER PECUNIARY LOSSES, EMOTIONAL
22 PAIN, SUFFERING, INCONVENIENCE, MENTAL ANGUISH, LOSS OF ENJOYMENT
23 OF LIFE, AND OTHER NONPECUNIARY LOSSES.

24 (d) THE TOTAL AMOUNT OF DAMAGES AWARDED PURSUANT TO
25 THIS SUBSECTION (3) SHALL NOT EXCEED THE FOLLOWING AMOUNTS FOR
26 EACH COMPLAINING PARTY OR PLAINTIFF, REGARDLESS OF WHETHER THE
27 DAMAGES ARE COMPENSATORY, PUNITIVE, OR A COMBINATION OF

1 COMPENSATORY AND PUNITIVE DAMAGES:

2 (I) IF THE RESPONDENT OR DEFENDANT HAS FOURTEEN OR FEWER
3 EMPLOYEES IN EACH OF TWENTY OR MORE CALENDAR WEEKS IN EITHER
4 THE CURRENT OR PRECEDING CALENDAR YEAR, TWENTY-FIVE THOUSAND
5 DOLLARS;

6 (II) IF THE RESPONDENT OR DEFENDANT HAS FIFTEEN OR MORE
7 EMPLOYEES AND ONE HUNDRED OR FEWER EMPLOYEES IN EACH OF
8 TWENTY OR MORE CALENDAR WEEKS IN EITHER THE CURRENT OR
9 PRECEDING CALENDAR YEAR, FIFTY THOUSAND DOLLARS;

10 (III) IF THE RESPONDENT OR DEFENDANT HAS MORE THAN ONE
11 HUNDRED EMPLOYEES AND TWO HUNDRED OR FEWER EMPLOYEES IN EACH
12 OF TWENTY OR MORE CALENDAR WEEKS IN EITHER THE CURRENT OR
13 PRECEDING CALENDAR YEAR, ONE HUNDRED THOUSAND DOLLARS;

14 (IV) IF THE RESPONDENT OR DEFENDANT HAS MORE THAN TWO
15 HUNDRED EMPLOYEES AND FIVE HUNDRED OR FEWER EMPLOYEES IN EACH
16 OF TWENTY OR MORE CALENDAR WEEKS IN EITHER THE CURRENT OR
17 PRECEDING CALENDAR YEAR, TWO HUNDRED THOUSAND DOLLARS; AND

18 (V) IF THE RESPONDENT OR DEFENDANT HAS MORE THAN FIVE
19 HUNDRED EMPLOYEES IN EACH OF TWENTY OR MORE CALENDAR WEEKS IN
20 EITHER THE CURRENT OR PRECEDING CALENDAR YEAR, THREE HUNDRED
21 THOUSAND DOLLARS.

22 (e) COMPENSATORY OR PUNITIVE DAMAGES AWARDED PURSUANT
23 TO THIS SUBSECTION (3) SHALL BE IN ADDITION TO, AND SHALL NOT
24 INCLUDE, FRONT PAY, BACK PAY, INTEREST ON BACK PAY, OR ANY OTHER
25 TYPE OF RELIEF AWARDED PURSUANT TO SUBSECTION (2) OF THIS SECTION.

26 (4) IN CASES ALLEGING THAT A RESPONDENT OR DEFENDANT
27 ENGAGED IN A DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICE BY

1 Failing to provide a reasonable accommodation to a person with
2 a disability who is otherwise qualified, it shall be an affirmative
3 defense to an award of damages under this section that the
4 respondent or defendant demonstrated good faith efforts, in
5 consultation with the person with the disability who informed
6 the respondent or defendant that an accommodation was
7 needed, to identify and make a reasonable accommodation that
8 would provide the person with the disability with an equally
9 effective opportunity and would not cause an undue hardship on
10 the operation of the business.

11 (5) (a) If a person was refused admission into or suspended
12 or expelled from a union, was refused employment or
13 advancement, or was suspended or discharged from employment,
14 and the labor organization or employer, as applicable, took the
15 action for any bona fide reason other than a discriminatory or
16 unfair employment practice, the commission or a court shall not
17 issue an order requiring, as applicable:

18 (I) A labor organization to admit or reinstate the person
19 as a member of a union;

20 (II) An employer to hire, reinstate, or promote the
21 individual; or

22 (III) The employer to pay the individual back pay.

23 (b) If the complaining party or plaintiff establishes that
24 the respondent or defendant engaged in a discriminatory or
25 unfair employment practice and the respondent or defendant
26 demonstrates that he, she, or it would have taken the same
27 action in the absence of the impermissible, motivating factor, the

1 COMMISSION OR COURT:

2 (I) MAY GRANT ANY DECLARATORY RELIEF AND INJUNCTIVE
3 RELIEF THE COMMISSION OR COURT DEEMS APPROPRIATE, TOGETHER WITH
4 REASONABLE ATTORNEY FEES AND COSTS THAT THE COMPLAINING PARTY
5 OR PLAINTIFF HAS DEMONSTRATED TO BE ATTRIBUTABLE TO THE PURSUIT
6 OF THE CLAIM OR COMPLAINT; AND

7 (II) SHALL NOT AWARD COMPENSATORY OR PUNITIVE DAMAGES OR
8 ISSUE AN ORDER REQUIRING ANY ADMISSION, REINSTATEMENT, HIRING,
9 PROMOTION, OR PAYMENT OF BACK PAY, AS DESCRIBED IN PARAGRAPH (a)
10 OF THIS SUBSECTION (5).

11 (6) IF A COMPLAINING PARTY OR PLAINTIFF IN A PROCEEDING
12 BEFORE THE COMMISSION OR IN A CIVIL ACTION FILED UNDER THIS PART 4
13 SEEKS COMPENSATORY OR PUNITIVE DAMAGES PURSUANT TO SUBSECTION
14 (3) OF THIS SECTION:

15 (a) ANY PARTY IN THE CIVIL ACTION MAY DEMAND A TRIAL BY
16 JURY; AND

17 (b) THE COURT IN THE CIVIL ACTION SHALL NOT INFORM THE JURY
18 OF THE LIMITATIONS DESCRIBED IN PARAGRAPH (d) OF SUBSECTION (3) OF
19 THIS SECTION.

20 (7) (a) IN ANY PROCEEDING OR CIVIL ACTION UNDER THIS PART 4,
21 THE COMMISSION OR COURT MAY AWARD REASONABLE ATTORNEY FEES
22 AND COSTS TO THE PREVAILING PARTY IN ACCORDANCE WITH SUBSECTION
23 (9) OF THIS SECTION UNLESS THE PREVAILING PARTY IS A GOVERNMENT,
24 GOVERNMENT AGENCY, OR POLITICAL SUBDIVISION OF THE STATE.

25 (b) NOTWITHSTANDING PARAGRAPH (a) OF THIS SUBSECTION (7),
26 IN ANY PROCEEDING OR CIVIL ACTION UNDER THIS PART 4 AGAINST A
27 JUDICIAL OFFICER FOR AN ACT OR OMISSION TAKEN IN THE OFFICER'S

1 JUDICIAL CAPACITY, THE JUDICIAL OFFICER SHALL NOT BE LIABLE FOR ANY
2 COSTS OR ATTORNEY FEES UNLESS THE ACTION WAS CLEARLY OUTSIDE THE
3 SCOPE OF THE OFFICER'S JURISDICTION.

4 (c) IT IS THE INTENT OF THE GENERAL ASSEMBLY THAT THE
5 COMMISSION'S OR COURT'S DISCRETION TO AWARD REASONABLE
6 ATTORNEY FEES AND COSTS SHALL BE GUIDED BY STANDARDS
7 ESTABLISHED THROUGH JUDICIAL INTERPRETATION OF THE DISCRETION
8 GIVEN TO COURTS TO MAKE SUCH AWARDS IN CASES BROUGHT UNDER
9 TITLE VII OF THE FEDERAL "CIVIL RIGHTS ACT OF 1964", 42 U.S.C. SEC.
10 2000e, AS AMENDED.

11 (8) THIS SECTION SHALL NOT APPLY TO CLAIMS ALLEGING A
12 VIOLATION OF SECTION 24-34-402.5.

13 (9) (a) FOR CAUSES OF ACTION ACCRUING BEFORE AUGUST 11,
14 2011, A COMPLAINING PARTY OR PLAINTIFF MAY RECOVER COMPENSATORY
15 AND PUNITIVE DAMAGES PURSUANT TO SUBSECTION (3) OF THIS SECTION
16 AND REASONABLE ATTORNEY FEES AND COSTS PURSUANT TO SUBSECTION
17 (7) OF THIS SECTION ONLY AGAINST A RESPONDENT OR DEFENDANT WHO
18 EMPLOYS FIFTEEN OR MORE EMPLOYEES IN EACH OF TWENTY OR MORE
19 CALENDAR WEEKS IN THE CURRENT OR PRECEDING CALENDAR YEAR.

20 (b) FOR CAUSES OF ACTION ACCRUING ON OR AFTER AUGUST 11,
21 2011, A COMPLAINING PARTY OR PLAINTIFF MAY RECOVER COMPENSATORY
22 AND PUNITIVE DAMAGES PURSUANT TO SUBSECTION (3) OF THIS SECTION
23 AND REASONABLE ATTORNEY FEES AND COSTS PURSUANT TO SUBSECTION
24 (7) OF THIS SECTION AGAINST ANY RESPONDENT OR DEFENDANT,
25 REGARDLESS OF THE NUMBER OF EMPLOYEES EMPLOYED BY THE
26 RESPONDENT OR DEFENDANT.

27 **SECTION 2.** 24-34-402.7 (3) (a), (3) (b), and (4), Colorado

1 Revised Statutes, are amended to read:

2 **24-34-402.7. Unlawful action against employees seeking**
3 **protection.** (3) (a) It shall be ~~unlawful~~ A DISCRIMINATORY OR UNFAIR
4 EMPLOYMENT PRACTICE for any employer to interfere with, restrain, or
5 deny the exercise of or any attempt to exercise any rights provided under
6 this section.

7 (b) It shall be ~~unlawful~~ A DISCRIMINATORY OR UNFAIR
8 EMPLOYMENT PRACTICE for any employer to discharge or in any other
9 manner discriminate against any individual for exercising his or her rights
10 under this section.

11 (4) ~~Notwithstanding any other provisions of this article to the~~
12 ~~contrary, the sole remedy for any person claiming to be aggrieved by a~~
13 ~~violation of this section shall be to bring a civil suit for damages or~~
14 ~~equitable relief or both in any district court of competent jurisdiction.~~
15 ~~Such person may claim as damages all wages and benefits that would~~
16 ~~have been due the person up to and including the date of the judgment~~
17 ~~had the act violating this section not occurred; except that nothing in this~~
18 ~~section shall be construed to relieve such person from the obligation to~~
19 ~~mitigate his or her damages.~~

20 **SECTION 3. Act subject to petition - specified effective date**
21 **- applicability.** (1) This act shall take effect August 11, 2010; except
22 that, if a referendum petition is filed pursuant to section 1 (3) of article V
23 of the state constitution against this act or an item, section, or part of this
24 act within the ninety-day period after final adjournment of the general
25 assembly, then the act, item, section, or part shall not take effect unless
26 approved by the people at the general election to be held in November
27 2010 and shall take effect on the date of the official declaration of the

1 vote thereon by the governor.

2 (2) The provisions of this act shall apply to causes of action
3 alleging discriminatory or unfair employment practices accruing on or
4 after the applicable effective date of this act.