Plaintiff Employment Lawyers Association

Colorado Chapter of the National Employment Lawyers Association

Analysis of Fiscal Note for SB009-110

Introductory Observations. The fiscal note for SB009-110, dated February 16, 2009, projects an increase in General Fund expenditures of $680,391 and 13.0 FTE in FY 2009-10 and of $525,478 and 11.7 FTE in FY 2010-11.[1] As explained in more detail in this document, the assumptions and data upon which that fiscal note is based are questionable at best and, at worst, are grossly inaccurate.

We wish to make two preliminary comments. First, the 1998 DORA Sunset Report for the Colorado Civil Rights Division ("CCRD") and the Colorado Civil Rights Commission ("CCRC") included a recommendation that the General Assembly amend C.R.S. § 24-34-405 "to equate employment discrimination remedies awarded by the CCRC with federal remedies so that state remedies include punitive damages, attorney's fees and compensatory damages."[2] That Sunset Report concluded that "the fiscal impact on the agency is expected to be negligible."[3] Neither the federal nor the Colorado remedies have changed since 1998. It is difficult to understand why DORA projected no fiscal impact in 1998 for the same statutory amendments for which the 2009 fiscal note projects more than $1.2 million in additional General Fund expenditures during just the next two fiscal years.

Second, many of the proposed additional expenditures set forth in the fiscal note, such as an increased number of outreach training sessions,[4] are desirable. However, those additional expenditures would not necessarily result from the provisions of SB009-110. For example, equating the remedies available under the employment discrimination provisions of the Colorado Anti-Discrimination Act ("CADA") with those that have been available for the last 18 years under Title VII of the Civil Rights Act of 1964 does not require those additional outreach training sessions.

The fiscal note projects increased expenditures for two Executive Branch agencies and for the Judicial Branch. This analysis examines those projections for each agency.

Department of Regulatory Agencies, CCRD – Based on data submitted by the CCRD, the fiscal note concludes that the expansion of remedies in CADA would increase the CCRD's caseload by 352 cases annually.[5] The fiscal note states that the CCRD's "estimate is based on the number of cases in other states that have already adopted similar remedies, adjusted for state population."[6] That estimate is inaccurate for reasons that include:

- The CCRD used the following methodology to arrive at its estimate. First, it divided the population in each of those states by the number of discrimination charges filed with the state anti-discrimination agency in each of those states.[7] Second, it averaged those averages to arrive at an overall average of 4,411 for

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[1] Colorado Legislative Council Staff Fiscal Note, SB009-110, Feb. 16, 2009 ("2009 Fiscal Note"), p. 1.
[2] 1998 Sunset Review, Colorado Civil Rights Division and the Colorado Civil Rights Commission ("1998 Sunset Report), pp. 23-24.
[3] *Id.*, p. 24.
[4] 2009 Fiscal Note, p. 2.
[5] *Id.*
[6] *Id.*
[7] Undated document entitled, "CCRD Increased Caseload Estimates."

those eight states.[8] Third, it calculated how many charges would be filed in Colorado if the charge-filing rate in this state were the same as that overall average.[9]

- The eight states that the CCRD used for its comparison[10] include four states – Connecticut, Iowa, Kentucky and Massachusetts – that do not include caps, or maximum amounts, for compensatory damages in their state anti-discrimination statutes.[11] In addition, the Connecticut statute contains no cap for punitive damages.[12] The remedies in those states are far in excess of what are available under Title VII and thus are not at all comparable to the additional CADA remedies in SB009-110. The proposed new remedies in that bill contain the same caps as exist in Title VII for employers with 15 or more employees. It is easy to see why charging parties may prefer to file charges of employment discrimination with a state agency when the remedies under the state law are more generous than those available under the federal statute. It does not follow that they will have the same preference when the remedies are the same. Thus, the primary methodology that the 2009 fiscal note uses to attempt to estimate potential increases in case filings is fundamentally flawed.

- Three of those eight states do not have EEOC offices located within their borders.[13] Those states have the lowest average numbers of residents per charge filed with their state fair employment practices agencies of those eight states.[14] It is likely that many, if not most, charging parties filed employment discrimination charges with the state agencies in those three states because there are no local EEOC offices in those states. The average number of residents per charge for the remaining five states is 6,067, not the 4,411 overall average contained in the CCRD's estimate.[15]

- The CCRD comparison included information about the total number of charges in each of the eight comparison states and in Colorado. That information appears to consist of the total number of charges of discrimination (including, for example, housing discrimination) – not just the total number of charges of employment discrimination – in each of those states.[16] Since the scope of other states' anti-

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[8] *Id.*

[9] The CCRD concluded that, based on that overall average, the number of residents per charge filed in Colorado would increase from 759 to 1,112, an increase of 46.3%. *See id.*

[10] Those states are Arizona, Connecticut, Iowa, Kentucky, Maryland, Massachusetts, Minnesota and Oregon. *See id.*

[11] Conn. Gen. Stat. § 46a-104; Iowa Code, §§ 216.15.8.*a.*(8); KRS § 344.450; Mass. Gen. Laws Ann. ch. 151, sec. 9.

[12] Conn. Gen. Stat. § 46a-104.

[13] Those states are Connecticut, Iowa and Oregon. See http://eeoc.gov/offices.html, last accessed Feb. 23, 2009.

[14] CCRD Increased Caseload Estimates.

[15] *Id.*

[16] The CCRD summary stated that 765 charges were filed with the CCRD in FY 06, 733 in FY 07 and 779 in FY 08. *See* CCRD Increased Caseload Estimates. In FY 06-07, 765 charges of employment, housing and public accommodation discrimination were filed with the CCRD; 733 charges in those three categories of discrimination were filed with it in FY 07-08. 1998 Sunset Report, p. 25. Only 593 and 492 charges of employment discrimination were filed with the CCRD in FY 06-07 and FY 07-08, respectively. *Id.*

discrimination statutes is not identical to those in CADA,[17] the greater number of charges per capita filed in those states most likely is the result of the more expansive substantive protections in those states.

- The CCRD and the U.S. Equal Employment Opportunity Commission ("EEOC") have a worksharing agreement, under which a charge filed with one agency is deemed to be filed with the other and under which the agency that takes the charge investigates it, with limited exceptions, in the cases for which the two agencies have joint jurisdiction,.[18] The number of charges filed with the CCRD, therefore, depends on the number of decisions by charging parties whether to file with the CCRD or the EEOC. That will remain true whether or not the General Assembly decides to equalize the CADA remedies with those in Title VII.

- The number of charges of employment discrimination filed with the CCRD decreased from 1,097 in FY 97-98 to 492 in FY 07-08.[19] Yet the remedies for those charges remained unchanged, and the General Assembly added harassment as a prohibited employment practice and sexual orientation as a protected class during that time.[20] The reduced number of charges filed with the CCRD might have resulted, at least in part, from the fact that the CCRD closed its offices in Colorado Springs, Grand Junction, Greeley and Pueblo in 2003 and 2004, and reopened only the Pueblo and Grand Junction offices in 2008.[21]

- The CCRD projects an increase in the number of charges filed with the CCRD from 759 to 1,111 per year, an increase of 352 charges per year.[22] That would be an increase of 46.3% per year, even though the remedies in CADA would be the same as those in Title VII. Since only 492 charges of employment discrimination were filed with the CCRD in FY 07-08,[23] the CCRD is projecting a 71.5% increase in employment discrimination charges. The CCRD has not provided any empirical evidence that any state that equalized the remedies for employment discrimination with those in Title VII resulted in an increase in the number of charges anywhere close to that amount, or even that any such amendment resulted in any increase in the number of state-law charges filed.

The fiscal note states that the "CCRD currently conducts 30 outreach training sessions annually" and that, "[t]o educate the public and employers on the new law, the CCRD plans to increase to 90 the number of sessions offered in FY 2009-10 and 50 in FY 2010-11."[24] Yet one

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[17] For example, Iowa, the state with the highest number of discrimination charges per capita of the eight comparison states, *see* CCRD Increased Caseload Estimates, prohibits discrimination in employment, public accommodation, services, housing, education and credit practices. Iowa Code, §§ 216.6-216.10. Connecticut, the state with the second highest per-capita charge filing rate of the eight, does not require that an employee be substantially limited in a major life activity in order to be protected from disability discrimination, as does Colorado, *compare* Conn. Gen. Stat. §§ 46a-51(15) and § 46a-60(1) *with* C.R.S. § 24-34-301(2.5), and protects employees under the age of 40, unlike Colorado. *Compare* Conn. Gen. Stat. § 46a-60(1) *with* C.R.S. § 24-34-301(1).

[18] 2008 Sunset Review: Colorado Civil Rights Commission and the Colorado Civil Rights Division ("2008 Sunset Report"), pp. 26-27.

[19] 1998 Sunset Report, p. 18; 2008 Sunset Report, p. 25.

[20] *See* 2008 Sunset Report, p. 8.

[21] *Id.*, p. 24 n. 120.

[22] CCRD Increased Caseload Estimates.

[23] 2008 Sunset Report, p. 25.

[24] 2009 Fiscal Note, p. 2.

of the administrative recommendations in the 2008 Sunset Report was that the CCRD increase its education and outreach efforts.[25] Since that report did not recommend equalizing the CADA remedies with those in Title VII, that recommendation, and therefore the CCRD's plans, have little if anything to do with the proposed equalization of remedies contained in SB009-110.

Judicial Branch – The fiscal note projects an increase of 177 cases per year filed in state court from the SB009-110 due to the changes in CADA.[26] It explained that of these, "127 cases are expected to be cases transferred from federal court and 50 cases will be new cases due to the ability to sue for discrimination based on sexual orientation and the lack of an 'intentional discrimination' standard under the bill."[27]

The initial fiscal note response submitted by the Judicial Branch concluded that "the impact [from SB009-110] is indeterminate and will depend on the number of new case filings that are filed in the district courts."[28] In a subsequent document, the Judicial Branch estimated "that approximately one-third of the federal court's yearly caseload (127 cases) will transfer to the state system" and that "we will see an additional 50 new cases a year due to the addition of sexual orientation to the discrimination statutes and a more appealing standard."[29]

Those estimates are both inaccurate and unfounded for reasons that include:

- In FY 2007, 193 employment discrimination cases were filed in the U.S. District Court for the District of Colorado, almost exactly one-half of the 381 discrimination cases that were filed in that court that year.[30] The estimate of 127 "transferred" cases is based on the number of all discrimination cases filed in that court that year, not the number of the employment discrimination cases. One-third of 193 cases is equal to 64 cases, not 127.

- The Judicial Branch provided no empirical evidence to support its claim that one-third of the discrimination cases now filed in the federal district court now will be filed in state court.

- Even if a case based on CADA is filed in state court, the employer has the right to remove that case to federal court within thirty (30) days of service of the complaint on the defendant, as long as the federal court has diversity jurisdiction over the parties.[31] That is, whenever an employer is incorporated and headquartered in a state other than Colorado, its counsel will almost invariably (and successfully) have the case transferred to federal court on the basis of diversity of citizenship of the plaintiff and defendant.

- The estimate of 50 new cases per year is highly questionable. Only 23 charges of sexual orientation employment discrimination and only seven charges of marriage to a co-worker were filed with the CCRD in FY 07-08.[32] The fiscal note for the

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[25] 2008 Sunset Report, pp. 53-54.
[26] 2009 Fiscal Note, p. 3.
[27] *Id.*
[28] Colorado Judicial Branch, Fiscal Note Response for SB009-110, dated Feb. 4, 2009.
[29] Addendum write up for SB110 ("Judicial Branch Addendum").
[30] *Id.*
[31] See U.S.C. §§ 1441(a), 1332(a).
[32] 2008 Sunset Report, p. 61.

2007 CADA amendment that added sexual orientation as a protected category[33] did not project any increase in the number of cases filed in state court.

- The other reason given for projecting that 50 new cases would be filed per year is the fact that SB009-110, as introduced, would enable a charging party or plaintiff who establishes discrimination as a result of a neutral employment practice that has a disparate impact on employees in a protected group could recover compensatory damages. Title VII provides for such damages only for "intentional" discrimination, not in such disparate impact cases.[34] That could be remedied easily by an amendment to SB009-110 that contains the same language about intentional discrimination and disparate impact cases that now appears in Title VII. No organization of which we are aware would oppose such an amendment.

- The Judicial Branch estimated that, because "[c]ases involving civil rights violations are much more resource intensive than the average civil case," it "expect[s] these new cases to require at least twice the amount of resources as an average civil case (300 cases per year)."[35] It provided no empirical support for that estimate. The actual number of pending cases for federal district court judges in Colorado has averaged 400 cases per year for the six most recent years.[36]

Department of Law – The fiscal note project increased General Fund expenditures of $303,704 and 2.2 FTE in FY 2009-10 and $303,704 and 2.2 FTE in FY 2010-11.[37] The Department of Law projected, for each of those two fiscal years, an increase of $45,661 and 0.3 FTE in its Business Licensing Unit; $135,180 and 1.0 FTE in its Employment Tort Unit; and $168,569 and 1.2 FTE in its Employment Law and Civil Rights Unit.[38]

The Department "assumed that more state employees would file lawsuits and more attorneys would be willing to take their cases because of the changes" to CADA.[39] It claimed that the remedial provisions of SB009-110 would "open the floodgates" to age discrimination, sexual orientation and disability discrimination lawsuits, just as allegedly happened when Congress enacted the Civil Rights Act of 1991.[40] Specifically, it projected three new cases per year filed in the State Personnel Board, a 25% increase in the amount of time it would take its Employment Tort Unit to resolve employment discrimination cases and a 20% increase in the number of those cases.[41] Those projections are seriously flawed for reasons that include:

- The Department of Law provided no empirical support for any of its assumptions. Because the State of Colorado employs more than 15 employees, State agencies, which that Department defends, already can be sued under CADA and under Title VII of the Civil Rights Act of 1964.[42] State agencies also can be sued for

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[33] Colorado Legislative Council Staff Fiscal Note, SB007-025, June 11, 2007.
[34] 42 U.S.C. § 1981a(a)(1).
[35] Judicial Branch Addendum.
[36] http://www.uscourts.gov/cgi-bin/cmsd2007.pl, last accessed Feb. 23, 2009. That report covers the twelve-month period for each year, ending September 30, 2002 through September 30, 2007.
[37] 2009 Fiscal Note, p. 3.
[38] Department of Law Fiscal Note Response to Legislative Counsel, Feb. 13, 2009, pp. 2-4.
[39] *Id.*, p. 2.
[40] *Id.*, pp. 2-3.
[41] *Id.*
[42] C.R.S. § 24-34-401(3); 42 U.S.C. § 2000e(b); *see also Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress validly waived States' Eleventh Amendment immunity to Title VII lawsuits in federal court).

disability discrimination under federal law if they accept funding from a federal agency.[43] State employees already can file employment discrimination appeals with the Colorado State Personnel Board.[44]

- A particular charge or lawsuit may allege multiple bases of discrimination.[45] For example, a charge or lawsuit might allege race, national origin and/or sex discrimination, prohibited by Title VII; age discrimination, prohibited by the Age Discrimination in Employment Act of 1967; and/or disability discrimination, prohibited by the Americans with Disabilities Act of 1990. (CADA prohibits employment discrimination on all of those grounds.) Since State employees already can recover the same remedies under Title VII and under § 504 of the Rehabilitation Act of 1974 that they will be able to recover under CADA if SB009-110 is enacted, and since they can allege discrimination in violation of either or both of those statutes already, it is difficult to understand why equalizing the remedies in the employment discrimination provisions in CADA with those available under Title VII will increase the number or complexity of the cases that the Department of Law defends.

Conclusion. The information provided to the fiscal analyst was, in many regards, substantially inaccurate. The assumptions upon which the agencies' projections were based are also questionable at best and, in many cases, are also inaccurate. Those agencies' projections of significant increases in General Fund expenditures are not based on accurate, empirical data. Those projections also were based on language about compensatory damages for disparate-impact claims in the introduced text of SB009-110 that can easily be cured by an amendment to that bill.

There is no reason to believe that DORA was inaccurate when, in 1998, it concluded that an amendment to CADA that would have been virtually identical to that contained in SB009-110 would have had a "negligible" fiscal impact. The 2009 fiscal note does not even begin to explain how, just a little more than ten years later, that "negligible" fiscal impact has ballooned into $1.2 million in increased General Fund expenditures during just the first two years the legislation would be in effect. Should the Senate Judiciary Committee approve SB009-110, with or without an amendment to address the circumstances under which compensatory damages can be awarded, the fiscal analyst will be able to re-evaluate the fiscal impact of this bill with the benefit of more accurate data and assumptions.

The Supreme Court has held that the Eleventh Amendment bars private lawsuits against State agencies in federal court under the Age Discrimination in Employment Act of 1967, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), and under Title I of the Americans with Disabilities Act of 1990. *Univ. of Alabama at Birmingham Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001).

[43] A State waives its Eleventh Amendment immunity to a disability discrimination lawsuit under § 504 of the Rehabilitation Act of 1974 by accepting federal funding after the enactment of 42 U.S.C. § 2000d-7(a)(1). *See, e.g., Brockman v. Wyoming Dept. of Family Services*, 342 F.3d 1159, 1167-68 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004).

[44] C.R.S. § 24-50-125.3.

[45] *See* 2008 Sunset Report, p. 26. If each basis for a charge is broken out separately, a total of 909 "bases" for charges were filed with the CCRD in FY 2007-08, *id.*, p. 61, even though only 492 employment discrimination were filed with that agency during that fiscal year. *Id.*, p. 25.